Reserve
KFM .
9031
.M66

RESERVE

Montana Code Annotated

Annotations 2006



Evidence • Civil Liability, Remedies & Limitations

STATE LAW LIBRARY
JUN 15 2006
OF MONTANA

ANNOTATIONS

to the

MONTANA CODE ANNOTATED

Code Commissioner & Director of Legal Services
Gregory J. Petesch

Staff Attorneys
Bart Campbell
Lee Heiman
Valencia Lane
Eddye McClure
John MacMaster
David Niss
Doug Sternberg, Legal Researcher

Legislative Technical Editors
Carol Ann Jacobsen, Chief Legislative Technical Editor
Sally Bush, Senior Legislative Technical Editor
Connie Dixon, Legislative Technical Editor

Office of Legislative Information Technology
Hank Trenk - Director

Central Services Office
Lois Menzies - Director

Documents Services Manager
Ann Patten

Proofreader/Data Entry
Kip Davis

Distribution & Typesetting
Kevin Hayes

Published and Distributed by
Montana Legislative Services Division
Capitol Bldg Rm 110
1301 E 6th Ave
PO Box 201706
Helena, MT 59620-1706
Telephone (406)444-3064 FAX (406)444-3036
Internet http://leg.mt.gov

Printed and Bound by
West, a Thomson business
610 Opperman Dr
Eagan MN 55123

STATE LAW LIBRARY
JUN 15 2006
OF MONTANA

2006 ANNOTATIONS to the MONTANA CODE ANNOTATED

CONTENTS

Volume 1

Table of Session Law to Code — 2005
Table of 2004 Ballot Issues to Code
Official Report of the Montana Code Commissioner — 2005
Enabling Act
Constitution of Montana
Title
1. General Laws and Definitions

Volume 2

Titles
2. Government Structure and Administration
3. Judiciary, Courts
4. Reserved
5. Legislative Branch
6. Reserved
7. Local Government
8 and 9. Reserved
10. Military Affairs and Disaster and Emergency Services
11 and 12. Reserved
13. Elections
14. Reserved

Volume 3

Titles
15. Taxation
16. Alcohol and Tobacco
17. State Finance
18. Public Contracts
19. Public Retirement Systems
20. Education
21. Reserved
22. Libraries, Arts, and Antiquities

Volume 4

Titles
23. Parks, Recreation, Sports, and Gambling
24. Reserved
25. Civil Procedure

Volume 5

Titles
26. Evidence
27. Civil Liability, Remedies, and Limitations

Volume 6

Titles
28. Contracts and Other Obligations
29. Reserved
30. Trade and Commerce

Volume 7

Titles
31. Credit Transactions and Relationships
32. Financial Institutions
33. Insurance and Insurance Companies
34. Reserved
35. Corporations, Partnerships, and Associations
36. Reserved
37. Professions and Occupations
38. Reserved

Volume 8

Titles
39. Labor
40. Family Law
41. Minors
42. Adoption
43. Reserved

Volume 9

Titles
44. Law Enforcement
45. Crimes
46. Criminal Procedure
47. Access to Legal Services
48. Reserved

Volume 10

Titles
49. Human Rights
50. Health and Safety
51. Reserved
52. Family Services
53. Social Services and Institutions
54-59. Reserved
60. Highways and Transportation
61. Motor Vehicles
62-66. Reserved
67. Aeronautics
68. Reserved
69. Public Utilities and Carriers

Volume 11

Titles
70. Property
71. Mortgages, Pledges, and Liens
72. Estates, Trusts, and Fiduciary Relationships
73 and 74. Reserved
75. Environmental Protection

Volume 12

Titles
76. Land Resources and Use
77. State Lands
78 and 79. Reserved
80. Agriculture
81. Livestock
82. Minerals, Oil, and Gas
83 and 84. Reserved
85. Water Use
86. Reserved
87. Fish and Wildlife
88 and 89. Reserved
90. Planning, Research, and Development
91-99. Reserved

PREFACE TO VOLUME 5
(Annotations — May 2006)

Annotations to this volume include case notes of applicable court decisions through public domain citation 2006 MT 36, volume 331 Montana Reports page 166, volume 130 Pacific Reporter (3rd Series) page 1256, volume 412 Federal Supplement (2nd Series) page 1357, volume 441 Federal Reporter (3rd Series) page 703, and volume 126 Supreme Court Reporter page 1493. Digests of Montana Attorney General's opinions are provided through volume 51 opinion number 16 of the Report and Official Opinions of Attorney General. Citations to the Administrative Rules of Montana implementing or authorized by a section of law and adopted through Issue 7 of the 2006 Montana Administrative Register are also included.

Amendment notes listed under compiler's comments are intended to explain only amendments made in the year indicated and may not accurately reflect current statutory language because of subsequent amendment.

The annotations are provided as a convenience to the user and are not intended to be an exhaustive compilation of the law under a given statute or in a given area.

TITLE 26
EVIDENCE

Title Law Review Articles

An Overview of Ninth Circuit Decisions in Evidence Law (Ninth Circuit Survey), B41 Willamette L. Rev. 507 (2005).

CHAPTER 1
STATUTORY PROVISIONS ON EVIDENCE

Part 1
Definitions and Miscellaneous Provisions

26-1-101. General definitions.

Compiler's Comments

1983 Amendment: Substituted definition of direct examination for "The examination of a witness by the party producing him is denominated the "direct examination"; the examination of the same witness upon the same matter by the adverse party, the "cross-examination". The direct examination must be completed before the cross-examination begins unless the court otherwise directs."; in definition of evidence substituted "Evidence" for "Judicial evidence", deleted ", sanctioned by law," after "means", and inserted "including but not limited to witness testimony, writings, physical objects, or other things presented to the senses"; at beginning of definition of leading question inserted "A "leading question" is" and at end deleted "is denominated a "leading question" or "suggestive question". On a direct examination leading questions are not allowed, except in the sound discretion of the court under special circumstances making it appear that the interests of justice require it"; and in definition of proof, after ""Proof" is", deleted "the effect of evidence,".

Case Notes

Consumption of Alcohol Following Accident Not Considered Tampering With Evidence: Peplow drove his truck off of a country road, then got a ride home, where he consumed three double shots of whiskey, allegedly for pain from the accident. After walking his dog, he went to a nearby bar and ordered a beer. He was found at the bar by the highway patrol officer who was investigating the accident. Peplow failed all sobriety tests and was charged with and convicted of DUI, driving with a suspended or revoked license, driving without insurance, failing to report an accident, and tampering with evidence. Following the state's case at trial, Peplow moved for a directed verdict on the tampering charge, arguing that a person's blood alcohol content does not fit the definition of a record, document, or thing, as required in 45-7-207, and also that the state failed to present evidence that Peplow knew or had reason to believe that an official proceeding or an investigation was pending or about to be instituted, as required by the statute. The motion was denied, and Peplow appealed. The Supreme Court noted that under 61-8-404, evidence of a person's blood alcohol content must be shown by an analysis of blood or breath for it to be admissible, but the section does not contemplate that potentially measurable amounts of alcohol, still within the body, constitute evidence. Until one's breath or blood has been collected for analysis, it cannot be considered physical evidence. Thus, the court held that a person's blood alcohol content, as it exists within the person's body and control, does not constitute physical evidence, as required in 45-7-207, or a thing presented to the senses, as explained in this section, so a person who consumes alcohol following a motor vehicle accident cannot be convicted of tampering with physical evidence under 45-7-207, with respect to that person's blood, breath, or urine still within the person's body. Peplow's tampering conviction was reversed. St. v. Peplow, 2001 MT 253, 307 M 172, 36 P3d 922 (2001).

Bloodhound Testimony: Testimony and evidence obtained by the use of a dog was not incompetent "bloodhound testimony" since the testimony objected to was not that of a dog as interpreted by his handler or intended to identify defendant as having been in the area searched with the aid of dogs. St. v. Stewart, 175 M 286, 573 P2d 1138 (1977), distinguishing St. v. Storm, 125 M 346, 238 P2d 1161 (1951).

Proof — Must Have Foundation: Court's striking alleged proof from record was proper when foundation was not properly laid for admission. Big Sky Livestock v. Herzog, 171 M 409, 558 P2d 1107 (1976).

Bloodhound Testimony — Former Rule: In this state, so-called "bloodhound testimony" is incompetent and inadmissible on the trial of any person accused of a crime. St. v. Storm, 125 M 346, 238 P2d 1161 (1951).

Leading Question — Review of Previous Testimony: A question on redirect examination inquiring "Is that what you told the court before?" after portions of witness' testimony given at preliminary hearing before Justice of Peace were read to witness was not objectionable as leading question. St. v. Collett, 118 M 473, 167 P2d 584 (1946).

Excess of Leading Questions — Denial of Fair and Impartial Trial: The asking of numerous leading questions by the prosecution, over objection of defendant, may justly be cause for complaint that by the course adopted he was denied the fair and impartial trial guaranteed by the 1889 Montana Constitution. St. v. Kanakaris, 54 M 180, 169 P 42 (1917).

Non-English Speaking and Illiterate Witnesses — Both Parties Lead: It appears to be within the sound discretion of the court to allow leading questions on the part of the County Attorney, especially when the witnesses are illiterate and unable to speak English; but, having done this, it is but fair to extend the same privilege to the defendant. St. v. Spotted Hawk, 22 M 33, 55 P 1026 (1899).

Law Review Articles

Animal Behavior Evidence, Muckelston, 31 Mont. L. Rev. 257 (1970).

Collateral References

Evidence *key* 584(1); Trial *key* 33; Witnesses *key* 224, 240(2) and (3), 266.

32 C.J.S. Evidence §§590, 592; 32A C.J.S. Evidence §§1016, 1027 through 1036, 1045; 88 C.J.S. Trial §141, et seq.; 98 C.J.S. Witnesses §§415, 445 through 465.

29 Am. Jur. 2d Evidence §§1, 2; 81 Am. Jur. 2d Witnesses §§409 through 411.

Permissibility of in-court demonstration to show effect of injury in action for bodily injury. 82 ALR 4th 980.

Cross-examination by leading questions of witness friendly to or biased in favor of cross-examiner. 38 ALR 2d 952.

26-1-102. Definitions — kinds of evidence.

Compiler's Comments

1983 Amendment: In definition of conclusive evidence, after ""Conclusive evidence"", deleted "or "unanswerable evidence"" and deleted last sentence, which read: "For example, the record of a court of competent jurisdiction cannot be contradicted by the parties to it."; in (1)(b), after "conclusive", deleted "or unanswerable", and changed "this code" to "statute"; inserted definition of corroborative evidence; in definition of direct evidence, after "proves", substituted "a fact" for "the fact in dispute directly", before "establishes" deleted "conclusively", and deleted last sentence, which read: "For example, if the fact in dispute be an agreement, the evidence of a witness who was present and witnessed the making of it is direct."; in definition of circumstantial evidence changed "Indirect evidence" to "Circumstantial evidence", after "tends to establish" substituted "a fact" for "the fact in dispute", and deleted last three sentences, which read: "For example, a witness proves an admission of the party to the fact in dispute. This proves a fact from which the fact in dispute is inferred. Indirect evidence is of two kinds: inferences and presumptions."; and in definition of prima facie evidence substituted "which proves" for "which suffices for the proof of", and deleted last sentence, which read: "For example, the certificate of a recording officer is prima facie evidence of a record, but it may afterward be rejected upon proof that there is no such record."

Case Notes

Cumulative Evidence 2
Circumstantial Evidence — Generally 4
Circumstantial Evidence — Inferences and Presumptions 6
Direct Evidence 8
Prima Facie Evidence 8

CUMULATIVE EVIDENCE

Clarification of Harmless Error Analysis in Determining Whether Trial Court Error Resulted in Prejudice — Structural Error Versus Trial Error — Cumulative Evidence Test Versus Overwhelming Weight of Evidence Test: When determining whether trial court error has

prejudiced a defendant, the Supreme Court has applied slightly different standards in various cases, resulting in some inconsistency and confusion over the proper test to be applied in a harmless error analysis. Over time, the "overwhelming weight of the evidence" test expressed in St. v. McKenzie, 186 M 481, 608 P2d 428 (1980) (affirmed in In re Petition of Brodniak v. St., 239 M 110, 779 P2d 71 (1989), and St. v. Fuhrmann, 278 M 396, 925 P2d 1162 (1996)), eclipsed the more substantive inquiry of whether erroneously admitted evidence might have contributed to a conviction, resulting in an inclination to simply tally the quantity of the admissible evidence of guilt instead of evaluating the qualitative impact that the inadmissible evidence might have had on the finder of fact—an approach that the court found unacceptable. In order to preserve the substantial rights of the accused and the fundamental fairness of the criminal trial and to provide consistent guidance to practitioners, the Supreme Court found it appropriate to formally adopt an approach to harmless error issues that first defined the type of error in question and that second, depending on the type of error, set a uniform standard against which the error must be analyzed to determine if the error was sufficiently prejudicial to warrant reversal, completing the analysis begun in St. v. Lamere, 2000 MT 45, 298 M 358, 2 P3d 204 (2000). The first step is to analyze whether the claimed error is structural error or trial error. Structural error is the type that affects the framework within which the trial proceeds, such as errors in jury selection, total deprivation of the right to counsel, and lack of an impartial judge, and is automatically reversible without additional analysis or review. Trial error is the type that typically occurs during presentation of the case to a jury. It is not presumptively prejudicial and is thus subject to harmless error review pursuant to 46-20-701. Once a convicted person raises and establishes that evidence was erroneously admitted and has alleged that there is a reasonable possibility that the evidence might have contributed to a conviction, the state must demonstrate that the error was not prejudicial. To determine whether that reasonable possibility exists, the Supreme Court abandoned the "overwhelming weight of the evidence" test in McKenzie, Brodniak, and Fuhrmann in favor of the "cumulative evidence" test set out in Harrington v. Calif., 395 US 250 (1969). In making its proof under the cumulative evidence standard, the state must show admissible evidence that proved the same facts as the tainted evidence and demonstrate that the quality of the tainted evidence was such that there was no possibility that it might have contributed to the conviction. If the only evidence tending to prove an element of the crime is tainted, then reversal will be compelled. If the tainted evidence does not go to the proof of an element of the crime and there is no other evidence that proves the same facts as the tainted evidence, then the tainted evidence will be considered harmless only if there is no possibility that it might have contributed to the conviction. In the present case, the trial court erred in admitting evidence related to Van Kirk's performance on a horizontal gaze nystagmus test; however, there was other admissible cumulative evidence that proved that same fact of Van Kirk's DUI as the tainted evidence, so Van Kirk's right to a fair trial was not prejudiced and the DUI conviction was affirmed. St. v. Van Kirk, 2001 MT 184, 306 M 215, 32 P3d 735 (2001), followed in St. v. Peplow, 2001 MT 253, 307 M 172, 36 P3d 922 (2001), St. v. Spang, 2002 MT 120, 310 M 52, 48 P3d 727 (2002), St. v. Weldele, 2003 MT 117, 315 M 452, 69 P3d 1162 (2003), St. v. Crawford, 2003 MT 118, 315 M 480, 68 P3d 848 (2003), St. v. Slavin, 2004 MT 76, 320 M 425, 87 P3d 495 (2004), St. v. Snell, 2004 MT 334, 324 M 173, 103 P3d 503 (2004), and St. v. Paoni, 2006 MT 26, 331 M 86, 128 P3d 1040 (2006).

Cumulative Hearsay Testimony Harmless: The admission of an officer's hearsay testimony that Stuit had committed an offense and that it had occurred on a specific date, although hearsay, was merely cumulative and was harmless error absent prejudice to Stuit. St. v. Stuit, 277 M 227, 921 P2d 866, 53 St. Rep. 607 (1996), followed in St. v. Veis, 1998 MT 162, 289 M 450, 962 P2d 1153, 55 St. Rep. 651 (1998).

Admissibility of Videotape With Cautionary Instruction — No Objection — Waiver: An insurer assigned as error the admission to evidence of a doctor's videotaped deposition, contending the deposition was cumulative, had no probative value, and invoked the sympathy and passion of the jury. The videotape was submitted to the jury without any objection by the insurer and under a cautionary instruction from the court that the video was not to be considered for the insured's damages but only to show whether he was physically able to participate in the fire in the way the insurer claimed he did. The District Court Judge, in his order denying the posttrial motions, properly found the objection to submission of the evidence to have been waived. Britton v. Farmers Ins. Group, 221 M 67, 721 P2d 303, 43 St. Rep. 641 (1986).

Independent Facts: The question whether evidence is "cumulative" within the meaning of this section does not depend upon the quantity or probable effect of the evidence but upon its character, and if it brings to light some new independent fact of a different character than that

theretofore elicited, though tending to prove the same proposition or ground of claim before canvassed, it is not cumulative. Jenkins v. Kitsen, 62 M 515, 205 P 243 (1922).

Newly Discovered Evidence: In an action in claim and delivery, allegedly newly discovered evidence which tended to prove plaintiff's ownership in the chattel by the same character of evidence as that given at the trial by plaintiff and her husband was cumulative and therefore did not warrant the granting of a new trial. Jenkins v. Kitsen, 62 M 515, 205 P 243 (1922).

CIRCUMSTANTIAL EVIDENCE — GENERALLY

Theft by Deception, Common Scheme, Proved by Circumstantial Evidence: While managing a hotel, Field engaged in highly irregular accounting practices, altering bank deposit slips and manipulating direct-bill accounts, resulting in losses of thousands of dollars to the hotel. Field was convicted of theft by deception, common scheme. On appeal, Field contended that there was insufficient evidence to prove theft beyond a reasonable doubt, including the fact that no one saw him take any money. Although true, there was substantial circumstantial evidence on which the jury could rely, including altered bank deposit slips handwritten by Field and transactions conducted under Field's personal computer password, in concluding that Field committed theft of greater than $1,000. Field's conviction was affirmed. St. v. Field, 2005 MT 181, 328 M 26, 116 P3d 813 (2005).

Circumstantial Evidence Supporting Conclusion That Victim Had Reasonable Apprehension of Bodily Injury: Defendant contended that a directed verdict motion should have been granted requesting dismissal of a partner or family member assault charge because no evidence was presented that the victim had reasonable apprehension of bodily injury, which the state had to prove in order to meet its burden of proof. The standard for determining whether a person had reasonable apprehension of bodily injury is that of a reasonable person under similar circumstances. Direct evidence is not necessary to establish the elements of the offense. A conviction may be based entirely on circumstantial evidence, and direct proof of other facts may give rise to an inference that a victim had reasonable apprehension of bodily injury. In this case, the victim: (1) fled from her apartment with her dog over concern about defendant's past behavior; (2) locked herself in a neighbor's bathroom; (3) heard defendant scream that he was going to kill her; (4) observed knife holes that defendant was making in her apartment door; and (5) ultimately fled the building. From these facts a jury could find that the victim had reasonable apprehension of bodily injury, and denial of defendant's directed verdict motion was not an abuse of discretion. St. v. Vukasin, 2003 MT 230, 317 M 204, 75 P3d 1284 (2003).

Expert Testimony on Evidence of Microscopic Hair Comparison Admissible: When considering whether expert evidence from microscopic hair comparison is admissible, the Supreme Court found that microscopic hair comparison is not novel scientific evidence; therefore, it was not error for the District Court to fail to consider the factors in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786 (1993), in determining if the expert's testimony was admissible. Nevertheless, when considering admissibility of microscopic hair comparison evidence, the District Court must conduct a conventional Rule 702, M.R.Ev. (Title 26, ch. 10), analysis. Applying Hulse v. Dept. of Justice, 1998 MT 108, 289 M 1, 961 P2d 75 (1998), the court held that microscopic hair comparison, like the horizontal gaze nystagmus test in Hulse, is beyond the range of ordinary training or intelligence and is thus a subject on which an expert may testify. Here the state established an adequate foundation for the expert's testimony, including education, training, and knowledge, and the District Court did not err in allowing it. St. v. Southern, 1999 MT 94, 294 M 225, 980 P2d 3, 56 St. Rep. 395 (1999), in accord with U.S. v. Matta-Ballesteros, 71 F3d 754 (9th Cir. 1995).

Circumstantial Evidence Sufficient to Affirm Conviction for Threats and Improper Influence in Official and Political Matters: After a confrontation with state highway crew members, the Heffners were convicted of threats and other improper influence in official and political matters, a felony under 45-7-102. They appealed on grounds that the convictions were based on mere suspicion or conjecture. Although the evidence presented was circumstantial, a rational jury could nevertheless infer that the Heffners were upset that their swift travel on the road was impeded by the duties of the road grader operator and that the Heffners took out their anger and frustration on the grader operator. The circumstantial evidence was sufficient to support the convictions. St. v. Heffner, 1998 MT 181, 290 M 114, 964 P2d 736, 55 St. Rep. 732 (1998).

Circumstantial Evidence Allowable to Establish Meeting of Minds Element of Civil Conspiracy — Summary Dismissal Proper Absent Genuine Issue of Material Fact: Because direct evidence of the meeting of the minds is typically in the possession and control of the alleged conspirators and thus difficult if not impossible to obtain, circumstantial evidence may be used to establish the meeting of the minds element of a civil conspiracy. However, when that

circumstantial evidence does not raise a genuine issue of material fact regarding the meeting of the minds element, summary dismissal is proper. Schumacker v. Meridian Oil Co., 1998 MT 79, 288 M 217, 956 P2d 1370, 55 St. Rep. 338 (1998).

Admissibility of Party Deposition — Failure of Party to Attend Trial — No Evidence Party Offering Deposition Procured Absence of Other Party — Cumulative Evidence Held Harmless Error: Just before trial on a complaint for damages brought by Susan, her husband David, their minor daughter, and their failed business, Rocky Mountain Enterprises, Inc., Susan and her minor daughter decided not to attend the trial because of fear for their safety and sent a declaration from San Diego, California, instead. The District Court denied a request by David and the failed business to introduce the deposition given by Susan in place of her live testimony, citing for its reasoning the fact that Susan had refused on her own volition to attend the trial. Distinguishing In re Marriage of Powell, 231 M 72, 750 P2d 1099 (1988), the Supreme Court held that when a witness's absence is procured by another, the person procuring the absence may not offer a deposition of the witness's testimony because the deposition provides no opportunity for cross-examination. In the case before it, the Supreme Court noted that there was no evidence that David or the company had procured the absence of Susan or the minor daughter and that because those witnesses were more than 100 miles from the place of trial, the District Court erred when it refused to admit Susan's deposition. However, the District Court correctly held that the deposition was cumulative of other evidence, pursuant to this section, and the Supreme Court held that only harmless error had been committed by the District Court. Rocky Mtn. Enterprises, Inc. v. Pierce Flooring, 286 M 282, 951 P2d 1326, 54 St. Rep. 1410 (1997).

Allegation That Evidence Is Circumstantial and Susceptible of Different Interpretations: Allegation that evidence of guilt was circumstantial and susceptible of different interpretations relates to the weight of the evidence, not its sufficiency, and was properly refused as a basis for granting a motion of acquittal. St. v. Moore, 268 M 20, 885 P2d 457, 51 St. Rep. 1151 (1994).

Additional Circumstantial Evidence of Burglary Properly Admitted: State's evidence that on the day following the theft of guns a person matching defendant's description and driving an automobile matching the description of defendant's vehicle attempted to pawn guns of the same general description as those stolen, although circumstantial, naturally or logically established an additional fact implicating defendant's guilt of burglary and was properly admitted. St. v. Oliver, 228 M 322, 742 P2d 999, 44 St. Rep. 1567 (1987).

Sufficient Circumstantial Evidence to Support Conviction — Deliberate Homicide: The Supreme Court found substantial evidence, although primarily circumstantial, to support conviction for deliberate homicide when the state pathologist's conclusions that lack of soot in victim's windpipe, minimal carbon monoxide level in blood and tissues, and fact that victim was found face up with limbs spread while most fire victims are found face down in fetal position supported theory that victim was dead before the fire began. St. v. Atlas, 224 M 92, 728 P2d 421, 43 St. Rep. 2042 (1986).

Sufficient Evidence to Support Conviction — Arson: The Supreme Court found abundant evidence to support defendant's conviction for arson when fire marshals concluded that: heat of the fire far exceeded the temperature of a normal house fire; the 1-hour fire wall between floors burned through in much less than 1 hour; the burn patterns along baseboards and even burn indicated use of accelerants; a heating pad, the wood stove, an electrical short, and acts of God were eliminated as causes of the fire; and defendant's own fire expert admitted that "alligator patterns" on the charred wood were compatible with the use of flammable liquids. St. v. Atlas, 224 M 92, 728 P2d 421, 43 St. Rep. 2042 (1986).

Breach of Covenant of Good Faith in Conducting Insurance Claim: In a foreclosure action, the insured, Britton, cross-claimed against Farmers Insurance Group (FIG) for the full amount of coverage provided by FIG's policy and for further compensatory and punitive damages by reason of "bad faith". FIG responded to the foreclosure action by setting up as a cross-claim against Britton its right under its partial assignment of mortgage and requesting foreclosure against Britton. FIG further defended against Britton's cross-claim by alleging that Britton had intentionally set the fire, had been guilty of fraud with respect to his interest in the property, and had not submitted a proper proof of loss. On appeal, the Supreme Court found that prior to filing its answer to Britton's cross-claim, FIG neither rejected Britton's proof of loss nor informed him in writing or otherwise of their contention of arson. Also, FIG's evidence regarding Britton's involvement in setting the fire was circumstantial, and there was no evidence of potential financial gain for Britton from the policy proceeds. The jury decision that FIG breached the implied covenant of good faith and fair dealing in conducting the claim was upheld. Britton v. Farmers Ins. Group, 221 M 67, 721 P2d 303, 43 St. Rep. 641 (1986).

Simulated Swimming Pool Accident — Rescue: In action by a father alleging negligent care and supervision of his son at the YMCA swimming pool, evidence showed that one of five qualified lifeguards at the pool found the 6-year-old boy submerged about 4 ½ feet from the surface, that the lifeguard and a young boy pulled the son to the surface, and that one or more lifeguards carried the boy to the edge of the pool. The trial judge admitted evidence of an experiment in which one of the lifeguards threw a diving ring into the pool where the son was recovered and timed how long it took two young boys (one of which had helped save the son) to retrieve it, and then threw a 10-pound diving weight into the pool so that it settled into the pool. The boys were unable to retrieve it. From this the lifeguard concluded that the son was not on the bottom of the pool when rescued. The evidence was properly admitted since it supported the conclusion that the son was rescued in a shorter period of time than it would take for brain damage to result through submersion in water, and the experiment was substantially similar to the accident and rescue so as to lay a sufficient foundation for admission of testimony regarding the experiment. Johnson v. YMCA, 201 M 36, 651 P2d 1245, 39 St. Rep. 1937 (1982).

Aggravated Assault — Sufficiency of Circumstantial Evidence: An aggravated assault appeal was sustained for the state despite the fact that no eyewitness testified that the defendant stabbed the victim and that the weapon was never found because the circumstances surrounding the assault, including the defendant striking the victim in the area in which he was stabbed and the actions of the defendant prior to and following the assault, were sufficient to support a conviction viewed in the light most favorable to the prosecution aided by a strong presumption in favor of the correctness of the judgment. St. v. Lozeau, 200 M 261, 650 P2d 789, 39 St. Rep. 1729 (1982), followed in St. v. Bower, 254 M 1, 833 P2d 1106, 49 St. Rep. 586 (1992).

Proximate Cause — Standard of Proof: Circumstantial evidence sufficient to prove proximate cause in a civil action need not exclude every reasonable conclusion other than the conclusion sought to be established. It is sufficient if it affords a basis for a reasonable inference by the trier of fact, even if there are other reasonable inferences that might be drawn by that trier of fact. Jacques v. Mont. Nat'l Guard, 199 M 493, 649 P2d 1319, 39 St. Rep. 1565 (1982).

Manufacturing Defect: Plaintiff met the burden of proof for a strict liability action in proving, by circumstantial evidence, a defect rendering a product unreasonably dangerous. The court rejected defendant's assertion of the "open and obvious danger" rule and the "patent-latent" distinction. Brown v. N. Am. Mfg. Co., 176 M 98, 576 P2d 711 (1978).

Instruction Proper Only When No Direct Evidence: A confession, such as that appearing in the record, constitutes direct evidence of the corpus delicti; thus, it is not error to refuse a circumstantial evidence instruction. St. v. Hallam, 175 M 492, 575 P2d 55 (1978).

Admission — Indirect Evidence: Under this statute any statement made to two witnesses by the defendant in a perjury offense was in the nature of an admission and, therefore, was indirect evidence (now "circumstantial evidence") of the fact sought to be proved. St. v. Scanlon, 174 M 139, 569 P2d 368 (1977), replacing opinion in 33 St. Rep. 1355 (1976).

Photographs — Condition Existing at Time of Controversy: Court did not abuse its discretion in refusing to admit photographs to assist jury in understanding theory that trucks depicted were properly loaded while truck involved in accident was improperly loaded because pictured trucks are different trucks loaded differently from truck involved and did not give a correct understanding of the condition existing at the time of the controversy. Leary v. Kelly Pipe Co., 169 M 511, 549 P2d 813 (1976).

Medical Proof of Causation: The fact that a traumatic injury was the proximate cause of a totally disabling disease (shaking palsy) could be proved by circumstantial evidence or inferences having a substantial basis in the evidence, demonstration or such a degree of proof as produces absolute certainty not being required by the law. Moffett v. Bozeman Canning Co., 95 M 347, 26 P2d 973 (1933), distinguished in Doty v. Indus. Accident Fund, 102 M 511, 59 P2d 782 (1936).

Possession of Stolen Property: In the absence of direct and positive evidence that defendant stole a steer, his possession of the meat of the animal and his exercise of ownership over it, under circumstances indicating knowledge of the origin of the animal, furnished a basis for the inference that he killed it, sufficient to justify submission of a larceny case to the jury. St. v. Evans, 60 M 367, 199 P 440 (1921).

CIRCUMSTANTIAL EVIDENCE — INFERENCES AND PRESUMPTIONS

Trier of Fact to Determine Reasonableness of Conflicting Circumstantial Evidence — Sufficient Evidence to Conclude Defendant Possessed Necessary Mental State for Robbery: At Hill's trial for robbery, only circumstantial evidence identified Hill as the perpetrator. At the

close of the state's case, Hill's counsel moved for a directed verdict regarding Hill's identity as the perpetrator, but the motion was denied. Hill appealed on grounds that the trial court erroneously denied the motion, but the Supreme Court affirmed. Pursuant to St. v. Bowman, 2004 MT 119, 321 M 176, 89 P3d 986 (2004), when circumstantial evidence is susceptible to two interpretations, one supporting guilt and one supporting innocence, the trier of fact determines which interpretation is most reasonable, and a directed verdict is appropriate only when there is no evidence whatsoever to support a guilty verdict. In this case, it could not be concluded that there was no evidence whatsoever from which the jury could conclude that Hill was the assailant and, given that reasonable inference, that Hill possessed the necessary mental state to commit the robbery. St. v. Hill, 2005 MT 216, 328 M 253, 119 P3d 1210 (2005).

Use of Ryan-Type Pattern Jury Instruction on Circumstantial Evidence Discontinued in Favor of Hall-Type Instruction: Based on the holding in St. v. Ryan, 229 M 7, 744 P2d 1242 (1987), Bowman contended that he was entitled to a jury instruction stating that to be convicted solely on circumstantial evidence, the facts and circumstances must not only be entirely consistent with the theory of guilt, but must be inconsistent with any other rational theory or conclusion. The Supreme Court noted that after the decision in St. v. Hall, 1999 MT 297, 297 M 111, 991 P2d 929 (1999), the pattern jury instruction based on Ryan is no longer a correct statement of law and cautioned practitioners not to request it. The acceptable Hall instruction states that if circumstantial evidence is susceptible to two interpretations, one pointing to a defendant's guilt and one to innocence, the trier of fact determines which interpretation is most reasonable. St. v. Bowman, 2004 MT 119, 321 M 176, 89 P3d 986 (2004), followed in St. v. Hill, 2005 MT 216, 328 M 253, 119 P3d 1210 (2005).

Test of Prejudicial Effect of Jury Instruction Under Sandstrom Rule — Inference: The true test of a jury instruction under the Sandstrom decision is whether that instruction has the effect of allocating to the defendant some part of the burden of proof that properly rests on the State throughout the trial. The Sandstrom instruction was by its terms mandatory, but the Coleman instruction is permissive and in terms of an inference which might be drawn by the jury. When read in conjunction with the other instructions, the instruction, stating that if the jury found defendant to have committed the homicide and that if no circumstances of mitigation, excuse, or justification were found the jury might infer that defendant acted knowingly or purposely, was not prejudicial to defendant. St. v. Coleman, 185 M 299, 605 P2d 1000, 36 St. Rep. 2237 (1979).

Evidence Susceptible to Two Constructions: Defendant's offered instruction would have instructed the jury that if the evidence is susceptible to two constructions, one consonant with guilt and the other consonant with innocence, it is the jury's duty to adopt the interpretation that is consonant with innocence. The District Court properly refused to give this instruction. That instruction is generally given where the State relies on circumstantial or indirect evidence to prove its case. The instruction has no application where the evidence is direct with respect to the crime charged. St. v. Freeman, 183 M 334, 599 P2d 368, 36 St. Rep. 1622 (1979), followed in St. v. Ryan, 229 M 7, 744 P2d 1242, 44 St. Rep. 1735 (1987).

Presumption or Inference From a Presumption or Inference:

One inference cannot be drawn from any other inference or presumption. Monforton v. N. Pac. Ry., 138 M 191, 355 P2d 501 (1960).

While negligence may be established by direct evidence, i.e., by inferences and presumptions deducible from facts, one inference cannot be drawn from another inference or presumption and a presumption cannot rest upon an inference. Fisher v. Butte Elec. Ry., 72 M 594, 235 P 330 (1925).

Presumption Rebutted: Under Montana statutes, a presumption remains as indirect evidence until rebutted by preponderance of contrary evidence, which must be weighed and determined by trier of facts, and disappears only when party to whom it is opposed produces sufficient evidence to preponderate against it. New York Life Ins. Co. v. Gamer, 106 F2d 375 (9th Cir. 1939).

Exclusion of Other Medical Causes: Where the evidence showed that claimant under the Workers' Compensation Act was a strong, healthy young man prior to a traumatic injury, that thereafter he was stricken with shaking palsy totally disabling him, which disease generally follows certain causes, including trauma, all of which causes, except trauma, were excluded by medical testimony, an inference that the industrial accident was the cause of his condition was justified. Moffett v. Bozeman Canning Co., 95 M 347, 26 P2d 973 (1933), distinguished in Doty v. Indus. Accident Fund, 102 M 511, 59 P2d 782 (1936).

Controversion of Presumption: A presumption is a form of indirect evidence, and it is valid and effective only until controverted by other evidence, direct or indirect. Cooper v. Romney, 49 M 119, 141 P 289 (1914).

DIRECT EVIDENCE

Prior DUI Convictions Affirmed in Absence of Direct Evidence of Irregularity — Presumption of Regularity of Prior Convictions: Snell contended that it was improper for the state to use two prior DUI convictions to elevate a new DUI charge to a felony based on the fact that the prior convictions were invalid because Snell was not informed of the right to counsel. Although the state may not use a constitutionally infirm conviction to support an enhanced punishment, a defendant must overcome the presumption of the regularity of the prior convictions with direct evidence of irregularity. However, Snell was unable to recall facts about the judges involved in both prior DUI cases, casting considerable doubt on his ability to recall other critical details in those cases. The District Court correctly held that Snell's testimony was not sufficient to overcome the presumption of regularity through direct evidence and that the prior convictions were therefore constitutionally firm. Denial of the dismissal motion was affirmed. St. v. Snell, 2004 MT 334, 324 M 173, 103 P3d 503 (2004). See also St. v. Moga, 1999 MT 283, 297 M 1, 989 P2d 856 (1999), and St. v. Weldele, 2003 MT 117, 315 M 452, 69 P3d 1162 (2003).

Evidence Susceptible to Two Constructions: Defendant's offered instruction would have instructed the jury that if the evidence is susceptible to two constructions, one consonant with guilt and the other consonant with innocence, it is the jury's duty to adopt the interpretation that is consonant with innocence. The District Court properly refused to give this instruction. That instruction is generally given where the State relies on circumstantial or indirect evidence to prove its case. The instruction has no application where the evidence is direct with respect to the crime charged. St. v. Freeman, 183 M 334, 599 P2d 368, 36 St. Rep. 1622 (1979), followed in St. v. Ryan, 229 M 7, 744 P2d 1242, 44 St. Rep. 1735 (1987).

Instruction Proper Only When No Direct Evidence: A confession, such as that appearing in the record, constitutes direct evidence of the corpus delicti; thus, it is not error to refuse a circumstantial evidence instruction. St. v. Hallam, 175 M 492, 575 P2d 55 (1978).

PRIMA FACIE EVIDENCE

Prima Facie Case Showing No Substantial Change in Evidence — Attack of Chain of Evidence at Trial: Defendant questioned whether evidence was properly admitted without the state's establishing a proper chain of evidence. Extensive testimony chronicled the labeling, storing, securing, transferring of possession, and testing of each exhibit. The state made a prima facie case showing that there had been no substantial change in the evidence, and defendant failed to produce any evidence to show if actual or even potential tampering could have occurred. Additionally, defendant vigorously attacked the chain of evidence at trial; thus, the jury had an opportunity to weigh this evidence. The Supreme Court found no abuse of discretion in admitting the evidence. St. v. Grant, 221 M 122, 717 P2d 562, 43 St. Rep. 685 (1986), followed in St. v. Evans, 247 M 218, 806 P2d 512, 48 St. Rep. 170 (1991).

Circumstantial Evidence as Basis for Prima Facie Case: In a case where no one could testify to actually seeing an oversize motorcycle tire bind with the fender, circumstantial evidence would have to be allowed or the court would be taking away the right of the plaintiff to recover on a strict liability action since it would be unrealistic to expect the rider of the motorcycle to actually observe the front tire bind. McGuire v. Nelson, 167 M 188, 536 P2d 768 (1975).

Statutory Rape: Prima facie case of statutory rape was established by testimony of rape victim on cross-examination and redirect examination that defendant had committed an act of sexual intercourse with her. St. v. Anderson, 156 M 122, 476 P2d 780 (1970).

Failure to Rebut: In action by administrator of estate of deceased partner against surviving partners to recover assets transferred by deceased during his last illness, evidence that deceased had a half interest in partnership cattle and failure of defendants to produce any of the partnership records at the trial in the lower court sustained finding that heir of deceased had overcome the prima facie showing of one-third interest in the partnership cattle arising from the recording of the brand in name of three persons. Marshall v. Minlschmidt, 148 M 263, 419 P2d 486 (1966).

Ownership of Cattle: Although under 70-1-307 and 81-3-105 prima facie the owners of the recorded brand have the same interest in the cattle bearing their brand as shown in brand record, joint ownership of the cattle may be contradicted and overcome by other evidence under this section. Marshall v. Minlschmidt, 148 M 263, 419 P2d 486 (1966).

Collateral References

Evidence *key* 53, 99, et seq., 154(1), 473; Trial *key* 56.

31 C.J.S. Evidence §1, et seq.; 31A C.J.S. Evidence §§114, 116 through 118, 120, 158, et seq., 161; 32 C.J.S. Evidence §§590, 592; 32A C.J.S. Evidence §§1016, 1027 through 1030, 1033, 1035, 1036, 1045; 88 C.J.S. Trial §183.

29 Am. Jur. 2d Evidence §181, et seq.

Strict products liability: product malfunction or occurrence of accident as evidence of defect. 65 ALR 4th 346.

Circumstantial evidence—modern status of rules as to admissibility of evidence of prior accidents or injuries at same place. 21 ALR 4th 472.

Comment note—power of court sitting as trier of fact to dismiss at close of plaintiff's evidence, notwithstanding plaintiff has made out prima facie case. 55 ALR 3d 272.

Prima facie tort. 16 ALR 3d 1191.

Reversed or vacated conviction as prima facie evidence of probable cause in malicious prosecution action. 86 ALR 2d 1104.

Insurance: Coroner's verdict or report as prima facie evidence on issue of suicide. 28 ALR 2d 372.

Prima facie case where goods stored in situation governed by Uniform Warehouse Receipts Act are stolen, or are damaged or lost by fire or water. 13 ALR 2d 681.

26-1-103. Declaration, act, or omission which is a part of the transaction.

Case Notes

Transaction Rule Generally 9
Continuing Course of Conduct 12
Criminal Actions 12
Time Between Transaction and Declaration 14

TRANSACTION RULE GENERALLY

Sufficient Evidence of Attempted Obstruction of Peace Officer — Jury Properly Instructed Regarding Mental Standards of Offense: When she saw heavily armed officers approaching a neighbor's residence, Baker called the neighbor and left a recorded message that it would be in the neighbor's interests to peek out the window. The message was subsequently confiscated, and Baker was charged with and convicted of attempted obstruction of a police officer. On appeal, Baker challenged the use of evidence regarding the neighbor's history and arrest, the purpose and use of the high-risk unit in arresting the neighbor, and an officer's outrage at Baker's interference with the police, contending that the evidence was irrelevant and unfairly prejudicial. The Supreme Court disagreed. Under the transaction rule set out in St. v. Beavers, 1999 MT 260, 296 M 340, 987 P2d 371 (1999), the trial court did not err in allowing the evidence because it enabled the jury to understand the circumstances surrounding the police activity and how Baker's interference could have affected the outcome. Baker also contested the jury instructions. Under 45-7-302, a person obstructs an officer when the person knowingly hinders the enforcement of the criminal law, so for a person to commit the offense of attempted obstruction, the person need only perform any act toward the commission of obstruction while aware of the fact that the person is performing the act. The instructions to the jury contained an explanation of the "knowingly" standard and multiple instructions on Baker's purpose for making the call and thus were a fair and full instruction on the law. The conviction was affirmed. St. v. Baker, 2004 MT 393, 325 M 229, 104 P3d 491 (2004).

Evidence of Defendant's Intoxication Following Arrest Admissible Under Transaction Rule: At McCaslin's trial for aggravated assault, assault, and assault with a weapon, the state introduced evidence of McCaslin's intoxication after arrest. McCaslin contended that the evidence was irrelevant and prejudicial. The Supreme Court disagreed. Under the transaction rule, McCaslin's behavior following arrest was relevant as part of the transaction, and the jury had a right to hear evidence regarding McCaslin's behavior subsequent to arrest in order to provide context to the criminal act. St. v. McCaslin, 2004 MT 212, 322 M 350, 96 P3d 722 (2004). See also St. v. Detonancour, 2001 MT 213, 306 M 389, 34 P3d 487 (2001).

Motion In Limine to Exclude Relevant Statements Made During and After Assault Properly Denied: During a bar fight, Brasda brandished a knife and stated that he would use it because he was not afraid to go back to prison. After the fight, Brasda stated to a deputy that he didn't try to stab anyone. At trial, Brasda made a motion in limine to suppress the statements on grounds that they were irrelevant to any fact at issue or, alternatively, that they were statements of other crimes or acts and inadmissible because no exception applied. The trial court denied the motion, and the Supreme Court affirmed. Both statements were clearly relevant and integral to the state's proof of the elements of the crime and to the jury's ability to evaluate witness testimony.

Further, the statements were admissible under the mental, emotional, or physical condition exception to the hearsay rule and under the transaction rule in this section. The court also noted that under St. v. Bauer, 2002 MT 7, 308 M 99, 39 P3d 689 (2002), statements regarding a defendant's history or imprisonment and probationary status that are inextricably linked to circumstances surrounding the crime are admissible. Denial of the motion in limine was proper. St. v. Brasda, 2003 MT 374, 319 M 146, 82 P3d 922 (2003).

Certain Relevant Evidence of Defendant's Conduct Following Sexual Assault Properly Admitted Under Transaction Rule: Immediately following a sexual assault, defendant went into the victim's daughter's room, then came back into the living room wearing a pair of the daughter's panties. Prior to trial, defendant moved in limine to exclude this evidence, as well as evidence that he then masturbated in front of the victim while wearing the panties. The District Court granted defendant's motion excluding testimony about the alleged masturbation, but allowed testimony about the panties and allowed the panties into evidence. Defendant contended on appeal that allowing the evidence was prejudicial and designed to inflame the jury. The Supreme Court held that the evidence was admissible under the transaction rule in this section. The conduct occurred immediately after the assault and was intertwined with the crime and relevant as part of the transaction, plus the victim testified that the conduct made her fearful. The evidence was highly probative, and the jury had the right to evaluate the evidence in the context in which the crime occurred. St. v. Detonancour, 2001 MT 213, 306 M 389, 34 P3d 487 (2001).

Sexual Abuse and Violence Against Women Act — Limitation of Evidence of Inappropriate Touching of Another: Evert sought damages against Swick based on Swick's alleged sexual abuse and violation of the federal Violence Against Women Act of 1994 (42 U.S.C. 13981). The District Court excluded proffered testimony of Evert's sister that Swick had also sexually and physically abused her. Swick was ultimately acquitted. Evert asserted on appeal that her sister's testimony was admissible to show opportunity, identity, or absence of mistake, that it was part of the res gestae, and that it should have been allowed as rebuttal testimony. The Supreme Court found no issue of opportunity, identity, or mistake because Swick and Evert had lived together, so the opportunity for abuse clearly existed. Moreover, the sister's testimony did not fall within any of the hearsay exceptions in Rule 803, M.R.Ev. (Title 26, ch. 10). The res gestae argument, when properly phrased in the context of the transaction rule, showed no evidence that Swick's contact with the sister involved part of the same transaction contained in Evert's complaint, a necessary element under this section. The Supreme Court also concluded that the testimony had no rebuttal value that would outweigh its prejudicial effect. The District Court correctly deduced that the evidence of other inappropriate touching was offered to impugn Swick's credibility and bolster Evert's credibility, which is not permitted under Rule 404, M.R.Ev. (Title 26, ch. 10), and the modified Just rule. The court properly exercised its discretion in weighing the probative value of the testimony against its prejudicial effect in limiting the sister's testimony to the allegations contained in the complaint and excluding the portion of her testimony regarding other acts. Evert v. Swick, 2000 MT 191, 300 M 427, 8 P3d 773, 57 St. Rep. 757 (2000).

Evidence of Victim's Statements as to Perpetrator of Crime Not Within Concept of Corpus Delicti or Res Gestae — Use of Terms "Corpus Delicti" and "Res Gestae" Discouraged: The Supreme Court extensively reviewed the use of the terms "corpus delicti" and "res gestae", examining definitions and the historical development of Montana case law referencing the concepts. Here, statements by the victim to family members and friends regarding her troubled relationship with her husband, were not within the bounds of the concept of the corpus delicti because they tended to establish the perpetrator of the crime, which is not an element of the corpus delicti, and should not have been admitted under that rule. The statements were also inadmissible under the concept of res gestae. However, the admission of the victim's statements was merely cumulative and constituted harmless error. The Supreme Court urged that these vague and imprecise terms not be used in the future and advised that the court will henceforth review claims of error in the admission of evidence by determining whether the evidence was admissible under some provision of the Montana Code Annotated or under the Montana Rules of Evidence. St. v. Hansen, 1999 MT 253, 296 M 282, 989 P2d 338, 56 St. Rep. 997 (1999), clarifying numerous Montana cases that have properly or improperly applied the concepts.

Admissibility of Victim Testimony as to Sexual Acts Committed by Nondefendants — Not Hearsay: The trial court allowed the victim to testify not only to the sexual acts committed by defendants but also to similar acts committed at about the same time by three other men not on trial. Defendants contended that the court abused its discretion in allowing the testimony because it was hearsay and violated the res gestae doctrine. However, the evidence was admissible because it was closely related to and explanatory of the offense and was therefore

part of the transaction, as contemplated under this section. The testimony was not considered hearsay because the testimony of the other three men was not offered into evidence to prove the sexual acts. St. v. Wing, 264 M 215, 870 P2d 1368, 51 St. Rep. 223 (1994), followed, with regard to admissibility of evidence that is closely related to and explanatory of an offense, in St. v. Atkins, 277 M 103, 920 P2d 481, 53 St. Rep. 561 (1996), St. v. Hayworth, 1998 MT 158, 289 M 433, 964 P2d 1, 55 St. Rep. 631 (1998), and St. v. Maier, 1999 MT 51, 293 M 403, 977 P2d 298, 56 St. Rep. 208 (1999). Atkins was also followed in Hayworth. See also St. v. Beavers, 1999 MT 260, 296 M 340, 987 P2d 371, 56 St. Rep. 1035 (1999).

Effect on Parol Evidence Rule: In a real estate listing contract dispute, the court held that this statute is an exception to the hearsay rule and cannot be used to admit evidence that would otherwise be inadmissible under the parol evidence rule. Payne v. Buechler, 192 M 311, 628 P2d 646, 38 St. Rep. 799 (1981).

Hearsay — No Applicable Exception: In a wrongful death action, the court properly refused admission of hearsay testimony from people who were not present at the time of the drowning and who attempted to testify to the approximate location where the deceased entered the water. Neither the "present sense impression" exception to the hearsay rule nor the "res gestae" rule operated in this case. Folda v. Bozeman, 177 M 537, 582 P2d 767, 35 St. Rep. 1019 (1978).

Distance and Time Between Transaction and Declaration: The court did not abuse its discretion in refusing to admit an allegedly res gestae statement offered by plaintiff to show that defendant was driving too fast at the time of collision because the observation was made by a witness overtaken at least 6.5 miles short of the point of impact on better road conditions than existed at such point. Kudrna v. Comet Corp., 175 M 29, 572 P2d 183 (1977).

Proof of Other Offenses: Proof of other offenses was admissible to show guilty knowledge, motive, or intent, and discussion of the defendant's attitude toward a prior sentence was admissible to show the defendant's motive to have pending charges dismissed and his intent to influence a Deputy County Attorney's prosecutorial discretion. St. v. Hensley, 171 M 38, 554 P2d 745 (1976).

Res Gestae — As Dying Statement of Murder Victim: Witnesses' testimony that deceased identified defendant as the person who shot her, while inadmissible as a dying declaration for lack of a proper foundation, is admissible as part of the res gestae. Deceased made her oral statement identifying defendant while still lying on the floor grievously wounded; therefore, her mind was still laboring under the excitement aroused by the shooting, before there was time to reflect and fabricate. St. v. Caryl, 168 M 414, 543 P2d 389, 32 St. Rep. 1207 (1975).

Scope of Rule — Competency: This provision was not intended to embody the statement of a rule by which to determine the competency of declarations relative to a transaction but to be a mere direction that they must be considered competent when they are so connected with the main transaction as to form a part of it. Gunderson v. Brewster, 154 M 405, 466 P2d 589 (1970); Callahan v. Chicago, Burlington & Quincy R.R., 47 M 401, 133 P 687 (1913).

Narrative of Future Intentions: Declaration by decedent that "I am buying a ranch and placing it in Bill's name until I get rid of my wife" was inadmissible in an action to establish a resulting trust since it was a narrative statement of future intentions and not a statement of present ownership. Platts v. Platts, 134 M 474, 334 P2d 722 (1959).

Admission Against Interest — Need Not Be Res Gestae: Where statements made by defendant tended to incriminate him, they were admissible as statements against interest regardless whether they were part of the res gestae. St. v. Allison, 122 M 120, 199 P2d 279 (1948).

Intent Shown by Declaration: Where the intention of a workman to aid in supporting his parents was an important fact in the matter of the parents' claim as his major dependents upon his death, the statement of a witness that decedent told him that he intended to send his next paycheck to his parents and thereafter every other check was admissible under this section as part of the res gestae, as evidence of the intent, and the Industrial Accident Board (now Workers' Compensation Court) was not warranted in rejecting the testimony as hearsay. Ross v. Indus. Accident Bd., 106 M 486, 80 P2d 362 (1938).

Declaration During Moment of Excitement: The declaration of a decedent, made in a building then on fire, that the smoke was caused by burning gas was admissible as a part of the res gestae, as an exception to the hearsay rule on the theory that it was made while the mind of the speaker was laboring under excitement and before there was time to reflect, thus rendering the solemnity of an oath unnecessary to give it probative value. Sellers v. Montana-Dakota Power Co., 99 M 39, 41 P2d 44 (1935).

Inadmissible Matters in Declaration — Insurance: While it is the general rule that where, in a personal injury action arising out of an automobile accident, the fact that defendant is protected by insurance against liability for damages may not be injected into the case by

evidence or argument, evidence thereof may be admissible where it is a part of a conversation involving an admission of responsibility by defendant; thus where defendant, in answer to a query by plaintiff's husband, "What kind of driving was that?" replied that she was insured and that "the company will take care of me", the reply was admissible as an admission of negligence as well as a part of the res gestae. Tanner v. Smith, 97 M 229, 33 P2d 547 (1934), distinguished in Watkins v. Williamson, 132 M 46, 314 P2d 872 (1957).

CONTINUING COURSE OF CONDUCT

Meeting of Decedent's Estate: Testimony, given by the executor of an estate and its attorney, of conversations had at a meeting of the persons interested in the estate and which culminated in a note given by way of settlement of a dispute was admissible under this section in an action on the note. Stagg v. Stagg, 96 M 573, 32 P2d 856 (1934).

Marital Relations: Where the question whether parties were husband and wife is at issue, their conduct during the entire time they cohabited is part of the res gestae; and whatever they did or said during that time, which sheds light upon the matter and aids in disclosing the relations they sustained toward each other, must be construed as part of the res gestae. Welch v. All Persons, 85 M 114, 278 P 110 (1929).

Preliminaries to Contract: In an action to recover a sum of money for communicating to the defendant valuable information about a mine, for which information the defendant promised to pay, whatever the defendant said and did, while engaged in one of the preliminary steps leading up to the consummation of the contract, without the doing of which there would have been no contract, is a part of the res gestae and is competent. McCrimmon v. Murray, 43 M 457, 117 P 73 (1911).

Agreement to Devise — Devisee Lived With Decedent: Where, in an action to enforce the performance of an agreement to devise, the evidence tended to show that the agreement was made by the deceased in consideration of the plaintiff's agreement to live with deceased and to render services and affection, the acts and declarations of deceased, made after the agreement and while plaintiff was living with him, were part of the res gestae and were admissible in evidence under this section. Burns v. Smith, 21 M 251, 53 P 742 (1898).

CRIMINAL ACTIONS

Evidence of Other Theft and Property Damage and Threatening Note Admissible Under Transaction Rule: During defendant's trial for theft and burglary, the District Court allowed the introduction of evidence of a prior theft and property damage, as well as a threatening note, that defendant had been involved with earlier in the day. Defendant contended that the evidence related to other acts or crimes and should not have been admitted. However, the prior theft and property damage and the note were intertwined with the theft and burglary, and the jury was entitled to hear what had transgressed immediately prior to the commission of the crime charged, so the evidence was admissible under the transaction rule. St. v. Flowers, 2004 MT 37, 320 M 49, 86 P3d 3 (2004).

Statement Admitting Prior Drug Use Not Considered Evidence of Other Crimes — Admissibility of Statement Under Transaction Rule: When his probation officer searched Lozon's room early one morning, the officer discovered a vial that Lozon admitted contained methamphetamine, but Lozon would not say to whom the vial belonged. However, Lozon did admit taking methamphetamine the previous evening. When the state sought to admit Lozon's statement, Lozon objected on grounds that the statement constituted evidence of prior crimes and that because the state had not provided notice that the statement would be used and the purpose for the evidence, as required in Rule 404, M.R.Ev. (Title 26, ch. 10), it was inadmissible. The trial court admitted the statement under the transaction rule, and Lozon appealed, but the Supreme Court affirmed. Under the transaction rule in this section, evidence of matters that are inextricably linked to and explanatory of the charged offense is admissible, notwithstanding rules related to the admission of other crimes evidence, and when the evidence at issue is not wholly independent of or unrelated to the charged offense, it is not considered other crimes evidence for which notice of intent to introduce is required. Here, Lozon's statement established Lozon's knowledge and possession of drugs in his room shortly before the search, was closely related to the possession charge, and was therefore admissible. St. v. Lozon, 2004 MT 34, 320 M 26, 85 P3d 753 (2004).

Character Evidence Improperly Admitted — Harmless Error: Defendant was charged with manufacture of dangerous drugs and sex crimes. The drug charge was severed, and defendant was convicted. When the sex crimes came to trial, the District Court allowed evidence of defendant's drug use. Defendant contended that the evidence was improperly admitted as bad

character evidence because the state failed to meet the procedural requirements of the modified Just rule. The state asserted that the evidence was not admitted as character evidence, but rather admitted pursuant to the transaction rule because the drug use explained the circumstances surrounding the alleged sex offenses. The Supreme Court held that although the challenged evidence may have been relevant to explain the transaction, the evidence was improperly admitted in this case because the District Court had earlier determined that the charges were sufficiently distinct to warrant separate trials, so admission of drug use evidence in the sex crimes trial somewhat undermined the benefit that defendant gained from the earlier granting of the request for severance. Having defended against the drug charges in the first trial, defendant was faced with the evidence again. However, the Supreme Court then went on to apply the test in St. v. Van Kirk, 2001 MT 184, 306 M 215, 32 P3d 735 (2001), to determine if admission of the evidence prejudiced defendant's right to a fair trial and found that the error was harmless. The evidence of drug use did not go to the proof of an element of the sex crimes, and only brief mention was made of drug use in closing arguments and then only in conjunction with other admissible evidence related to the transaction. Thus, the impact of the tainted evidence was minimal, and given other ample evidence upon which the state could develop its case, there was no reasonable possibility that the tainted evidence contributed to the conviction, which was therefore affirmed. St. v. Insua, 2004 MT 14, 319 M 254, 84 P3d 11 (2004).

Facts Regarding Defendant's Prison Incarceration and Probationary Status Properly Admitted as Inextricably Linked to Circumstances Surrounding Incest Charge: At Bauer's incest trial, the District Court barred mention by the prosecution of Bauer's two prior felony convictions, but did rule that the fact of Bauer's lengthy prior prison incarceration and status as a probationer at the time of the incest were admissible as part of the transaction. Bauer contended on appeal that the incarceration and probation information were highly prejudicial and constituted evidence of other crimes that should have been admitted only after the appropriate notice under the Just rules. The state cited the transaction rule in this section, which provides that when a declaration, act, or omission forms part of a transaction that is itself the fact in dispute or evidence of that fact, then the declaration, act, or omission is admissible as part of the transaction. The Supreme Court agreed with the state. In order for the jury to understand the context of the alleged incest, the victim needed to explain that she had not known or seen her father because he had been incarcerated since she was a small child. Thus, the District Court acted conscientiously and within the bounds of reason in allowing the facts of Bauer's prison incarceration and probationary status into evidence. St. v. Bauer, 2002 MT 7, 308 M 99, 39 P3d 689 (2002).

Inflammatory Statements as Part of Same Transaction That Formed Basis of Criminal Offense Properly Admitted as Part of Res Gestae: Beavers contended that the trial court erred in admitting inflammatory statements made by a passenger in Beavers' car immediately after Beavers was stopped for speeding and just prior to his attempt to avoid arrest on an outstanding warrant. The Supreme Court held that the statements were properly admitted under the res gestae rule, along with the evidence of resisting arrest and the evidence of Beavers' felony warrant and classification as an escape risk, because they were part of the same transaction that included the acts that formed the basis of the underlying offense. Failure to admit the statements and evidence of flight would have left the jury with an incomplete picture of all the acts that transpired to result in the charge against Beavers. Relevance of the evidence outweighed any possible prejudice. St. v. Beavers, 1999 MT 260, 296 M 340, 987 P2d 371, 56 St. Rep. 1035 (1999). See also St. v. Wing, 264 M 215, 870 P2d 1368, 51 St. Rep. 223 (1994).

Discussion of Intent to Kill Persons Other Than Those Assaulted Admissible as Part of Res Gestae, Transaction, or Corpus Delicti: Before Hayworth participated in shooting Bradford and Kunesh, Hayworth and another defendant discussed killing two men known as Tray and Big Rich. Hayworth tried to prevent testimony of his discussion with the other defendant from being given, but the District Court denied Hayworth's motion in limine and allowed the testimony. The Supreme Court held that the evidence of Hayworth's conversation about killing Tray and Big Rich was admissible, whether as part of the transaction, res gestae, or corpus delicti. St. v. Hayworth, 1998 MT 158, 289 M 433, 964 P2d 1, 55 St. Rep. 631 (1998).

Proof of Other Offenses: Proof of other offenses was admissible to show guilty knowledge, motive, or intent, and discussion of the defendant's attitude toward a prior sentence was admissible to show the defendant's motive to have pending charges dismissed and his intent to influence a Deputy County Attorney's prosecutorial discretion. St. v. Hensley, 171 M 38, 554 P2d 745 (1976).

Res Gestae — As Dying Statement of Murder Victim: Witnesses' testimony that deceased identified defendant as the person who shot her, while inadmissible as a dying declaration for

lack of a proper foundation, is admissible as part of the res gestae. Deceased made her oral statement identifying defendant while still lying on the floor grievously wounded; therefore, her mind was still laboring under the excitement aroused by the shooting, before there was time to reflect and fabricate. St. v. Caryl, 168 M 414, 543 P2d 389, 32 St. Rep. 1207 (1975).

Complaint of Crime: In a prosecution for the crime against nature, the mother of the victim to whom the complaint was made could testify to that fact and state the time, place, and circumstances under which it was made but not what was said by the victim concerning the details of the crime. St. v. Shambo, 133 M 305, 322 P2d 657 (1958).

Applicability to Criminal Actions: Under the law of evidence, res gestae are the circumstances, facts, and declarations which grew out of the main fact, are contemporaneous with it, and serve to illustrate its character. St. v. Schlaps, 78 M 560, 254 P 858 (1927).

Condition of Victim's Body: Where husband and wife were murdered at about the same time and defendant was placed on trial for the killing of the wife, evidence as to the condition of the body of the husband was admissible as part of the res gestae. St. v. Schlaps, 78 M 560, 254 P 858 (1927), distinguished in St. v. Park, 88 M 21, 289 P 1037 (1930).

Victim Hospitalized — Identification of Defendant: Where a man was shot and afterward, in a hospital, identified the accused as the man who did the shooting, his testimony is admissible as touching a matter in issue, though no foundation was laid for it as a dying declaration. St. v. Fisher, 54 M 211, 169 P 282 (1917).

TIME BETWEEN TRANSACTION AND DECLARATION

Distance and Time Between Transaction and Declaration: The court did not abuse its discretion in refusing to admit an allegedly res gestae statement offered by plaintiff to show that defendant was driving too fast at the time of collision because the observation was made by a witness overtaken at least 6.5 miles short of the point of impact on better road conditions than existed at such point. Kudrna v. Comet Corp., 175 M 29, 572 P2d 183 (1977).

Between Beating and Death — Two-Day Span: Statements made by decedent to her neighbors to the effect that her husband had beaten her the previous evening and that morning and that she was anxious to leave the house were not part of the res gestae and not admissible in prosecution against husband for voluntary manslaughter where statements were made 12 to 13 hours after the alleged beating and decedent died nearly 24 hours later in a hospital as a result of a subarachnoid clot caused by external trauma. St. v. Newman, 162 M 450, 513 P2d 258 (1973).

Driver in Automobile Accident: In a negligence action by passenger of car struck by truck, testimony of truck driver concerning declarations of driver of automobile concerning speed at which he was traveling was admissible even though made some 10 minutes after collision. Blevins v. Weaver Constr. Co., 150 M 158, 432 P2d 378 (1967).

Details of Complaint of Criminal Act: In a prosecution for the crime against nature, it was error to permit the mother of the prosecuting witness to testify as to details of the crime as related by him when he complained to her, where there was no showing that the statement was made while in shock or immediately after the crime. St. v. Shambo, 133 M 305, 322 P2d 657 (1958).

Contemporaneous With Execution or Delivery of Documents: A statement made by plaintiff's alleged deceased grantor that "Mr. Poore has the papers" and that "they were in Mr. Poore's possession" was not contemporaneous with execution or delivery of the papers referred to, so was not admissible under this section. Wilson v. Davis, 110 M 356, 103 P2d 149 (1940).

Declarations Made Before Time to Reflect: While declarations, to be admissible as part of the res gestae, need not have been strictly contemporaneous with the main incident which gave rise to them, they must have been made while the mind of the speaker was laboring under the excitement aroused by the incident, before there was time to reflect and fabricate. Callahan v. Chicago, Burlington & Quincy R.R., 47 M 401, 133 P 687 (1913).

Later Discussion of Incident: In an action against a railroad company for the killing of livestock, the testimony of a witness that the section boss showed him where the animal was when struck and stated that after it was struck he killed it to end its sufferings was not admissible as res gestae. Poindexter & Orr Live Stock Co. v. Oreg. Short Line R.R., 33 M 338, 83 P 886 (1905).

Law Review Articles

Montana's Rule on Res Gestae, Warren, 34 Mont. L. Rev. 269 (1973).

Collateral References

Evidence *key* 118, et seq.

31A C.J.S. Evidence §§260, 403, 405 through 409, 414, 416, 419 through 421.

29A Am. Jur. 2d Evidence §860, et seq.

Admissibility of impeached witness' prior consistent statement—modern state civil cases. 59 ALR 4th 1000.

Admissibility of testimony regarding spontaneous declarations made by one incompetent to testify at trial. 15 ALR 4th 1043.

Admissibility of evidence concerning words spoken while declarant was asleep or unconscious. 14 ALR 4th 802.

Admissibility in civil action, apart from res gestae, of lay testimony as to another's expression of pain. 90 ALR 2d 1071.

Declarant's age as affecting admissibility of declaration as res gestae. 83 ALR 2d 1368, §§6, 11, 16 superseded by 15 ALR 4th 1043.

Admissibility in criminal case, as part of res gestae, of statements or utterances of bystanders made at time of arrest. 78 ALR 2d 300.

Clothing of deceased as part of res gestae in homicide prosecution. 68 ALR 2d 921.

Admissibility as part of res gestae, in civil assault and battery action, of similar acts or assaults against other persons. 66 ALR 2d 827.

Admissibility as part of res gestae, in prosecution for gambling or gaming offense, of evidence of other acts of gambling. 64 ALR 2d 837.

Admissibility as res gestae, in rape prosecution, of evidence that accused is married, has children, and the like. 62 ALR 2d 1078.

Admissibility as res gestae of statements or exclamations relating to cause of, or responsibility for, motor vehicle accident. 53 ALR 2d 1245.

Admissibility in evidence, as part of res gestae, of rule of defendant in action for negligence. 50 ALR 2d 19.

Time element as affecting admissibility of statements by victim of sex crime as res gestae. 19 ALR 2d 570.

Inability of person making utterance to recollect and narrate facts to which it relates as affecting its admissibility as part of res gestae. 7 ALR 2d 1324.

26-1-104. Evidence of third person's obligation.

Case Notes

Judgment Roll as Evidence: Though the rights of one not made a party to an action are not affected by the resultant judgment, the judgment roll therein is admissible in a subsequent action, for the purpose of making out a prima facie case as to the rights of the party introducing it, in and to the subject matter of the action in which the judgment was entered. Sunburst Oil & Ref. Co. v. Callender, 84 M 178, 274 P 834 (1929).

Collateral References

Evidence *key* 99.

31A C.J.S. Evidence §§158, 160, 162, 212; 32 C.J.S. Evidence §§576, 577.

Admissibility against beneficiary of life or accident insurance policy of statements of third persons included in or with proof of death. 1 ALR 2d 365.

26-1-105. Superseded.

Compiler's Comments

Superseded: This section was superseded by the Montana Rules of Evidence on July 10, 1979, pursuant to Supreme Court Order 12729. (See chapter compiler's comment, Title 26, ch. 10.)

26-1-106. Explanation of alterations in a writing.

Case Notes

Presumption of Authority — Alteration of Both Parties' Copies: Where plaintiff asserted that contract of sale was altered after its execution without his consent by adding to his name as vendee that of his wife, the trial court in weighing the evidence could properly indulge the presumption that the vendor, since deceased, was innocent of wrongdoing, i.e., that he would not have made the alteration without plaintiff's consent, the copies in both the hands of plaintiff and vendor containing the same alteration. Kern v. Eichhorn, 113 M 262, 124 P2d 311 (1942).

Criminal Cases — Alleged Alteration of Confession: Where alterations appeared in an alleged written confession of defendant charged with crime, it was incumbent upon the State, under this section, which is made applicable to criminal cases by 46-30-101, to account for them before it is admissible in evidence; in the instant case defendant testified that the writing was inaccurate. St. v. Crighton, 97 M 387, 34 P2d 511 (1934).

Collateral References

Alteration of Instruments *key* 27(3).

3B C.J.S. Alteration of Instruments §138.

Presumptions and burden of proof as to interlineations and changes appearing on face of will. 34 ALR 2d 630.

Part 2
Province of Court and Jury

Part Collateral References

Sufficiency of corroboration of confession for purpose of establishing corpus delicti as question of law or fact. 33 ALR 5th 571.

26-1-201. Questions of law.

Compiler's Comments

1983 Amendment: At beginning of section inserted exception clause; and at end of section, deleted "and all discussions of law addressed to it. Whenever the knowledge of the court is, by this code, made evidence of a fact, the court is to declare such knowledge to the jury, which is bound to accept it".

Case Notes

Questions of Law 16
Admissibility 17

QUESTIONS OF LAW

Sale of Automobile Franchise — Error in Failure to Resolve Mootness as Threshold Issue Before Underlying Dispute Addressed: Ford Motor Company (Ford) notified franchisee Shamrock Motors (Shamrock) that it intended to terminate Shamrock's automobile dealer franchise because Shamrock had sold 80% of its stock without Ford's knowledge or consent, which violated their franchise agreement. The Motor Vehicle Division of the Department of Justice issued a ruling that Ford had good cause, so Shamrock filed for judicial review in the District Court. Ford then removed to federal court, where the ruling was reversed, so Ford appealed to the Ninth Circuit Court. Shamrock then sold the dealership, and the decision was vacated because of lack of jurisdiction. The case was remanded to state court, where Ford moved to dismiss for mootness. The District Court denied the motion without discussion and ruled for Shamrock, concluding that the franchise could not be terminated as a result of the sale of 80% of the franchise stock. Reversing on appeal, the Supreme Court cited Adkins v. Livingston, 121 M 528, 194 P2d 238 (1948), in holding that mootness is a threshold issue that must be dealt with before the underlying dispute may be addressed. A matter is moot when, because of an event or happening, the issue has ceased to exist and no longer presents an actual controversy. A question is moot when a court cannot grant effective relief. If the parties cannot be restored to their original position, an appeal becomes moot. When Shamrock chose to sell the franchise during the appellate process, the question of whether Ford had good cause to terminate the franchise in the first instance became academic and thus moot. The District Court erred when it did not resolve the issue of mootness before addressing the merits of the claim, not recognizing that once Shamrock sold the dealership and was no longer the franchisee, there was no effective relief that the court could fashion under Title 61, ch. 4, part 2, so the appeal from the Motor Vehicle Division's ruling should have been dismissed as moot. Shamrock Motors, Inc. v. Ford Motor Co., 1999 MT 21, 293 M 188, 974 P2d 1150, 56 St. Rep. 99 (1999), followed in Shamrock Motors, Inc. v. Chrysler Corp., 1999 MT 39, 293 M 317, 974 P2d 1154, 56 St. Rep. 164 (1999).

Constitution "Other Writing" — Compelling State Interest Analysis — Application of Strict Scrutiny Test — Questions of Law — Harmless Error: In a suit for wrongful discharge from employment, it was harmless error for the District Court to submit to the jury the question of whether the right that plaintiff asserted was a constitutionally protected right and, if constitutionally protected, whether it was a fundamental right and, if it was a fundamental right, whether the state provided a compelling interest for infringing upon it. Wadsworth v. St., 275 M 287, 911 P2d 1165, 53 St. Rep. 146 (1996).

Relevance of Evidence — Remoteness in Time: A trial court is not guided by fixed rules in determining whether evidence is too remote in time to be relevant. The nature of the evidence and the circumstances of the case control. For this reason the determination is left in great part to the discretion of the judge and is subject to review only in the event of manifest abuse. Preston v. McDonnell, 203 M 64, 659 P2d 276, 40 St. Rep. 297 (1983), followed in In re Marriage of Cole,

224 M 207, 729 P2d 1276, 43 St. Rep. 2136 (1986), and in In re Marriage of Starks, 259 M 138, 855 P2d 527, 50 St. Rep. 719 (1993).

Lesser Included Offense Instruction — When Required: Defendant, convicted of burglary and theft, alleged error in the failure to instruct the jury on the lesser included offense of criminal trespass. The Supreme Court noted the fundamental rule that the defendant is entitled to an instruction on a lesser included offense if the evidence would enable the jury rationally to find him guilty of a lesser offense and to acquit him of the greater. However, if the evidence is such to show that the defendant is either guilty of the offense charged or entitled to an acquittal, the District Court does not err by refusing to instruct as to the lesser included offense. Once the determination was made that the mobile home was an occupied structure within the meaning of the statute, the evidence was not in dispute and the defendant was either guilty of burglary or entitled to an acquittal. St. v. Kyle, 192 M 374, 628 P2d 260, 37 St. Rep. 1447 (1980).

Definition of "Occupied Structure" — Question of Law: Because the trial court judge determined that a furnished mobile home located on a sales lot was an "occupied structure" for the purposes of 45-6-204, he correctly denied defendant's motion for directed verdict on the burglary charge. St. v. Kyle, 192 M 374, 628 P2d 260, 37 St. Rep. 1447 (1980).

Questions of Statutory Construction — Court Determination: All questions of law, including the construction of statutes, are to be decided by the court and not by the jury. Therefore, it was not error for the court to refuse plaintiff's instruction regarding statutory construction. Stenberg v. Neel, 188 M 333, 613 P2d 1007, 37 St. Rep. 1170 (1980).

Judge to Instruct Jury on Law — Testimony of Constitutional Expert Excluded: The interpretation and application of the United States Constitution was a question of law and not a fact in issue in a prosecution for failure to file proper state tax returns. It was a determination to be made by the trial judge within his statutory powers. Instructing the jury on the law necessary for the jury's rendering of a verdict in a criminal case is a duty within the exclusive province of the trial judge. It was proper to exclude the testimony of an expert on the United States Constitution. St. v. Poncelet, 187 M 528, 610 P2d 698, 37 St. Rep. 760 (1980).

Interpretation of Lease: Interpretation of lease of building was matter for court in dispute between lessor and lessee. Solich v. Hale, 150 M 358, 435 P2d 883 (1967).

Corporate Business Activities: The determination whether an out-of-state publisher who advertised Montana land for sale was doing business in Montana within the purview of section 15-1701, R.C.M. 1947 (since repealed), or was carrying on the business of a real estate broker were questions of law under this section. Union Interchange, Inc. v. Parker, 138 M 348, 357 P2d 339 (1960), explained in Minnehoma Fin. Co. v. Van Oosten, 198 F. Supp. 200 (D.C. Mont. 1961).

ADMISSIBILITY

Attorney as Witness — Testimony as to Legal Opinions on Legal Issues: Defendant claimed on appeal that plaintiffs' former attorney testified as to ultimate legal issues in the case and his legal opinion on the law involved. In view of defendant's limited trial objection that the offer of an opinion may improperly invade the province of the jury in determining the facts in the case and in view of no objection that the attorney was testifying as to legal opinions, the court refused to find error in allowing the testimony. Baird v. Norwest Bank, 255 M 317, 843 P2d 327, 49 St. Rep. 1026 (1992).

Exhibit Not Linked to Event in Dispute — Notice Period Not Met — Exhibit Properly Excludable: Defendant attempted to introduce BB pellets as physical evidence that he did not fire in the direction of another person. The pellets were properly excluded as lacking probative value since no ballistics tests were conducted that would tie the pellets to the alleged weapon or the alleged time and place of the incident. Further, defendant attempted to introduce the exhibit as tangible evidence after the 30-day notice period set out in 46-15-323 and was unable to vouch for the exhibit to the trial court's satisfaction. St. v. Keup, 228 M 194, 741 P2d 1330, 44 St. Rep. 1451 (1987).

Expert — Duty to Determine Qualifications — Relevance of Degree of Qualifications: Whether a witness is an expert is largely within the discretion of the trial judge. Defendant objected that a witness was not qualified. The trial judge said: "The court is going to permit her to testify. If the jury doesn't believe she is qualified—well, that will be up to the jury to decide". The judge did not leave to the jury the decision whether the witness was qualified. He made that decision when he permitted the testimony and then stated that the jury could determine the degree of the qualifications. The degree of qualification affects the weight, not the admissibility, of the testimony. St. v. Berg, 215 M 431, 697 P2d 1365, 42 St. Rep. 518 (1985), followed in St. v. Martin, 226 M 463, 736 P2d 477, 44 St. Rep. 804 (1987), and in St. v. Baker, 249 M 156, 815 P2d 587, 48 St. Rep. 685 (1991).

Evidence Admitted Pertaining to Charge Later Dismissed — Jury Instructed to Disregard: Defendant was charged with deliberate homicide and with conspiracy to commit homicide. The conspiracy charge was dismissed at the close of the State's case. The District Court instructed the jury to consider only the evidence pertaining to the charge of deliberate homicide and to disregard evidence pertaining to the conspiracy charge. Such an instruction is presumed to cure any error that may have been committed by the introduction of evidence pertaining to the conspiracy charge. St. v. Freeman, 183 M 334, 599 P2d 368, 36 St. Rep. 1622 (1979).

Sound Recorded Evidence: In order for sound recordings to be admissible into evidence there must be showing of: (1) the capability of the recording device; (2) the competency of the operator; (3) the authenticity of the recording; (4) the fact that no changes or deletions have been made; (5) the manner of the preservation of the recording; and (6) the identification of the speakers. St. v. Smith, 164 M 334, 523 P2d 1395 (1974).

Dying Declaration — Admissibility by Judge — Weight by Jury: The question whether a dying declaration is admissible is one for the court's decision after hearing preliminary proof concerning the condition of the declarant and the circumstances surrounding the making of the statement, whereupon, if admitted, the question of its sufficiency and the weight to be given it is for the jury's determination; hence refusal to submit instructions stating the rule governing the admission of such declarations was not error. St. v. Vettere, 76 M 574, 248 P 179 (1926).

Witnesses Capacity to Testify: The orthodox division of function between judge and jury allots, without question, to the judge the determination of all matters of fact on which the admissibility of evidence depends and therefore of the facts of a witness' capacity to testify. St. v. Newman, 66 M 180, 213 P 805 (1923).

Confession — Circumstances Under Which Made: The question of the admissibility of a confession, alleged to have been made by defendant while in custody, is to be determined by the court after hearing evidence, in the presence of the jury, relative to the circumstances under which it was made, and its finding thereon will not be disturbed on appeal unless clearly against the weight of the evidence. St. v. Berberick, 38 M 423, 100 P 209 (1909).

Admission — Jury Not to Decide Admissibility: It is error to submit the question of the admissibility of an admission to the jury, and testimony relative thereto taken before the court sitting without the jury will not be examined on appeal. St. v. Sherman, 35 M 512, 90 P 981 (1907), overruling St. v. Tighe, 27 M 327, 71 P 3 (1903). See also Territory v. McClin, 1 M 394 (1871), and Territory v. Underwood, 8 M 131, 19 P 398 (1888).

Collateral References

Trial *key* 136(1) through (4).

88 C.J.S. Trial §§335, 339, 340, 346 through 379.

Reasonableness of peace officer's delay in making arrest without warrant for misdemeanor or breach of peace committed in his presence as question of law. 58 ALR 2d 1058.

26-1-202. Questions of fact.

Compiler's Comments

1983 Amendment: At end of first sentence concerning trial by jury, changed "this code" to "law"; inserted last sentence concerning trial of a question of fact not by jury; and made minor changes in style and phraseology.

Case Notes

Error in Exclusion of Evidence of Stress-Provoking Event Other Than Accident in Determining Loss of Established Course of Life: Maurer was injured in a car accident, after which he was depressed. This depression led him to leave the family ranch and contributed to his "course of life" damages. Defendants should have been allowed to introduce evidence of another stress-provoking incident that occurred about the same time and could have contributed to Maurer's depression. The incident involved the injury of Maurer's girlfriend, criminal charges against Maurer, and his subsequent trial and acquittal on felony assault (now assault with a weapon) charges. The link between the incident and Maurer's depression was self-evident, and the jury should have been allowed to consider evidence of the incident from a common sense viewpoint to determine to what degree, if any, the stress from the incident contributed to Maurer's loss of established course of life. The probative value of evidence of the incident was not substantially outweighed by its prejudicial nature. Maurer v. Clausen Distrib. Co., 275 M 229, 912 P2d 195, 53 St. Rep. 78 (1996).

Jury Trial — ERISA Action: A jury trial is appropriate when suit is brought in state court based on a breach of contract claim under ERISA to recover benefits under a group health

insurance plan when issues of fact are controverted. Head v. Cent. Reserve Life of N. America Ins. Co., 256 M 188, 845 P2d 735, 50 St. Rep. 20 (1993).

Conclusion Through Evidence and Instructions That Mental State Existed for Conviction of Felony Attempted Theft: Given the evidence and instructions presented to the jury, it could reasonably conclude beyond a reasonable doubt that defendant had the requisite mental state for conviction of felony attempted theft. When the evidence, viewed in a light most favorable to the prevailing party, permits a rational trier of fact to find the essential elements of a crime, the Supreme Court will not reverse the conviction. St. v. Johnstone, 244 M 450, 798 P2d 978, 47 St. Rep. 1715 (1990).

Aggravating Circumstances Related to Sentencing — Jury Determination Not Required: Defendant argued that the aggravating circumstances with which the trial court justified the death penalty were equivalent to a finding of malice and that he was therefore entitled to have a jury determine facts constituting the aggravating circumstances. The Supreme Court held that defendant was not entitled to a jury determination because the aggravating circumstances were related to sentencing only and were not elements of the crime charged. Capital sentencing procedures do not require jury participation. St. v. Dawson, 233 M 345, 761 P2d 352, 45 St. Rep. 1542 (1988).

Evidence — When Sufficient to Support Verdict: Plaintiff appealed from jury verdict in favor of defendant, alleging the evidence did not support the verdict. The Supreme Court held that in order to overturn the verdict on the basis of insufficient evidence, it must find plaintiff entitled to judgment as a matter of law, and that there was insufficient evidence to warrant submitting the case to a jury. Here the court found credible evidence supporting a verdict either way and considered itself without power to set aside the decision of the trier of fact as a matter of law. The District Court properly denied plaintiff's motions for directed verdict and judgment notwithstanding the verdict. Gunlock v. W. Equip. Co., 219 M 112, 710 P2d 714, 42 St. Rep. 1882 (1985), followed in Weinberg v. Farmers St. Bank of Worden, 231 M 10, 752 P2d 719, 45 St. Rep. 391 (1988).

Conflicting Evidence Resolved by Jury — Substantial Evidence to Support Verdict: Where the plaintiff brought a negligence action against the defendant for injuries sustained at an outdoor beer party when the defendant allegedly tossed a large rock that struck the plaintiff on the head, the Supreme Court found that there was substantial evidence to support the jury's verdict for the defendant. The evidence was equally supportive of the defendant's theory (that the plaintiff tripped and fell) as it was of the plaintiff's theory. The court held that if there is conflicting evidence in the record, the credibility and weight given to that evidence is the province of the jury and not the Supreme Court. Anderson v. Jacqueth, 205 M 493, 668 P2d 1063, 40 St. Rep. 1451 (1983). See also Wheeler v. Bozeman, 232 M 433, 757 P2d 345, 45 St. Rep. 1173 (1988), Stewart v. Fisher, 235 M 432, 767 P2d 1321, 46 St. Rep. 116 (1989), and Young v. Horton, 259 M 34, 855 P2d 502, 50 St. Rep. 662 (1993).

Conflicting Testimony — Substantial Credible Evidence — Sufficiency of Verdict: Plaintiff alleged defendant negligently failed to close a farm gate when returning a tractor to plaintiff, allowing plaintiff's horses to escape onto a highway where they were subsequently killed. Plaintiff's wife testified that defendant had admitted leaving a gate open. Defendant disputed this. Two boys who had accompanied the defendant testified that he had closed the gate. The Supreme Court held, on appeal, that there was substantial credible evidence to support the jury finding for defendant, and it refused to overturn the verdict on the basis of insufficiency. Brogan v. Blanchard, 200 M 399, 650 P2d 1390, 39 St. Rep. 1829 (1982).

Aggravated Assault — Sufficiency of Circumstantial Evidence: An aggravated assault appeal was sustained for the state despite the fact that no eyewitness testified that the defendant stabbed the victim and that the weapon was never found because the circumstances surrounding the assault, including the defendant striking the victim in the area in which he was stabbed and the actions of the defendant prior to and following the assault, were sufficient to support a conviction viewed in the light most favorable to the prosecution aided by a strong presumption in favor of the correctness of the judgment. St. v. Lozeau, 200 M 261, 650 P2d 789, 39 St. Rep. 1729 (1982), followed in St. v. Bower, 254 M 1, 833 P2d 1106, 49 St. Rep. 586 (1992).

Jury Discretion to Award Exemplary Damages: In awarding exemplary damages a jury may consider such attendant circumstances as the malice or wantonness of an act and the motive for an act and thus has discretion, without being in the realm of passion and prejudice, to calculate a punishment for defendant's actions after listening to the testimony and weighing the evidence. Lauman v. Lee, 192 M 84, 626 P2d 830, 38 St. Rep. 499 (1981).

Evidence Sufficient to Support Verdict — Jury to Weigh Evidence — Presumption of Correctness: In judging whether there is evidence sufficient to support a verdict, the Supreme

Court recognizes that the jury is in the best position to weigh the evidence and consider the credibility of witnesses. Thus, in examining the sufficiency of the evidence, review will be made in a light most favorable to the prevailing party, presuming that the findings of the District Court are correct. Rock Springs Corp. v. Pierre, 189 M 137, 615 P2d 206, 37 St. Rep. 1378 (1980).

Polygraph Test Results: The results of a polygraph test regarding a friend's understanding of the defendant's intentions and actions were correctly denied admissibility by the trial court because Montana does not recognize the admissibility of polygraph test results in criminal actions. Because the friend's testimony could be made to the jury, as the trier of facts, the use of polygraph test results going to the credibility of the witness was properly for the jury, not the polygraph operator to determine thus the use of the polygraph test was not scientific evidence used to assist the trier of fact to understand the evidence or determine a fact in issue under Rule 702, M.R.Ev. St. v. Bashor, 188 M 397, 614 P2d 470, 37 St. Rep. 1098 (1980).

Mental State (Intent) — Theft: Where intent is necessary in the commission of a crime, it may be proved by circumstances and by the action of the party at the time. The question of intent is a question for the jury. It may be inferred by them from what the accused does and says and from all the facts and circumstances involved in the transaction. One will be held accountable for the logical and ordinary consequences resulting from his acts. Where defendant admitted knowing the property was "hot" and displayed furtive actions in the presence of such property, he acted with purpose and knowledge to sustain a felony theft conviction. St. v. Jackson, 180 M 195, 589 P2d 1009, 36 St. Rep. 169 (1979).

Credibility and Weight of Evidence: Under this section the court may not invade the province of the jury when the verdict is supported by substantial evidence. The credibility of witnesses and the weight to be given their testimony are questions for determination by the jury. The verdict in the case at bar being supported by substantial evidence, the Supreme Court is thereby precluded as to the issues of fact. Gilmore v. Mulvihill, 109 M 601, 98 P2d 335 (1940).

Criminal Cases: This section is applicable to both civil and criminal cases. St. v. Sherman, 35 M 512, 90 P 981 (1907).

Collateral References

Trial *key* 134.

88 C.J.S. Trial §335.

75 Am. Jur. 2d Trial §§120 through 122, 128, 138 through 140, 190, 257.

Materiality of testimony forming basis of perjury charge as question for court or jury in state trial. 37 ALR 4th 948.

Existence of actionable defect in street or highway proper as question for court or for jury. 1 ALR 3d 496.

Reasonableness of time within which tenant yields or abandons premises after claimed constructive eviction as question of law or fact. 91 ALR 2d 644.

Question of law or fact as to what is "public place" within requirements as to posting of notices. 90 ALR 2d 1212, 1221, 1224.

Probable cause as question of fact or law in malicious prosecution action. 87 ALR 2d 183; 68 ALR 2d 1168.

Proximate cause as question for jury in action against landlord for personal injury of tenant or privies from electrical system or equipment. 86 ALR 2d 841.

Residence or nonresidence for purpose of fixing tuition fees or the like in public school or college as question of fact or law. 83 ALR 2d 497, §3 superseded by 56 ALR 3d 641.

Question for court or jury as to application of standard provision in fire policy specifically excepting loss by explosion unless fire ensues. 82 ALR 2d 1125.

Question of law or fact as to cause of injury or death in action under accident policy or accident provision of life policy as affected by preexisting arteriosclerosis. 82 ALR 2d 617 through 633.

Voluntariness of confession allegedly induced by police statements that if suspect confesses his relatives will be released from custody or not be arrested as question of fact. 81 ALR 2d 1441.

Negligence in executing contract sought to be reformed as question of fact. 81 ALR 2d 36.

Question of fact with respect to width and boundaries of public highway acquired by prescription or adverse user. 76 ALR 2d 538.

Acceptance of deed by grantee as question of fact or law. 74 ALR 2d 1005.

Whether momentary forgetfulness of danger constitutes contributory negligence as jury question. 74 ALR 2d 950.

Whether prosecutrix in incest case is accomplice or victim as question of law or fact. 74 ALR 2d 725.

Binding effect, on customer of stock or commodity broker, of conditions printed on confirmation slip, as question of fact. 71 ALR 2d 1090.

Weight of voice recognition testimony as question of fact. 70 ALR 2d 1012.

Question whether oral statements amount to express warranty as one of fact for jury or of law for court. 67 ALR 2d 619.

Existence of agreement to pay salary to partner as question of fact. 66 ALR 2d 1025.

"Discovery" under mining laws of radioactive minerals such as uranium as question of fact. 66 ALR 2d 560.

Waiver of, or estoppel to assert, failure to give required notice of claim of injury to municipality, county, or other governmental agency or body as presenting question for court or jury. 65 ALR 2d 1305.

Condition of surface of railroad crossing as proximate cause of injury to pedestrian, jury question as to. 64 ALR 2d 1217.

Abandonment of wrecked vessel as question of law or fact. 63 ALR 2d 1369.

Proximate cause of injury or damage by motorboat as question of fact. 63 ALR 2d 343, §superseded by 71 ALR 3d 1018, §15 superseded by 98 ALR 3d 1127.

Credibility of witness giving uncontradicted testimony as matter for court or jury. 62 ALR 2d 1191, §12 superseded by 26 ALR Fed. 427.

Novation through creditor's acceptance of obligation of third person as question of fact or law. 61 ALR 2d 755.

Liability of building or construction contractor for injury or damage to third person occurring after completion and acceptance of the work, questions for jury as to. 58 ALR 2d 865, superseded by 70 ALR 5th 261, 74 ALR 5th 523, and 75 ALR 5th 413.

Spontaneity of declaration sought to be admitted as part of res gestae as question for court or ultimately for jury. 56 ALR 2d 372.

Authority of agent to borrow money for principal as question for jury. 55 ALR 2d 1215.

Qualified or conditional privilege with respect to liability of insurance company for libel or slander by its agent or employee as question of fact or law. 55 ALR 2d 852.

Death as consequence of burning of building, within insurance provision for coverage or double indemnity, as question of fact. 55 ALR 2d 398.

Proximate cause of injury or death from collision with guy wire as question for jury. 55 ALR 2d 196.

Implied or apparent authority of agent to purchase or order goods or merchandise as question for jury. 55 ALR 2d 111.

Weight of party's admissions as to tort occurring during his absence as questions for jury. 54 ALR 2d 1082.

Sufficiency of repudiation of express trust by trustee to cause Statute of Limitations to run as question for jury. 54 ALR 2d 74.

Question of law or fact as to admissibility as res gestae of statements or exclamations relating to cause of, or responsibility for, motor vehicle accident. 53 ALR 2d 1259.

Timeliness of tender or offer of return of consideration for release or compromise, required as condition of setting it aside, as question for jury. 53 ALR 2d 766.

Scope of employment of automobile salesman as question for jury. 53 ALR 2d 658.

Sufficiency of notice which buyer of goods must give in order to recover damages for seller's breach of warranty as presenting question for court or jury. 53 ALR 2d 280.

Question of law or fact as to status of route driver or salesman as independent contractor or employee of merchandise producer or processor for purposes of respondeat superior doctrine. 53 ALR 2d 183.

Extent of premises which may be defended without retreat under right of self-defense as question of law or fact. 52 ALR 2d 1459.

Time within which buyer must make inspection, trial, or test to determine whether goods are of requisite quality, as question for court or jury. 52 ALR 2d 922.

Contributory negligence or assumption of risk of passenger leaving seat before conveyance stops as question for jury. 52 ALR 2d 600.

Scope of employment in use of employer's vehicle, question for jury as to. 52 ALR 2d 350; 51 ALR 2d 8, 120.

Scope of employment of an employee driving his own car, questions for jury as to. 52 ALR 2d 287, superseded by 27 ALR 5th 174.

Waiver of written notice of exercise of option to renew lease as question of fact. 51 ALR 2d 1417.

Negligence or malpractice of nurse as proximate cause of injury, question of fact as to. 51 ALR 2d 973.

Proximate cause of damage or injury by stranger starting motor vehicle left parked on street as question for jury. 51 ALR 2d 651.

Cemetery or burial ground as nuisance as question of fact. 50 ALR 2d 1325.

Owner's presence in motor vehicle operated by another as presenting question for jury as to agency and right of control. 50 ALR 2d 1296, 1300.

Question of fact as to intent with respect to theft, robbery, or pilferage within automobile theft policy. 48 ALR 2d 50.

Intent to collect debt as question for jury in prosecution for robbery or assault to commit robbery. 46 ALR 2d 1234.

Owner's knowledge of broker's status as question for court or jury in action by broker for commission where owner sells property to broker's customer at less than stipulated price. 46 ALR 2d 884.

Question of fact as to landlord's consent to extension of renewal of lease where he accepts rent from tenant holding over. 45 ALR 2d 835.

Owner's satisfaction, under provision in private building and construction contract that work must be done to satisfaction of owner, as question of fact. 44 ALR 2d 1120.

Justification for use of set gun, trap, or similar device on defendant's own property as question for jury. 44 ALR 2d 391, 399, superseded in part by 47 ALR 3d 646.

Holder in due course status of transferee of commercial paper given by purchaser of chattel and secured by conditional sale, retention of title, or chattel mortgage, as question for jury. 44 ALR 2d 113.

Reasonableness of corporal punishment administered by teacher to pupil as question for jury. 43 ALR 2d 476.

Time within which buyer of goods must give notice in order to recover damages for seller's breach of express warranty as question for court or jury. 41 ALR 2d 825.

Sufficiency of proof of genuineness of handwriting offered as standard or exemplar for comparison with a disputed writing or signature as question for court or jury. 41 ALR 2d 579.

Testamentary character of letter as question of law or fact. 40 ALR 2d 729.

Municipal notice of snow and ice on sidewalk as question for jury. 39 ALR 2d 820.

Employer's failure to furnish assistance to employee as proximate cause of employee's death as question for jury. 36 ALR 2d 61.

Bill of sale, absolute on its face, as a chattel mortgage as question for court or jury. 33 ALR 2d 378.

Jury question as to proximate cause in action against railroad for injury to adult pedestrian attempting to pass over, under or between cars obstructing crossing. 27 ALR 2d 382.

Justification for procuring breach of contract as question of fact. 26 ALR 2d 1264.

Death of insured while assaulting another as due to accident or accidental means as question of fact. 26 ALR 2d 399.

Qualified privilege in defamation of one relative to another by person not related to either as question for court or jury. 25 ALR 2d 1388.

Intention to abandon private easement by nonuser as question for court or jury. 25 ALR 2d 1265, §§3 through 23 superseded by 62 ALR 5th 219.

Proximate cause as a question for jury in action against electric power or telephone company for death by lightning transmitted on wires. 25 ALR 2d 742.

Landlord's knowledge of defect in inside steps or stairways as jury question. 25 ALR 2d 392, 407.

Intent of testator in attempted physical alteration of will after execution as question of law or fact. 24 ALR 2d 525.

Proximate cause of spread of fire purposely and lawfully kindled as question for court or jury. 24 ALR 2d 273.

Authority of employee committing assault in collecting debt, question for court or jury. 22 ALR 2d 1232 through 1242.

Right of employer to terminate contract because of employee's illness or physical incapacity as question for jury. 21 ALR 2d 1248.

Breach of lessee's obligation under express covenant as to repairs as question for jury. 20 ALR 2d 1357.

Question, as one of law for court or of fact for jury, whether oral promise was an original one or was a collateral promise to answer for the debt, default or miscarriage of another. 20 ALR 2d 246.

Question as to who are accomplices, within rule requiring corroboration of their testimony, as one of law or fact. 19 ALR 2d 1352.

Master-servant relation where operator is furnished with leased machine or motor vehicle as question of fact or law. 17 ALR 2d 1388.

Bad faith of real estate broker in stating to prospective purchaser that property may be bought for less than list price in breach of duty to vendor as question for court or jury. 17 ALR 2d 904.

Shipper's intent to ratify carrier's unauthorized delivery or misdelivery as question of law or fact. 15 ALR 2d 812.

Question for court or jury as to clause in life, accident, or health policy excluding or limiting liability in case of insured's use of intoxicants or narcotics. 13 ALR 2d 1014.

Question for jury as to liability of building or construction contractor for injury or damage to third person occurring after completion and acceptance of the work. 13 ALR 2d 191, supplemented by 58 ALR 2d 865, superseded by 70 ALR 5th 261, 74 ALR 5th 523, and 75 ALR 5th 413.

Contributory negligence failing to comply with statute regulating travel by pedestrian along highway as question for the jury. 4 ALR 2d 1258, superseded in part by 45 ALR 3d 658.

Increase of risk for manufacture or sale of intoxicating liquor as question of fact. 2 ALR 2d 1163.

26-1-203. Who to judge effect and value of evidence.

Compiler's Comments

1983 Amendment: In first sentence concerning jury as judge of effect and value of evidence, before "is the judge", deleted "in the cases specified in this code" and substituted "effect and value" for "effect or value"; and inserted last sentence concerning court as judge of effect and value of evidence.

Case Notes

Limited Scope of Supreme Court Review of Jury Verdict: The Supreme Court's scope of review of a jury verdict is very limited, and the court will not reverse a jury verdict that is supported by substantial credible evidence. It is within the province of the jury to determine the weight and credibility afforded to the evidence, and it is not the court's function to agree or disagree with the jury's verdict. The Supreme Court will view evidence in the light most favorable to the prevailing party. Byers v. Cummings, 2004 MT 69, 320 M 339, 87 P3d 465 (2004). See also Magart v. Schank, 2000 MT 279, 302 M 151, 13 P3d 390 (2000), and Satterfield v. Medlin, 2002 MT 260, 312 M 234, 59 P3d 33 (2002).

Standard of Review of Refusal to Issue Proposed Jury Instruction: The standard of review of a District Court's refusal to issue a proposed jury instruction is whether the court abused its discretion. In reviewing for abuse of discretion, the Supreme Court does not determine whether it agrees with the District Court, but rather whether the District Court abused its discretion by acting arbitrarily without employment of conscientious judgment or by exceeding the bounds of reason in view of all the circumstances. Byers v. Cummings, 2004 MT 69, 320 M 339, 87 P3d 465 (2004). See also Finstad v. W.R. Grace & Co., 2000 MT 228, 301 M 240, 8 P3d 778 (2000), and Schuff v. A.T. Klemens & Son, 2000 MT 357, 303 M 274, 16 P3d 1002 (2000).

Failure to Give Unsupported Accountability Jury Instruction Proper: Hall contended that the District Court erred in refusing to give an accountability instruction in Hall's trial for theft because certain evidence at the crime scene implicated that a witness was an accomplice in the crime, so the jury should have been instructed that the witness's testimony should be viewed with distrust. The Supreme Court disagreed. In this case, the accomplice instruction was inconsistent with Hall's theory of complete innocence, and the witness's testimony established no element of accountability. It is not proper to give an accountability instruction when it is not supported by the evidence and is inconsistent with a defendant's claim of innocence. St. v. Hall, 2003 MT 253, 317 M 356, 77 P3d 239 (2003).

Evidence Supporting Jury's Verdict of Zero Damages for Lost Earning Capacity Resulting From Automobile Accident: Magart was injured in a collision with Schank, who admitted negligently causing the accident. The case proceeded to jury trial on the issue of damages, and the jury awarded damages for everything except Magart's claim for lost earning capacity. Magart appealed, arguing that that portion of the verdict was not supported by substantial evidence and that the jury was required to find a loss of earning capacity because uncontroverted expert testimony at trial established that Magart suffered continuing shoulder problems because of his job duties that rendered him unable to continue his employment as a result of the injury. As a general rule, a jury may not disregard uncontradicted, credible nonopinion evidence,

but this rule applies only to nonopinion lay witness testimony, and a jury may disregard expert testimony if it finds the testimony unpersuasive. In this case, the jury could reasonably have determined that future deterioration of Magart's shoulder, together with a concomitant inability to perform his job, was not reasonably certain to occur. Further, lay testimony from Magart's former employers implied that the shoulder injury did not impair the ability to perform the job and that Magart left employment not because of the injury but rather to accept different employment. This evidence, coupled with Schank's 23-minute videotape of Magart performing his current job without apparent difficulties, was sufficient to support the jury's verdict of zero damages for loss of earning capacity with regard to past and present employment. Magart v. Schank, 2000 MT 279, 302 M 151, 13 P3d 390, 57 St. Rep. 1167 (2000), distinguishing Tappan v. Higgins, 240 M 158, 783 P2d 396 (1989).

Judging Inconsistencies in Circumstantial Evidence: It is for the jury, not the judge on a motion for acquittal, to judge inconsistencies in circumstantial evidence. When the evidence is susceptible of an interpretation supporting guilt and an interpretation supporting acquittal, the jury determines which is most reasonable. St. v. Moore, 268 M 20, 885 P2d 457, 51 St. Rep. 1151 (1994).

Imprecision of Expert Opinion — Relates to Weight of Evidence, Not Admissibility: An expert witness testified that shoe prints found at the scene of a crime were exactly like the defendant's shoes, but that he could not positively identify the defendant's shoes as making the shoe prints. The Supreme Court dismissed the defendant's contention that unless the expert could positively identify the prints to a degree of scientific certainty, the testimony should be inadmissible. The Supreme Court said that relevance means having a tendency to make a fact more or less probable than it would have been without the testimony, and this testimony linked the defendant to the scene of the crime. Any imprecision of expert opinion goes to the weight of evidence, not admissibility. St. v. Smith, 220 M 364, 715 P2d 1301, 43 St. Rep. 449 (1986).

Any Evidence Consistent With Theory of Innocence — Jury Not Bound to Acquit: Because of the presumption of innocence, the defendant contended that the jury must accept his interpretation of facts in a criminal trial when testimony at trial could reasonably be interpreted to support either the State's or defendant's view. A jury is not bound to accept defendant's view and reject State's view simply because the defendant would be found not guilty under the former and guilty under the latter. It is the duty of the jury to resolve conflicts of evidence. St. v. Greenwell, 206 M 233, 670 P2d 79, 40 St. Rep. 1616 (1983).

Criminal Mental State — Jury Question: Whether a defendant acted with the requisite mental state is a question for the jury, and because a state of mind is rarely susceptible of direct or positive proof, it must usually be inferred from the facts testified to by witnesses and the circumstances as developed by the evidence. St. v. Greenwell, 206 M 233, 670 P2d 79, 40 St. Rep. 1616 (1983).

Conflicting Evidence Resolved by Jury — Substantial Evidence to Support Verdict: Where the plaintiff brought a negligence action against the defendant for injuries sustained at an outdoor beer party when the defendant allegedly tossed a large rock that struck the plaintiff on the head, the Supreme Court found that there was substantial evidence to support the jury's verdict for the defendant. The evidence was equally supportive of the defendant's theory (that the plaintiff tripped and fell) as it was of the plaintiff's theory. The court held that if there is conflicting evidence in the record, the credibility and weight given to that evidence is the province of the jury and not the Supreme Court. Anderson v. Jacqueth, 205 M 493, 668 P2d 1063, 40 St. Rep. 1451 (1983). See also Wheeler v. Bozeman, 232 M 433, 757 P2d 345, 45 St. Rep. 1173 (1988), Stewart v. Fisher, 235 M 432, 767 P2d 1321, 46 St. Rep. 116 (1989), and St. v. Barrack, 267 M 154, 882 P2d 1028, 51 St. Rep. 983 (1994).

Aggravated Assault — Sufficiency of Evidence: An aggravated assault appeal was sustained for the state despite the fact that no eyewitness testified that the defendant stabbed the victim and that the weapon was never found because the circumstances surrounding the assault, including the defendant striking the victim in the area in which he was stabbed and the actions of the defendant prior to and following the assault, were sufficient to support a conviction viewed in the light most favorable to the prosecution aided by a strong presumption in favor of the correctness of the judgment. St. v. Lozeau, 200 M 261, 650 P2d 789, 39 St. Rep. 1729 (1982), followed in St. v. Bower, 254 M 1, 833 P2d 1106, 49 St. Rep. 586 (1992).

Alibi Defense: Defendant's presentation of alibi defense did not entitle him to reversal as a matter of law. Jury could believe alibi witnesses and still determine that witnesses did not fully account for defendant's time. St. v. Maxwell, 198 M 498, 647 P2d 348, 39 St. Rep. 1149 (1982).

Credibility of Witnesses — Conflicts of Evidence:

In prosecution for sexual intercourse without consent, inconsistencies in victim's prior statements did not render her testimony incredible as a matter of law. St. v. Maxwell, 198 M 498, 647 P2d 348, 39 St. Rep. 1149 (1982).

The jury is to judge the credibility of witnesses and it is its province to decide conflicts in the evidence, and unless the testimony of the prevailing party is characterized by such inherent improbability as in effect to destroy it, the Supreme Court will not interfere. Callan v. Hample, 73 M 321, 236 P 550 (1925).

The jury members, in the first instance, are the exclusive judges of the credibility of a witness and of the weight to be given to his testimony. Bowen v. Webb, 37 M 479, 97 P 839 (1908).

Instruction That Witness Will Not Change Pretrial Identification: Whether a witness is likely or unlikely to change his mind from a previous identification is a question for the jury, not the courts, to determine as a matter of law; thus an instruction which suggests that once a witness makes a pretrial photographic identification he will not change this identification is properly withheld from a jury by a judge. St. v. Strain, 190 M 44, 618 P2d 331, 37 St. Rep. 763 (1980).

Evidence Susceptible to Two Conclusions — Jury Upheld: The Supreme Court does not substitute its view of the evidence for that of the jury; thus when the evidence furnishes reasonable grounds for different conclusions, the finding of the jury will not be disturbed. Rock Springs Corp. v. Pierre, 189 M 137, 615 P2d 206, 37 St. Rep. 1378 (1980).

Evidence Susceptible to Two Constructions — Criminal Action: Defendant's offered instruction would have instructed the jury that if the evidence is susceptible to two constructions, one consonant with guilt and the other consonant with innocence, it is the jury's duty to adopt the interpretation that is consonant with innocence. The District Court properly refused to give this instruction. That instruction is generally given where the State relies on circumstantial or indirect evidence to prove its case. The instruction has no application where the evidence is direct with respect to the crime charged. St. v. Freeman, 183 M 334, 599 P2d 368, 36 St. Rep. 1622 (1979), followed in St. v. Ryan, 229 M 7, 744 P2d 1242, 44 St. Rep. 1735 (1987).

Jury to Resolve Conflicts in Evidence: Where the jury has before it all the elements of the conflict, it is entitled to consider the evidence for both sides and to make its decision thereon. The resolution of conflicts in the evidence by the jury is binding upon the appellate court unless the testimony on which the decision depends is so inherently improbable or transparent or so contradictive to other testimony in the case as to deny such testimony all claims to belief. In this medical malpractice case, the jury had before it conflicting expert testimony and was entitled to make its decision thereon. Frisnegger v. Gibson, 183 M 57, 598 P2d 574, 36 St. Rep. 1335 (1979).

Effect of Uncontradicted Evidence: Where there is direct testimony in the record, uncontradicted by other direct testimony, a court or jury is not bound thereby and can render a decision contrary to such direct testimony based on adverse circumstantial evidence. Holenstein v. Andrews, 166 M 60, 530 P2d 476 (1975).

Weighing Evidence — Jury Instructions:

The propriety of submitting instructions to the jury based upon the rules prescribed by this section for weighing evidence is a matter addressed to the trial court, and its determination is subject to review only for abuse of discretion; ordinarily an instruction in the words of 26-1-302 is sufficient. St. v. Sedlacek, 74 M 201, 239 P 1002 (1925).

In instructing the jury as to the manner in which they should exercise their power of judging the effect of evidence, the court should be guided by the provisions of this section, which are authoritative and sufficient. Murray v. Butte, 51 M 258, 151 P 1051 (1915).

Weighing Testimony of Police: An instruction, requested by defendant to the effect that, in weighing the testimony given by police officers and detectives, the jury should exercise greater care than in the case of other witnesses because of the natural and unavoidable tendency and bias of such persons to construe everything as evidence against the accused and disregard all matters which did not tend to support their preconceived opinions of the case, was properly refused as, if given, it would have invaded the province of the jury. St. v. Paisley, 36 M 237, 92 P 566 (1907).

Part 3
Weight and Effect of Evidence

Part Case Notes

Defendant's Testimony That Conflicts With State's Evidence Not Sufficient to Set Aside Guilty Verdict: Barrack argued that there was insufficient evidence to support his conviction in an assault case in light of his argument that he had used justified force. The Supreme Court held that the fact that Barrack's testimony conflicted with that of the state's witnesses did not render the evidence insufficient to support a conviction. St. v. Barrack, 267 M 154, 882 P2d 1028, 51 St.

Rep. 983 (1994), following St. v. Sorenson, 190 M 155, 619 P2d 1185 (1980), and St. v. Bower, 254 M 1, 833 P2d 1106 (1992).

Negligent Suppression of Evidence — Harmless Error: In an appeal involving the negligent suppression of evidence, the court agreed with appellant that the state acted improperly in suppressing four taped witness statements during discovery and a possibly incriminating statement made by appellant during his arrest and in endorsing an additional witness on the first day of trial. However, the court found that the suppressed evidence was either repetitive of other testimony or minimally supportive of a self-defense theory, and that since the defense knew of the additional witness' connection with and importance in the case, it could not convincingly claim surprise at the endorsement. Therefore, all errors were held to be harmless and not grounds for reversal. St. v. Wallace, 223 M 454, 727 P2d 520, 43 St. Rep. 1908 (1986), followed, with regard to application of the harmless error rule to admissibility of hearsay testimony, in St. v. Alexander, 265 M 192, 875 P2d 345, 51 St. Rep. 474 (1994).

Evidence as a Whole to Be Considered — Not Individual Pieces: Armstrong contended that the state's evidence is not sufficient to find him guilty of deliberate homicide, and he points out individual pieces of evidence that tend to indicate his innocence. The Supreme Court, however, finds that the jury had other evidence to consider and when all the evidence is considered, it is consistent with his guilt and inconsistent with his innocence. The Supreme Court finds no fault with the jury verdict based on the evidence. St. v. Armstrong, 189 M 407, 616 P2d 341, 37 St. Rep. 1563 (1980).

Supreme Court as Final Authority: The Supreme Court of Montana is the final authority on the legal weight to be given a presumption instruction under Montana law, but it is not the final authority on the interpretation which a jury could have given to the instruction. Sandstrom v. Mont., 442 US 510, 61 L Ed 2d 39, 99 S Ct 2450 (1979).

26-1-301. One witness sufficient to prove a fact.

Case Notes

General Application of Section. 26
Preponderance of Evidence — Single Witness 27
Perjury 29

GENERAL APPLICATION OF SECTION

No Reasonable Grounds to Believe Defendant DUI — Sole Testimony of Defendant Sufficient to Prove No DUI Occurred: Eustance drove to the airport to pick up his daughter and grandson who were arriving on a flight. Because of hip pain, it was more comfortable to wait in his car. Eustance parked in the lot of a nearby car rental agency and fell asleep. Eustance was later awakened by a Deputy Sheriff who requested that Eustance perform field sobriety tests and a breath test, but Eustance refused to perform both tests, so his license was seized and suspended. At a hearing on a petition for reinstatement of his license, Eustance was the only witness. He testified that he had been operating his vehicle in a safe and legal manner prior to arrest, that his ability to drive was not impaired, and that he did not believe there was reasonable suspicion or probable cause to justify his arrest. The District Court agreed and granted the petition reinstating the license. On appeal, the state cited Hunter v. St., 264 M 84, 869 P2d 787 (1994), contending that Eustance had not met the burden of establishing that suspension of the license was improper because without the deputy's testimony, Eustance's own testimony was self-serving and insufficient to meet the burden. The Supreme Court disagreed. The testimony of one witness is sufficient to prove any fact. Nowhere in Hunter was it held that a petitioner in a license reinstatement hearing cannot meet the burden of proof without testimony from the arresting officer or that a petitioner's testimony, without more, is insufficient to meet the burden of proof. Thus, the District Court was entitled to accept Eustance's uncontradicted testimony as true. Absent evidence supporting the state's position, Eustance met the burden of proof and his license was properly reinstated. Eustance v. St., 2005 MT 34, 326 M 77, 107 P3d 478 (2005).

Criminal Trespass — Testimony Sufficient to Support Conviction — Testimony of One Witness Sufficient: Gladue was charged with criminal trespass after he was found to be in a home in which he had previously lived with Joyce Nanini but was no longer welcome. The only prosecution witness to testify at trial on the issue of the trespass was Nanini, who testified that Gladue had lived there previously but was not living there at the time that the trespass occurred, that Gladue was unwelcome in her home at the time that the trespass occurred, that she had asked the County Attorney to keep Gladue away from her, that she did not give Gladue permission to be in her home, and that she did not know how Gladue gained entrance to the home. The Supreme Court, citing St. v. Flack, 260 M 181, 860 P2d 89 (1993), and this section,

held that the testimony of Nanini alone was sufficient for the purposes of the conviction, even though Gladue had testified in a manner somewhat contrary to the testimony of Nanini and testified that Nanini had given him a key to the home. Because the testimony indicated that Gladue did not have permission from Nanini to enter the home and the criminal trespass statute prohibits both unlawful entry and remaining unlawfully, the Supreme Court declined to consider whether the evidence showed that Gladue remained unlawfully in the home. St. v. Gladue, 1999 MT 1, 293 M 1, 972 P2d 827, 56 St. Rep. 1 (1999).

Court May Expect Corroboration of Self-Serving Testimony: Welch argued that the lower court erred in using his 1992 income tax return to determine his income for child support purposes when he had testified that his 1993 income was significantly less. The Supreme Court held that although the testimony of one witness is generally sufficient to establish a fact, a court may legitimately expect the witness to corroborate self-serving testimony, which Welch had failed to do. In re Marriage of Welch, 273 M 497, 905 P2d 132, 52 St. Rep. 1081 (1995).

Question of Witness Credibility — Summary Judgment Improper: Where credibility, including that of defendant, is crucial, summary judgment becomes improper and a trial indispensable. Morrow v. FBS Ins. Montana-Hoiness LaBar, Inc., 230 M 262, 749 P2d 1073, 45 St. Rep. 188 (1988), following Arnstein v. Porter, 154 F2d 464 (2nd Cir. 1946).

Sufficiency to Prove Contributory Negligence of Decedent: When the defendant testified that the plaintiff's decedent was contributorily negligent in the accident causing death, there was sufficient evidence for a contributory negligence instruction to the jury. Allen v. Moore, 167 M 330, 538 P2d 1352 (1975).

Appellate Review — Substantial Evidence: Where there is any substantial evidence, even from only one witness, to support the findings of the trial court, even though the evidence is conflicting, the Supreme Court will not interfere with the judgment and findings of the trial court. Hankins v. Waitt, 120 M 596, 189 P2d 666 (1948).

Execution and Objection to Attestation of Will: Even though section 91-107, R.C.M. 1947 (since repealed), made two attesting witnesses an indispensable requirement to a valid will, the satisfactory testimony of one witness, under this section, entitled the will to probate as against the objection of defective execution of the attestation clause. In re Bragg's Estate, 106 M 132, 76 P2d 57 (1937).

Credibility of Witness — "Full Credit": In order for the direct evidence of one witness to be sufficient to prove a fact, he must be one who is entitled to full credit. In re Silver's Estate, 98 M 141, 38 P2d 277 (1934); Bowen v. Webb, 37 M 479, 97 P 839 (1908).

Instructions to Jury:

An instruction in the words of this section, that the "direct evidence of any witness who is entitled to full credit is sufficient proof of any fact", etc., was proper and not in conflict with section 93-2001-1, R.C.M. 1947 (now 26-1-203, 26-1-303, 26-1-403, and 26-2-301), dealing with the weight and effect of evidence. St. v. Park, 88 M 21, 289 P 1037 (1930).

Refusal of an instruction to the effect that the uncorroborated testimony of a witness is insufficient in law to prove a fact was proper. Williams v. Thomas, 58 M 576, 194 P 500 (1920).

Statutory Rape Prosecutions:

The rule requiring a prosecutrix raped by force to make immediate outcry or disclosure, or stand discredited on the trial, has no application to a prosecution for the rape of a female under the age of consent. St. v. Paddock, 86 M 569, 284 P 549 (1930); St. v. Peres, 27 M 358, 71 P 162 (1903). See also St. v. Gaimos, 53 M 118, 162 P 596 (1916).

In a prosecution for statutory rape, the evidence of the prosecutrix, if believed by the jury, is sufficient to sustain a conviction of the crime charged. St. v. Vinn, 50 M 27, 144 P 773 (1914). See also St. v. Gaimos, 53 M 118, 162 P 596 (1916).

PREPONDERANCE OF EVIDENCE — SINGLE WITNESS

Evidence of Flight Unacceptable as Sole Corroboration of Inconsistent Statement: After Giant's conviction of aggravated assault for attacking his wife in her home, he moved for dismissal on grounds that the evidence was insufficient to convict him as a matter of law because evidence of flight was the only corroboration of the prior inconsistent statements of the victim identifying him as the assailant. The victim initially identified Giant as the assailant in pretrial statements, but at trial, she identified her son as the attacker. No forensic testing was performed on evidence seized from the home, and there was no other testimony to corroborate either statement. The state argued, and the trial court agreed, that undisputed testimony of Giant's flight behavior was sufficient to corroborate the victim's prior inconsistent statements and that evidence seized from the home matched her statements. When considering a motion for a directed verdict to determine whether any rational trier of fact could find the elements of a crime

satisfied beyond a reasonable doubt, the Supreme Court will consider trial testimony and the evidence properly admitted and before the jury according to the criminal rules of evidence, but will not consider potential unintroduced evidence or other evidence outside the trial setting. A criminal conviction cannot be sustained when the only evidence of some essential element of a crime is a prior inconsistent statement. In Montana, all prior inconsistent statements are admissible as substantive evidence under Rule 801(d)(1)(A), M.R.Ev. (Title 26, ch. 10); however, prior inconsistent statements admitted as substantive evidence of guilt must be corroborated in order to sustain a conviction. Evidence of flight is not sufficient in itself to prove guilt or to support a conviction as a matter of law because evidence of flight by itself is as consistent with innocence as it is with guilt. Therefore, evidence of flight cannot be the sole corroboration of a prior inconsistent statement admitted as substantive evidence of guilt. Here, the physical evidence recovered from the home and photographs of the victim's injury, which would normally be sufficient corroborating evidence, were insufficient because they did not corroborate the essential element of identity because the victim identified another possible assailant. Further, the victim's prior inconsistent statements alone were insufficient as a matter of law to support Giant's conviction, in light of evidence that the victim stopped cooperating with the County Attorney's office when Giant was released on bail and asked that the case be dismissed after her divorce proceedings against Giant were voluntarily dismissed—actions that affected the reliability of the prior inconsistent statements but did not independently corroborate the statements. Giant's conviction was reversed. St. v. Giant, 2001 MT 245, 307 M 74, 37 P3d 49 (2001). See also St. v. White Water, 194 M 85, 634 P2d 636 (1981).

Employee's Testimony Regarding Discharge Due to Poor Work Relationship Sufficient to Confirm Grievance Committee Findings: The testimony of an employee that a poor working relationship with her employer was directly related to the termination of her employment constituted sufficient proof that a department director improperly rejected a grievance committee's findings of a misapplication of department policies and procedures. Brander v. Dept. of Institutions, 247 M 302, 806 P2d 530, 48 St. Rep. 207 (1991).

Statutory Rape Not Proved Solely by Unreliable Prior Inconsistent Statement: Charge of sexual intercourse without consent was properly dismissed at the end of the state's presentation of its case where the only evidence upon which conviction could be based was an unreliable prior statement of the alleged victim that was inconsistent with her testimony at trial in which she repudiated the statement. St. v. White Water, 194 M 85, 634 P2d 636, 38 St. Rep. 1664 (1981).

Sufficiency of Evidence: Numerical superiority of witnesses is not the test of sufficiency of evidence. The testimony of a single witness entitled to full credit is sufficient to prove any fact. The correct test is whether there is substantial evidence supporting the conviction. St. v. Azure, 181 M 47, 591 P2d 1125, 36 St. Rep. 514 (1979).

Credibility of Witness: When there was testimony that clearly tended to incriminate defendant, the jury was at liberty not to believe the testimony of defendant and his fiancee and find from credible evidence that defendant committed the offense. St. v. Seitzinger, 180 M 136, 589 P2d 655, 36 St. Rep. 122 (1979).

One Witness Sufficient: It is long established that the testimony of one witness is sufficient to establish a fact. St. v. Radi, 176 M 451, 578 P2d 1169 (1978).

One Witness Over Many — Produced Conviction in Mind of Judge: In deciding the facts of a case, the trial judge could accept "the direct evidence of one witness who is entitled to full credit" to prove any fact and he was not bound to decide the facts in conformity with the declarations of any number of witnesses, who did not produce conviction in his mind, against a less number or against a presumption or other evidence satisfying his mind. Davis v. Burton, 128 M 434, 278 P2d 213 (1955).

Party as Sole Witness:

The party seeking reformation of a contract on the ground of mistake has the burden of establishing his claim by a preponderance of the evidence, and such preponderance may be established by the plaintiff's own testimony as against that of a greater number of witnesses to the contrary. Ayers v. Buswell, 73 M 518, 238 P 591 (1925).

Since the burden of proof is not to be determined by the number of witnesses introduced and the direct evidence of one witness entitled to full credit is sufficient to prove any fact, the direct evidence of the plaintiff, upon whom was the burden of showing nonpayment of the certificate of deposit in suit, was sufficient to establish that fact. O'Langan v. First St. Bank of Hilger, 59 M 190, 196 P 149 (1921).

Preponderance of Evidence — Established by One Witness: A preponderance of the evidence may be established by the testimony of a single witness as against a greater number of witnesses

who testify to the contrary. Doane v. Marquisee, 63 M 166, 206 P 426 (1922); Parchen v. Chessman, 53 M 430, 164 P 531 (1917).

PERJURY

Evidentiary Standard: The evidentiary standard for the proof of perjury was not met, resulting in dismissal of the charges, when the State failed to produce the direct testimony of two witnesses or one witness and admissible corroborating circumstances and establish that the alleged perjured statement was material. St. v. Scanlon, 174 M 139, 569 P2d 368 (1977), replacing opinion in 33 St. Rep. 1355 (1976).

Elements of Perjury: The court dismissed each of 18 counts of perjury based upon the absence of one of these elements: lack of direct evidence as to the falsity of the statement, lack of corroboration, or lack of materiality. All dismissals except two were proper. St. v. Scanlon, 33 St. Rep. 1355 (1976).

Prisoner Entitled to "Full Credit": Whether a convict under sentence of imprisonment in the state prison, appearing as a witness for the State in a perjury trial, was entitled to full credit, under the rule that perjury may be proved by the testimony of two witnesses or one witness and corroborating circumstances, was, under the circumstances, for the determination of the jury. St. v. Jackson, 88 M 420, 293 P 309 (1930).

Perjury — Instruction: Upon a trial for perjury, an instruction that "the direct evidence of one witness alone is not sufficient to convict of the crime of perjury, unless corroborated by other facts and circumstances proved on the trial" is not error under this section. St. v. Gibbs, 10 M 213, 25 P 289 (1890).

Law Review Articles

Criminal Law—Conviction on Accomplice Testimony—Sufficiency of Corroborating Evidence, Beighle, 21 Mont. L. Rev. 134 (1959).

Collateral References

Evidence *key* 588; Perjury *key* 34(1); Treason *key* 13.

32A C.J.S. Evidence §§1026 through 1031, 1042; 87 C.J.S. Treason §§14, 15.

26-1-302. Witness presumed to speak the truth — how presumption rebutted.

Compiler's Comments

1983 Amendment: Substituted entire section (see 1983 Session Law for text) for "A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, by evidence affecting his motives or his character for truth, honesty, or integrity, or by contradictory evidence; and the jury is the exclusive judge of his credibility."

Case Notes

Recantation of Sexual Assault Victim's Testimony — Remand for Consideration of New Trial — Perry Partially Overruled: Following Clark's conviction of sexual assault against his stepdaughter, she recanted her testimony and Clark moved for a new trial, citing St. v. Perry, 232 M 455, 758 P2d 268 (1988). The Supreme Court overruled Perry to the extent that it stands for the proposition that a trial judge is required to grant a new trial only when satisfied that the recantation of the witness is true. However, the Perry proposition that the weight to be given to recanted testimony is for the trial judge to determine was retained as authoritative precedent to be considered as part of the analysis set out in Berry v. St., 10 Ga. 511 (Ga. 1851), describing when it is proper to grant a new trial based on newly discovered evidence, as adopted in St. v. Greeno, 135 M 580, 342 P2d 1052 (1959). In applying the restated Berry test, a District Court is not to make factual determinations as to the veracity of the recantation, but should evaluate the recantation for materiality and its tendency to be cumulative or impeaching and should determine whether there is a reasonable probability that a new trial would produce a different outcome, keeping in mind the aspects of recantations that make them inherently suspect. If the Berry elements are met, a new trial is warranted; if not, the prior judgment stands. Here, the record was not clear as to the District Court's reasons for denying a new trial and whether the court correctly applied the law, so the case was remanded to allow the District Court to readdress Clark's motion for a new trial. St. v. Clark, 2005 MT 330, 330 M 8, 125 P3d 1099 (2005).

Failure to Give Unsupported Accountability Jury Instruction Proper: Hall contended that the District Court erred in refusing to give an accountability instruction in Hall's trial for theft because certain evidence at the crime scene implicated that a witness was an accomplice in the crime, so the jury should have been instructed that the witness's testimony should be viewed with distrust. The Supreme Court disagreed. In this case, the accomplice instruction was

inconsistent with Hall's theory of complete innocence, and the witness's testimony established no element of accountability. It is not proper to give an accountability instruction when it is not supported by the evidence and is inconsistent with a defendant's claim of innocence. St. v. Hall, 2003 MT 253, 317 M 356, 77 P3d 239 (2003).

Substantive Changes to Deposition Testimony Properly Viewed With Distrust: Albert filed an action to determine a claim for a prescriptive easement and quiet title to a road across Hastetter's property. Hastetter was deposed, and in addition to the original transcript, Hastetter also submitted three pages of corrections, which contained numerous substantive changes to the original testimony. Hastetter died prior to trial, so the entire deposition was entered into evidence. Hastetter's trustee contended that because Hastetter's credibility was not directly attacked at trial, the judge was not at liberty to view the amended testimony with distrust and that the original and amended testimony should stand as probative evidence for every fact stated because Hastetter was presumed to speak the truth. In a case of first impression, the Supreme Court noted that a witness may make any changes in form or substance in altering deposition testimony, but that the witness who changes testimony on a material matter between the giving of the deposition and appearance at trial may be impeached by the former answers and cross-examined as to why the answers were changed. However, Hastetter's death foreclosed Albert's right to cross-examination, raising an issue regarding the evidentiary value of the substantive changes to the deposition testimony and challenging the trial court with conflicting evidence without the benefit of witness cross-examination. In the event that a party deponent is unavailable to address apparent conflicts in amended deposition testimony, the trial court must exercise sound discretion in weighing the value of the evidence, and the Supreme Court will not second-guess a trial court's determination regarding the strength and weight of conflicting evidence. With Hastetter unavailable to explain the extensive changes to his original deposition testimony, the trial court appropriately exercised its discretion in viewing Hastetter's deposition changes with great distrust. Albert v. Hastetter, 2002 MT 123, 310 M 82, 48 P3d 749 (2002). See also Lugtig v. Thomas, 89 F.R.D. 639 (N.D. Ill. 1981), and J.H. Harvey Co. v. Reddick, 522 SE 2d 749 (Ga. 1999).

Evidence of Prior Acts Not Tending to Impeach Expert Testimony Properly Excluded: Plaintiff who alleged that he was sexually abused as a child sought to have evidence of the prior acts of the alleged abuser introduced to impeach the testimony of a doctor who testified that there was no reliable, third-party documentation that plaintiff was abused and that as a result, the scientific validity of plaintiff's claim was in doubt. The prior acts evidence was properly excluded because it was not the type of evidence that the doctor said would document the abuse and thus would not have tended to impeach the doctor's testimony. Benjamin v. Torgerson, 1999 MT 216, 295 M 528, 985 P2d 734, 56 St. Rep. 847 (1999).

Evidence on Issue of Witness's Credibility — Probative Rather Than Prejudicial: The presumption that a witness speaks the truth and is credible may be rebutted by evidence of the witness's character for truth, honesty, and integrity, but evidence bearing on the issue of the witness' credibility, in order to be admissible, must be more probative than prejudicial. St. v. Sor-Lokken, 246 M 70, 803 P2d 638, 47 St. Rep. 2264 (1990), following St. v. Hammer, 233 M 101, 759 P2d 979 (1988).

Weight Given to Recanted Accomplice Testimony — Discretion of Trial Court to Determine Veracity: An accomplice recanted testimony relied on in the conviction of defendant 15 years earlier. Defendant contended the District Court improperly applied the presumption of truthfulness to the original testimony but not to the recantation. In light of the inherent suspicion surrounding recanted testimony and the public interest in swift and sure justice, the Supreme Court adopted the view that the weight to be given such testimony is for the judge passing on the motion for a new trial to determine. Absent a clear abuse of discretion, the trial court will be upheld. St. v. Perry, 232 M 455, 758 P2d 268, 45 St. Rep. 1192 (1988).

Evidence of Witness' Misrepresentations and Omissions Improperly Excluded — "Collateral Matters" Rule Incorrectly Applied: The District Court excluded evidence of a witness' misrepresentations and omissions after holding that the evidence constituted impeachment on collateral matters. The Supreme Court found the exclusion of evidence improper on two issues: the issue of the credibility of the witness and the issue of punitive damages. Further, the Supreme Court noted that the rule on collateral matters was abolished in favor of the relevancy approach contained in Rule 607, M.R.Ev. (Title 26, ch. 10). Cooper v. Rosston, 232 M 186, 756 P2d 1125, 45 St. Rep. 978 (1988), followed in St. v. Kowalski, 252 M 166, 827 P2d 1253, 49 St. Rep. 197 (1992).

Expert Testimony on the Credibility of Children: A psychologist testified that 5- and 6-year-old children are unable to sustain a lie about sexual abuse. While acknowledging that an

expert may not testify to the credibility of a particular witness, the Supreme Court allowed testimony on the reliability of a class of witnesses, such as child victims of sexual abuse. In re J.W.K., 223 M 1, 724 P2d 164, 43 St. Rep. 1483 (1986).

Witness' Statement Not Referred to in Affidavit — No Ex Post Facto Problem — Admissible as Prior Inconsistent Statement: Defendant was convicted of operating a motor vehicle while designated a habitual traffic offender. Proceeding pro se, the defendant argued on appeal that failure to refer to a witness' statement in the affidavit supporting leave to file information constituted an ex post facto problem. The court held that he simply misunderstood that legal theory. The court further held that the statement, which asserted that defendant drove from Great Falls to Loma, was admissible as a prior inconsistent statement because the witness testified at trial that he, not the defendant, drove that distance. St. v. Grant, 217 M 357, 704 P2d 1064, 42 St. Rep. 1248 (1985).

Discovery Limited by Court — Witness' Bias a Jury Question: The defendant, convicted of theft in the holdup of a truckstop, contended that the trial court had erred in refusing to allow discovery of the "rap sheet" of a suspected accomplice. Defendant argued on appeal that he was denied due process. The reviewing court disagreed saying that (unlike the defendant in the case this defendant relied upon, who was unable to make a record from which to argue the witness's bias or lack of impartiality because the witness' criminal record could not be presented to the jury) this defendant was permitted to present fully evidence of the criminal character and bias of the suspected accomplice. The jury was aware of the immunity bargain between the witness and the prosecution and of the witness' complicity in the truckstop theft. The trial court's denial of the defendant's motion was well within its discretion to control cross-examination. St. v. Dolan, 190 M 195, 620 P2d 355, 37 St. Rep. 1860 (1980).

Credibility of Witness — Impeached on Different Issue: Findings of fact may not be set aside unless clearly erroneous, and due regard will be given to the opportunity of the trial court to judge the credibility of the witnesses. The District Court did not abuse its discretion by ruling in favor of the defendant on one issue after the defendant's credibility had been impeached on a separate issue. Kis v. Pifer, 179 M 344, 588 P2d 514, 35 St. Rep. 1965 (1978).

Constitutional Right to Observe Witness: Cases which permit testimony, given by a witness in a first trial, to be read into evidence in a second trial, in the absence of such witness, are based upon the theory that the accused has been present when the witness gave the testimony in the first trial and had the opportunity of then cross-examining such witness. Such cases proceed upon the theory that the observation by the jury of the manner and demeanor of the witness is no essential part of the right of a defendant to meet the witness face to face. Montana subscribes to no such theory. To do so would be to make this section a useless and meaningless thing and would deny the defendant the right to meet the witness against him face to face, a right guaranteed him by Art. III, sec. 16, 1889 Mont. Const. (now Art. II, sec. 24, Mont. Const.). St. v. Piveral, 127 M 427, 265 P2d 969 (1953), overruled in St. v. Bouldin, 153 M 276, 456 P2d 830 (1969).

Previous Testimony Read Into Record: It was error for the trial court to allow the testimony of a witness at the first trial to be read into evidence at the second trial of the defendant. It was the right of the defendant to have the jury see and observe the witness upon the witness stand. It was his right that the jury see how the witness acted while under direct and cross-examination. It was his right to have the jury judge the credibility of the witness from his appearance and manner while upon the witness stand. None of these rights could be had except and unless the witness met the defendant "face to face" in the presence of the jury during the course of the trial. St. v. Storm, 127 M 414, 265 P2d 971 (1951), overruled in St. v. Bouldin, 153 M 276, 456 P2d 830 (1969).

Jury Verdict — Substantial Evidence: Where there is ample substantial evidence to sustain a jury's verdict, the Supreme Court will not disturb it. Roberts St. Bank v. O'Rourke, 121 M 228, 191 P2d 321 (1948).

Variance in Testimony — Credibility: Testimony of defendant that when his sister-in-law delivered a deed to him covering an apartment house shortly before her death she said he could now "send her to the poor farm", while in a prior deposition he stated that she said now "he could break her", did not indicate falsity, both expressions having the same meaning: impoverishment of vendor. Walsh v. Kennedy, 115 M 551, 147 P2d 425 (1944).

Credibility of Witnesses: Courts may reject the most positive testimony though the witness be not discredited by direct evidence impeaching him or contradicting his statements. Credibility is not to be considered commensurate with the facility or vehemence with which a witness swears. It is swearing credibly that is to conclude their judgment. McLaughlin v. Corcoran, 104 M 590, 69 P2d 597 (1937), distinguished in St. v. Keating, 134 M 372, 332 P2d 906 (1958).

Credibility — Judgment of Jury Controls: As against the contention that the testimony of the State's witnesses relative to occurrences incident to a homicide was incredible, the Supreme Court may not, in the absence of such inherent weakness therein as would destroy it as legal evidence, substitute its judgment for that of the jury, which is the exclusive judge of the credibility of witnesses and the weight to be given to their testimony. St. v. Gunn, 89 M 453, 300 P 212 (1931).

Instructions to Jury — Use of This Section: The propriety of submitting instructions to the jury based upon the rules prescribed by section 93-2001-1, R.C.M. 1947 (now 26-1-203, 26-1-303, 26-1-403, 26-2-301), for weighing evidence, is a matter addressed to the trial court, and its determination is subject to review only for abuse of discretion; ordinarily an instruction in the words of this section is sufficient [section has since been amended—annotator]. St. v. Sedlacek, 74 M 201, 239 P 1002 (1925).

Manner of Testifying — Goes to Weight: In determining the weight to be given to testimony, it is necessary to consider not only what is said but also the manner of saying it. Sanger v. Huguenel, 65 M 236, 211 P 349 (1922).

Instructions to Jury — Weighing Evidence: An error in refusing an instruction that the jury should consider particular matters in weighing testimony of witnesses is not cured by submitting the language of this section, supplemented by the words that they were at liberty to disregard the testimony of any witness who had willfully and deliberately testified falsely to any material matter, unless corroborated. St. v. Beesskove, 34 M 41, 85 P 376 (1906).

Interest in Cause of Action — Determinant of Credibility: Error in refusing to permit cross-examination of plaintiff's witness to the extent of his admitted interest in the suit is not ground for reversal where other evidence shows that, for purposes of collection, the witness had assigned to plaintiffs his account against defendants, which constituted one of the causes of action, it being thus apparent that the jury clearly understood the extent of his interest and was thereby enabled to weigh properly his credibility. Hefferlin v. Karlman, 30 M 348, 76 P 757 (1904).

Law Review Articles

Testimony on Credibility: A Case Analysis, Slovenko, 32 J. Psychiatry & L. 243 (2004).

Collateral References

Evidence *key* 588.

32A C.J.S. Evidence §§1026 through 1031, 1042.

26-1-303. Instructions to jury on how to evaluate evidence.

Compiler's Comments

1983 Amendment: In (4), changed "an accomplice" to "a person legally accountable for the acts of the accused", and after "with distrust" deleted ", and the evidence of the oral admissions of a party with caution"; deleted former (5), which read: "evidence is to be estimated not only by its own intrinsic weight but also according to the evidence which it is in the power of one side to produce and of the other to contradict; and therefore"; and made minor changes in style and phraseology.

Case Notes

Judging Effect of Evidence 32
Numbers of Witnesses or Presumptions 35
Part of Testimony False 37
Testimony of Person Legally Accountable 39
Cases Decided Under Subsection (5) 40

JUDGING EFFECT OF EVIDENCE

Trier of Fact to Determine Reasonableness of Conflicting Circumstantial Evidence — Sufficient Evidence to Conclude Defendant Possessed Necessary Mental State for Robbery: At Hill's trial for robbery, only circumstantial evidence identified Hill as the perpetrator. At the close of the state's case, Hill's counsel moved for a directed verdict regarding Hill's identity as the perpetrator, but the motion was denied. Hill appealed on grounds that the trial court erroneously denied the motion, but the Supreme Court affirmed. Pursuant to St. v. Bowman, 2004 MT 119, 321 M 176, 89 P3d 986 (2004), when circumstantial evidence is susceptible to two interpretations, one supporting guilt and one supporting innocence, the trier of fact determines which interpretation is most reasonable, and a directed verdict is appropriate only when there is no evidence whatsoever to support a guilty verdict. In this case, it could not be concluded that there was no evidence whatsoever from which the jury could conclude that Hill was the assailant

and, given that reasonable inference, that Hill possessed the necessary mental state to commit the robbery. St. v. Hill, 2005 MT 216, 328 M 253, 119 P3d 1210 (2005).

Use of Ryan-Type Pattern Jury Instruction on Circumstantial Evidence Discontinued in Favor of Hall-Type Instruction: Based on the holding in St. v. Ryan, 229 M 7, 744 P2d 1242 (1987), Bowman contended that he was entitled to a jury instruction stating that to be convicted solely on circumstantial evidence, the facts and circumstances must not only be entirely consistent with the theory of guilt, but must be inconsistent with any other rational theory or conclusion. The Supreme Court noted that after the decision in St. v. Hall, 1999 MT 297, 297 M 111, 991 P2d 929 (1999), the pattern jury instruction based on Ryan is no longer a correct statement of law and cautioned practitioners not to request it. The acceptable Hall instruction states that if circumstantial evidence is susceptible to two interpretations, one pointing to a defendant's guilt and one to innocence, the trier of fact determines which interpretation is most reasonable. St. v. Bowman, 2004 MT 119, 321 M 176, 89 P3d 986 (2004), followed in St. v. Hill, 2005 MT 216, 328 M 253, 119 P3d 1210 (2005).

Failure to Give Unsupported Accountability Jury Instruction Proper: Hall contended that the District Court erred in refusing to give an accountability instruction in Hall's trial for theft because certain evidence at the crime scene implicated that a witness was an accomplice in the crime, so the jury should have been instructed that the witness's testimony should be viewed with distrust. The Supreme Court disagreed. In this case, the accomplice instruction was inconsistent with Hall's theory of complete innocence, and the witness's testimony established no element of accountability. It is not proper to give an accountability instruction when it is not supported by the evidence and is inconsistent with a defendant's claim of innocence. St. v. Hall, 2003 MT 253, 317 M 356, 77 P3d 239 (2003).

No Prejudicial Error in Failure to Give Negligent Homicide Mental State Instruction in Wrongful Death Action When Other Instructions Adequately Reflect Negligence: Samson's son was killed by Bercier, a youth who walked away from a nonsecure, supervised licensed youth group home. Samson sued the state for foreseeable negligence. To boost the theory of foreseeability, Samson offered a jury instruction that defined Bercier's conduct as reckless and postulated therefrom that the conduct was foreseeable because of Bercier's background, seeking to undermine the state's theory that the shooting was an unforeseeable accident. The District Court refused to offer the instruction, instead instructing the jury on elements of wrongful death, and Samson appealed. The state argued that the mental state of Bercier was not a controlling issue and contended that it was not necessary to instruct the jury on the mental state of negligent homicide because the instructions as a whole properly included the key concepts of a wrongful death action. The Supreme Court agreed with the state. The fundamental issue concerned the state's negligence, not Bercier's mental state. Nevertheless, Samson was still able to present the foreseeability theory under the instructions that were given, so failure to give Samson's offered instruction did not result in prejudice to Samson's case. It is within a District Court's discretion to decide how to instruct the jury, taking into account the theories of the contending parties, and absent an abuse of discretion, the District Court was affirmed. Samson v. St., 2003 MT 133, 316 M 90, 69 P3d 1154 (2003). See also Busta v. Columbus Hosp. Corp., 276 M 342, 916 P2d 122 (1996).

Jury Question Concerning Amount of Damages in Injury Case — Use of Special Verdict Form Not Abuse of Discretion: Ele alleged that he was injured in a motor vehicle accident for which Ehnes admitted liability. In the pretrial order, Ehnes agreed that the sole issue of fact at trial was the amount of Ele's accident-related injury and damage claims. The first question on the District Court's verdict form stated that Ehnes had admitted responsibility for the accident and asked if Ele was injured as a result. The jury said no and returned the verdict. Ele contended that the verdict form was inconsistent with instructions on negligence because it did not ask if Ehnes' conduct was the cause of damages. Ele also asserted that the verdict form should not have included the question of whether he was injured because the amount of injury was the only question for trial. The Supreme Court considered whether the District Court abused its discretion and decided that it did not. Causation was in fact the first issue posed in the instruction, and inclusion of that issue did not conflict with the pretrial order. The use of the term "accident-related" in the pretrial order confirmed that the issue remaining for trial was not merely the amount of Ele's damages, but the amount of damages caused by and related to the accident. Ele v. Ehnes, 2003 MT 131, 316 M 69, 68 P3d 835 (2003).

Argument Regarding Weaker or Less Satisfactory Evidence More Appropriately Made in Closing Statement Than in Jury Instructions: Bauer contended that his incest victim's testimony should be viewed with distrust, and requested a jury instruction on weak and less satisfactory evidence. After a discussion with both counsel, the trial court declined to give the

proposed instruction, recognizing that the instruction would amount to a comment on the victim's credibility and the weight to be given to her testimony. The court concluded that the defense could make an argument regarding weak and less satisfactory evidence in the closing statement to the jury. The Supreme Court agreed that such comments are better reserved for closing arguments and affirmed the trial court's rejection of the proposed jury instruction. St. v. Bauer, 2002 MT 7, 308 M 99, 39 P3d 689 (2002).

Burden on Defendant in Justifiable Use of Force Case to Raise Reasonable Doubt of Guilt: Longstreth was charged with deliberate homicide and relied on a defense of justifiable use of force. After being convicted of negligent homicide, Longstreth alleged that the jury was incorrectly instructed in violation of her due process rights, contending that the instructions improperly allocated the burden of proof by failing to require the state to prove an absence of justification beyond a reasonable doubt. Citing St. v. Daniels, 210 M 1, 682 P2d 173, 41 St. Rep. 880 (1984), and St. v. Miller, 1998 MT 177, 290 M 97, 966 P2d 721 (1998), the Supreme Court reiterated that justifiable use of force is an affirmative defense and that only the defendant has the burden of producing sufficient evidence to raise a reasonable doubt of guilt. The state's burden is to prove the elements of the charged offense beyond a reasonable doubt, which does not include the absence of justification. Further, 45-5-112 allows for a permissive inference by the jury rather than a mandatory inference. As long as the instructions given to the jury make it clear that the burden of proof of guilt and all necessary elements of guilt lies squarely with the state, placing the burden of presenting evidence to raise a reasonable doubt of guilt on the defendant is not unconstitutional. St. v. Longstreth, 1999 MT 204, 295 M 457, 984 P2d 157, 56 St. Rep. 795 (1999). See also Leland v. Oreg., 343 US 790, 96 L Ed 1302, 72 S Ct 1002 (1952), Patterson v. N.Y., 432 US 197, 53 L Ed 281, 97 S Ct 2319 (1977), and St. v. Lopez, 185 M 187, 605 P2d 178 (1980).

Conclusion Through Evidence and Instructions That Mental State Existed for Conviction of Felony Attempted Theft: Given the evidence and instructions presented to the jury, it could reasonably conclude beyond a reasonable doubt that defendant had the requisite mental state for conviction of felony attempted theft. When the evidence, viewed in a light most favorable to the prevailing party, permits a rational trier of fact to find the essential elements of a crime, the Supreme Court will not reverse the conviction. St. v. Johnstone, 244 M 450, 798 P2d 978, 47 St. Rep. 1715 (1990).

Instruction on Flight Proper When Based on Evidence: A jury instruction allowing consideration of testimony showing flight or concealment by the defendant as a circumstance tending to prove consciousness of guilt was proper in light of defendant's admission that he left the scene of the crime. St. v. Hurlbert, 232 M 115, 756 P2d 1110, 45 St. Rep. 923 (1988), citing St. v. Walker, 148 M 216, 419 P2d 300 (1966). Walker was followed in St. v. Patton, 280 M 278, 930 P2d 635, 53 St. Rep. 1402 (1996). Patton was followed in St. v. Johnson, 1998 MT 289, 291 M 501, 969 P2d 925, 55 St. Rep. 1186 (1998), in which it was held that even in the limited environment of prison, a defendant may fly to wherever the defendant thinks is safe to dispose of evidence, but that only some departure from a crime scene is necessary to support giving an instruction on flight. Patton was also followed in St. v. Maier, 1999 MT 51, 293 M 403, 977 P2d 298, 56 St. Rep. 208 (1999). See also St. v. Hall, 1999 MT 297, 297 M 111, 991 P2d 929, 56 St. Rep. 1190 (1999), in which the Supreme Court reconsidered the probative value of the flight instruction and directed that the better policy in future cases when evidence of flight has been properly admitted is to reserve comment on the significance of flight to counsel, rather than to the court through jury instructions. However, in Hall's case, no prejudice attached because the instruction included the qualification that evidence of flight was not, by itself, sufficient evidence of guilt, but rather only one circumstance to be considered by the jury. Hall was followed in St. v. Hatten, 1999 MT 298, 297 M 127, 991 P2d 939, 56 St. Rep. 1198 (1999).

Instruction Necessary — Interference With Contract: An instruction on interference with contract must address the element of unjustifiability or impropriety of the alleged tortious actions and provide that the act is "without right or justifiable cause on the part of the actor". NW. Nat'l Bank of Great Falls v. Weaver-Maxwell, Inc., 224 M 33, 729 P2d 1258, 43 St. Rep. 1995 (1986), distinguished in Weinberg v. Farmers St. Bank of Worden, 231 M 10, 752 P2d 719, 45 St. Rep. 391 (1988).

Evidence Sufficient to Instruct in Tort Action on Driving Under Influence — Statutory Violation and Proximate Cause Instructions: During the course of a tort trial involving an automobile accident, some evidence was produced indicating the driver may have consumed some alcohol prior to the accident, and drug paraphernalia was found in his car. There was sufficient evidence to instruct the jury regarding driving under the influence. It was not error to give a jury instruction stating that a Montana statute makes it unlawful to drive under the

influence because the instruction must be read in conjunction with other instructions, one of which provides that although conduct in violation of a statute constitutes negligence as a matter of law, such a violation is of no consequence unless it was the proximate cause of an injury suffered by the plaintiff. Foreman v. Minnie, 211 M 441, 689 P2d 1210, 41 St. Rep. 1478 (1984).

Sexual Intercourse Without Consent — "Easy to Charge but Difficult to Defend" Instruction Improper: The cautionary jury instruction providing that sexual intercourse without consent is an easy charge to make but is difficult to defend is an improper instruction. The Supreme Court, in holding that the instruction is an unwarranted and improper comment on the evidence which is not required by law or public policy, specifically overruled St. v. Smith, 187 M 245, 609 P2d 696, 37 St. Rep. 583 (1980). St. v. Liddell, 211 M 180, 685 P2d 918, 41 St. Rep. 1293 (1984).

Conflicting Testimony — Substantial Credible Evidence — Sufficiency of Verdict: Plaintiff alleged defendant negligently failed to close a farm gate when returning a tractor to plaintiff, allowing plaintiff's horses to escape onto a highway where they were subsequently killed. Plaintiff's wife testified that defendant had admitted leaving a gate open. Defendant disputed this. Two boys who had accompanied the defendant testified that he had closed the gate. The Supreme Court held, on appeal, that there was substantial credible evidence to support the jury finding for defendant, and it refused to overturn the verdict on the basis of insufficiency. Brogan v. Blanchard, 200 M 399, 650 P2d 1390, 39 St. Rep. 1829 (1982).

Unjust Enrichment Instruction — When Error: The trial court erred in instructing jury that if the lessee of agricultural land expended money and labor on the strength of a provision in the lease agreement, which later became unenforceable, he could still recover either the cost or the value of the improvements he had placed on the land, under a theory of unjust enrichment. This instruction incorrectly permitted the jury to find for the lessee regardless of the meaning of the lease agreement. Overcast v. Akra, 197 M 276, 642 P2d 1058, 39 St. Rep. 558 (1982).

Required Instruction on Elements of Crime: Defendant was charged with theft after he sold an engine to cover an overdue repair bill. In the instructions the jury was told that each element of the crime as defined by statute had to be proved, but the jury was never instructed as to the statutory elements of the crime. Without a correct statement of the elements of the crime being presented to the jury, the Supreme Court found that defendant had not received a fair trial. St. v. Lundblade, 191 M 526, 625 P2d 545, 38 St. Rep. 441 (1981), followed in St. v. Forsyth, 197 M 248, 642 P2d 1035, 39 St. Rep. 540 (1982).

Substantial Evidence to Support Verdict — Evidence to Support Contrary Findings Not Proper Consideration: The plaintiff offered evidence that a leaking pipe caused damage to a house. The defendant introduced evidence tending to show that the damage was caused by either melting snow or because of improper construction. The jury found that the evidence presented by the defendant was more credible. On appeal, the Supreme Court found that there was substantial evidence on which the jury could base its verdict. It is not the Supreme Court's function to determine if there is sufficient evidence to support contrary findings. Judgment was affirmed. Cissel v. W. Plumbing and Heating, 188 M 149, 612 P2d 206, 37 St. Rep. 966 (1980).

Jury Not to Act Capriciously: Under this section, juries may not arbitrarily and capriciously disregard the testimony of witnesses, not only unimpeached in any of the usual modes known to the law, but supported by all the circumstances in the case. Haddox v. N. Pac. Ry., 43 M 8, 113 P 1119 (1911).

NUMBERS OF WITNESSES OR PRESUMPTIONS

Evidence Supporting Jury's Verdict of Zero Damages for Lost Earning Capacity Resulting From Automobile Accident: Magart was injured in a collision with Schank, who admitted negligently causing the accident. The case proceeded to jury trial on the issue of damages, and the jury awarded damages for everything except Magart's claim for lost earning capacity. Magart appealed, arguing that that portion of the verdict was not supported by substantial evidence and that the jury was required to find a loss of earning capacity because uncontroverted expert testimony at trial established that Magart suffered continuing shoulder problems because of his job duties that rendered him unable to continue his employment as a result of the injury. As a general rule, a jury may not disregard uncontradicted, credible nonopinion evidence, but this rule applies only to nonopinion lay witness testimony, and a jury may disregard expert testimony if it finds the testimony unpersuasive. In this case, the jury could reasonably have determined that future deterioration of Magart's shoulder, together with a concomitant inability to perform his job, was not reasonably certain to occur. Further, lay testimony from Magart's former employers implied that the shoulder injury did not impair the ability to perform the job and that Magart left employment not because of the injury but rather to accept different employment. This evidence, coupled with Schank's 23-minute videotape of Magart performing

his current job without apparent difficulties, was sufficient to support the jury's verdict of zero damages for loss of earning capacity with regard to past and present employment. Magart v. Schank, 2000 MT 279, 302 M 151, 13 P3d 390, 57 St. Rep. 1167 (2000), distinguishing Tappan v. Higgins, 240 M 158, 783 P2d 396 (1989).

Improper Grant of Partial Summary Judgment on Issue of Whether Train Crew Gave Adequate Auditory Warning at Railroad Crossing — Party Without Memory of Accident: Mickelson was injured when the fire truck that he was driving was struck by a Montana Rail Link (MRL) train and sought damages. In its order granting partial summary judgment to MRL, the District Court ruled, as a matter of law, that the MRL train crew had properly sounded the train whistle and bell, in accordance with 69-14-562, and that because Mickelson had no memory of the accident, he could not produce any specific facts that presented a genuine issue worthy of trial. In the brief opposing summary judgment, Mickelson pointed out several inconsistencies in the testimony of the train crew that raised factual and credibility issues concerning the crew's story about how the accident occurred, particularly with regard to Mickelson's prior common practice of loading the fire truck in a particular manner, which conflicted with the crew's story. The Supreme Court held that the trial court committed reversible error by preventing the jury from deciding crucial factual and credibility issues regarding adequate auditory warnings, citing several cases that precluded summary judgment on whistle issues because of disputed facts. Mickelson v. Mont. Rail Link, Inc., 2000 MT 111, 299 M 348, 999 P2d 985, 57 St. Rep. 446 (2000). See also Easterwood v. CSX Transp., Inc., 933 F2d 1548 (11th Cir. 1991), Bowman v. Norfolk S. Ry. Co., 832 F. Supp. 1014 (D. S.C. 1993), and Borden v. CSX Transp., Inc., 843 F. Supp. 1410 (M.D. Ala. 1993).

Effect of Uncontradicted Evidence: Where there is direct testimony in the record, uncontradicted by other direct testimony, a court or jury is not bound thereby and can render a decision contrary to such direct testimony based on adverse circumstantial evidence. Holenstein v. Andrews, 166 M 60, 530 P2d 476 (1975).

Rebuttal of Statutory Presumption:

Whether sworn testimony to the contrary is sufficient to rebut a statutory presumption is a question for the triers of fact to determine, except where the facts proved are overwhelmingly against the presumed facts and permit but one rational and reasonable conclusion. St. v. Rice, 134 M 265, 329 P2d 451 (1958); McMahon v. Cooney, 95 M 138, 25 P2d 131 (1933).

A statutory disputable presumption is satisfactory if uncontradicted. Whether sworn testimony to the contrary is sufficient to rebut such a statutory presumption is a question for the triers of fact to determine, except where the facts proved are overwhelmingly against the presumed facts and permit but one rational and reasonable conclusion. N. Y. Life Ins. Co. v. Gamer, 106 F2d 375 (9th Cir. 1939).

Trial Judge Determining Credibility — Nonjury Trial: In deciding the facts of a case, the trial judge could accept "the direct evidence of one witness who is entitled to full credit" to prove any fact and the trial judge was not bound to decide the facts in conformity with the declarations of any number of witnesses, who did not produce conviction in his mind, against a less number or against a presumption or other evidence satisfying his mind. Davis v. Burton, 128 M 434, 278 P2d 213 (1955).

Presumption Against Suicide: The presumption of an accidental death, rather than suicide, is indirect evidence, stands even though controverted, and must be given weight in determining the fact. Lewis v. N. Y. Life Ins. Co., 113 M 151, 124 P2d 579 (1942).

Jurors Judge of Credibility:

A preponderance of the evidence may be established by the testimony of a single witness against a greater number of witnesses who testify to the contrary, the jurors being the exclusive judges of their credibility. In re Silver's Estate, 98 M 141, 38 P2d 277 (1934); State ex rel. Bourquin v. Morris, 67 M 40, 214 P 332 (1923); Doane v. Marquisee, 63 M 166, 206 P 426 (1922).

The party seeking reformation of a contract on the ground of mistake has the burden of establishing his claim by a preponderance of the evidence, and such preponderance may be established by the plaintiff's own testimony as against that of a greater number of witnesses to the contrary. Ayers v. Buswell, 73 M 518, 238 P 591 (1925).

Application to Criminal Cases: The rule that preponderance of the evidence may be established by the testimony of a single witness against a greater number of witnesses who testify to the contrary applies with equal force in criminal cases in which the State must prove the facts beyond a reasonable doubt. St. v. Park, 88 M 21, 289 P 1037 (1930).

Party as Sole Witness: Since the burden of proof is not to be determined by the number of witnesses introduced and the direct evidence of one witness entitled to full credit is sufficient to prove any fact, the direct evidence of the plaintiff, upon whom was the burden of showing

nonpayment of the certificate of deposit in suit, was sufficient to establish that fact. O'Langan v. First St. Bank of Hilger, 59 M 190, 196 P 149 (1921).

Rebuttal of Prima Facie Evidence: Where the presumption of negligence on the part of a railroad company in the killing of livestock by one of its trains, arising by virtue of the statute making the fact of the killing prima facie evidence of such negligence, is rebutted by testimony of its train operatives that there was not any negligence on their part, the result is a conflict of evidence resolvable by the jury under subsection (2) of this section. Johnson v. Chicago, Milwaukee & St. Paul Ry., 52 M 73, 155 P 971 (1916).

Statutory Rape — Conflicting Testimony: Under subsection (2) of this section, the fact that prosecutrix was contradicted or that conflicting impeaching evidence was given against her would not overthrow a conviction of statutory rape. St. v. Peres, 27 M 358, 71 P 162 (1903).

PART OF TESTIMONY FALSE

Proof of Crimes Charged — Proof of Ownership of Stolen Money — Disbelief of Portion of Witness' Testimony as Not Requiring Total Disbelief: Defendant charged with robbery and theft was convicted of theft but found not guilty of robbery. One ground of his appeal was the assertion that the prosecution's evidence was insufficient to prove theft. Defense counsel argued that the jury must have distrusted the testimony of the truckstop cashier who was held up because they found the defendant not guilty of robbery. Further, since the cashier's testimony was critical to prove a theft was committed, the evidence was insufficient to prove theft if the jury disbelieved the cashier. The Supreme Court dismissed this argument because sufficient disbelief of the cashier's testimony to find the defendant not guilty of robbery would not require the jury to disbelieve all of the cashier's testimony. The jury had instructions about its right to believe or disbelieve any portion of a witness' testimony. As long as there was substantial evidence to support the verdict, it will not be disturbed on appeal. The Supreme Court found sufficient evidence to convict here and sufficient evidence to refute the defendant's argument that the truckstop did not own the stolen money. Here, proof of possession sufficed to prove ownership because the defendant's jury instruction to that effect was accepted by the court. St. v. Dolan, 190 M 195, 620 P2d 355, 37 St. Rep. 1860 (1980).

Cautionary Instruction as to Evidence at End of Trial Instead of Immediately Following Admission of Evidence: A cautionary instruction given by a court to a jury concerning evidence of a modus operandi of a criminal defendant at the end of trial instead of immediately following admission of the evidence was not error. St. v. Strain, 190 M 44, 618 P2d 331, 37 St. Rep. 1763 (1980), distinguishing St. v. Just, 184 M 262, 602 P2d 957 (1979).

Instruction Lacking "Corroborated" Phrase — Not Error:

Conviction would not be reversed for giving of instruction based on statute but including words "except insofar as it may be corroborated by other and credible evidence in the case", in absence of specific showing of prejudice. St. v. Rollins, 149 M 481, 428 P2d 462 (1967).

Court's instruction relative to the credibility of a witness who has sworn falsely, framed in strict compliance with subsection (3) of this section, may not be held error for failure to include the qualifying phrase "except insofar as corroborated by other testimony". St. v. Keays, 97 M 404, 34 P2d 855 (1934).

Distrust Rather Than Disregard Testimony: In separate maintenance action by wife where evidence on most points was in sharp conflict, if the court thought some of plaintiff's story incredible, the most it could have done was to treat the rest of her testimony with distrust and the court was not bound to disregard all of her testimony. Reynolds v. Reynolds, 132 M 303, 317 P2d 856 (1957).

Deliberate Falsity on One Point — Error to Reject All Testimony: Although court was satisfied that testimony on one point was deliberately false, it would only furnish grounds for distrusting other parts of the witness' testimony and would not necessarily call for a rejection of all of it. Sanders v. Sanders, 124 M 595, 229 P2d 164 (1951), explained in Poepping v. Monson, 138 M 38, 353 P2d 325, 354 P2d 183 (1960).

Isolated False Testimony — Error to Deny Recovery: The mere fact that plaintiff in a personal injury action may have testified falsely in one particular, standing alone, does not justify denial of recovery but under subsection (3) would simply warrant the jury in distrusting his testimony in other respects. McCulloch v. Horton, 105 M 531, 74 P2d 1, 114 ALR 823 (1937).

Instruction to Disregard Whole of Testimony — Error:

An instruction in robbery case that the jury could disregard the entire testimony of a witness believed by it to have willfully and deliberately testified falsely unless corroborated by other and credible evidence was prejudicially erroneous irrespective of defendant's admission of four previous convictions for felony. St. v. Hogan, 100 M 434, 49 P2d 446 (1935).

An instruction that where a witness has willfully testified falsely as to a material matter in the case, the jury may disregard any and all of his testimony, except insofar as it was corroborated by other credible evidence, was erroneous, the statute going no further than to provide that the jury may look with distrust upon the testimony of any witness found to have so testified and making no exception in favor of one who has been corroborated. Vande Veegaete v. Vande Veegaete, 75 M 52, 243 P 1082 (1925), explained in St. v. Hogan, 100 M 434, 49 P2d 446 (1935).

An instruction that the jury could disregard the entire testimony of any witness whom they believed to have deliberately testified falsely to any fact material to the issue, etc., was erroneous under subsection (3) of this section. St. v. Kanakaris, 54 M 180, 169 P 42 (1917), explained in St. v. Hogan, 100 M 434, 49 P2d 446 (1935).

An instruction charging the jury on a trial for murder that if they were satisfied that any witness had knowingly and willfully testified falsely in any material matter, they had the right to reject the whole of his testimony, "unless on any point such testimony is corroborated by the facts and circumstances of the case or other credible evidence", is an unauthorized restriction upon the discretionary power of the jury to reject testimony and should not be given in any case. St. v. Penna, 35 M 535, 90 P 787 (1907).

Discarding Any Evidence of Contract — Disbelief in Other Testimony: If the trial court believed the witnesses who testified disputing the performance by the appellants, then it found the testimony of the appellants with reference thereto was false; and a witness who is false in one part is to be distrusted in others. The only testimony from which it would have been possible for the trial court to have found the existence of the contracts, or either of them, was the testimony of the respective appellants as to their verbal contracts with the deceased. Therefore, if the trial court determined on the conflicting testimony that the appellants' testimony was not worthy of credit and was to be distrusted, there was no credible evidence in the record to warrant a finding in favor of the appellants or either of them. Langston v. Currie, 95 M 57, 26 P2d 160 (1933).

Dying Declaration — Instruction on Falsity Therein: Where in a homicide case a general instruction in the language of subsection (3) of this section was given, an offered instruction that if the jury found a dying declaration false in any material part they could reject it in its entirety was erroneous and properly refused. St. v. Le Duc, 89 M 545, 300 P 919 (1931).

Use of Instruction — When: Whether an instruction "that a witness false in one part of his testimony is to be distrusted in others" shall be given lies largely in the discretion of the trial court, not to be interfered with on appeal unless abuse thereof is shown. Russell v. Sunburst Ref. Co., 83 M 452, 272 P 998 (1928).

Instruction Omitting "Willfully" and "Material Matter" — Not Error:

An instruction that "a witness who testifies falsely in one part of his testimony is to be distrusted in others" is proper where it is apparent that false testimony has been given, and the court is not required to modify it by confining the rule to testimony willfully false as to a material matter. Hageman v. Arnold, 79 M 91, 254 P 1070 (1927).

On appeal from the judgment in a criminal case, it will be presumed, in the absence of the evidence, that the giving of an instruction in the language of subsection (3) of this section was warranted by the case as submitted. Such instruction is not erroneous for failure to insert the word "willfully" before the word "false" and the words "as to a material matter" after the word "testimony". St. v. Connors, 37 M 15, 94 P 199 (1908). See also Shea v. U.S., 260 F 807 (9th Cir. 1919).

Favor to Witness Corroborated — Instruction Error: An instruction making an exception to the statutory rule that a witness false in one part of his testimony is to be distrusted in others, in favor of one who has been corroborated by other credible evidence, was error. St. v. Belland, 59 M 540, 197 P 841 (1921), explained in St. v. Hogan, 100 M 434, 49 P2d 446 (1935); Vande Veegaete v. Vande Veegaete, 75 M 52, 243 P 1082 (1925).

Jury Allowed to Disregard Testimony — Corroboration: As a statute affecting the province of the jury members in weighing evidence, subsection (3) of this section requires them to view with distrust the testimony of a witness who willfully swears falsely as to a material matter. They must distrust such a witness, and under their general power of passing upon the credibility to be attached to each witness, they may discard such testimony entirely, except insofar as it is corroborated by other credible evidence. St. v. De Wolfe, 29 M 415, 74 P 1084 (1904); Cameron v. Wentworth, 23 M 70, 57 P 648 (1899). See also St. v. Fuller, 34 M 12, 85 P 369 (1906); St. v. Lee, 34 M 584, 87 P 977 (1906).

Instruction Regarding Subsection — Limitation Required: Subsection (3) of this section does not authorize an instruction that a witness false in one part of his testimony is to be distrusted in

others without limiting it to willfully false statements as to material matters. Ashley v. Rocky Mtn. Bell Tel. Co., 25 M 286, 64 P 765 (1901).

"Willful" and "Material" — Effect of Minor Errors in Testimony: Subsection (3) of this section is not applicable to unintentional errors or evidence given upon immaterial matters and without intent to deceive. Its sense is to require the jury to distrust only a witness who willfully swears falsely as to material matters, and it ought always to be given with the words "willfully" and "material" expressed as qualifications of the rule it declares. Cameron v. Wentworth, 23 M 70, 57 P 648 (1899), explained in St. v. Connors, 37 M 15, 94 P 199 (1908).

TESTIMONY OF PERSON LEGALLY ACCOUNTABLE

Failure of Counsel to Request Instruction on Accomplice Testimony Constituting Ineffective Assistance of Counsel — Failure of Court to Give Instruction Prejudicial: Kougl was convicted of operating an unlawful clandestine laboratory and subsequently appealed on grounds of ineffective assistance of counsel. The state's case was based largely on the testimony on three accomplices. At trial, both the prosecution and defense counsel pointed out to the jury in closing arguments that accomplice testimony should be viewed with suspicion because of the accomplices' criminal conduct and the deals that they cut with the state. However, Kougl's counsel did not request a jury instruction that accomplice testimony ought to be viewed with distrust and that it must be corroborated. Applying the Strickland test for effective assistance of counsel, the Supreme Court found that Kougl's counsel's failure to request the instructions constituted a failure to use the law to strike at the heart of the state's case, and because there was no plausible explanation for not asking for the instructions, counsel's performance was deficient and the first prong of Strickland was satisfied. Further, the trial court failed its duty to instruct the jury on the law, which is a duty that may not be delegated to counsel because what the court tells the jury carries the force of law, while counsel's comments do not. Thus, the second prong of Strickland requiring a showing of prejudice was also satisfied because if the jury had been properly instructed, there was a reasonable probability that it would have arrived at a different outcome. Therefore, Kougl received ineffective assistance of counsel, and Kougl's conviction was reversed. St. v. Kougl, 2004 MT 243, 323 M 6, 97 P3d 1095 (2004), following St. v. Rose, 1998 MT 342, 292 M 350, 972 P2d 321 (1998).

Record Connecting Defendant With Alleged Accomplice — Jury Instruction on Accomplice Testimony Proper: Trial testimony indicated that the defendant had an accomplice and that one of his witnesses may have been the accomplice. The trial court instructed the jury that if the jury found the witness was the accomplice, his testimony must be corroborated by other evidence, but the court did not require the jury to make that finding. Because the record connected the actions of the defendant and his witness, it was not error to give the instruction on accomplice testimony. St. v. West, 245 M 298, 800 P2d 1047, 47 St. Rep. 2129 (1990).

Receiver of Stolen Property Not Accomplice: The defendant in a burglary trial argued that the jury should have been instructed to view with distrust the testimony against him given by a witness who had received some of the stolen property. The Supreme Court ruled that one receiving stolen property is not an accomplice and no jury instruction was needed. St. v. Moreno, 241 M 359, 787 P2d 334, 47 St. Rep. 351 (1990).

Failure to Give Mandatory Accomplice Jury Instruction — Harmless Error — Not Ineffective Assistance of Counsel: In petitioner's trial on the charge of attempted deliberate homicide, his lawyer withdrew a previous request, in a jury instruction mandated by 26-1-303, that testimony of an accomplice must be viewed with distrust. Petitioner's theory of defense was that his alleged accomplices had fabricated their testimony. The judge did instruct the jury that testimony of accomplices must be corroborated. In a proceeding for postconviction relief, the Supreme Court ruled that the court's failure to give the mandatory instruction was harmless error and that the withdrawal by petitioner's lawyer of the request for the mandatory instruction was not ineffective assistance of counsel under Strickland v. Wash., 466 US 668, 80 L Ed 2d 674, 104 S Ct 2052 (1984). Petition of Gillham, 218 M 187, 707 P2d 1100, 42 St. Rep. 1508 (1985).

Accomplice Testimony Instruction Required: Because the language of this section is mandatory, in a trial involving accomplice (now "person legally accountable") testimony, it is reversible error to fail to instruct the jury that such testimony must be viewed with distrust. St. v. Laubach, 201 M 226, 653 P2d 844, 39 St. Rep. 2074 (1982), followed in Bishop v. St., 254 M 100, 835 P2d 732, 49 St. Rep. 650 (1992), and overruled in St. v. Johnson, 257 M 157, 848 P2d 496, 50 St. Rep. 209 (1993), concerning mandatory giving of instruction.

Testimony of Accomplice: Jury instruction simply stating that the testimony of a person accountable for the same crime as the defendant ought to be viewed with distrust is sufficient. Rejection by the trial court of defendant's offered instruction emphasizing that accomplice's

testimony is "particularly suspect" was not error. St. v. Forsyth, 197 M 248, 642 P2d 1055, 39 St. Rep. 540 (1982), followed in St. v. Anderson, 197 M 374, 643 P2d 564, 39 St. Rep. 629 (1982).

Accomplice as a Matter of Law — Insufficient Corroborating Evidence — Directed Verdict Required: The defendant was charged with suppressing evidence in connection with the investigation of his son on a deliberate homicide charge. The case against the defendant was based entirely on the testimony of Hopkins, who testified that the defendant gave him a pistol that belonged to the homicide suspect and asked him to dispose of it. Hopkins kept the pistol for 5 months before turning it over to the police. The court concluded that if the jury inferred from the evidence that the defendant intended to suppress the evidence then it would have to infer that the same intent existed for Hopkins. That would make Hopkins an accomplice as a matter of law. Since there was no corroborating evidence to support the testimony of Hopkins, the District Court should have entered a judgment of acquittal. St. v. Warren, 192 M 436, 628 P2d 292, 38 St. Rep. 773 (1981).

Instruction — Section Considered by Jury: Where the court gave a defendant's instruction quoting this section verbatim in a criminal case, it may be assumed that the instruction was considered by the jury in weighing the evidence. St. v. Barick, 143 M 273, 389 P2d 170 (1964).

Affects Weight — Not Admissibility: An accomplice is treated as any other witness, except that his credibility may be affected by the fact that he is charged with the same offense as the person against whom he testifies; his testimony that tends to connect the defendant with the commission of the offense is admissible, but its weight is for the jury. St. v. Harmon, 135 M 227, 340 P2d 128 (1959).

Instruction on Determination of Accomplice — May Be Prerequisite: Where the defense requested instructions as to the effect of accomplice's testimony and there was evidence in the record from which the jury might have concluded that a Deputy Sheriff was an accomplice of the defendant, the court should have instructed the jury that if they believed the Deputy Sheriff was an accomplice then they must weigh his evidence as provided by this section and that such evidence must be corroborated as required by section 94-7220, R.C.M. 1947 (since repealed, similar to 46-16-213). St. v. Porter, 125 M 503, 242 P2d 984 (1952).

Character of Oral Admissions as Evidence: Statements as to declarations or admissions made by another are the weakest and least satisfactory character of evidence in persuasive value and should be received with great caution. Linn v. French, 97 M 292, 33 P2d 1002 (1934); Escallier v. Great N. Ry., 46 M 238, 127 P 458 (1912). See also Gauss v. Trump, 48 M 92, 135 P 910 (1913).

Instruction — Use of Subsection: Refusal of an offered instruction that the uncorroborated testimony of an accomplice should be received with great caution was not error, where the court had advised the jury, pursuant to subsection (4) of this section, that the testimony of an accomplice ought to be viewed with distrust. St. v. Lyford, 87 M 325, 287 P 214 (1930).

Careful Scrutiny Advised: Oral admissions of a party should be viewed with caution and subjected to careful scrutiny, no other class of testimony affording such opportunities for unscrupulous witnesses to distort the facts or to commit open perjury. Sylvain v. Page, 84 M 424, 276 P 16, 63 ALR 528 (1929).

Admission by One Now Deceased: Evidence of oral admissions must be viewed with caution, especially so where the party alleged to have made the admission is dead. Humble v. St. John, 72 M 519, 234 P 475 (1925).

Oral Admission — Instruction: Though the propriety of giving an instruction in the words of subsection (4) of this section is a matter of discretion in the trial court, refusal to give it was error in a case which hinged on an oral admission by defendant testified to by plaintiff and only one other witness. McCrimmon v. Murray, 43 M 457, 117 P 73 (1911).

CASES DECIDED UNDER SUBSECTION (5)

Criminal Defendant's Proposed Instruction — Jury to Consider State's Failure to Produce Evidence — Refusal Not Error: In a criminal homicide trial, it was not error for the District Court to refuse defendant's instruction to the effect that the jury could consider the State's failure to call a witness or produce other particular evidence. The defendant based his right to the instruction on his contention that several weapons discussed in the trial were not introduced into evidence and a witness was not called on rebuttal. The Supreme Court held his instruction went to how the jury should weigh the evidence, a concept different from that in civil cases provided in subsection (5) of this section. St. v. Daniels, 210 M 1, 682 P2d 173, 41 St. Rep. 880 (1984), followed in St. v. Longstreth, 1999 MT 204, 295 M 457, 984 P2d 157, 56 St. Rep. 795 (1999).

Failure to Produce Partnership Records: In action by administrator of estate of deceased partner against surviving partners to recover assets transferred by the deceased during his last illness, evidence that deceased had a half interest in the partnership cattle and failure of defendants to produce any of the partnership records at the trial in the lower court sustained finding that heir of deceased had overcome the prima facie showing of one-third interest in the partnership cattle arising from the recording of the brand in name of three persons. Marshall v. Minlschmidt, 148 M 263, 419 P2d 486 (1966).

Failure to Introduce Own Land Survey: In an action to quiet title and establish a boundary, where the plaintiff and the defendant each had a survey made but the defendant did not produce any evidence of his survey, the court was justified in finding the survey as made by the plaintiff correct. Reel v. Walter, 131 M 382, 309 P2d 1027 (1957).

Failure to Call Participant: Where the president of an alleged political club in the name of which beer, etc., was dispensed in behalf of a candidate for office was not called as a witness in behalf of the candidate in an action to have him ousted for violation of the Corrupt Practices Act (since repealed), the trial court was justified in applying the provisions of subsection (5) of this section. Kommers v. Palagi, 111 M 293, 108 P2d 208 (1940).

Failure to Call Witness: Where the State had a witness in a criminal case present in the courtroom who might have contradicted the otherwise unimpeached testimony of defendant's witnesses but failed to put him on the stand, the jury in weighing the evidence should, under this section, have taken into consideration the State's failure in that behalf. St. v. Neely, 90 M 199, 300 P 561 (1931).

Interpretation of Subsections: Where a party has it within his power to introduce stronger and more satisfactory evidence than that offered by him, the evidence produced should be viewed with distrust. State ex rel. Foot v. Farmers' & Mechanics' St. Bank, 85 M 256, 278 P 828 (1929).

Part 4
Burdens of Proof

Part Case Notes

Circumstantial Evidence Sufficient for Conviction: A guard at the Montana State Prison was struck in the back by two handmade darts. The defendant's fingerprints were on the darts, and a plastic tube in the defendant's cell was loose and capable of being removed from the wall. The tube could be used to shoot the darts. The defendant had threatened the guard and was in a position to hit the guard with the darts. Based on this evidence, the defendant was convicted of assault. The defendant argued on appeal that the State failed to meet its burden of proof because it failed to produce an eyewitness to the assault. The Supreme Court held that although the State's case was based on circumstantial evidence, it was sufficient to meet its burden of proof. St. v. Shurtliff, 195 M 213, 635 P2d 1294, 38 St. Rep. 1798 (1981).

Amendment of Information to Greater Offense — Not Unconstitutional Shifting of Burden: Appealing her conviction of deliberate homicide, the defendant claimed that the information, which had first charged her with mitigated deliberate homicide but was later amended, constituted an unconstitutional shifting of the burden to the defendant to prove an element of mitigated deliberate homicide because one justification for the motion to amend the information was the fact that the defendant had failed to supply the State with the names of witnesses who would justify retaining the lesser offense; when it allows affirmative defenses at all, the State may regulate the burden of producing evidence and the burden of persuasion as long as it does not thereby shift to the defendant its own burden of proof as to each of the elements of the offense beyond a reasonable doubt. St. v. Sorenson, 190 M 155, 619 P2d 1185, 37 St. Rep. 1834 (1980).

Suppression of Defendant's Confession — When Miranda Warning Inadequate — Voluntariness: Appellant's statement was admitted into evidence erroneously for two reasons. First, the State failed to prove the voluntariness of appellant's confession at the suppression hearing by a preponderance of the evidence. When the State fails to show that appellant was advised of his Miranda rights or that appellant made the statement attributed to him or fails to introduce any evidence other than the evidence showing that the appellant had the mental capacity to make a voluntary statement, a finding that the State has carried its burden of proving voluntariness by a preponderance of the evidence is clearly against the weight of the evidence and must be overturned. Second, the Miranda warning allegedly given appellant was inadequate. The language "we have no way of giving you a lawyer, but one will be appointed for you, if and when you go to court", was held confusing. Because the confession "undoubtedly weighed heavily in the minds of the jurors in finding [the] appellant guilty", conviction was reversed. St. v. Dess, 184 M 116, 602 P2d 142, 36 St. Rep. 1929 (1979).

26-1-401. Who has the burden of producing evidence.

Compiler's Comments

1983 Amendment: Substituted "The initial burden of producing evidence as to a particular fact is on the party who would be defeated if no evidence were given on either side." for "The party holding the affirmative of the issue must produce the evidence to prove it; therefore, the burden of proof lies on the party who would be defeated if no evidence were given on either side."; and inserted second sentence concerning subsequent burden of producing evidence.

Case Notes

Burden of Proof on Party Asserting Claim in Contested Case Hearing to Present Evidence That Department Decision Violated Law: Plaintiffs requested a hearing before the Board of Environmental Review, contending that an air quality permit issued by the Department of Environmental Quality for a coal-fired power plant and the application for the permit suffered from various procedural and substantive deficiencies. The Board held a contested case hearing and, after establishing that plaintiffs had the burden of proof, approved the Department's decision to grant the permit. On appeal, the Supreme Court affirmed that, as the party asserting the claim in the contested case, plaintiffs had the burden of presenting evidence necessary to establish the fact that the Department's decision violated the law. Mont. Envtl. Information Center v. Dept. of Environmental Quality, 2005 MT 96, 326 M 502, 112 P3d 964 (2005).

Failure to Prove Amount of Damages for Replacement Tail Insurance Coverage: A doctor was suspended from employment with a health care facility and was informed that the facility had removed her from the medical malpractice insurance that covered the clinic doctors. There was no immediate indication whether the doctor continued to be covered under the facility's policy for tail coverage, which is the portion of the policy that would cover any potential claims made against the doctor in the future related to the doctor's practice while employed at the facility, although the facility later contended that the doctor was in fact covered by the facility's tail insurance. Nevertheless, in order to cover her tail insurance, the doctor subsequently purchased her own malpractice insurance that included tail insurance for the time that she was employed at the clinic and later contended that the facility should be liable in damages for the cost of the replacement insurance. However, no evidence was presented to indicate a specific amount in the doctor's replacement insurance that related to the cost of tail insurance. Unable to prove that she incurred damages when she believed that she was without tail coverage, no damages were awarded. Marias Healthcare Serv., Inc. v. Turenne, 2001 MT 127, 305 M 419, 28 P3d 491 (2001).

Failure to Provide Sufficient Evidence That Employee Not Fully Compensated: A doctor claimed that a health care facility did not pay full compensation owing under an employment contract, that monthly income was miscalculated, and that a cost of living increase was not included in the base salary. As evidence of underpayment, the doctor provided payment stubs representing a portion of the monthly compensation. However, the District Court held that the doctor presented incomplete evidence by which to determine whether the doctor was underpaid in terms of the total monthly compensation package. The Supreme Court agreed. The compensation provisions were intentionally flexible for tax purposes and designed to benefit the doctor by withholding certain claims from paychecks. The doctor presented no evidence as to the appropriate or required monthly level of compensation, accounting for Social Security, workers' compensation or other withholding, or the favorable tax benefits that would adequately demonstrate whether the health care facility provided adequate compensation. Marias Healthcare Serv., Inc. v. Turenne, 2001 MT 127, 305 M 419, 28 P3d 491 (2001).

Motion to Dismiss on Grounds of Insufficient Evidence Properly Denied: When it was clear from the record that a reasonable juror could have concluded from the evidence taken in a light most favorable to the prosecution that guilt on several counts was proved beyond a reasonable doubt, the District Court did not abuse its discretion in denying defendant's motion for a directed verdict of acquittal, and further prosecution was not barred on double jeopardy grounds. St. v. Hocevar, 2000 MT 157, 300 M 167, 7 P3d 329, 57 St. Rep. 625 (2000). See also St. v. Bromgard, 261 M 291, 862 P2d 1140 (1993), and St. v. Campbell, 278 M 236, 924 P2d 1304 (1996).

Antenuptial Agreement Enforceable if Contract Conditions Met — Burden of Surviving Spouse to Prove Invalidity of Waiver and Absence of Fair Disclosure: Generally, an antenuptial agreement is valid and enforceable between two consenting parties if the agreement meets the requirements of a contract. Under this section, the party asserting a right in a case bears the burden of proving each of the material allegations of the cause of action. Thus, antenuptial agreements receive the same scrutiny as any other contract, except that there is an additional requirement of fair disclosure imposed on both parties in recognition of the confidential relationship between them. Therefore, the burden is on the surviving spouse to prove an invalid

contractual waiver and to prove the absence of fair disclosure. Here, the surviving wife did not meet these burdens of proof, and the District Court did not err in holding that an antenuptial agreement was valid, precluding the wife from collecting a homestead allowance, an exempt property allowance, a family allowance, or an elective share from the husband's estate. Wiley v. Iverson, 1999 MT 214, 295 M 511, 985 P2d 1176, 56 St. Rep. 838 (1999). See also In re Estate of Lopata, 641 P2d 952 (Colo. 1982), and In re Estate of Thies, 273 M 272, 903 P2d 186, 52 St. Rep. 970 (1995).

Denial of Contractual Liability by Both Defendant Entities — Claims Put in Issue — Burden of Proof — Proposed Findings to Be Based Upon Evidence — No Evidence of Intent to Mislead as Basis for Relief From Judgment: Wright Oil sued Goodrich for petroleum products allegedly delivered but not paid for. Goodrich denied liability, claiming that the products were for the use of West Yellowstone Snowmobile Rentals, Inc. (WYSR), which owned Westgate Texaco, operated by Goodrich. Wright Oil amended its complaint to include WYSR, and after a bench trial, the District Court held against Goodrich because no evidence had been presented proving a contract between WYSR and Wright Oil. Wright Oil then filed a motion for relief from judgment under Rule 60(b)(6), M.R.Civ.P. (Title 25, ch. 20), seeking relief from the District Court's failure to hold against WYSR. On the basis of evidence not presented at trial, the District Court granted the motion and ordered an evidentiary hearing to reopen the case against WYSR regarding WYSR's contractual liability to Wright Oil. WYSR appealed. The Supreme Court held that the District Court incorrectly granted the motion because the circumstances of the District Court's failure to hold WYSR liable for the debt to Wright Oil were not so extraordinary as to warrant relief from judgment under Rule 60(b)(6), M.R.Civ.P. The Supreme Court noted that WYSR's denial of its liability put the allegation of its contractual liability at issue under Rule 8(b), M.R.Civ.P. (Title 25, ch. 20), and under 26-1-402 and this section, Wright Oil had the burden of going forward with the evidence of WYSR's contractual liability but failed to present evidence of a contractual relationship between WYSR and Wright Oil. The fact that Goodrich alleged that WYSR was liable for the debt could not, the Supreme Court held, be taken as an admission by WYSR that it was liable for the amounts due. Further, the Supreme Court noted that Wright Oil should not have been surprised by WYSR's proposed findings of fact that it was not liable for the debt because under Rule 52(a), M.R.Civ.P. (Title 25, ch. 20), a party's proposed findings of fact must be supported by the evidence, and Wright Oil failed to produce that evidence of liability. Wright Oil & Tire Co. v. Goodrich, 284 M 6, 942 P2d 128, 54 St. Rep. 811 (1997).

"Confusion Doctrine" Properly Considered — Specific Pleading Not Required — Burden of Proof: Gentry was arrested for DUI and raised the "confusion doctrine" — that he was confused over his right to counsel at the time that he was required to submit to a Breathalyzer test (see Blomeyer v. St., 264 M 414, 871 P2d 1338 (1994)). The Supreme Court held that the District Court was limited by 61-8-403 to consideration of only three issues and that because one of those issues was whether the person refused to take the test, the confusion doctrine was properly considered by the District Court because it relates to whether a true "refusal to submit" to the test was made. The Supreme Court also held that the doctrine need not be specifically pleaded but that the burden remains on the petitioner to prove that the license suspension was invalid. Gentry v. St., 282 M 491, 938 P2d 693, 54 St. Rep. 450 (1997).

Burden of Proof on Driver to Prove Invalidity of Revocation: Because there is a presumption of correctness to the state's action of revocation of a driver's license until otherwise shown to be improper, the burden of proof falls on the driver to prove the invalidity of the state's action rather than to require the state to justify its act of revocation. Jess v. St., 255 M 254, 841 P2d 1137, 49 St. Rep. 951 (1992), followed in In re License Revocation of Gildersleeve, 283 M 479, 942 P2d 705, 54 St. Rep. 735 (1997).

Disclosure of Rebuttal Witness Not Required: The law does not require the advance disclosure of rebuttal witnesses. Valley Properties Ltd. Partnership v. Steadman's Hardware, Inc., 251 M 242, 824 P2d 250, 49 St. Rep. 13 (1992), citing Massman v. Helena, 237 M 234, 773 P2d 1206 (1989). See also Lutz v. Nat'l Crane Corp., 267 M 368, 884 P2d 455, 51 St. Rep. 810 (1994).

No Error for Refusal to Allow Rebuttal Testimony: In a case involving the destruction of a building by fire, the trial court did not err in refusing to allow a retired firefighter to give his expert opinion on behalf of the plaintiffs during rebuttal testimony concerning the alleged negligent firefighting methods employed by the defendant city firefighters. The proposed testimony related to the issue of whether the city negligently fought the fire and was not a new matter raised by the defense; it was one of the main issues raised by the plaintiffs in their complaint. Having failed during their case in chief to meet the burden of proving that the defendant negligently fought the fire, the plaintiffs cannot then assert that the city's alleged

negligent firefighting was a new issue first raised by the defense and open to rebuttal testimony. Massman v. Helena, 237 M 234, 773 P2d 1206, 46 St. Rep. 764 (1989).

Prima Facie Case Showing No Substantial Change in Evidence — Attack of Chain of Evidence at Trial: Defendant questioned whether evidence was properly admitted without the state's establishing a proper chain of evidence. Extensive testimony chronicled the labeling, storing, securing, transferring of possession, and testing of each exhibit. The state made a prima facie case showing that there had been no substantial change in the evidence, and defendant failed to produce any evidence to show if actual or even potential tampering could have occurred. Additionally, defendant vigorously attacked the chain of evidence at trial; thus, the jury had an opportunity to weigh this evidence. The Supreme Court found no abuse of discretion in admitting the evidence. St. v. Grant, 221 M 122, 717 P2d 562, 43 St. Rep. 685 (1986), followed in St. v. Evans, 247 M 218, 806 P2d 512, 48 St. Rep. 170 (1991).

Burdens of Proof in Case Involving Claimed Breach of Fiduciary Duty by Union Officers: In a dispute between a union and its former business managers, the District Court gave a general instruction that the party who asserts the affirmative of an issue has the burden of proving that issue by a preponderance of the evidence. The court further instructed the jury that if a fiduciary profits personally from the use of union funds, the burden shifts to the fiduciary to show he acted reasonably. Finally, the court instructed that a person with the duty to keep proper accounts has the burden of proving that he is entitled to the credits he claims. These instructions were consistent, clear, and accurate. Local Union No. 400 v. Bosh, 220 M 304, 715 P2d 36, 43 St. Rep. 388 (1986), followed in Luke v. Gager, 2000 MT 377, 303 M 474, 16 P3d 377, 57 St. Rep. 1599 (2000).

Break in Chain of Evidence Alleged — Burden of Proof: In a prosecution for deliberate homicide in which the defendant's fingerprints were found at the crime scene and the defendant objected to admission of the fingerprint evidence on the basis of an alleged break in the chain of evidence, which occurred because there could have been a master key that could have been used to gain access to the evidence, the court did not err in overruling the defendant's objection to the evidence. Once the State has shown prima facie that there has been no tampering or alteration of an exhibit, the burden of proving alteration shifts to the defendant. The speculation by the defendant is insufficient to meet the burden requiring proof of alteration. St. v. Close, 191 M 229, 623 P2d 940, 38 St. Rep. 177 (1981).

Assert Right — Carry Burden: Under this section, the party asserting a right in any case has the burden of proving each of the material allegations of his cause of action. D & K Distrib. v. Ford, 189 M 505, 616 P2d 1097, 37 St. Rep. 1693 (1980); McDonald v. Peters, 128 M 241, 272 P2d 730 (1954); Tucker v. Missoula Light & Ry., 77 M 91, 250 P 11 (1926); De Sandro v. Missoula Light & Water Co., 48 M 226, 136 P 711 (1913).

Jury Instructions on Diminished Capacity Defense — Constitutionality — Burden of Proof on Defendant: Under 46-14-201 (prior to the 1979 amendment) (renumbered 46-14-214), the State required the defendant to prove his legal insanity. Defendant objected, however, to the jury instruction on mental disease or defect (diminished capacity), saying it unconstitutionally shifted the burden to him to disprove intent, an essential element of the crime charged. Because psychiatric evaluation as to subtle gradations of mental impairment is highly subjective and not within the common experience of the layman juror, the State may in fairness require a defendant to convince the jury of his diminished capacity by a preponderance of the evidence. The State meticulously proved the facts constituting the deliberate homicide and aggravated kidnapping crimes beyond any reasonable doubt, based on all the evidence, including the evidence of defendant's alleged mental disease or defect. The State could then refuse constitutionally to sustain the affirmative defense of diminished capacity unless the defendant proved that defense by a preponderance of the evidence. The instructions here required defendant to establish his diminished capacity by raising a reasonable doubt, rather than by proof by a preponderance of the evidence. They posited a more liberal burden of proof than that to which the defendant was entitled. The instructions were, therefore, constitutional. St. v. McKenzie, 186 M 481, 608 P2d 428, 37 St. Rep. 325 (1980).

Distribution of Property Based on Fraud — Burden of Proof: Where appellants alleged that a decree of distribution of the decedent's estate was based on a fraudulently obtained consent decree, the District Court's decree was proper, as the appellants failed to prove by a preponderance of the evidence that they would have taken more under the will but for the alleged fraud. Estate of Wallace v. McAlear, 186 M 18, 606 P2d 136, 37 St. Rep. 158 (1980).

Burden of Producing Evidence — Affirmative Defense to Res Ipsa: Based on language in Sweeney v. Erving, 228 US 233, 240 (1913), the Montana Supreme Court held that a res ipsa case

does not put the defendant in a position of having to prove an affirmative defense to escape liability. Helmke v. Goff, 182 M 494, 597 P2d 1131, 36 St. Rep. 1104 (1979).

Burden of Producing Evidence — Prima Facie Case for Plaintiff: Once a discharged hospital employee had established that her discharge was brought about in substantial part by her refusal to participate in a sterilization, it then became the burden of the hospital to prove by a preponderance of the evidence that it would have discharged the employee even if she had not exercised her right of refusal. Swanson v. St. John's Lutheran Hosp., 182 M 414, 597 P2d 702, 36 St. Rep. 1075 (1979).

Products Liability — Burden of Proof: Summary judgment for defendant was proper when plaintiff failed to prove that product was defective at the time it left manufacturer's hands. Barich v. Ottenstror, 170 M 38, 550 P2d 395, 33 St. Rep. 481 (1976).

Failure to Prove Burden — Defeats Plaintiff's Claim: Plaintiff had burden of proof that disputed range rights were based on land other than that purchased jointly by plaintiff and defendant, and failure so to prove defeated plaintiff's claim that defendants were not entitled to one-half the appraised value of the range rights. Watson v. Barnard, 155 M 75, 469 P2d 539 (1970).

Partial Payment as Affirmative Defense: Partial payment by special deposit was an affirmative defense which debtor had burden of proving in suit on note; that burden of proof required that it be shown that payment was made on the particular obligation in controversy. Baker Nat'l Bank v. Lestar, 153 M 45, 453 P2d 774 (1969).

Allegation of Notice — Burden of Proof: Where plaintiff alleged giving of notice that defendant denied, notice or lack thereof was put in issue and plaintiff had burden of proof. Glacier Gen. Assurance Co. v. St. Farm Mut. Auto Ins. Co., 150 M 452, 436 P2d 533 (1968).

Negligence — Proof of Due Care: Where plaintiff's property was damaged by the dropping of fire retardant from airplanes and at the trial he failed to come forth with sufficient evidence to show lack of due care under the circumstances, the trial court properly nonsuited plaintiff upon defendant's motion. Stocking v. Johnson Flying Serv., 143 M 61, 387 P2d 312 (1963).

Res Ipsa Loquitur — Burden on Plaintiff: Res ipsa loquitur does not relieve the plaintiff of the burden of proving actionable negligence, nor is it sufficient that he show that he was injured and that the instrumentality which caused his injury was in the control of the defendant; he must also show that the accident would not have occurred in the ordinary course of events if the defendant had exercised due care. Stocking v. Johnson Flying Serv., 143 M 61, 387 P2d 312 (1963).

Mandamus: On application for Writ of Mandate in the District Court, in establishing the facts of his case, the petitioner is required to do no more than to show that the material allegations of his complaint are sustained by a preponderance of the evidence. State ex rel. Phillips v. Ford, 116 M 190, 151 P2d 171 (1944).

Alteration of Contract — Presumption: The presumption that the purchaser in a contract to purchase real property consented to alteration by addition of his wife's name as a purchaser could be overcome by the denial of an interested witness, and the court could take into consideration all available presumptions tending to corroborate the testimony of either, the interest of each, credibility, etc., and pass upon the weight of the evidence. Kern v. Eichhorn, 111 M 171, 107 P2d 873 (1940).

Proof That Defendant Used Excessive Force — Burden of Plaintiff Trespasser: Court erred in giving instruction that burden of proof rested upon defendant to justify means employed in trying to evict plaintiff when plaintiff and her husband were trespassers and contributed in provoking an alleged assault by defendant. The burden of proof is upon plaintiff to prove that force used by defendant in repelling trespass was excessive. Vaughn v. Mesch, 107 M 498, 87 P2d 177, 123 ALR 1106 (1939).

Ratification: Plaintiffs, by alleging ratification and issue being joined thereon by the defendants, assumed the burden of proof of that fact. Arnold v. Genzberger, 96 M 358, 31 P2d 296 (1934).

Marriage: While the right of dower (since eliminated) was favored in the law, the burden of establishing the existence of a valid marriage as the basis of that right rested upon the person asserting it. Shepherd & Pierson Co. v. Baker, 81 M 185, 262 P 887 (1927).

Life Insurance Fraud: Where a life insurance policy provided that the contract should not become effective unless the first premium had been paid and the policy issued during the "continuance in good health" of the insured, it being admitted that the first premium was paid, the widow was entitled to judgment on the policy in the absence of evidence tending to establish fraud upon which alone the defendant relied to avoid the contract; and the burden to show such fraud was on the defendant. Pelican v. Mut. Life Ins. Co., 44 M 277, 119 P 778 (1911).

Right to Use Water: If one asserts himself to be the owner of the right to use waters, the burden is on him to prove it. Smith v. Duff, 39 M 374, 102 P 981 (1909).

Law Review Articles

Instructing on the Burden of Proof and Reasonable Doubt, Siffert, 8 U. Bridgeport L. Rev. 365 (1987).

Collateral References

Evidence *key* 91.

31A C.J.S. Evidence §§106 through 109, 110.

29 Am. Jur. 2d Evidence §155, et seq.

Unemployment compensation: burden of proof as to voluntariness of separation. 73 ALR 4th 1093.

Burden of proof as to entrapment defense—state cases. 52 ALR 4th 775.

Necessity, in action against husband for necessaries furnished wife, of proving husband's failure to provide necessities. 19 ALR 4th 432.

Burden of proof as to exceptions in coverage under "all risks" insurance. 88 ALR 2d 1129.

Action against manufacturer or seller of product sold in injury-causing container or packaging, burden of proof of proximate causation in. 81 ALR 2d 263.

Action against chiropodist for malpractice, burden of proof in. 80 ALR 2d 1278.

Action against manufacturer or seller for injury caused by clothing, shoes, comb, or similar product, burden of proof in. 80 ALR 2d 710.

Action against manufacturer or seller for injury caused by firearm, explosive, or inflammable, burden of proof of proximate causation in. 80 ALR 2d 517.

Action against manufacturer or seller for injuries caused by automobile or other vehicle, aircraft, boat, or their parts, supplies, or equipment, burden of proof of proximate causation in. 78 ALR 2d 504, §§34.5, 34.6 superseded by 81 ALR 3d 394, §4 superseded by 66 ALR 4th 622.

Action against manufacturer or seller for injury caused by food or food product or beverage sold, burden of proof of proximate cause in. 77 ALR 2d 82, 253.

Contributory negligence in action against physician or surgeon for malpractice, burden of proof as to. 50 ALR 2d 1048.

Negligence of trustee or executor under instrument authorizing or directing retention of investments received under such instrument, burden of proof of. 47 ALR 2d 281.

Attorney's negligence in preparing or conducting litigation, burden of proof of. 45 ALR 2d 11.

Justification for procuring breach of contract, burden of proof of. 26 ALR 2d 1263, §§6, 7 superseded by 96 ALR 3d 1294.

Contributory negligence in relation to liability for injury to customer from object projecting into aisle or passageway in store, burden of proof as to. 26 ALR 2d 687.

Contributory negligence in action for spread of fire purposely and lawfully kindled, burden of proof as to. 24 ALR 2d 267.

Actions under general declaratory judgment acts, burden of proof in. 23 ALR 2d 1243.

Action against owner or operator of motor vehicle for accident resulting from alleged breaking of or defect in steering mechanism, burden of proof in. 23 ALR 2d 552.

Action against one furnishing lockers for hire or to patrons for loss of packages or goods placed therein, burden of proof in. 19 ALR 2d 331.

Bailee, action against for damage to airplane, burden of proof in. 17 ALR 2d 921.

Action by patron of public amusement for accidental injury from cause other than assault, hazards of game or amusement, or condition of premises, burden of proof in. 16 ALR 2d 912.

Burden of proof in action against owner or bailor of horse for injuries by horse to hirer or bailee thereof. 15 ALR 2d 1331.

Burden of proof or justification in action against landowner for killing or injuring trespassing dog. 15 ALR 2d 578.

Burden of proof as to what would be to child's best interest in case involving nonresident's right to custody of child. 15 ALR 2d 463.

Burden of proof in unemployment compensation cases involving leaving employment or unavailability for particular job or duties, because of sickness or disability. 14 ALR 2d 1311.

Burden of proof as to cause in life, accident, or health policy excluding or limiting liability in case of insured's use of intoxicants or narcotics. 13 ALR 2d 1013.

Burden of proof where goods stored in situation governed by Uniform Warehouse Receipts Act are stolen, or are damaged or lost by fire or water. 13 ALR 2d 681.

Burden of proving actual damage from conversion or loss of, or damage to, personal property having no market value. 12 ALR 2d 909.

Burden of proof as to exception in insurance policy as to loss or damage caused by dishonesty of employee. 12 ALR 2d 236.

Burden of proof as to unadjudged incompetency which prevents running of Statute of Limitations. 9 ALR 2d 967.

Burden of proof as to reasonableness of amount of funeral expenses. 4 ALR 2d 1021.

Burden of proof as to nonrevocation of lost will. 3 ALR 2d 952, §9 superseded by 86 ALR 3d 980.

Burden of proof as to change of beneficiary of National Service Life Insurance. 2 ALR 2d 509, superseded 13 ALR Fed. 6.

Burden of proof with respect to succession or estate taxes affecting estates by entirety and other joint estates. 1 ALR 2d 1146.

Partition suit, burden of proof as regards alleged prior voluntary partition of property. 1 ALR 2d 473.

26-1-402. Who has the burden of persuasion.

Compiler's Comments

1983 Amendment: Substituted "Except as otherwise provided by law, a party has the burden of persuasion as to each fact the existence or nonexistence of which is essential to the claim for relief or defense he is asserting." for "Each party must prove his own affirmative allegations. Evidence need not be given in support of a negative allegation, except when such negative allegation is an essential part of the statement of the right or title on which the cause of action is founded, nor even in such case when the allegation is a denial of the existence of a document, the custody of which belongs to the opposite party."

Case Notes

Burden of Proof on Party Asserting Claim in Contested Case Hearing to Present Evidence That Department Decision Violated Law: Plaintiffs requested a hearing before the Board of Environmental Review, contending that an air quality permit issued by the Department of Environmental Quality for a coal-fired power plant and the application for the permit suffered from various procedural and substantive deficiencies. The Board held a contested case hearing and, after establishing that plaintiffs had the burden of proof, approved the Department's decision to grant the permit. On appeal, the Supreme Court affirmed that, as the party asserting the claim in the contested case, plaintiffs had the burden of presenting evidence necessary to establish the fact that the Department's decision violated the law. Mont. Envtl. Information Center v. Dept. of Environmental Quality, 2005 MT 96, 326 M 502, 112 P3d 964 (2005).

Denial of Contractual Liability by Both Defendant Entities — Claims Put in Issue — Burden of Proof — Proposed Findings to Be Based Upon Evidence — No Evidence of Intent to Mislead as Basis for Relief From Judgment: Wright Oil sued Goodrich for petroleum products allegedly delivered but not paid for. Goodrich denied liability, claiming that the products were for the use of West Yellowstone Snowmobile Rentals, Inc. (WYSR), which owned Westgate Texaco, operated by Goodrich. Wright Oil amended its complaint to include WYSR, and after a bench trial, the District Court held against Goodrich because no evidence had been presented proving a contract between WYSR and Wright Oil. Wright Oil then filed a motion for relief from judgment under Rule 60(b)(6), M.R.Civ.P. (Title 25, ch. 20), seeking relief from the District Court's failure to hold against WYSR. On the basis of evidence not presented at trial, the District Court granted the motion and ordered an evidentiary hearing to reopen the case against WYSR regarding WYSR's contractual liability to Wright Oil. WYSR appealed. The Supreme Court held that the District Court incorrectly granted the motion because the circumstances of the District Court's failure to hold WYSR liable for the debt to Wright Oil were not so extraordinary as to warrant relief from judgment under Rule 60(b)(6), M.R.Civ.P. The Supreme Court noted that WYSR's denial of its liability put the allegation of its contractual liability at issue under Rule 8(b), M.R.Civ.P. (Title 25, ch. 20), and under 26-1-401 and this section, Wright Oil had the burden of going forward with the evidence of WYSR's contractual liability but failed to present evidence of a contractual relationship between WYSR and Wright Oil. The fact that Goodrich alleged that WYSR was liable for the debt could not, the Supreme Court held, be taken as an admission by WYSR that it was liable for the amounts due. Further, the Supreme Court noted that Wright Oil should not have been surprised by WYSR's proposed findings of fact that it was not liable for the debt because under Rule 52(a), M.R.Civ.P. (Title 25, ch. 20), a party's proposed findings of fact must be supported by the evidence, and Wright Oil failed to produce that evidence of liability. Wright Oil & Tire Co. v. Goodrich, 284 M 6, 942 P2d 128, 54 St. Rep. 811 (1997).

Break in Chain of Evidence Alleged — Burden of Proof: In a prosecution for deliberate homicide in which the defendant's fingerprints were found at the crime scene and the defendant

objected to admission of the fingerprint evidence on the basis of an alleged break in the chain of evidence, which occurred because there could have been a master key that could have been used to gain access to the evidence, the court did not err in overruling the defendant's objection to the evidence. Once the State has shown prima facie that there has been no tampering or alteration of an exhibit, the burden of proving alteration shifts to the defendant. The speculation by the defendant is insufficient to meet the burden requiring proof of alteration. St. v. Close, 191 M 229, 623 P2d 940, 38 St. Rep. 177 (1981).

Insanity Defense — Constitutionality of Burden of Proof: Defendant attacked the constitutionality of the statute requiring that defendant's counsel prove insanity because the Montana statute directly contradicted previous Montana case law. The case law relied on a U.S. Supreme Court decision later described by the U.S. Supreme Court as establishing no constitutional doctrine, but only the rule to be followed in the federal courts. Just as Congress could conceivably change the federal rule set forth in a Supreme Court case, the Montana Legislature clearly had the power to change the rule announced in the early Montana cases. St. v. McKenzie, 186 M 481, 608 P2d 428, 37 St. Rep. 325 (1980).

Distribution of Property Based on Fraud — Burden of Proof: Where appellants alleged that a decree of distribution of the decedent's estate was based on a fraudulently obtained consent decree, the District Court's decree was proper, as the appellants failed to prove by a preponderance of the evidence that they would have taken more under the will but for the alleged fraud. Estate of Wallace v. McAlear, 186 M 18, 606 P2d 136, 37 St. Rep. 158 (1980).

Partial Payment — Affirmative Defense: Partial payment by special deposit was an affirmative defense which debtor had burden of proving in suit on note; that burden of proof required that it be shown that payment was made on the particular obligation in controversy. Baker Nat'l Bank v. Lestar, 153 M 45, 453 P2d 774 (1969), followed in Ins. Specialists, Inc. v. Longfellow, 201 M 132, 654 P2d 500, 39 St. Rep. 2005 (1982).

Notice Denied by Defendant: Where plaintiff alleged giving of notice which defendant denied, notice or lack thereof was put in issue and plaintiff had burden of proof. Glacier Gen. Assurance Co. v. St. Farm Mut. Auto. Ins. Co., 150 M 452, 436 P2d 533 (1968).

Proof of Allegations for Mandate: On application for Writ of Mandate in the District Court, in establishing the facts of his case, the petitioner is required to do no more than to show that the material allegations of his complaint are sustained by a preponderance of the evidence. State ex rel. Phillips v. Ford, 116 M 190, 151 P2d 171 (1944).

Nonpayment Alleged Necessary as Part of Claim for Relief: Where the allegation of nonpayment in a counterclaim is necessary to state a cause of action, it is material, and being deemed denied, it must be proved, the burden resting upon the defendant. Yancey v. N. Pac. Ry., 42 M 342, 112 P 533 (1910).

Ownership of Water Rights: If one asserts himself to be the owner of the right to use waters claimed by him, the burden is on him to prove it. Smith v. Duff, 39 M 374, 102 P 981 (1909).

Exemption From Taxation: In an action by the State to recover a license tax from a telephone company, the burden was on the defendant to establish the number of telephones used exclusively in interstate business and that they were the same instruments attempted to be taxed. St. v. Rocky Mtn. Bell Tel. Co., 27 M 394, 71 P 311 (1903).

Collateral References

Pleading *key* 374.

71 C.J.S. Pleading §774.

Burden of proof as to commercially reasonable disposition of collateral. 59 ALR 3d 369.

26-1-403. Instructions to jury on standard of proof required to meet burden of persuasion.

Case Notes

Criminal Cases 48
Civil Cases 50

CRIMINAL CASES

Question of Whether Circumstantial Evidence Supports Finding of Guilt or Innocence for Trier of Fact: Bromgard moved for a directed verdict of acquittal on charges of rape, arguing that the state had only provided circumstantial evidence and no fingerprints or other forensic evidence. The Supreme Court held that a conviction could be based on circumstantial evidence alone and that if the evidence was susceptible to two interpretations, one supporting guilt and the other supporting innocence, the trier of fact determines which is most reasonable. St. v. Bromgard, 261 M 291, 862 P2d 1140, 50 St. Rep. 1320 (1993), followed in St. v. Sullivan, 266 M

313, 880 P2d 829, 51 St. Rep. 827 (1994), St. v. Treible, 275 M 59, 910 P2d 237, 53 St. Rep. 38 (1996), St. v. Enright, 1998 MT 322, 292 M 204, 974 P2d 1118, 55 St. Rep. 1308 (1998), St. v. Sittner, 1999 MT 103, 294 M 302, 980 P2d 1053, 56 St. Rep. 434 (1999), and St. v. Billedeaux, 2001 MT 9, 304 M 89, 18 P3d 990 (2001).

Jury Instruction Reducing State's Burden of Proof — Reversible Error: The trial court used one of the prosecution's jury instructions, which the defendant argued allowed the jury to use a preponderance of the evidence standard to convict him. The Supreme Court agreed and held that the instruction constituted reversible error because it reduced the state's burden of proving guilt beyond a reasonable doubt. St. v. Croteau, 248 M 403, 812 P2d 1251, 48 St. Rep. 484 (1991).

Reasonable Doubt Standard — Separate Instruction Eliminating Confusion: Defendant claimed two instructions defining the offense were inconsistent; both set forth the elements of the crime, but the second, prepared by the defendant, also incorporated some facts of the case and the reasonable doubt standard. Defendant claimed he could have been convicted under the first instruction under a standard less than that of reasonable doubt. This argument failed because a separate instruction requiring a reasonable doubt standard for acquittal was given the jury. St. v. DeSilva, 209 M 169, 679 P2d 1237, 41 St. Rep. 620 (1984).

Sandstrom Instruction — Not Harmless Error if Intent Disputed Issue at Trial: Hamilton appealed federal District Court's dismissal of his habeas corpus petition on grounds that Sandstrom instruction given in his homicide trial was not harmless error. The court of appeals held that the giving of a Sandstrom instruction cannot be held harmless error if intent is a disputed issue at trial. If a criminal defendant's intent is a disputed issue at trial, the reviewing court cannot rationally conclude beyond a reasonable doubt that an unconstitutional Sandstrom instruction given to a jury did not taint its verdict even if substantial evidence of intent exists. Petition of Hamilton, 721 F2d 1189 (9th Cir. 1983).

Sandstrom Instruction — Harmless Error — Not Related to Disputed Issue: Because the victim was shot four times in the head at close range and the only disputed issue in the case was the identity of the perpetrator, error by the trial court in using the Sandstrom instruction was harmless. McGuinn v. Crist, 657 F2d 1107 (9th Cir. 1981).

Clear and Convincing Evidence: Identification testimony, coupled with testimony to the effect that one defendant was seen with the codefendant immediately prior to the commission of a theft, is sufficient to meet the clear and convincing standard required to show association of another theft to the theft at which defendant was seen with the codefendant. St. v. Strain, 190 M 44, 618 P2d 331, 37 St. Rep. 1763 (1980).

Sandstrom Instruction — Viewing Instructions as a Whole — Assurance of Effect on Jury: Petition for Writ of Habeas Corpus was filed in U.S. District Court. When the Sandstrom instruction (Sandstrom v. Mont., 442 US 510, 61 L Ed 2d 39, 99 S Ct 2450 (1979)) was given at a homicide trial, it may be that the defect can be cured by viewing all of the instructions as a whole; other instructions may be so "rhetorically inconsistent" (ibid. 518-519, n. 7) with the Sandstrom instruction that they overcome its presumptive effect. The court may not speculate on the curative effects of the other instructions on the jury; it must be assured that the jury did not find the defendant guilty on the grounds that he merely acted voluntarily, rather than finding the necessary criminal intent. In examining the instructions given, the court was not so assured and the petition for a Writ of Habeas Corpus was granted. McGuinn v. Crist, 492 F. Supp. 478, 37 St. Rep. 1159 (D.C. Mont. 1980), reversed, 657 F2d 1107 (9th Cir. 1981).

Sandstrom Jury Instruction — Presumptions of Intent of Consequences of Acts — Harmless Error: Defendant charged with mitigated deliberate homicide alleged as error the giving of the jury instruction, "The law presumes that a person intends the ordinary consequences of his voluntary acts." Under Montana law, causing the death of another becomes deliberate homicide only when it is committed purposely or knowingly. These elements are necessary to the proof of this particular crime and must be proved beyond a reasonable doubt by the prosecution. Intent is a difficult element to prove. The evidence normally must be in the nature of outward manifestations of the defendant's state of mind, but when a telephone line to the police station from the scene of the murder happened to be open and the defendant was overheard at length, the court knew what he was thinking from his own words. It is difficult to conceive of a better indication as to defendant's intent. Also, the officer heard the fight at the time these words were spoken and another officer found the defendant and the victim's body minutes later. The only contested element here was intent, and the evidence on it was overwhelming. Basing its holding on the probable impact of the instructions upon the minds of the average jury, in the light of the evidence, the impact of the instruction upon the jury could not reasonably have contributed to the verdict. The error in giving the contested instruction was harmless. St. v. Hamilton, 185 M 522, 605 P2d 1121, 37 St. Rep. 70 (1980), certiorari denied, 447 US 924, 65 L Ed 2d 117, 100 S Ct

3017 (1980); dismissal of federal District Court habeas corpus petition reversed on Sandstrom grounds, sub nom. Petition of Hamilton, 721 F2d 1189 (1983).

Jury Instructions — Intention of Consequences of Acts — Sandstrom Distinguished: Distinguishing Sandstrom, the court noted that the jury was not given a mandatory presumption, but it was told it could reasonably infer the defendant's intent for all the consequences which one acting in a like position would reasonably have expected. Nothing in the instruction lessened the duty of the State to prove every element of the crime charged beyond a reasonable doubt, nor did it affect the presumption of defendant's innocence. St. v. Bad Horse, 185 M 507, 605 P2d 1113, 37 St. Rep. 45 (1980), distinguishing Sandstrom v. Mont., 442 US 510, 61 L Ed 2d 39, 99 S Ct 2450 (1979).

Jury Instructions — Presumption of Innocence: In a criminal prosecution for theft of an automobile in which the defendant timely requested and was twice denied an instruction on the presumption of innocence, an instruction on the State's burden of proof could not supplant an instruction on the presumption of innocence. The standard for prejudicial effect of the lack of the instruction was established in St. v. Harrison, 23 M 79, 57 P 647 (1899), and is more strict than that used by the U.S. Supreme Court. It is per se reversible error to deny the instruction. St. v. Williams, 185 M 140, 604 P2d 1224, 36 St. Rep. 1959 (1979).

Direct Criminal Evidence Susceptible to Two Constructions: Defendant's offered instruction would have instructed the jury that if the evidence is susceptible to two constructions, one consonant with guilt and the other consonant with innocence, it is the jury's duty to adopt the interpretation that is consonant with innocence. The District Court properly refused to give this instruction. That instruction is generally given where the State relies on circumstantial or indirect evidence to prove its case. The instruction has no application where the evidence is direct with respect to the crime charged. St. v. Freeman, 183 M 334, 599 P2d 368, 36 St. Rep. 1622 (1979), followed in St. v. Ryan, 229 M 7, 744 P2d 1242, 44 St. Rep. 1735 (1987).

"Reasonable Doubt" Standard:

Defendant charged with crime may not be convicted on conjectures, however shrewd, on suspicions, however justified, or on probabilities, however strong, but only upon evidence which establishes guilt beyond a reasonable doubt, i.e., upon proof such as logically to compel the conviction that the charge is true. St. v. Konon, 84 M 255, 274 P 1060 (1929).

Suspicion, however well founded, that defendant is guilty of the crime for the commission of which he is being tried is not sufficient to meet the requirements of this section and does not justify a conviction. To justify a conclusion of guilt, the criminatory circumstances proved must be consistent with each other and so clearly justify that conclusion that they exclude any other rational hypothesis. St. v. Brower, 55 M 349, 177 P 241 (1918).

In a criminal case, the State must prove the defendant's guilt beyond a reasonable doubt; evidence that does no more than to cast suspicion upon the defendant is not enough; mere suspicions or probabilities, however strong, are not a sufficient basis for a conviction. St. v. Sieff, 54 M 165, 168 P 524 (1917).

"Moral Certainty" — Same Degree of Proof: That degree of proof in a criminal case which produces conviction in an unprejudiced mind is denominated "moral certainty", and "moral certainty" and the phrase "beyond a reasonable doubt" as employed in this section are synonymous. St. v. Mun, 76 M 278, 246 P 257 (1926).

Proof of Element of Crime: In a prosecution against a telegraph company for furnishing information for bets on horseraces, there must be evidence that the defendant communicated the information or guilt cannot be established beyond a reasonable doubt. St. v. Postal Tel. Cable Co., 53 M 104, 161 P 953 (1916).

CIVIL CASES

Improper Standard of Review Applied by Board of Environmental Review in Contested Case Hearing — Remand: Plaintiffs requested a hearing before the Board of Environmental Review, contending that an air quality permit issued by the Department of Environmental Quality for a coal-fired power plant and the application for the permit suffered from various procedural and substantive deficiencies. The Board held a contested case hearing, addressed plaintiffs' contentions whether the Department's decision was erroneous, arbitrary, capricious, or an abuse of discretion, and approved the Department's decision to grant the permit. Plaintiffs petitioned for judicial review of the Board's order, and the District Court affirmed the Board's findings, conclusions, and order. On appeal, the Supreme Court noted that hearings related to the issuance of an air quality permit must be conducted under the contested case provisions of Title 2, ch. 4, part 6, rather than part 7, which sets out the standard of judicial review. The role of the Board was to receive evidence from the parties, enter findings of fact based on a preponderance of

the evidence, and then enter conclusions of law based on the findings. The determination of whether an agency decision is erroneous, arbitrary, capricious, or an abuse of discretion is the role of the District Court. Thus, the Board applied a standard of review not legally available to it as the finder of fact in a contested case hearing. The District Court erred in determining that the Board applied the correct standard, so the case was remanded with instructions that the Board enter new findings of fact and conclusions of law in conformity with Title 2, ch. 4, part 6. Mont. Envtl. Information Center v. Dept. of Environmental Quality, 2005 MT 96, 326 M 502, 112 P3d 964 (2005).

Not Error to Fail to Instruct That Severity of Injury Did Not Mean There Must Be Negligence: A doctor in a medical malpractice case argued on appeal that the judge should have given a "mere fact of injury" instruction because no instruction was given to prevent the jury from believing that because the injuries were so severe, there must have been negligence. There was no error because the given instructions stated in part: (1) that plaintiff had the burden of proving the doctor was negligent, that the plaintiff was injured, and that the doctor's negligence was a proximate cause of plaintiff's injury; (2) that it is the doctor's duty to use the skill and learning ordinarily used in like cases by other doctors practicing in that same specialty and holding the same national board certification and that violation of that duty is negligence; and (3) that the proper test for determining negligence in a doctor's actions is whether he met the accepted standards of skill and care. O'Leyar v. Callender, 255 M 277, 843 P2d 304, 49 St. Rep. 1008 (1992).

Instruction on Negligent Misrepresentation Not Given — Action for Fraud: There was no error when District Court instructed the jury on constructive fraud but not on negligent misrepresentation. In Montana, an action for negligent misrepresentation is an action for fraud, so the jury was adequately instructed. Bushnell v. Cook, 221 M 296, 718 P2d 665, 43 St. Rep. 825 (1986), partially overruled in Cechovic v. Hardin & Associates, Inc., 273 M 104, 902 P2d 520, 52 St. Rep. 854 (1995).

Instruction Given on Constructive Fraud — Instruction on Bad Faith Superfluous: The District Court instructed the jury on constructive fraud but not on breach of the implied covenant of good faith and fair dealing, which plaintiff contended was error. The Supreme Court noted that the jury found no breach of duty under the instruction on constructive fraud, which does not require a showing of fraudulent intent. An instruction on bad faith would require plaintiff to prove intentional concealment. The court held that if plaintiff could not meet the burden of proof on constructive fraud, she could not meet the higher burden of proof on bad faith; thus, the instruction would have been superfluous. Bushnell v. Cook, 221 M 296, 718 P2d 665, 43 St. Rep. 825 (1986), partially overruled in Cechovic v. Hardin & Associates, Inc., 273 M 104, 902 P2d 520, 52 St. Rep. 854 (1995).

Jury Instructions — "Locality Rule" Standard Not Relevant for Judging Medical Specialist — "Loss of Chance": Woman sued her doctor, a national board certified orthopedic surgeon, for damages for alleged negligent medical treatment. Defendant had treated plaintiff for misdiagnosed knee problems for 4 months without ordering diagnostic X-rays before referring plaintiff for surgery to out-of-state doctor who discovered a giant cell tumor in plaintiff's knee. Plaintiff alleged that defendant's failure to order diagnostic films early in treatment resulted in her losing any chance to have less radical surgery and preserve her natural knee. Jury returned verdict in favor of defendant, and plaintiff appealed. Supreme Court vacated District Court judgment and remanded for new trial. Supreme Court held that District Court committed reversible error by instructing jury on the "locality rule" as appropriate standard of care rather than giving plaintiff's proposed instruction holding board certified specialists to national standards of the specialty. Supreme Court also held that on retrial, plaintiff is entitled to a "loss of chance" instruction. The trier of fact should determine whether defendant's negligence was a substantial factor in reducing plaintiff's chances of obtaining a better result rather than whether plaintiff would have obtained a better result with earlier diagnosis. Aasheim v. Humberger, 215 M 127, 695 P2d 824, 42 St. Rep. 235 (1985); holding explained and extended to include Board-certified family practitioners in Glover v. Ballhagen, 232 M 427, 756 P2d 1166, 45 St. Rep. 1168 (1988).

Conflicting Evidence Resolved by Jury — Substantial Evidence to Support Verdict: Where the plaintiff brought a negligence action against the defendant for injuries sustained at an outdoor beer party when the defendant allegedly tossed a large rock that struck the plaintiff on the head, the Supreme Court found that there was substantial evidence to support the jury's verdict for the defendant. The evidence was equally supportive of the defendant's theory (that the plaintiff tripped and fell) as it was of the plaintiff's theory. The court held that if there is conflicting evidence in the record, the credibility and weight given to that evidence is the

province of the jury and not the Supreme Court. Anderson v. Jacqueth, 205 M 493, 668 P2d 1063, 40 St. Rep. 1451 (1983). See also Wheeler v. Bozeman, 232 M 433, 757 P2d 345, 45 St. Rep. 1173 (1988), and Stewart v. Fisher, 235 M 432, 767 P2d 1321, 46 St. Rep. 116 (1989).

Sufficiency of Objection — Incorrect Statement of Law — Sufficiency of Evidence: In settling a boundary dispute the Supreme Court held that the objection to a jury instruction as being an incorrect statement of law was insufficient, not having specified the defect. Considering the jury instructions as a whole, the Supreme Court held the jury was fully and correctly instructed on the law, that there was substantial evidence to support its verdict, and that no prejudice to the defendants arose from the failure of the court to give a proffered jury instruction. Nott v. Booke, 194 M 251, 633 P2d 678, 38 St. Rep. 1507 (1981).

Effect of Uncontradicted Evidence: Where there is direct testimony in the record, uncontradicted by other direct testimony, a court or jury is not bound thereby and can render a decision contrary to such direct testimony based on adverse circumstantial evidence. Holenstein v. Andrews, 166 M 60, 530 P2d 476 (1975).

Lease — Cancel and Terminate: In an action to cancel and terminate a lease, the burden was on the plaintiffs to prove, by a preponderance of the evidence, that the defendants had violated the lease as charged in the complaint. Davis v. Burton, 128 M 434, 278 P2d 213 (1955).

Divorce — Denial of Marriage: The denial in an answer of an allegation in a complaint for divorce that the plaintiff and defendant are husband and wife imposes upon the plaintiff the burden of proving that fact by a preponderance of the evidence. Sell v. Sell, 58 M 329, 193 P 561 (1920).

Contracts — Fraud or Lack of Mental Capacity: Under this section, fraud or lack of mental capacity to enter into a contract may be established by a bare preponderance of the evidence. Koerner v. N. Pac. Ry., 56 M 511, 186 P 337 (1919).

Single Witness: A preponderance of the evidence may be established by the testimony of a single witness as against a greater number of witnesses who testify to the contrary. Parchen v. Chessman, 53 M 430, 164 P 531 (1917).

Reformation of Instrument — Mistake: To warrant reformation of an instrument for mistake, it is not necessary that the mistake be made to appear beyond a reasonable doubt or by any quantum of proof beyond a bare preponderance, as provided in this section. Parchen v. Chessman, 53 M 430, 164 P 531 (1917).

Support of Verdict — Conflicting Evidence: In civil actions, where the evidence is conflicting, a preponderance of the evidence is the least that will support a verdict. Flaherty v. Butte Elec. Ry., 42 M 89, 111 P 348 (1910).

Support of Verdict — Evidence Not Conflicting: In civil actions, where the evidence is not conflicting, the verdict must be in favor of the party who has the affirmative of the issue and who has produced the uncontradicted evidence in support of it. Flaherty v. Butte Elec. Ry., 42 M 89, 111 P 348 (1910).

"Clearly and Distinctly Proven" — Greater Burden Than Preponderance: An instruction charging that fraud is never presumed "but must be clearly and distinctly proven" was erroneous, in that it advised the jury that something more than a bare preponderance of the evidence was necessary to prove fraud, and imposed too great a burden upon the party alleging it. Fleming v. Lockwood, 36 M 384, 92 P 962 (1907); Gehlert v. Quinn, 35 M 451, 90 P 168 (1907).

Partnership — Proof: Under this section, it was error to charge that, in actions against a firm by a third person, less strictness of proof was required to show partnership than is required in an action brought by one partner against another, preponderance of the evidence being required in both cases. Lawrence v. Westlake, 28 M 503, 73 P 119 (1903). See also Gallick v. Bordeaux, 31 M 328, 78 P 583 (1904).

Collateral References

Burden of proof on defense that killing was accidental. 63 ALR 3d 936.

Burden of proof of defendant's age, in prosecution where attainment of particular age is statutory requisite of guilt. 49 ALR 3d 526.

Modern status of rules as to burden and sufficiency of proof of mental irresponsibility in criminal case. 17 ALR 3d 146.

Part 5
Inferences

26-1-501. Inference defined.

Compiler's Comments

1983 Amendment: Substituted "which the trier of fact may make from the evidence" for "which the reason of the jury makes from the facts proved, without an express direction of the law to that effect".

Case Notes

Circumstantial Evidence Sufficient to Affirm Conviction for Threats and Improper Influence in Official and Political Matters: After a confrontation with state highway crew members, the Heffners were convicted of threats and other improper influence in official and political matters, a felony under 45-7-102. They appealed on grounds that the convictions were based on mere suspicion or conjecture. Although the evidence presented was circumstantial, a rational jury could nevertheless infer that the Heffners were upset that their swift travel on the road was impeded by the duties of the road grader operator and that the Heffners took out their anger and frustration on the grader operator. The circumstantial evidence was sufficient to support the convictions. St. v. Heffner, 1998 MT 181, 290 M 114, 964 P2d 736, 55 St. Rep. 732 (1998).

Experiments — Simulated Accident: In action by a father alleging negligent care and supervision of his son at the YMCA swimming pool, evidence showed that one of five qualified lifeguards at the pool found the 6-year-old boy submerged about 4 ½ feet from the surface, that the lifeguard and a young boy pulled the son to the surface, and that one or more lifeguards carried the boy to the edge of the pool. The trial judge admitted evidence of an experiment in which one of the lifeguards threw a diving ring into the pool where the son was recovered and timed how long it took two young boys (one of which had helped save the son) to retrieve it, and then threw a 10-pound diving weight into the pool so that it settled into the pool. The boys were unable to retrieve it. From this the lifeguard concluded that the son was not on the bottom of the pool when rescued. The evidence was properly admitted since it supported the conclusion that the son was rescued in a shorter period of time than it would take for brain damage to result through submersion in water, and the experiment was substantially similar to the accident and rescue so as to lay a sufficient foundation for admission of testimony regarding the experiment. Johnson v. YMCA, 201 M 36, 651 P2d 1245, 39 St. Rep. 1937 (1982).

Omission of Jury Instruction on Nonconclusiveness of Defendant's Proximity to Scene — No Error: The trial court did not err in omitting an instruction to the effect that defendant's proximity to the crime did not, in and of itself, support a finding of guilt when the prosecution's case was based on evidence other than mere presence of the defendant at the scene of the crime. St. v. Sheriff, 190 M 131, 619 P2d 181, 37 St. Rep. 1793 (1981).

Inference Distinguished From Suspicion: An inference is to be distinguished from mere suspicion, which is "the act or an instance of suspecting: imagination or apprehension of something wrong or hurtful without proof or on slight evidence" (quoting Webster's New International Dictionary, 3rd ed. 1961). St. v. Barick, 143 M 273, 389 P2d 170 (1964).

Continuing Condition Inferred — Foundation: If an inference is to be permitted to show a previous condition, the foundation must show that the substance was in the same state or condition at a time not too remote and that the nature of the substance is constant. Richardson v. Farmers Union Oil Co., 131 M 535, 312 P2d 134 (1957).

Instructions to Jury — Abstract of Section: An instruction containing an abstract statement of the statutory law as set out in this section and sections 93-1301-3, R.C.M. 1947 (superseded by Rule 301, M.R.Ev.), and 26-1-502 is not error when the facts are few and simple. Gobel v. Rinio, 122 M 235, 200 P2d 700 (1948).

Usual Propensities or Passions of Man: In an action for damages resulting from negligence in driving automobile, an instruction touching upon the usual propensities or passions of man when there was no evidence touching on such subject was harmless, if error. Gobel v. Rinio, 122 M 235, 200 P2d 700 (1948).

Collateral References

Admissibility of evidence as to financial condition of debtor on issue as to payment of debt. 9 ALR 2d 205.

26-1-502. When an inference arises.

Case Notes

Inferring Injury Caused by Auto Accident: Jury trying personal injury action could properly choose to infer from the evidence presented that an auto accident allegedly caused by negligence

of defendant was the direct cause of plaintiff's injuries, and Supreme Court would not supplant jury's findings with one of its own. Allers v. Willis, 197 M 499, 643 P2d 592, 39 St. Rep. 745 (1982).

Continuing Existing Conditions — Length of Time Permissible: The presumption of the continued existence of a person, a personal relation, or a state of things is prospective and not retrospective, and the law does not presume, from proof of the existence of present conditions or facts, that the same facts or conditions had existed for any length of time previously. Richardson v. Farmers Union Oil Co., 131 M 535, 312 P2d 134 (1957).

Circumstantial Evidence as Basis for Inference: This statute makes no distinction between "a fact legally proved" by direct evidence and "a fact legally proved" by circumstantial evidence. A fact, although arrived at by indirect or circumstantial evidence, may serve as a basis for an inference. Fegles Constr. Co. v. McLaughlin Constr. Co., 205 F2d 637 (9th Cir. 1953).

Instructions to Jury — Detail Required: After having correctly defined an inference and stating that it must be founded upon a fact legally proved, it is not error for the court to refuse to instruct the jury that an "inference cannot be founded upon another inference, or upon facts inferred from other facts legally proved". St. v. Blaine, 45 M 482, 124 P 516 (1912).

Verdict Supported by Inference: A verdict may be founded upon an inference; thus, if a passenger of one railroad company is injured at the depot platform of another company by stepping into an uncovered waterhole in the platform, an inference that the employees omitted to recover the hole is justified and authorizes a recovery against the latter company. Jenkins v. N. Pac. Ry., 44 M 295, 119 P 794 (1911).

Collateral References

Medical malpractice: presumption or inference from failure of hospital or doctor to produce relevant medical records. 69 ALR 4th 906, superseded by 121 ALR 5th 157.

Necessity and content of instructions to jury respecting reasons for or inferences from accused's absence from state criminal trial. 31 ALR 4th 676.

What constitutes "recently" stolen property within rule inferring guilt from unexplained possession of such property. 89 ALR 3d 1202.

Modern status: instruction allowing presumption or inference of guilt from possession of recently stolen property as violation of defendant's privilege against self-incrimination. 88 ALR 3d 1178.

Validity and construction of statute creating presumption or inference of intent to sell from possession of specified quantity of illegal drugs. 60 ALR 3d 1128.

Modern status of rules against basing an inference upon an inference or a presumption upon a presumption. 5 ALR 3d 100.

Inference of negligence in action against druggist for injury caused by drug or medicine sold. 79 ALR 2d 328.

Acceptance of deed by grantee, inferences as to. 74 ALR 2d 1006.

Inference of criminal intent in prosecution for bigamy or allied offense, defended on ground of mistaken belief in existence, validity, or effect of divorce or separation. 56 ALR 2d 931.

Fraud of public accountants, inference of. 54 ALR 2d 349, §§1 through 12 superseded by 92 ALR 3d 396.

Diagnosis of fracture or dislocation, inference of negligence in. 54 ALR 2d 275.

Inference of malice or intent to kill where killing is by blow without weapon. 22 ALR 2d 855.

Part 6
Presumptions

Part Compiler's Comments

Table D — Presumptions: The following table on Presumptions was prepared by the Montana Supreme Court Commission on the Montana Rules of Evidence as an aid for lawyers in considering the proposed Montana Rules of Evidence (adopted 1977, see ch. 10). The table contains references to the Revised Codes of Montana, 1947; the current disposition of those sections has been set forth in brackets by the annotator. The table has been updated to reflect statutory presumptions enacted since 1977. The presumptions added by the compiler appear in brackets.

TABLE D
PRESUMPTIONS

Rule 301 of the Montana Rules of Evidence follows the case law in its interpretation of Montana statutes and gives presumptions the effect of evidence. Since such importance is given presumptions, the [Montana Supreme Court Commission on Rules of Evidence] has included

this table listing in Part I Statutory Conclusive Presumptions, in Part II Statutory Disputable Presumptions, and in Part III Common Law Disputable Presumptions. This list is intended only as an aid to Montana judges and lawyers, and the inclusion or exclusion from this table of any particular presumption should have no effect on a court's treatment of that particular presumption. Therefore, this table is not intended as an authority for whether or not any particular presumption exists, but only as a research guide to presumptions generally.

Part I. Statutory Conclusive Presumptions

The general statute listing statutory conclusive presumptions is R.C.M. 1947, Section 93-1301-6 [26-1-601]. It reads as follows:

[See text of statute at 26-1-601.]

Other conclusive presumptions referred to in subdivision 7 of this section are arranged according to general area of law in which they fall.

[Aircraft]

[Section 67-1-211 provides that any crewmember with a blood alcohol concentration of 0.04% or more is conclusively presumed to be under the influence.]

Local Government

[Section 7-3-154 provides that the validity of the procedures whereby any charter or alternative plan of government is adopted is subject to judicial review initiated by petition; if no petition is filed within the required time period, the validity of the manner of adoption is conclusively presumed;]

[Section 7-11-310 provides that the validity of the procedures used in adopting any service consolidation or transfer is subject to judicial review initiated by petition; if no petition is filed within the required time period, the validity of the manner of consolidation or transfer is conclusively presumed;]

R.C.M. 1947, Section 16-5115.15(3) [section terminated June 30, 1977], providing the means of enforcing the local government revision laws, allows judicial review if a petition requesting it is filed challenging the procedures for a selection of a new form of government; if no petition is filed for such review, the compliance with all the procedures of the laws and the validity of adoption of the form of government is conclusively presumed.

[Section 7-13-3013 provides that for purposes of a local government's deletion of part of the area of a proposed water supply or sewer district, it is conclusively presumed that an area within 1,500 feet of a proposed or existing sanitary sewer is contributing to the pollution of a watercourse in the proposed area.]

Property

[Sections 7-2-4210, 7-2-4331, 7-2-4421, 7-2-4511, 7-2-4621, and 7-2-4761 provide that land that has been shown on municipal maps as being within municipal boundaries but is later found to have been improperly annexed is conclusively presumed to be annexed and may be so recorded if municipal taxes have been paid on it for a period of 7 years;]

R.C.M. 1947, Section 11-3914 [7-15-4265] states that any instrument executed by a municipality conveying any right, title or interest in property under the Urban Renewal Act shall be conclusively presumed to have been executed in compliance with the provision of the act;

Section 29-208 [31-2-315, now repealed] states that certain transfers of property are conclusively presumed fraudulent where not accompanied by an immediate delivery and followed by an actual and continued change of possession;

Section 45-414 [71-3-612] states that a court shall conclusively presume that a party purchasing property subject to a logger's lien is not an innocent third party nor a bona fide owner and then lists exceptions.

[Public Bonds]

[Section 17-5-1625 provides that after issuance, all bonds or notes of the Board are conclusively presumed to be fully authorized and issued under all the laws of this state.]

Statutory Construction

[Section 2-4-404 states that if the Administrative Code Committee (amended in 1999 to read "appropriate administrative rule review committee") has conducted a poll of the Legislature regarding the validity of a proposed rule and a majority of both houses find the proposed rule is contrary to the intent of the Legislature, the rule must be conclusively presumed to be contrary to the legislative intent in any court proceeding involving its validity;]

R.C.M. 1947, Section 81-430 [not codified, severability clause] states that if any section, clause, paragraph or provision of the act providing for leasing of state land shall be found invalid, it shall be conclusively presumed that the act would have been passed by the Legislature without that section, paragraph or clause and that the act as a whole shall not be declared invalid;

Section 81-2613 [not codified, severability clause] provides that if any section, clause, paragraph or provision of an act providing for leases of geothermal resources is found invalid by a court it shall be conclusively presumed that the act would have been passed by the Legislature without the invalid section, paragraph or clause and that the act as a whole shall not be declared invalid.

Tax

R.C.M. 1947, Section 84-5606 [16-11-112] states all taxes paid pursuant to the act requiring a cigarette tax shall be conclusively presumed to be direct taxes on the retail consumer precollected for the purpose of convenience and facility only.

Water Law

[Section 85-2-212 provides that the Supreme Court may issue an order stating that the failure to file a required claim will result in a conclusive presumption that the water right or claim has been abandoned. See also 85-2-226, stating that failure to file a claim establishes a conclusive presumption of abandonment;]

R.C.M. 1947, Section 16-4415 [7-13-113] states that it will be conclusively presumed that an area which is within 1,500 feet of a proposed or existing sanitary sewer is contributing to the pollution of a water course in the proposed area, for the purpose of the Act providing for municipal storm sewer systems.

Wills

R.C.M. 1947, Section 91A-3-406 [72-3-309] provides that in formal testacy proceedings, if the will is self-proved, compliance with requirements for execution is conclusively presumed.

Workers' Compensation

R.C.M. 1947, Section 92-1315 [repealed] states an irrebuttable presumption of total disability due to pneumoconiosis where certain requirements are met.

Part II. Statutory Disputable Presumptions

The general statute providing statutory disputable presumptions is R.C.M. 1947, Section 93-1301-7 [26-1-602] which states:

[See 26-1-602 for text of section.]

Other Disputable Statutory Presumptions

Other disputable statutory presumptions are set forth under heading of General Areas of the law in which they fall.

[Agriculture]

[Section 80-5-111 (renumbered 80-5-129) provides that the certificate of the seed laboratory regarding seed samples is presumptive evidence of the facts contained therein;]

[Section 81-5-109 provides that there is a presumption of forfeiture as to all property used for the transportation of stolen livestock.]

Common Carriers

R.C.M. 1947, Section 8-107.2 [69-12-404] states that when the Public Service Commission has allowed a carrier's petition to suspend its intrastate operating authority the suspension establishes a presumption of absence of public convenience and necessity;

Section 8-121 [69-12-106] provides that any person, firm or corporation maintaining a public motor vehicle stand, holding forth transportation for compensation, or soliciting the transportation of persons or property for compensation is prima facie deemed a motor carrier subject to the licensing and regulations of the Motor Carriers' License and Regulation sections;

Section 8-602 [69-11-406] states that the consignor of freight is presumed to be liable for the freightage unless otherwise provided by contract.

Contracts

[Section 2-2-201 provides that when a local government contracts with an interested party, it is presumed that the local government could not otherwise reasonably afford itself of the subject of the contract if the additional cost to the local government is greater than 10% of a contract with an interested party;]

[Section 61-4-504 states that a reasonable number of attempts to conform a new motor vehicle to the express warranties is presumed to have been made if the same nonconformity has been subject to repair by the manufacturer four or more times but continues to exist or the vehicle has been out of service for a cumulative total of 30 or more business days;]

[Section 71-3-522 provides that for the purpose of determining whether a person is a contracting owner, agency is presumed in the absence of clear and convincing evidence to the contrary;]

R.C.M. 1947, Section 13-510 [28-2-804] states that a written instrument is presumptive evidence of consideration;

Section 13-720 [28-3-206], providing that in construing contracts the language should be construed most strongly against the party causing the uncertainty, states presumptions that the promisor is presumed that party except in contracts between a public officer or body and private party, where it is presumed that the uncertainty was caused by the private party;

Section 13-725 [28-3-703] states oral parties making a promise receive some benefit, the promise is presumed to be joint and several;

Section 13-726 [28-3-703] states that a promise made in the singular but executed by several persons is presumed to be joint and several;

Section 13-805 [28-2-721], providing the exception to Section 13-804 [28-2-721] not allowing contracts fixing damages, states parties may agree to an amount which shall be presumed to be an amount of damage sustained by a breach of a contract where it would be impractical or extremely difficult to fix the actual damage;

Section 17-902 [28-2-1701] [presumption deleted, 1979] states it is presumed that all parties intended to make an equitable and conscientious agreement;

Section 58-405 [28-1-1105], providing that the voluntary retention of benefits of a partial performance of an indivisible obligation extinguishes a corresponding proportion thereof, states that if such partial performance is such that if it were not retained it would injure the party's own property, retention is not presumed to be voluntary;

Section 93-401-18 [1-4-107] states that terms of a writing are presumed to have been used in their primary and general expectation.

Corporations

R.C.M. 1947, Section 15-2242 [35-1-409, now repealed] [presumption now found in 35-1-401, now repealed] provides the director of a corporation present at a meeting of the board at which any action is taken is presumed to have assented to the action unless his dissent is entered in the minutes or filed with the secretary of the corporation.

Creditor-Debtor

[Section 71-3-524 states that the delivery of materials to the site of the improvement, whether by the lien claimant or another, creates a presumption that they were used in the course of construction;]

R.C.M. 1947, Section 47-121 [31-1-103] states whenever a loan of money is made it is presumed to be made upon interest unless otherwise expressly stipulated in writing.

Criminal Law

[Section 23-2-535 provides that the blood alcohol concentration presumptions contained in 61-8-401 also apply to the operation of vessels;]

[Section 30-13-143 provides that possession of 5 or more duplicate copies or 20 or more individual copies of sound recordings produced without the owner's consent creates a rebuttable presumption that the copies are intended for sale or distribution;]

[Section 44-12-203 creates a presumption as to what property can be forfeited to the state in connection with seizures related to controlled substances;]

[Section 45-5-206 provides that with respect to domestic abuse, the purpose or knowledge that reasonable apprehension would be caused is presumed in any case in which a person knowingly points a firearm at a family or household member, whether or not the offender believes the firearm to be loaded;]

[Section 45-6-326 provides that the possession or transfer of any machine, vehicle, device, or firearm with a destroyed or obscured serial number creates a presumption that the person knew the serial number had been removed or obscured;]

[Section 61-8-401 sets out the presumptions for driving under the influence with respect to blood alcohol content;]

R.C.M. 1947, Section 54-133(d) [45-9-102] states that persons under the age of twenty-one convicted of criminal possession of dangerous drugs are presumed to be entitled to a deferred imposition of sentence;

Section 84-5606.28 [16-11-113] states that cigarettes found in the place of business of an unlicensed wholesaler, retailer, or other person without the insignia affixed and canceled or not marked as having been received by such person or business gives rise to the presumption that the cigarettes are kept in violation of the chapter regulating sales and taxation of cigarettes;

Section 94-5-201(1)(d) [45-5-201], providing the elements of the offense of assault, states that reasonable apprehension is presumed in any case in which a person knowingly points a firearm at or in the direction of another, whether or not the offender believes the firearm to be loaded;

Section 94-8-204 [45-8-305] states that possession or use of a machine gun is presumed to be for offensive or aggressive purposes under certain conditions;

[Section 45-8-321 provides that a photocopy of a certificate of completion of a course teaching firearms use and safety, the instructor's affidavit of course completion, or a copy of any other document attesting to course completion verifiable by contact with the instructor or entity that conducted the course creates a presumption that an applicant for a concealed weapon permit completed the course.]

Section 95-304(b) [46-2-101], providing for state criminal jurisdictions where an element of the offense occurs within the state, states that it is presumed to have occurred within the state under certain conditions;

Section 95-1904(b) states that the defendant shall be conclusively deemed to be present in the court at all stages of trial unless the record affirmatively shows the contrary and in all cases it shall be conclusively deemed that the court or judge gave the proper admonition in accordance with Section 95-1913(e) unless the record affirmatively shows to the contrary [both sections now at 46-16-501];

Section 95-2901 [46-16-204] states the defendant is presumed innocent until the contrary is proved.

Damages

R.C.M. 1947, Section 17-404 [27-1-320] states that damages for conversion are presumed to be the value of the property, with interest, or the highest market value without interest, and fair compensation for efforts to recover the property;

Section 17-604 [27-1-304] states for the purpose of estimating damages for the value of a written instrument, the value of the instrument is presumed to be equal to that of the property to which it entitles the owner;

Section 17-804 [27-1-419] states the presumption that the breach of an agreement to transfer real property cannot be adequately relieved by pecuniary compensation, but an agreement to transfer personal property can be so satisfied.

Death

R.C.M. 1947, Section 91(A)-1-107 [72-1-108] states that a person who is absent for a continuous period of seven years during which he has not been heard from and his absence is not satisfactorily explained after diligent search or inquiry, is presumed to be dead;

Under the same section, his death is presumed to have occurred at the end of the seven year period.

Domicile

R.C.M. 1947, Section 75-8703 [20-25-503] states that unless the contrary appears to a particular university system unit several presumptions apply in determining the domicile of students;

Section 75-8704(4) [20-25-504], providing rules for the determination of domicile of a person, states that it is presumed a minor or adult registered as a full-time student is not qualified to change his classification unless conditions are met.

Elections

R.C.M. 1947, Section 23-4104 [13-16-303] states that failure to comply with the provision of Section 23-4103 [13-15-202] is sufficient cause to presume [changed to "for believing", 1979] that the election judges and the clerks [language referring to clerks deleted, 1979] did not correctly ascertain the number of votes cast in a recount canvassing.

Family Law

[Section 40-4-219 provides that the court shall presume the custodian is not acting in the child's best interests if the custodian interferes with visitation rights or is convicted of certain crimes listed in the statute;]

[Section 40-4-224, now repealed, creates a presumption that joint custody is in the best interests of the child;]

[Section 40-5-232 creates a presumption that it is in the best interests of the child to legally determine and establish his paternity;]

[Section 40-5-234 states that if the results of a blood test show a 95% or higher probability of paternity, the alleged father is presumed to be the natural father of the child;]

[Section 40-5-273 provides that in an administrative hearing for review of child support, a support increase is presumed to be in the child's best interests.]

[Section 40-6-126, now repealed, states that a person filing a notice of intent to claim paternity or acknowledging paternity in accordance with 40-6-105 is presumed to be the father of the child unless the mother denies that the claimant is the father;]

[R.C.M. 1947, Section 61-119 [40-6-235] provides that a parent may relinquish to the child the right of controlling him and receiving his earnings. Abandonment by the parent is presumptive evidence of such relinquishment;]

R.C.M. 1947, Section 36-116 [40-2-207] states all work and labor performed by a married person for a person other than his spouse and children is presumed to be performed on his separate account;

Section 48-126 [40-1-322] states that the original certificate of marriage and a record thereof shall be received in all courts as presumptive evidence of marriage;

Section 61-101 [40-6-201] states that all children born in wedlock are presumed to be legitimate;

Section 61-102 [40-6-202] states that all children born within ten months after the dissolution of a marriage are presumed to be legitimate children of that marriage;

Section 61-117 [40-6-217] states that while a married person is not bound to support his spouse's children by a former marriage, when he does so it is presumed that he acts as a parent;

Section 61-305 [40-6-105] states several conditions under which a man is presumed to be the natural father of a child under the Uniform Parentage Act.

Fiduciaries

[Section 32-6-303 provides that a bank customer who willingly gives his identification device and personal identification number to another is presumed to have authorized any electronic funds transfers requested by the other person;]

R.C.M. 1947, Section 67-1911(3) [72-25-209, now repealed], providing under the Principal and Income Act that unprofitable principal may be changed in form, states the time used for determination of delayed income shall be presumed to be one year;

Section 86-103 [72-24-104, now repealed] states that when a transfer of real property is made to one person and consideration is paid by another a trust is presumed to result in favor of, by, or for whom such payment is made; for an exception to this doctrine see Part III, Common Law Presumptions, under the heading "Gifts";

Section 86-308 [72-20-208, now repealed] states that in all transactions between a trustee and his beneficiary it is presumed that they are entered into by the beneficiary without sufficient consideration and under undue influence;

Section 86-509 [72-23-306, now repealed] states the discretionary power conferred upon a trustee is presumed not to be left to his arbitrary discretion but may be controlled by a proper court.

Gifts

[Section 70-9-209, now repealed, provides that a gift certificate or credit memo issued in the ordinary course of an issuer's business that remains unclaimed by the owner for more than 5 years is presumed abandoned;]

R.C.M. 1947, Section 67-1710 [70-3-202] states that a gift made during the last illness of the giver or under circumstances which would impress him with an expectation of speedy death is presumed to be a gift in view of death.

Goods

[Section 30-12-1003, now repealed, states that a certificate signed by the chief chemist of a laboratory designated by the Department of Commerce relating to the analysis of paint products is presumptive evidence of the facts stated in the report;]

R.C.M. 1947, Section 87A-1-201(17) [30-1-201], defining fungible, states that goods which are not fungible shall be deemed fungible for the purposes of the Uniform Commercial Code to the extent that under a particular agreement or document unlike units are treated as equivalents;

Section 87A-2-513 [30-2-513], providing the buyer's right to inspection of goods, states the place or method of inspection by the parties is presumed to be exclusive.

Immunity From Liability

R.C.M. 1947, Section 10-1306 [41-3-203] [presumption deleted, 1979], the provision of the Abused, Neglected and Dependent Children and Youth Act, states persons making a report or participating in a judicial proceedings are presumed to be acting in good faith and shall be immune from liability;

Section 46-1606 [81-4-328], a provision in an act dealing with horse-herd districts, states that no officer, board, or employee is liable for any act performed in the collection of stray animals and that such acts shall be presumed to have been in good faith;

Section 46-1813 [81-4-515], a provision of an act dealing with abandoned horses, is identical language to Section 46-1606 [81-4-328] providing that officers, the board, or employees, is presumed to have acted in good faith;

Section 46-2326 [76-16-319], a provision of the Grass Conservation Act, uses similar language to Sections 46-1606 [81-4-328] and 46-1813 [81-4-515] in providing that officers, members of the board, or employees are presumed to have acted in good faith in the collection of livestock running at large without a permit;

Section 66-1051 [37-2-303] states that persons reporting gunshot or stab wounds as provided by law are presumed to be acting in good faith.

Insurance

[Section 33-1-412, now repealed, provides that the Commissioner's verified report is presumptive evidence of the facts therein;]

[Section 33-2-1101 provides that with respect to holding companies, control is presumed when one person holds the power to vote 10% or more of the voting securities of any other person;]

R.C.M. 1947, Section 40-5344 [33-7-525] [presumption deleted, 1981], a provision relating to the licensing of agents of fraternal benefit societies selling life insurance to its members, states that any person soliciting and procuring life insurance contracts in excess of fifty thousand dollars ($50,000.00) or on more than twenty-five (25) individuals is presumed to be devoting fifty percent (50%) of his time to solicitation and procurement of insurance, and is an insurance agent;

Section 40-5350 [33-7-518, now repealed], a provision dealing with misrepresentation in the solicitation and procurement of life insurance under fraternal benefit societies, states in any determination of the incompleteness or misleading character of any statement it shall be presumed that the insured had no knowledge of any of the contents of the contract involved;

Section 40-5509 [repealed], a provision of the Insurance Holding Companies Act defining control, states that control shall be presumed to exist if any person owns, controls, or holds more than ten percent (10%) of the voting securities of any other person.

Judgment

[R.C.M. 1947, Section 93-1001-27 [26-3-205] states that the judgment of a foreign country or any other tribunal against a person is presumptive evidence of a right as between the parties and their successors in interest;]

R.C.M. 1947, Section 93-1001-21 [26-3-202] states that judicial orders of a court or judge of this state or the United States creates a disputable presumption in actions brought between the same parties or their representatives and successors or litigants for the same thing in the same capacity.

Jurisdiction

[Section 33-1-1102 provides that the Department is presumed to have jurisdiction over persons or entities providing certain medical coverages unless the person or entity shows it is subject to the jurisdiction of another agency of this or another state or any subdivision thereof or the federal government;]

R.C.M. 1947, Section 93-6601(2) [25-31-202, now repealed], providing where action must be commenced, states when an obligation is incurred in one county it is deemed to be the county in which the obligation is to be performed or paid unless there is a special contract to the contrary;

Section 93-2601-47 [40-5-108, now repealed], a provision of the Uniform Reciprocal Enforcement of Support Act, states that the obligor is presumed to have been present in the responding state during the period for which support is sought until otherwise shown;

Section 95-304(b) [46-2-101], providing for state criminal jurisdiction, states that death is presumed to have occurred within the state under certain conditions.

Landlord-Tenant

[Section 70-19-412 provides that when the relation of landlord and tenant has existed between any persons, the possession of the tenant is deemed the possession of the landlord until the expiration of 5 years from the termination of the tenancy, notwithstanding that such tenant may have acquired another title or may have claimed to hold adversely to his landlord;]

[Section 70-24-431 provides that in an action by or against a tenant, evidence of a complaint within 6 months before the alleged retaliation creates a rebuttable presumption that the landlord's conduct was retaliatory;]

R.C.M. 1947, Section 42-203 [70-26-201] states a hiring of real property, other than lodgings and dwelling houses, is presumed to be for one year from its commencement;

Section 42-204 [repealed] states that the hiring of lodgings or dwelling houses for unspecified times is presumed to have been made for the time the rent is paid and in the absence of any agreement respecting the length of time or rent it is presumed to be monthly;

Section 42-205 [70-26-204] states that if a lessee of real property remains in possession after the expiration of the hiring and the lessor accepts rent the parties are presumed to have renewed the hiring for one month when the rent is so paid, or otherwise for one year;

Section 42-301(3) [70-25-101], a provision of the Tenants' Security Deposit Act, states in the definition of security deposit that if an agreement requires the tenant to provide or maintain a deposit to the landlord for part or all of the term of the lease-hold agreement, the deposit shall be presumed to be a security deposit [and that a fee or charge for future cleaning and damages, no matter how it is designated, is presumed to be a security deposit].

Liquor

R.C.M. 1947, Section 4-207 [16-6-311] states that when an offense against the State Liquor Control Act has been committed by any person employed by the owner of the establishment, the owner shall be prima facie deemed to be a party to the offense committed;

Section 4-219 [16-6-303] [language relating to inference deleted, 1977] states that a court trying a case under the Liquor Control Act is at liberty to infer that a liquor in question is intoxicating from the fact that a witness describes it as such or uses a name commonly applied to intoxicating liquor;

Section 32-2142 [61-8-401] states several presumptions that certain levels of alcohol in the bloodstream prove that the defendant was under the influence of alcohol.

Master-Servant

[Section 2-18-1011 states that an action attempting to revise the class specifications of a state employee who has exercised his rights under the grievance provisions is presumed to be a prohibited interference, restraint, coercion, or retaliation;]

R.C.M. 1947, Section 41-402 [39-2-602] states that a servant is presumed to have been hired for the length of time the parties adopt for the estimation of wages, a hiring at a yearly rate is presumed for one year, a hiring at a daily rate for one day;

Section 38-1229(3) [53-20-164], providing rules governing resident labor of individuals confined for treatment of developmental disability, states the presumption that performance of a task for more than three months is not a training task but one involved in the operation or maintenance of the facility;

Section 41-403 [39-2-602] states that in the absence of any agreement or custom as to the term of service, the time of payment or rate or value of wages, a servant is presumed to be hired by the month;

Section 41-404 [39-2-603] states that after the expiration of an agreement respecting wages and term of service, a continuation of the relation is presumed to have renewed the agreement with the same wages and term of service.

Mining

[Section 82-1-306 provides that upon payment of a $5 fee, any person claiming an interest in minerals underlying a tract of land that is the subject of a trust proceeding may thereby create a rebuttable presumption of ownership of the interest claimed;]

R.C.M. 1947, Section 50-702 [82-2-102], providing for a record of certificate of location, states failure of a locator to file a certificate of location shall create a prima facie presumption of intent to abandon the location;

Section 50-1203 [82-4-303] states that abandonment of surface or underground mining is defined and may be presumed when it is shown that continued operation will not resume.

Motor Vehicle Ownership

Section 57-107 [27-30-201], providing the requirement of certificate of registration and ownership of motor vehicles, states that when more than one owner's name appears on the certificate of ownership, joint ownership with rights of survivorship, and not as tenants in common, is presumed.

Negligence

R.C.M. 1947, Section 69-3515 [23-2-529] [presumption now found in 23-2-505], providing that the owner of a vessel shall be liable for injury or damage occasioned by the negligent operation of such vessel, states it shall be presumed that such vessel is being operated with the knowledge and consent of the owner if it is under the control of his or her spouse, father, mother, brother, sister, son, daughter, or other immediate member of the owner's family;

Section 72-402 [69-14-707], providing liability for injury from negligence by railroads, provides that the killing or injury of any stock animal shall be prima facie evidence of negligence on the part of the railroad.

Negotiable Instruments

[Section 30-4-406 provides that 14 calendar days after a check is received by a customer from a bank is presumed to be a reasonable period of time for the customer to examine the check and notify the bank of an unauthorized signature or wrongful alteration.]

[Section 30-10-103 provides that any commodity investment contract offered or sold is presumed to be offered or sold for speculation or investment purposes;]

R.C.M. 1947, Section 87A-3-114(3) [30-3-114] states that where an instrument or any signature thereon is dated, the date is presumed to be correct;

Section 87A-3-307(1)(b) [30-3-307] states that a signature on a negotiable instrument is presumed to be genuine or authorized except where the action is to enforce an obligation against a purported signer who has died or become incompetent;

Section 87A-3-414(2) [30-3-414] states that unless otherwise agreed endorsers are liable to one another in the order in which they endorse the negotiable instrument, which is presumed to be the order in which the signatures appear on the instrument;

Section 87A-3-416(4) [30-3-416, now repealed], providing that no words of guarantee added to the signature of a sole maker or acceptor's effective liability, states that such words added to the signature create a presumption that the signature is for the accommodation of the others;

Section 87A-3-419(2) [30-3-419] states that an act, actions, or conversion other than against the drawee, the measure of liability is presumed to be the face amount of the instrument;

Section 87A-3-503(2) [30-3-503, now repealed] states that in a case of an uncertified check which is drawn and payable within the United States and is not a draft drawn by a bank, a reasonable time for presentment is presumed to be thirty (30) days after the date or issue with respect to the liability of the drawer and seven (7) days after the endorsement with respect to the liability of an endorser;

Section 87A-3-510 [30-3-510] states three circumstances which create a presumption of dishonor or notice of dishonor of a negotiable instrument;

Section 87A-3-304(3)(c) [30-3-304], providing that in determining whether the purchaser of a demand instrument had notice that it is overdue, a reasonable time is presumed to be thirty days;

Section 87A-4-201(1) [30-4-201] states a presumption of the agency status of collecting banks;

Section 87A-8-105(2)(b) [30-8-105, now repealed] states the signature on negotiable securities are presumed to be genuine or authorized.

[Nuisance]

[Section 23-2-526 provides that the operation of a motorboat that emits noise in excess of 86 dbA when measured at a distance of 50 feet is presumed to be a public nuisance and to constitute disorderly conduct unless operated under a motorboat racing permit.]

Oil and Gas

R.C.M. 1947, Section 60-131.8 [82-11-211] states several presumptions having the effect of allocating the conduct of operations and production of oil to each tract in a unitized reservoir and a presumption that operations conducted pursuant to an order that the Board of Oil and Gas Conservation fulfilled all the expressed or implied obligations of each lease or contract covering land in the unit area.

Probate

[Section 72-9-103 sets out rebuttable presumptions with respect to whether or not certain property is subject to disposition as community property at death;]

R.C.M. 1947, Section 91-4402 [72-16-301, now repealed], providing for transfers in contemplation of death, states that transfers of property without consideration three years prior to death, are deemed to have been made in contemplation of death;

Section 91-4408 [72-16-306, now repealed] states that all transfers of property recorded after death are deemed for the purposes of taxation to have been made by will;

Section 91A-2-202(3)(c) [72-2-222], providing for an augmented estate, states that property owned by the surviving spouse as of decedent's death or previously transferred by the surviving spouse is presumed to have been derived from the decedent unless the surviving spouse establishes that it was derived from another source;

Section 91A-3-406(2) [72-3-309], providing for formal testacy proceedings, states that self-proved wills are conclusively presumed properly executed subject to rebuttal by proof of fraud or forgery.

Property

R.C.M. 1947, Section 9-818 [35-21-418, now repealed] states all plots conveyed to individuals are presumed to the sole and separate property of the owner;

Section 20-206 [70-6-203] states if personal property is lost or under the control of a bailee and the bailee refuses to inform the bailor of the circumstances under which the loss or injury to the property occurred, or willfully misrepresents circumstances, the bailee is presumed to have willfully or by gross negligence permitted the loss or injury to the property to occur;

Section 32-3904(3) [60-4-104], providing for the exercise of right of eminent domain by the Department of Highways [now Department of Transportation], states that an order by the Department for exercise of the right of eminent domain creates and establishes three disputable presumptions, of the public necessity of the proposed highway or improvement, that the taking of the interest is necessary therefor, and that the proposed highway or improvement is planned or located in the manner which will be most compatible with the greatest public good and the least private injury;

Section 39-131 [70-20-316] states that in deeds made prior to 1900 by a grantor without an indication that he was married or single or that the wife of the grantor joined in the conveyance, the presumption shall be that the person conveying the land had no wife living at the date of the conveyance and that the land was conveyed free of all right of dower;

Section 49-114 [1-3-213] states that one who grants a thing is presumed to grant also whatever is essential to its use;

Section 67-209 [70-15-103], providing a definition of fixtures, states a thing is deemed to be affixed to land when it is attached to it by roots, or embedded in it or permanently resting upon it or permanently attached to what is thus permanent;

Section 67-210 [70-15-104] states that certain mining equipment is deemed to be affixed to mines;

Section 67-713 [70-16-202] states an owner of land bounded by a road or street is presumed to own to the center thereof;

Section 67-1510 [70-1-509] states a grant duly executed is presumed to have been delivered at its date;

Section 67-1514 [70-1-512] states even though a grant has not actually been delivered into the possession of the grantee, it is presumed constructively delivered in two cases; first, where the instrument is understood to be delivered and the grantee is entitled to immediate delivery, or second, where it is delivered to a stranger for the benefit of the grantee and his assent is shown or may be presumed;

Section 67-1608 [70-20-301] states a fee simple title is presumed to be intended to pass by a grant of real property;

Section 67-2003(6) [70-22-103] states a definition of monument as an accessory that is presumed to occupy the exact position of a corner;

Section 67-2202 [70-9-201, now repealed] lists property held by banking or financial organizations or business associations which is presumed abandoned, the usual criteria being that there has been no contact within seven (7) years;

Section 67-2203 [70-9-202, now repealed] states that unclaimed funds held by life insurance corporations are presumed abandoned if the last known address of the person entitled to the funds is within this state;

Section 67-2204 [70-9-203, now repealed] states that deposit and refunds held by utilities are presumed abandoned when they remain unclaimed for more than seven (7) years;

Section 67-2205 [70-9-204, now repealed] states that undistributed dividends and distributions of business associations are presumed abandoned when they are not claimed within seven (7) years if the last known address of the person entitled thereto is in this state;

Section 67-2206 [70-9-205, now repealed] states that property of business associations and banking or financial organizations held in the course of dissolution that is unclaimed by the owner within two years of the date for final distribution is presumed abandoned;

Section 67-2207 [70-9-206, now repealed] states that all intangible personal property and any income thereon held by a fiduciary for the benefit of another is presumed abandoned unless the owner has within seven (7) years accepted payment of principal, corresponded in writing concerning the property, or otherwise indicated an interest in the property;

Section 67-2208 [70-9-207, now repealed] states that all intangible personal property held for the owner by any court, public corporation, public authority, or public officer that has remained unclaimed for more than seven (7) years is presumed abandoned;

Section 67-2209 [70-9-208, now repealed] states that all intangible personal property not otherwise covered by previous sections held or owing in this state in the ordinary course of the holder's business that has remained unclaimed by the owner for more than seven (7) years is presumed abandoned;

[Section 70-9-210, now repealed, provides that intangible property is presumed abandoned and subject to the state's custody if the owner has not claimed or corresponded about the property for 5 years after the date for payment or delivery, his address is unknown, and the entity issuing the property is the state or a local government or was incorporated, organized, or created in the state.]

Section 84-101 [15-1-101], defining terms in sections dealing with taxation, states that a mobile home is presumed to be an improvement to real property;

Section 91-502 [72-14-102 — presumption amended out], providing for transfer of title of escheated property to the State of Montana, states that title shall be presumed to have failed whenever the owner, beneficial owner, or person entitled to any such property remains unknown for a period of twenty (20) successive years and the whereabouts of such owner remain unknown;

Section 93-2507 [70-19-404] states that in actions for the recovery of real property the person establishing a legal title to the property is presumed to have been in possession within the time period required by law and the occupation of the property by any other person is deemed to have been under and in subordination to the legal title unless it appears the property has been held and possessed adversely for five (5) years before the commencement of the action.

Regularity of Official Acts, Orders, Etc.

R.C.M. 1947, Section 11-522(5) [7-2-4743], states that all decisions and findings of a governing body of a municipality shall be presumed to be reasonable and lawful;

Section 16-5115.15(3) [terminated June 30, 1977], providing means of enforcing local government review laws, provides the presumption that all proper procedures were followed in the adoption of a new form of government;

Section 72-132 [69-14-402] states that in actions railroads may bring to review orders of the Commission, all orders are prima facie deemed just, reasonable and proper;

Section 72-133 states the same presumption as Section 72-132 [both sections now 69-14-402] to be used in any action by shippers other than railroads;

Section 72-155 [69-14-403] states that in an action to determine the reasonableness of rules, all rules, regulations and orders made shall be prima facie deemed to be just, reasonable and proper;

Section 72-162 [69-14-136] states the same presumption as Section 72-155 [69-14-403], and is to be applied in any action by a common carrier to determine the reasonableness of a rule, regulation or order;

Section 72-708 [69-14-608] states the same presumption in actions to determine the justness or reasonableness of an order regulating the placing of railroad crossings;

Section 89-2815 [85-8-315] states that commissioners of drainage districts are declared to be public officers and that there is a presumption in favor of the regularity and validity of all their official acts.

Residence

Section 23-3022(8) [13-1-112] states the place where a person's family resides is presumed his place of residence;

Section 75-8704(4) [20-25-504] states it is presumed a minor or adult registered as a full-time student at any unit of the university system is not qualified for a change in classification as to residence. (See also statutes under Domicile.)

Statutes

[Section 1-2-108 provides that a statute that refers to a title, chapter, part, section, or subsection number without further identification is presumed to refer to the Montana Code Annotated;]

R.C.M. 1947, Section 93-1001-12 [26-1-603] provides that books printed or published under the authority of a sister state or foreign country containing statutes, code, or other written law are presumed to be correct and admissible as evidence of that written law.

Tax

[Section 16-1-403 states that the method provided to determine the amount of liquor purchased outside the state and sold within the state by airlines and railroads is presumed to be fair;]

R.C.M. 1947, Section 16-1715 [7-22-2148] states that in determining what land shall be included as land covered under a special tax for the destruction of weeds, it shall be presumed that all work done upon any of the land of any one landowner shall be for the benefit of all the land within the district;

Section 84-1835 [15-70-332] states that assessments made by the Department of Revenue are presumed to be correct for license taxes for gasoline dealers;

Section 84-6802(1) [16-11-202, now repealed] states all taxes paid pursuant to the Cigarette Sales Tax Act are exclusively presumed to be direct taxes on the retail consumer.

[Telecommunications]

[Section 69-3-808 provides that if a telecommunications service provider seeks forbearance of regulation to facilitate competition and a customer or potential customer of the provider requests a quotation of prices from another provider, the Public Service Commission may presume the existence of competition.]

Trusts

[Section 72-34-105 provides that a transaction between the trustee and a beneficiary occurring during the existence of the trust and resulting in an advantage to the trustee is presumed to be a violation of a trustee's fiduciary duties;]

R.C.M. 1947, Section 86-103 [72-24-104, now repealed] states that when transfer of real property is made to one person and the consideration is paid for by another, a trust is presumed to result in favor of the person by or for whom such payment is made. (For an exception, see the Common Law Presumption on Gifts.)

Unfair Trade Practices

[Section 30-12-506 states that the existence of any weighing or measuring device in any place where buying and selling are commonly carried on is presumptive proof of the regular use of that device for commercial purposes;]

R.C.M. 1947, Section 51-114 [30-14-211], a provision establishing procedures for establishing cost surveys, states the percentage or percentages so fixed and determined shall be presumed to be the actual cost of doing business and overhead expense of any person, firm, or corporation;

Section 51-204 [61-4-404] states that any threat expressed or implied made directly or indirectly to any dealer or manufacturer engaged in the business of financing the purchase of motor vehicles shall be presumed to be made at the direction of and with the authority of such manufacturer;

Section 51-303 [16-10-103] states that in the absence of filing with the Department proof of a lesser or higher cost of doing business, the cost of doing business by a wholesaler shall be presumed to be five percent (5%) of the basic cost of cigarettes to the wholesaler;

Section 67-1706.1 [70-3-104], a provision allowing a person to not return unsolicited goods, states that if unsolicited goods are addressed to or intended for the recipient they shall be deemed a gift;

Section 85-506(1) [30-14-507] a provision of the Door-To-Door Sales Act, states that after a sale has been cancelled, the seller must demand possession within a reasonable time and reasonable time is presumed to be forty (40) days.

Usage

R.C.M. 1947, Section 19-103(13) [1-1-202] [presumption now found in 1-1-206], a provision defining usage, states that usage is a reasonable and lawful public custom, existing at the place where the obligation is to be performed, and either known to the parties or so well established that they must be presumed to have acted with reference thereto.

Water Law

[Section 76-5-202 provides that designations made according to a flood hazard boundary map prepared by the Federal Emergency Management Agency have a rebuttable presumption of reasonable hydrological certainty;]

R.C.M. 1947, Section 89-894 [85-2-404] states that if an appropriator ceases to use all or part of his appropriation right with the intention of wholly or partially abandoning the right or ceases using the appropriation according to its terms and conditions the appropriation shall be deemed abandoned; it also states that if an appropriator ceases to use all or part of his appropriation right for a period of ten (10) successive years and there was water available for his use, there shall be a prima facie presumption that the appropriator has abandoned his right in whole or for the part not used;

Section 89-3503(7) [76-5-104], defining drainway, states that in the event of doubt as to whether a depression is a water course or drainway, it shall be presumed to be a water course;

Section 89-3514(1) [76-5-108] [presumption now found in 76-5-109], a provision of the Floodway Management and Regulation Act, states that where it is shown there is a wrongful failure to comply with this Act, there is a rebuttable presumption that the obstruction was the proximate cause of the flooding of the land of a person bringing suit.

[Wills]

[Section 50-9-103 provides that with respect to living wills, a physician or health care provider may presume, without actual notice to the contrary, that declaration complies with state law and is valid.]

Witness

R.C.M. 1947, Section 93-401-4 [26-1-302] states that a witness is presumed to speak the truth.

Workers' Compensation

[Section 39-71-117 provides that an employer who uses the services of a worker who is provided by another person or firm, other than a temporary service contractor, is presumed to be the worker's employer for workers' compensation premium and loss experience purposes related to the employee's work.]

[Section 39-71-118 provides that a worker whose services are provided by a person or firm, other than a temporary service contractor, to an employer is presumed to be employed and controlled by the employer.]

[Section 39-71-711 provides that an impairment rating rendered by a Department-designated evaluator is presumed correct;]

[Section 39-72-102, now repealed, states that silicosis, when complicated by active pulmonary tuberculosis, is presumed to be total disablement;]

R.C.M. 1947, Section 92-209 [repealed] states that an employee shall be presumed to have elected to be subject to and bound by the provisions of the particular plan which may have been adopted by his employer;

Section 92-605 [39-71-405, now repealed] states where any employer procures work to be done by contract, such contractor and his employees shall be presumed to have elected to come under that plan of compensation adopted by the employer;

Section 92-1303(5) [repealed], defining disablement, uses several presumptions to find death or disablement arose out of employment where certain diseases are found among coal miners;

Section 92-1315 [repealed], providing procedures for medical examination, uses several presumptions to determine that certain diseases arose out of employment in coal mines.

Part III. Common Law Presumptions

Citing every case relating to each of the following presumptions is a near impossibility. Therefore, the cases listed are an adequate representation of the presumptions for which they stand. Additional cases stating the presumptions may be found cited within those cases listed below.

Age

Parties are presumed to be of full age and without disability in the absence of a contrary showing. State ex rel. Hamilton v. District Court, 102 Mont. 341, 348, 57 P.2d 1227 (1936).

Appeal

(For related material see R.C.M. 1947 Section 93-1301-7(15) and (16) [26-1-602] and Montana Digest Key Numbers 900 through 939.)

Bill of Exceptions (This is no longer required by Rule 46, M.R.Civ.P.)

When a bill of exceptions is settled and verified, the presumption arises that the judge included all things in it which it should contain. Montana Ore Purchasing v. Lindsey, 25 Mont. 24, 29, 63 P. 719 (1901).

On appeal from a judgment it will be presumed that the court passed on all matters raised in the bill of exceptions. Whiter v. Kemper, 25 Mont. 432, 437, 65 P. 422 (1901).

The presumption of correctness from the settlement of the certification of a bill of exceptions is conclusive if not rebutted. State v. Tate, 55 Mont. 343, 344, 177 P. 243 (1918).

Bond

Where exception is not taken to the sufficiency of sureties on an appeal bond, it will be presumed that it was sufficient. O'Neil v. State Savings Bank, 34 Mont. 521, 87 P. 970 (1906).

Evidence

All evidence necessary to support the judgment will be presumed on appeal. Story v. Black, 5 Mont. 26, 41, 1 P. 1 (1883); Alder Gulch Consol. Mining Co. v. Hayes, 6 Mont. 31, 33, 9 P. 581 (1886); Clark v. Parker, 6 Mont. 153, 160, 9 P. 911 (1886); Blessing v. Sias, 7 Mont. 103, 106, 14 P. 663 (1887); Sperling v. Calfer, 7 Mont. 514, 527, 19 P. 204 (1888); Princeton Mining Co. v. First National Bank of Butte, 7 Mont. 530, 535, 19 P. 210 (1888); Ingalls v. Austin, 8 Mont. 333, 336, 20 P. 637 (1889); Lloyd v. Sullivan, 9 Mont. 577, 589, 24 P. 218 (1890); State v. Allen, 23 Mont. 118, 120, 57 P. 125 (1899); Prior v. City of Walkerville, 31 Mont. 618, 621, 79 P. 240 (1904); McGregor v. Lang, 32 Mont. 568, 573, 81 P. 343 (1905); Pope v. Alexander, 36 Mont. 82, 91, 92 P. 203 (1907); Anderson v. Regimental Mining Co., 36 Mont. 312, 325, 93 P. 44 (1907); Gow v. Cascade Silver Mines and Mills Co., 66 Mont. 488, 492, 213 P. 1092 (1923); In re Crow Creek Irrigation Distr., 63 Mont. 293, 301, 207 P. 121 (1922); State ex rel. City of Bozeman v. Police Court, 68 Mont. 435, 422, 219 P. 810 (1923); First National Bank v. Marlowe, 71 Mont. 461, 473, 230 P. 374 (1924); Thompson v. Chicago, B & Q Ry., 78 Mont. 170, 177, 253 P. 313 (1927); Carey v. Guest, 78 Mont. 415, 425, 258 P. 236 (1927); Sunburst Oil and Gas Co. v. Neville, 79 Mont. 550, 561, 257 P. 1016 (1927); Bond Lumber Co. v. Timmons, 82 Mont. 497, 501, 267 P. 802 (1928); Shaw v. McNamara and Marlow, Inc., 85 Mont. 389, 394, 278 P. 836 (1929); Thelen v. Vogel, 86 Mont. 33, 36, 281 P. 753 (1929); Mulholland v. Butte and Superior Mining Co., 87 Mont. 561, 569, 289 P. 574 (1930); McBride v. School District No. 2, 88 Mont. 110, 113, 200 P. 252 (1930); Park Saddle Horse Co. v. Cook, 89 Mont. 414, 419, 300 P. 242 (1931) (doctrine of implied findings); In re Baxter's Estate, 98 Mont. 291, 298, 39 P.2d 186 (1934); Monteath v. Monteath, 99 Mont. 444, 451, 44 P.2d 517 (1935); Missoula Light and Water Co. v. Hughes, 106 Mont. 355, 365, 77 P.2d 1041 (1938); Aitken v. Lane, 108 Mont. 368, 373, 92 P.2d 628 (1939).

Judge's Consideration of Evidence

In a non-jury case, presume that the judge considered only competent evidence in reaching his findings. Montana Ore Packing Co. v. Butte & Boston Consol. Mining Co., 25 Mont. 427, 432,

65 P. 420 (1901); Colousa Mining & Smelting Co. v. Barnard, 28 Mont. 11, 16, 72 P. 45 (1903); Finlen v. Heinze, 28 Mont. 548, 568, 73 P. 123 (1903); Bordeaux v. Bordeaux, 43 Mont. 102, 108, 115 P. 25 (1911); Moss v. Goodhart, 47 Mont. 257, 264, 131 P. 1071 (1913); State v. Driscoll, 49 Mont. 558, 567, 144 P. 153 (1914); Anaconda Mining Co. v. Pilot Butte Mining Co., 51 Mont. 443, 454, 153 P. 1006 (1915); Butler v. Lofters, 53 Mont. 546, 562, 165 P. 601 (1917); Lagier v. Lagier, 58 Mont. 267, 270, 193 P. 393 (1920); Hopkins v. Paradise Heights F. G. Ass'n., 58 Mont. 404, 410, 193 P. 389 (1920); Noyes' Estate v. Granite Alaska Co., 64 Mont. 406, 415, 210 P. 96 (1922); Atkinson v. Roosevelt Co., 71 Mont. 165, 185, 227 P. 811 (1924); Gallatin Natural Gas Co. v. Public Service Comm., 79 Mont. 269, 289, 256 P. 373 (1927); Minnesota L & T Co. v. Busby, 84 Mont. 373, 379, 275 P. 761 (1929); Newton v. Weiler, 87 Mont. 164, 174, 286 P. 133 (1930); Adornczik v. McCauley, 89 Mont. 27, 37, 297 P. 486 (1931); Williard v. Campbell, 91 Mont. 493, 507 11 P.2d 782 (1932); Bickford v. Bickford, 94 Mont. 314, 320, 22 P.2d 306 (1933); Murphy v. LaChapelle, 95 Mont. 36, 43, 24 P.2d 131 (1933); Clem v. Clem, 97 Mont. 570, 580, 36 P.2d 1034 (1934); Missoula Light & Water Co. v. Heylus, 106 Mont. 355, 365, 77 P.2d 1041 (1948); Atkin v. Lane, 108 Mont. 368, 373, 92 P.2d 628 (1939); Wolz v. Wolz, 110 Mont. 458, 463 102 P.2d 22 (1940).

However the presumption was not followed in Anaconda Copper Mining v. Heinze, 27 Mont. 161, 172, 69 P. 909 (1902) where the excluded evidence was important and it is reasonably apparent that it was regarded by the court, case reversed; State ex rel. Rankin v. Martin, 68 Mont. 392, 404, 219 P. 632 (1923) where the excluded evidence went to the heart of the matter, the presumption could not be indulged; State ex rel. Regis v. District Court, 102 Mont. 74, 85, 55 P.2d 1295 (1936) where the record of the proceeding shows affirmatively that the recitals contained in the judgment were untrue; and Cedar Creek Oil & Gas Co. v. Archer, 122 Mont. 477, 489, 117 P.2d 265 (1941) where the equities are clearly in favor of the losing party.

If a brief does not mention evidence supporting a contention, presume no such evidence exists. Kelley v. Granite Bi-Metallic Mining Co., 41 Mont. 1, 11, 108 P. 785 (1910).

Where evidence is entered late in the record presume it was considered by the trial court in making its decision. White v. Bailing, 41 Mont. 138, 141, 108 P. 654 (1910).

Instructions

The general rule is where instructions are not included in the record a presumption arises that all imperfections were cleared up and a correct statement of the law made. Howard v. Fraser, 83 Mont. 194, 199, 271 P. 444 (1928); Jones v. Northwestern Auto Supply, 93 Mont. 224, 232, 18 P.2d 305 (1932).

It is presumed that the jury followed an instruction to disregard testimony. Newton v. City of Roundup, 60 Mont. 24, 30 198 P. 441 (1921); Brown v. Homestake Exploration Co., 98 Mont. 305, 339, 39 P.2d 168 (1934).

Judge

Where the record indicates that the admission of a judgment roll from another action pending appeal was overruled, presume the judge was sufficiently aware of the pending appeal. Boucher v. Barsalou, 27 Mont. 99, 101, 65 P. 555 (1902).

Where change of venue is requested to a district where the judge is free of bias, such condition will be presumed to continue until shown otherwise. Stair v. Lunke, 56 Mont. 130, 132, 180 P. 569 (1919).

Judgment

In the absence of a showing to the contrary a judgment or order will be presumed proper. Rumney Land & Cattle Co. v. Detroit and Mont. Cattle Co., 19 Mont. 557, 559, 49 P. 395 (1897); Cornish v. Floyd-Jones, 26 Mont. 153, 156, 66 P. 838 (1901); Swain v. McMillan, 30 Mont. 433, 441, 76 P. 943 (1904); Bowen v. Webb, 34 Mont. 61, 66, 85 P. 739 (1906); Donivan-McCormick Co. v. Spaer, 34 Mont. 237, 245, 85 P. 1029 (1906); Passavant v. Arnold, 34 Mont. 513, 515, 87 P. 905 (1906); State v. Paisley, 36 Mont. 237, 251, 92 P. 566 (1907); Lozar v. Neill, 37 Mont. 287, 297, 96 P. 343 (1908); Moore v. Butte Electric Ry., 47 Mont. 467, 474, 138 P. 1098 (1914); Great Northern Ry. v. Benjamin, 51 Mont. 167, 174, 149 P. 968 (1915); State v. Rocky Mtn. Elev. Co., 52 Mont. 487, 492, 158 P. 818 (1916); State v. Schoenborn, 55 Mont. 517, 520, 178 P. 294 (1919); Myrick v. Peet, 56 Mont. 13, 22, 180 P. 574 (1919); Boles v. Boles, 60 Mont. 411, 416, 190 P. 912 (1921); In re Eakin's Estate, 64 Mont. 84, 91, 208 P. 956 (1922); State ex rel. McKennan v. District Court, 69 Mont. 341, 346, 222 P. 426 (1924); Greenough v. Randall, 71 Mont. 578, 580, 230 P. 1094 (1924); State v. Keppler, 77 Mont. 307, 314, 250 P. 603 (1926); Hoppin v. Lang, 81 Mont. 330, 334, 263 P. 421 (1928); Baker v. Citizens State Bank, 81 Mont. 543, 548, 264 P. 675 (1928); Nelson v. Wilson, 81 Mont. 560, 568, 264 P. 679 (1928); Dockins v. Dockins, 82 Mont. 218, 220, 266 P. 398 (1928); Greer v. Stannard, 85 Mont. 78, 85, 277 P. 622 (1929); State v. Farmer's & Mech. State Bank, 85 Mont. 256, 263, 278 P. 828 (1929); Mulholland v. Butte Superior Mining Co., 87 Mont. 561, 569,

289 P. 574 (1930); Coburn v. Coburn, 89 Mont. 386, 389, 298 P. 349 (1931); State v. Groom, 89 Mont. 447, 452, 300 P. 226 (1931); Autio v. Miller, 92 Mont. 150, 163, 11 P.2d 1039 (1932); Swaim v. Redeen, 101 Mont. 521, 533, 55 P.2d 1 (1936); Sawyer Stores, Inc. v. Mitchell, 103 Mont. 148, 179, 62 P.2d 342 (1936). (See also annotated [annotations] under R.C.M. 1947, Section 93-1301-7(16) [26-1-602(16)].)

Error will not be presumed, but must be affirmatively shown, the burden resting on appellant to show how trial court erred. (Many cases cited above also contain this rule.) State v. Matt, 29 Mont. 292, 307, 74 P. 728 (1903); Swain v. McMillan, 30 Mont. 433, 441, 76 P. 943 (1904); State v. Kremer, 34 Mont. 6, 11, 85 P. 736 (1906); Van Vranlsen v. Granite Co., 35 Mont. 427, 430, 90 P. 164 (1907); State v. Gordon, 35 Mont. 458, 469, 90 P. 173 (1907); Cassidy v. Slemons & Booth, 41 Mont. 426, 433, 109 P. 976 (1910); Orton v. Bender, 43 Mont. 263, 269, 115 P. 406 (1911); Haley v. McDermott, 45 Mont. 217, 218, 121 P. 1060 (1911); Wherry v. Sprinkle, 50 Mont. 191, 192, 146 P. 735 (1915); Dover Lumber Co. v. Whitcomb, 54 Mont. 141, 149, 168 P. 947 (1917); State v. Schoenborn, 55 Mont. 517, 520, 178 P. 294 (1919); Lindeberg v. Howe, 67 Mont. 195, 199, 215 P. 230 (1923); State ex rel. Woare v. Board of Comm. of Liberty County, 70 Mont. 252, 258, 225 P. 389 (1924); Fitschen Bros. Commercial Co. v. Noyes' Estate, 76 Mont. 175, 194, 246 P. 773 (1926); Gilna v. Barker, 78 Mont. 343, 350, 254 P. 169 (1927); Dockins v. Dockins, 82 Mont. 218, 266 P. 398 (1928); Herberson v. Great Falls Wood and Coal Co., 83 Mont. 527, 533, 273 P. 294 (1929); Kosonen v. Waara, 87 Mont. 24, 30, 285 P. 668 (1930); Downs v. Nihill, 87 Mont. 145, 148, 286 P. 410 (1930); Conway v. Fabian, 108 Mont. 287, 323, 89 P.2d 1022 (1939); Vail v. Custer County, 132 Mont. 205, 211, 315 P.2d 993 (1957).

The presumption of correctness does not obtain under the following cases:

Judgments obtained by constructive service are not presumed regular. Palmer v. McMaster, 8 Mont. 186, 194, 19 P. 535 (1888).

The supreme court will not presume that the trial court considered a demurrer where appellants have not shown such a pleading. Bowen v. Webb, 34 Mont. 61, 66, 85 P. 739 (1906).

The presumption of correctness does not obtain where the trial court has lost jurisdiction. Evans v. Oregon Short Line Ry., 51 Mont. 107, 112, 149 P. 715 (1915).

The presumption that in the absence of the record the testimony supports the court's action does not obtain where the record is available to the supreme court. State ex rel. Ellan v. District Court, 97 Mont. 160, 168, 33 P.2d 526 (1934).

Where stipulated facts are submitted to both the trial court and the supreme court, the presumption that the trial court's findings are correct does not have the same force as in other cases. McCracken v. Liquor Control Board, 115 Mont. 347, 352, 143 P.2d 891 (1943).

The presumption of regularity has been variously applied in cases dealing with default judgments:

Presume that the court followed the law when entering a default judgment. Butte Butchering Co. v. Clarke, 19 Mont. 306, 311, 48 P. 303 (1897).

On motion to vacate a default judgment, presume the vacating ruling is not made on discretionary grounds. Beller v. LaBoeuf, 50 Mont. 192, 195, 145 P. 945 (1915).

Neglect is presumed where defendant allows statutory period to run without an appearance. Pacific Acceptance Corp. v. McCue, 71 Mont. 99, 103, 288 P. 761 (1924).

On appeal service of amended complaint or waiver thereof must establish jurisdiction over defendant as presumption of jurisdiction will not obtain in appeal from default judgment. Griffith v. Montana Wheat Growers Assoc., 75 Mont. 466, 473, 244 P. 277 (1926).

On appeal from a default judgment where the pleadings are before the supreme court the presumption that the judgment was supported by the complaint does not obtain. State ex rel. Costello v. District Court, 86 Mont. 387, 394, 284 P. 128 (1930).

Default judgments presumed properly entered in absence of showing to the contrary. State ex rel. Delmoe v. District Court, 100 Mont. 131, 142, 46 P.2d 39 (1935).

Presumption of regularity of the default judgment does not obtain where proper notice was not received by defendants. Holen v. Phelps, 131 Mont. 146, 152, 308 P.2d 624 (1957).

Motion for New Trial

When the court grants a motion for new trial on a general order without specifying grounds, the presumption arises that the court discretionarily granted motion on grounds of insufficient evidence to justify verdict. Norton v. Great Northern Railway, 78 Mont. 273, 285, 254, P. 165 (1927) and Brennan v. Mayo, 100 Mont. 439, 447, 50 P.2d 245 (1935).

Where a judge acts on a motion for new trial and has not tried the case, but acts only on the record of a predecessor, the rule applies that his order will not carry the presumption usually indulged on appeal in favor of such an order. Worden v. Alexander, 108 Mont. 208, 212, 90 P.2d 160 (1939).

Doctrine of Stare Decisis

A party calling for application of this doctrine is presumed to have relied upon a former decision. Continental Supply Co. v. Abell, 95 Mont. 148, 171, 24 P.2d 133 (1938).

Receiver

On appeal from order appointing receiver, presume the trial court decided plaintiff was likely to succeed. Beale v. Lindquist, 92 Mont. 480, 486, 15 P.2d 927 (1932).

Assignment

Presume assignment of accounts for value. Carver v. Lynde, 7 Mont. 108, 113, 14 P. 697 (1887).

Where assignee receives proceeds of judgment, the presumption obtains that he consented to action by assignor to protect debtor from double liability. Osborne v. MacDonald, 91 Mont. 83, 86, 5 P.2d 568 (1931).

Attorneys

Attorney's acts are presumed regular and by client's authority. (See also R.C.M. 1947, Section 93-2101 [37-61-401]). Pullen v. City of Butte, 45 Mont. 46, 56, 121 P. 878 (1911) (Notice); Missoula Belt Line Railway v. Smith, 58 Mont. 432, 441, 193 P. 529 (1920); Davenport v. Davenport, 69 Mont. 405, 410, 22 P. 422 (1924) (appearance); In re Miller's Estate, 71 Mont. 330, 338, 229 P. 851 (1924) (right to contest attorney's authority to represent); Union Bank and Trust Co. v. Penwell, 99 Mont. 255, 263, 42 P.2d 457 (1935); Rieckhoff v. Woodhull, 106 Mont. 22, 32, 75 P.2d 56 (1937); State ex rel. Coleman v. Dist. Court, 120 Mont. 372, 375, 186 P.2d 91 (1947) (neglect implied to party through attorney).

An attorney is presumed innocent in disbarment proceedings. In re Parsons, 35 Mont. 478, 482, 90 P. 163 (1907).

An order allowing attorney's fees is presumed to have followed proper considerations. Forrester & MacGinniss v. Boston & Mont. Consol. Copper & Silver Min. Co., 29 Mont. 397, 409, 74 P. 1088 (1914).

Although the court is presumed to be aware of the value of an attorney's services, evidence may be allowed showing what is just and reasonable. Hickey v. Parrot Silver & Copper Co., 32 Mont. 143, 158, 79 P. 698 (1904).

Where the record shows no evidence as to whether attorney's fees are reasonable, presume on appeal that the amount fixed by the court was correct. Britt v. Powder Butte Mine, 108 Mont. 174, 180, 89 P.2d 266 (1939).

Banking

In an action dishonoring a check, plaintiff could rely on the presumption of allowing him substantial damages temperately measured. Crites v. Security State Bank, 52 Mont. 121, 123, 155 P. 970 (1915); and Ward v. State Bank of Yates, 52 Mont. 328, 330, 157 P. 573 (1916).

Presume that in the ordinary course of business a bank follows instructions given it with reference to collection of draft. Guignor v. First National Bank of Helena, 22 Mont. 140, 144, 55 P. 1051 (1898); California Packing Corp. v. McClintock, 75 Mont. 72, 76, 241 P. 522 (1925).

Where a promissory note was left with a bank for collection prior to its insolvency and the collection was made it will be presumed in an action by the owner to establish preference claim that it constituted a trust fund so long as the balance at least equal to the trust fund remains in the bank. The specific money collected was retained by it and constituted an integral part of the bank's money which passed into the hands of the receiver. McDonald v. American Bank and Trust, 79 Mont. 233, 241, 255 P. 733 (1927). (Citing Hawaiian Pineapple Co. v. Brown, supra, under Fiduciary.)

Where a check upon a foreign bank is deposited by the payee in a local bank without special agreement, the presumption is that it was deposited for collection only and that title remained in the depositor. A person tendering payment by check through the mail is deemed to have knowledge of the usual and customary method of making presentment through a bank at the place to which it is sent. Blackwelder v. Fergus Motor Co., 80 Mont. 374, 389, 260 P. 734 (1927).

A foreign company employing local bank to act as collecting agent is presumed to have done so with the knowledge of the well-known custom of banks to mingle their collections with the bank's other funds, resulting in a general and not special deposit, thus creating the relation of a debtor and creditor and depriving the creditor of the right to claim a preference in the bank's insolvency. Montana-Dakota Power Co. v. Johnson, 95 Mont. 16, 21, 23 P.2d 956 (1933).

The presumption of liability for an assessment of shares of stock in insolvent bank arising from the presence of a person's name on its stock is rebutted by evidence that qualified transfer of the stock was made and that the transferor performed every duty imposed by law to secure the transfer. Mitchell v. Banking Corporation, 95 Mont. 9, 15, 23 P.2d 978 (1933).

In determining whether a trust relation arises between a bank and the purchaser of a cashier's check, the presumption is that the money received by a bank is to be received and used in the ordinary banking sense and no preference in the event the bank becomes insolvent should be allowed unless the facts force a different conclusion. Powell Building and Loan Association v. Larabie Bros., 100 Mont. 183, 195, 46 P.2d 697 (1935).

The presumption is that the acts of a bank are not ultra vires. The powers of a corporation are ordinarily matters of allegation and proof. Conley v. Johnson, 101 Mont. 376, 386, 54 P.2d 585 (1936).

Bankruptcy

Insolvency is never presumed. Floyd-Jones v. Anderson, 30 Mont. 351, 358, 76 P. 751 (1904).

Where a federal court discharges a debtor presume it had jurisdiction and proceedings were regular. Ragsdale v. Botham, 81 Mont. 408, 419, 263 P. 972 (1928).

Citizenship

Presume U.S. citizenship or the intention to become a citizen of locators of a mine. Garfield M & M Co. v. Hammer, 6 Mont. 53, 60, 8 P. 153 (1886).

Where a father is resident of U.S., citizenship of the son is presumed. Buckley v. MacDonald, 33 Mont. 483, 488, 84 P. 1114 (1906).

Contempt

On habeas corpus no presumptions obtain against a party punished for direct contempt. In re Mettler, 50 Mont. 299, 302, 146 P. 747 (1915); State ex rel. Bacorn v. District Court, 73 Mont. 297, 302, 236 P. 553 (1925).

Contracts

Construction of Terms

Where a contract does not state the place of performance presume that payment is to be made at the creditor's residence or place of business. Electrical Products Consolidated v. Goldstein, 97 Mont. 581, 585, 36 P.2d 1033 (1934).

Presume payment be made within a reasonable time when a specific time is not mentioned in the contract. Johnson v. Elliot, 123 Mont. 597, 604, 218 P.2d 703 (1950).

Presume that parties to an ambiguous contract knew best what was meant and would not likely be mistaken about its intention. Cook-Reynolds Co. v. Beyer, 107 Mont. 1, 16, 79 P.2d 658 (1938).

Future Delivery

Presume that grain contracts for future delivery are not wagering contracts and therefore lawful. Benson Stabeck Co. v. Reservation Farmers' Draining Co., 62 Mont. 254, 270, 205 P. 651 (1922).

Implied Contracts

Where services are rendered and received without contract, presume they were given in expectation of payment and carry a promise to pay what they are worth. San Antonio v. Spencer, 82 Mont. 9, 13, 264 P. 944 (1928).

Materials

Presumption obtains that where building materials were delivered in compliance with a contract, that they were used in the construction of the proposed building, in the absence of evidence to the contrary. Rogers-Templeton Lumber Co. v. Welch, 56 Mont. 321, 329, 184 P. 838 (1919).

Novation

Novation is never presumed. Harrison v. Fregger, 88 Mont. 448, 453, 294 P. 372 (1930).

Ratification

The presumption that a contract is ratified is raised by slight facts. Larson v. Marcy, 61 Mont. 1, 8, 201 P. 685 (1921).

Waiver

Where the owner permits work to proceed after expiration of the time for completion, presume that he waives the contractual provisions requiring work to be completed within a given time. Wortman v. Montana Central Ry., 22 Mont. 266, 289, 6 P. 316 (1899).

Writing

Presume that a contract required to be in writing because of the statute of frauds or otherwise is in writing. Sweetland v. Barrett, 4 Mont. 217, 223, 1 P. 745 (1882); Mayger v. Cruse, 5 Mont. 485, 493, 6 P. 333 (1885); Hefferlin v. Karlman, 29 Mont. 139, 150, 74 P. 201 (1903); Mantle v. White, 47 Mont. 234, 244, 132 P. 22 (1913); Hurley v. Great Falls Baseball Assoc., 59 Mont. 21, 27, 195 P. 559 (1921); Crawford v. Pierse, 56 Mont. 371, 385, 185 P. 315 (1919); McIntyre v. Dawes, 71 Mont. 367, 375, 229 P. 846 (1924); Johnson v. Elliot, 123 Mont. 597, 603, 218 P.2d 703 (1950).

Corporations

Authority

Corporate officers are presumed to have full authority to bind a corporation. Tague v. John Caplice Co., 28 Mont. 51, 59, 72 P. 297 (1903).

The presumption of implied authority obtains where corporation president ratified notes and testimony shows custom and acquiescence. Alley v. Butte and Western Mining Co., 77 Mont. 477, 492, 251 P. 517 (1926).

Where a contract is executed by a corporation's general mangaer [manager], presume it to be that of the corporation until a contrary showing. Wells-Dickey Co. v. Embody, 82 Mont. 150, 161, 266 P. 869 (1928).

Where the authority to execute a corporate deed was in the president and secretary and the status of the secretary was uncertain, presume that the authority of the president acting alone was sufficient. Stauffacher v. Great Falls Public Service Co., 99 Mont, 324, 329, 43 P.2d 647 (1935).

Derivative Suits

In a derivative suit, jurisdiction over a corporation is not presumed where only an alleged trustee of its property appears. Hanrahan v. Andersen, 108 Mont. 218, 234, 90 P.2d 494 (1939).

Officers of Corporation

Presume knowledge of corporations' affairs by directors in favor of innocent third persons, but not in favor officers or directors. Alward v. Broadway Gold Mining Co., 94 Mont. 45, 56, 20 P.2d 647 (1933).

If director of a corporation holds bona fide claim against it he may enforce it as any creditor might, and no presumption arises that he is dealing in bad faith unless he gains advantage thereby. Mayger v. St. Louis Mining Co., 68 Mont. 492, 501, 219 P. 1102 (1923).

Where a majority of directors are present at a stockholders meeting and assent to a specific action presume it has been ratified by Board of Directors. Fitzpatrick v. O'Neill, 43 Mont. 552, 563, 118 P. 273 (1911).

Stockholders

The presumption does not obtain that stockholders know the contents of records of directors' meeting or account books, and entries in such books do not therefore impute knowledge or ratification to them. Alward v. Broadway Gold Mining Co., 94 Mont. 45, 54, 20 P.2d 647 (1933).

Ultra Vires

The presumption is that the acts of a corporation are not ultra vires and that its bylaws are valid. McMahon v. Cooney, 95 Mont. 138, 145, 25 P.2d 131 (1933).

Creditor-Debtor

Proof of demand in an action for money had and received is not presumed. Anderson v. Hulme, 5 Mont. 295, 298, 5 P. 865 (1885).

In the absence of an affirmative showing that a renewal note is given and accepted as discharge and payment of a debt, there is no presumption of payment. First National Bank of Missoula v. Cottonwood Land Co., 51 Mont. 544, 550, 154 P. 582 (1916).

Where one borrows money from another upon a promise to repay but makes no mention of a debt claimed to be due him by the latter, the presumption arises that the lender is not indebted to the borrower. Crawford v. Pierce, 56 Mont. 371, 384, 185 P. 315 (1919); Kramer v. Schmidt, 62 Mont. 568, 574, 206 P. 620 (1922); Mundt v. Mallon, 106 Mont. 242, 249, 76 P.2d 326 (1938).

A promissory note in the possession of the payee bearing no endorsement showing payment is presumed to be unpaid, this must be proven. Vesel v. Polich Trading Co., 96 Mont. 118, 129, 28 P.2d 858 (1934).

The mere endorsement of partial payment on a joint promissory note made by an employee of the holder at the latter's direction does not raise a presumption that such payment was made by the maker of either of them. Nathan v. Jenkins, 113 Mont. 46, 57, 123 P.2d 975 (1942).

A settlement of accounts does not create an estoppel but furnishes a strong prima facie presumption that the results reached were correct. Johnson v. Gallatin Valley Mining Co., 38 Mont. 83, 88, 98 P. 883 (1909).

Criminal Law

Character

Previous good character of a party is not conclusive evidence and does not raise a presumption in his favor. State v. Jones, 32 Mont. 442, 451, 80 P. 1095 (1905).

Error

Error will not be presumed prejudicial. State v. Byrd, 41 Mont. 585, 592, 111 P. 407 (1910); State v. Hall, 55 Mont. 182, 188, 175 P. 267 (1918); State v. Prouty, 60 Mont. 310, 313, 199 P. 281

(1921); State v. Mumford, 69 Mont. 424, 436, 222 P. 447 (1924); State v. Huffman, 89 Mont. 194, 198, 296 P. 789 (1931).

Where accused shows he was denied constitutional right of public trial, prejudice is presumed. State v. Keeler, 52 Mont. 205, 214, 156 P. 1080 (1916).

Instructions concerned with presumption of innocence. (See [Table D] Part II Criminal Law and R.C.M. 1947, Section 95-2901 [46-16-204].)

The presumption of innocence of accused has the effect of evidence on his behalf and entitles defendant to instruction of same. State v. Harrison, 23 Mont. 79, 81, 57 P. 647 (1899); State v. Howell, 26 Mont. 3, 4, 66 P. 291 (1901); State v. Northern Pacific Railway, 41 Mont. 557, 563, 111 P. 141 (1910); State v. Livermore, 59 Mont. 362, 365, 196 P. 977 (1921).

An instruction allowing a strong presumption of innocence because reasonable doubt existed as to who committed the act was refused as misleading and invading the province of the jury. State v. Lu Sing, 34 Mont. 31, 39, 85 P. 521 (1906).

Where an instruction on the presumption of innocence is given and the instruction reads "where there are two presumptions, one in favor of innocence and the other in favor of a criminal course, the one in favor of innocence must prevail", it was properly refused. State v. Blaine, 45 Mont, 482, 486, 124 P. 516 (1912).

Malice

Presume second degree murder in the absence of evidence proving the act to be manslaughter, excusable or justifiable. State v. Fisher, 23 Mont, 540, 546, 59 P. 919 (1899); State v. Kuum, 55 Mont. 436, 447, 178 P. 288 (1919); State v. Chavez, 85 Mont. 544, 549, 281 P. 352 (1929); State v. LuDuc, 89 Mont. 545, 562, 300 P. 919 (1931).

Possession

Possession of liquor presumed illegal, the justification of its possession being on the accused. State v. Breeding, 73 Mont. 30, 32, 235 P. 1097 (1925).

The presumption obtains that a person in possession of premises is also in possession of articles found thereon. State v. Sawyer, 71 Mont. 269, 271, 229 P. 734 (1924); State v. Jacobson, 77 Mont. 57, 60, 249 P. 571 (1926); State v. Daly, 77 Mont. 387, 393, 250 P. 976 (1926).

Regularity of Proceedings

Presume an order amending minutes to show entry of plea is proper. Territory v. Clayton, 8 Mont. 1, 13, 19 P. 293 (1888).

Where pronouncement of judgment came before a required two-day interval after the guilty verdict was entered, the presumption obtains that the court did not remain in session after the judgment was entered. State v. Lu Sing, 34 Mont. 31, 40, 85 P. 521 (1906).

Presume in the absence of testimony that evidence was sufficient to show that guilty defendant committed burglary in nighttime and therefore received proper punishment. State v. Mish, 36 Mont. 168, 175, 92 P. 459 (1907).

On appeal, a presumption obtains in favor of the trial judge who saw and heard witnesses, where he denied a motion to suppress evidence. State v. Hum Quock, 89 Mont. 503, 512, 300 P. 220 (1931).

Presumption obtains that evidence was sufficient to sustain jury's verdict, even in absence of bill of exceptions. State v. Wong Sun, 114 Mont. 185, 193, 133 P.2d 761 (1943).

Held error for the trial court to presume jury commissioners had regularly performed duty. State v. Deeds, 130 Mont. 503, 509, 305 P.2d 321 (1956); State v. Chapman, 139 Mont. 98, 102, 360 P.2d 703 (1961).

Damages

Where landlord entered and intruded upon family's privacy for continued length of time, resulting detriment and damages are presumed; also where jury allows exemplary damages, it is presumed they found actual damages. Welsh v. Roehm, 125 Mont. 517, 525, 527, 241 P.2d 816 (1952).

Where a portion of purchase price sought as damages for breach of contract is the agreed value of a used car turned in as payment, a prima facie presumption arises that such valuation is the actual-value of the car. Evankovich v. Howard Pierce, Inc., 91 Mont. 354, 8 P.2d 653 (1932).

Presume that reasonably certain profits are within the mutual understanding of the parties to a contract and may be the basis for recovery upon breach. Smith v. Fergus County, 98 Mont. 377, 386, 39 P.2d 193 (1934).

Easements

Where easement on land under contract is open and visible the presumption obtains that parties entered contract with knowledge of conditions of property at the time. Pioneer Mining Co. v. Bannack Gold Mining Co., 60 Mont. 254, 263, 198 P. 748 (1921).

Where use of land is open and continuous, presume use was under claim of right and not license. To overcome the presumption landowner must show permissive use only or it becomes an easement by prescription. Ferguson v. Standley, 89 Mont. 489, 501, 300 P. 245 (1931); Groshean v. Dillmont Realty Co., 92 Mont. 227, 239, 12 P.2d 273 (1932).

Non-use of any easement for less time than required by statute of limitations for perfection does not raise a presumption of abandonment. Groshean v. Dillmont Realty Co., 92 Mont. 227, 239, 12 P.2d 273 (1932).

Elections

Presume elector knows time of election but not that a vacancy arose on election day which might be filled. State ex rel. Rowe v. Kehoe, 49 Mont, 582, 593, 144 P. 162 (1914).

Presume elector knows what offices are to be filled in general election, but not that a special election to fill an unexpired term is to be held. State ex rel. Patterson v. Lentz, 50 Mont. 322, 344, 146 P. 932 (1915).

Family Law

Adoption

Where an order of adoption is attacked by a stranger on grounds that the record did not reveal that a consent was signed, on appeal the presumption obtains that all requirements were met. In re Hoermann's Estate, 108 Mont. 386, 394, 91 P.2d 394 (1939).

Custody of Children

Presume that the best interest of the child requires that its custody be awarded to its parents. Haynes v. Fillner, 106 Mont. 59, 71, 75 P.2d 802 (1938).

Conflicting Presumptions of Marriage

A subsequent marriage is deemed valid, the presumption being that prior marriages were lawfully dissolved. In re Rash's Estate, 21 Mont. 170, 173, 53 P. 312 (1898); Shepherd & Pierson Co. v. Baker, 81 Mont. 185, 197, 262 P. 887 (1927).

The presumption of marriage disappears when it is shown that a prior marriage of one of the parties is undissolved and the burden rests on the party of the second marriage to prove validity. Shepherd & Pierson Co. v. Baker, 81 Mont. 185, 199, 262 P. 887 (1927); Welch v. All Persons, 85 Mont. 114, 132, 278 P. 110 (1929).

Pleading

Marriage being established and no actual separation shown, it will be presumed that when the wife applied for temporary alimony, the parties were still living together. State ex rel. Robinson v. District Court, 56 Mont. 592, 598, 186 P. 335 (1915).

Fiduciary Relationships

Banks as Trustees

Presume that trustee bank used its own funds first when mingling its funds with beneficiary's, and the remaining sum is presumed to belong to the beneficiary as portion of full amount due him. Hawaiian Pineapple Co. v. Brown, 69 Mont. 140, 148, 220 P. 114 (1923).

Guardians

Settlements and transactions of guardians are viewed with distrust and the presumption obtains that a ward acts with guardian's influence; such a transaction found constructively fraudulent must be proved a knowledgeable, deliberate act of the ward. In re Cuffe's Estate, 63 Mont. 399, 406, 207 P. 640 (1922).

No presumption arises that guardian is at fault for ward's loss, as guardian need not insure safety of investments of ward's funds. In re Kostohris' Estate, 96 Mont. 226, 241, 29 P.2d 829 (1934).

Undue Influence

Where parties in fiduciary relationship are parent and adult child the rebuttable presumption that undue influence was exerted in making transactions does not always apply. Roecher, Administrator v. Story, 91 Mont. 28, 42, 5 P.2d 205 (1931).

Fraud

Fraud is never presumed but must be proven by the party asserting it. Harrison v. Riddell, 64 Mont. 466, 478, 210 P. 460 (1922); Morigeau v. Lozar, 81 Mont. 434, 441, 263 P. 985 (1928); Cuckovich v. Buckovich, 82 Mont. 1, 6, 264 P. 930 (1928); Greer v. Stannard, 85 Mont. 78, 90, 277 P. 622 (1929); Teisinger v. Hardy, 86 Mont. 180, 189, 282 P. 1050 (1929); Eskestrand v. Wunder, 94 Mont. 57, 63, 20 P.2d 622 (1933); Costello v. Shields, Sheriff, 99 Mont. 335, 343, 43 P.2d 879 (1935).

Where one voluntarily conveys his property without keeping sufficient assets to pay creditors there is no requirement to show actual fraudulent intent, as under R.C.M. 1947, Section 93-1301-7(3), a person is presumed to intend the consequences of not retaining enough assets

and therefore to hinder, delay or defraud collection of the judgment. National Bank of Anaconda v. Yegen, 83 Mont. 265, 280, 271 P. 612 (1928).

Where statute of limitations is involved, if circumstances led plaintiff to suspect fraud so that if he inquired into it he would have had knowledge of the fraud, presume he had actual knowledge at that time. Ray v. Divers, 81 Mont. 552, 558, 264 P. 673 (1928).

Gifts

Gifts Causa Mortis

Where trustee accepts a gift causa mortis for donee presume acceptance of the gift. Stagg v. Stagg, 90 Mont. 180, 188, 300 P. 539 (1931).

Exception to Resulting Trust Presumption

R.C.M. 1947, Section 86-103 states that where real property is transferred to one person and consideration for it is paid by another, the presumption obtains that the trust results in favor of the person making the payment. An exception arises, however, where the person receiving the transfer and the party making payment are in close relationship, in which case the presumption obtains that the transaction was a gift. Clay v. Fleming, 60 Mont. 246, 250, 198 P. 546 (1921); Bast v. Bast, 68 Mont. 69, 76, 217 P. 345 (1923); Gates v. Powell, 77 Mont. 554, 562, 252 P. 377 (1926); McQuay v. McQuay, 81 Mont. 311, 320, 263 P. 683 (1928); Hoppin v. Lang, 81 Mont. 330, 339, 263 P. 421 (1928); Roman v. Albert, 81 Mont. 393, 406, 264 P. 115 (1928); Nelson v. Wilson, 81 Mont. 560, 568, 264 P. 679 (1928); Humbird v. Arnet, 99 Mont. 499, 509, 44 P.2d 756 (1935); McLaughlin v. Corcoran, 104 Mont. 590, 595, 69 P.2d 597 (1937); Bingham v. National Bank of Montana, 105 Mont. 159, 166, 72 P.2d 90 (1937); Lewis v. Lewis, 109 Mont. 42, 49, 94 P.2d 211 (1939); Lewis v. Browman, 113 Mont. 68, 77, 121 P.2d 162 (1942); Kranjcec v. Belinak, 114 Mont. 26, 34, 132 P.2d 150 (1942); Emmery v. Emmery, 122 Mont. 201, 223, 200 P.2d 251 (1948); In re Kuhr's Estate, 123 Mont. 593, 595, 220 P.2d 83 (1950); Dial v. Dial, 131 Mont. 310, 314, 310 P.2d 610 (1957); Platts v. Platts, 134 Mont. 474, 479, 334 P.2d 722 (1959); Poepping v. Monson, 138 Mont. 38, 45, 353 P.2d 325 (1960); Morano v. Newland, 141 Mont. 32, 36, 374 P.2d 721 (1962).

This presumption and exception do not apply to relationships between brothers or sisters. Detra v. Bartoletti, 150 Mont. 210, 217, 433 P.2d 485 (1967).

Indians

Where a person of mixed blood resides upon an Indian reservation and claims to be an Indian, the presumption obtains that he is an Indian, also against the assertion that defendant was erroneously enrolled in the tribe, it will be presumed that a reservation agent regularly performed his duty. State v. Phelps, 93 Mont. 277, 286, 19 P.2d 319 (1933).

Instructions to Jury

Presume instructions are correct. Black v. Black, 5 Mont. 15, 24, 2 P. 317 (1883); Howard v. Fraser, 83 Mont. 194, 199, 271 P. 444 (1928).

Presume the jury followed instructions. Vasby v. U.S. Gypsum Co. 46 Mont. 411, 423, 128 P. 686 (1912); Roberts v. Sinnott, 55 Mont. 369, 375, 177 P. 252 (1918); Komposh v. Powers, 75 Mont. 493, 508, 244 P.2d 298 (1926); Wallace v. Wallace, 85 Mont. 492, 513, 279 P. 374 (1929).

Where two instructions are given on a material point and one is incorrect it will not be presumed on appeal that the jury followed the correct one, but rather is reversible error. Sullivan v. Metropolitan Life Ins. Co., 35 Mont. 1, 7, 88 P. 401 (1906); Helena P.T. Co. v. McLean, 38 Mont. 388, 391, 99 P. 1061 (1908); Wells v. Waddell, 59 Mont. 436, 443, 196 P. 1000 (1921); Nagle v. City of Billings, 77 Mont. 205, 213, 250 P. 445 (1926).

Where party objects to a certain instruction, presume he would not have requested a similar instruction. First National Bank of Portland v. Carroll, 35 Mont. 302, 313, 88 P. 1012 (1907).

An erroneous instruction is presumed to be error and prejudicial. Parrin v. Montana Central Railway, 22 Mont. 290, 292, 56 P. 513 (1909); State v. Mason, 24 Mont. 340, 341, 61 P. 879 (1900); State v. Johnson, 26 Mont. 9, 11, 66 P. 290 (1901); Smith v. Parham, 33 Mont. 309, 313, 83 P. 492 (1905); Martin v. City of Butte, 34 Mont. 281, 284, 86 P. 264 (1906).

Insurance

Accidental Death

(For presumption of accidental death rather than suicide, see Suicide.) Insurance company must overcome the presumption that decedent's wife killed him accidentally and not with malicious intent in action on accident policy. Withers v. Pacific Mutual Life Insurance Co., 58 Mont. 485, 493, 195 P. 666 (1920).

Construction of Policy Terms

Presume the type of business practices engaged in were contemplated by insured when contracting. Park Saddle Horse Co. v. Royal Indemnity Co., 81 Mont. 99, 111, 261 P. 880 (1927).

A fire insurance policy is presumed to contain all the engagements of the parties. Baker v. Pennsylvania Fire Insurance Co., 81 Mont. 271, 278, 263 P. 93 (1928).

Auto insurance contract is presumed to contain mutually agreed terms and that the rates should be usual and customary. Austin v. New Brunswick Fire Insurance Co., 111 Mont. 192, 199, 108 P.2d 1036 (1940).

Duties of Assured and Agent

Presume an assured knows contents, conditions and limitations of a policy. (For limitation, see R.C.M. 1947, Section 40-5350). Collins v. Metropolitan Life Ins. Co., 32 Mont. 329, 342, 80 P. 609 (1905).

An insurance agent is presumed to know character and practice of business he insures. Park Saddle Horse Co. v. Royal Indemnity Co., 81 Mont. 99, 110, 261 P. 880 (1927).

Hail Insurance

In an action on a hail insurance policy presume the plaintiff owned the crop in the absence of proof to the contrary where he referred to it as his crop. Pasherstnik v. Continental Insurance Co., 67 Mont. 19, 23, 214 P. 603 (1923).

Waiver

An insurance company is presumed to have waived forfeiture of a policy for non-compliance where it retained a premium paid two days after it was due. Collins v. Metropolitan Life Insurance Co., 32 Mont. 329, 344, 80 P. 609 (1932).

The presumption does not necessarily follow that the insured intended to waive security for his loan on a policy. Zimmerman v. Mutual Life Insurance Co., 90 Mont. 336, 343, 3 P.2d 278 (1931).

Joint Interest

Where parties are awarded joint interest without specifically fixing the extent of their interest and the parties knew the extent of the rights of their predecessors, it is presumed that their interests were to that extent. Bennett v. Quinlan, 47 Mont. 247, 256, 131 P. 25 (1913).

Where one holder only of an awarded joint interest appeals, presume the other is satisfied. Spokane R & W Co. v. Beatty, 37 Mont. 342, 349, 96 P. 727 (1908).

Joint Ventures

Where one party in joint venture acts in good faith presume he has power to bind his associates and they are liable. Kennedy v. Conrad, 91 Mont. 356, 363, 9 P.2d 1075 (1932).

Jurisdiction (See also Statutory Presumption R.C.M. 1947, Section 93-1301-7(15), (16) [26-1-602].)

Where statutory presumption of jurisdiction does not apply:

Upon direct attack the presumption that the court has jurisdiction in rendering a default judgment does not obtain. Burke v. Interstate Steel Association, 25 Mont. 315, 320, 64 P. 879 (1901).

Where constructive service is used do not presume jurisdiction. English v. Jenks, 54 Mont. 295, 300, 169 P. 727 (1917).

Where court exercises statutory powers in special manner, general jurisdiction is not presumed and conferred special jurisdiction must be shown in the record. State ex rel. Thompson v. District Court, 75 Mont. 147, 152, 242 P. 959 (1926).

Jurisdiction of a board of county commissioners will not be presumed, and its validity may be questioned. Warren v. Chouteau County, 82 Mont. 115, 125, 265 P. 676 (1928).

The presumption does not obtain that a chairman of a board of county commissioners acting in the absence of a district judge had jurisdiction to enter commitment order in an insanity proceedings; if jurisdiction does not appear in the record, proceeding is void. State ex rel. Leonidas v. Larson, 109 Mont. 70, 73, 92 P.2d 774 (1934).

Justice Courts

No presumption obtains in favor of the judgments of justice courts. Jenkins v. Carroll, 42 Mont. 302, 312, 112 P. 1064 (1910); Miller v. Miller, 47 Mont. 150, 153, 131 P. 23 (1913); Beck v. Felenzer, 69 Mont. 592, 598, 233 P. 499 (1924).

Justice courts, being inferior courts, do not carry the presumption in favor of their jurisdiction. Layton v. Trapp, 20 Mont. 453, 455, 52 P. 208 (1897); State v. Lagoni, 30 Mont. 472, 475, 76 P. 1044 (1904); State ex rel. Skrukrud v. District Court, 71 Mont. 570, 575, 230 P. 1098 (1924); Peterson v. Feely, 88 Mont. 459, 462, 293 P. 667 (1930); Novack v. Pericich, 90 Mont. 91, 94, 300 P. 240 (1931); General Oil Corp v. Kelly, 94 Mont. 445, 450, 23 P.2d 555 (1933).

Presume a justice administered the oath to a witness before he testified. Mette and Kanne Distilling Co. v. Lowrey, 39 Mont. 124, 133, 101 P. 966 (1909).

Jury

In equity, presume the final decision corrects any errors in submitting issues to the jury. Lenahan v. Casey, 46 Mont. 367, 375, 128 P. 601 (1912).

The finding of the jury is presumed to be supported by the evidence. Huston v. Nuss, 19 Mont. 113, 114, 47 P. 634 (1897); Hefferlin v. Krieger, 19 Mont. 123, 126, 47 P. 638 (1897); Michalsky v. Centennial Brewing Co., Mont. 1, 15, 134 P. 307 (1913); Rumsey v. Spratt, 79 Mont. 158, 162, 255 P. 5 (1927).

Presume a jury's verdict is reached properly and that the jury drew no inference from the failure of the defendant to testify. State v. Sparks, 40 Mont. 82, 87, 105 P. 87 (1909).

Presume the jury considered evidence generally admitted, without limitation, in deciding the main issue of the case. Kansier v. City of Billings, 56 Mont. 250, 257, 184 P. 630 (1919).

Presume a jury did not consider extraneous behavior of the plaintiff while testifying and the verdict is properly reached. Hunt v. Van, 61 Mont. 395, 399, 202 P. 573 (1921).

Presume the jury disregarded a witness' stricken answer. Lindquist v. Seibold, 62 Mont, 162, 164, 199 P. 709 (1921).

Laches

When using the defense of laches where there is no explanation for delay, presume that none exists. Kavanaugh v. Flavin, 35 Mont. 133, 138, 88 P. 764 (1907); Hynes v. Silver Prince Mining Co., 86 Mont. 10, 18, 281 P. 548 (1929).

Laches is not presumed from a delay alone short of the time required for statute of limitations to expire. Brundy v. Canby, 50 Mont. 454, 473, 148 P. 315 (1915).

Landlord-Tenant

Where entry and occupancy are by permission of landlord, presume tenancy. Hamilton v. Crane, 62 Mont. 319, 322, 205 P. 205 (1922); Doyle v. Mullaney, 89 Mont. 20, 24, 295 P. 760 (1931).

This presumption does not obtain where lease was made with person other than the one claiming tenancy. Doyle v. Mullaney, 89 Mont. 20, 24, 295 P. 760 (1931).

Presume a lease is construed according to parties' intentions. McDonald v. McNinch, 63 Mont. 308, 315, 206 P. 1096 (1922).

Libel and Slander

A libelous publication per se is presumed malicious and injurious. Paxton v. Woodward, 31 Mont. 195, 208, 78 P. 215 (1904); Kelly v. Independent Publishing Co., 45 Mont. 127, 141, 122 P. 735 (1912).

Presume that third parties understood alleged slanderous words in their usual popular meaning. Daniel v. Moncure, 58 Mont. 193, 200, 190 P. 983 (1920).

In an action for slander presume the plaintiff has a good reputation. Fowlie v. Cruse, 52 Mont. 222, 237, 157 P. 958 (1916).

License Fee

Presume a license fee is reasonable. State ex rel. City of Bozeman v. Police Court, 68 Mont. 435, 444, 219 P. 810 (1923); State v. Pepper, 70 Mont. 596, 604, 226 P. 1108 (1924); City of Bozeman v. Nelson, 73 Mont. 147, 155, 237 P. 528 (1925); State v. Johnson, 75 Mont. 240, 257, 243 P. 1073 (1926).

A particular county officer's fees are presumed to be full compensation for designated services of his office as prescribed by the legislature. Brannin v. Sweet Grass County, 88 Mont. 412, 415, 293 P. 970 (1930).

Malicious Prosecution

An action for malicious prosecution requires that malice and lack of probable cause in a criminal action be established. Where lack of probable cause is established, malice may be presumed. Grorud v. Lossl, 48 Mont. 274, 281, 136 P. 1069 (1913); Beadle v. Harrison, 58 Mont. 606, 614, 194 P. 134 (1920); Halladay v. State Bank of Fairfield, 66 Mont. 111, 115, 212 P. 861 (1923); Wendel v. Metropolitan Life Insurance Co., 83 Mont. 252, 264, 272 P. 245 (1928).

Master-Servant

Employee may presume master is performing his duty to provide for his safety. McCabe v. Montana Central Railway, 30 Mont. 323, 333, 76 P. 701 (1904); Morelli v. Twohy Bros., 54 Mont. 366, 376, 170 P. 757 (1918).

Employer is presumed to use due care in supplying working equipment for employee, the burden being on employee to prove otherwise. Forquer v. Slater Brick Co., 37 Mont. 426, 447, 97 P. 843 (1908); Markarites v. Chicago, Minneapolis & St. Paul Railway, 59 Mont. 493, 501, 197 P. 743 (1921).

Scope of Employment

Presume compensation paid to employee is for services performed similar to his regular duties within scope of his employment. Doane v. Marquisee, 63 Mont. 166, 171, 206 P. 420 (1922).

Where an employee uses his employer's truck and the employer accrues slight incidental benefit, it is presumed that the employee was acting within the scope of his employment. Monaghan v. Standard Motor Co., 96 Mont. 165, 173, 29 P.2d 278 (1934).

Mining

Angle of Vein

The common law presumption of ownership of land from the sky to the center of the earth is overcome by the right to follow an ore vein to its dip. State ex rel. Parrot S & C Co. v. District Court, 28 Mont. 528, 538, 73 P. 230 (1903).

The quality and degree of a vein does not overcome the presumption that a landowner owns the ore beneath the surface. Heinze v. Boston & Montana Consolidated Mining Co., 30 Mont. 484, 488, 77 P. 421 (1904).

The angle of a vein is presumed the same, both above and below the surface. Barker v. Condon, 53 Mont. 585, 594, 165 P. 909 (1917).

Mining Claim

The validity of a mining claim is presumed and abandonment must be proved. Street v. Delta Mining Co., 42 Mont. 371, 385, 112 P. 701 (1910); Tripp v. Silver Dike Mining Co., 70 Mont. 120, 125, 224 P. 272 (1924).

Mortgages

The presumption does not obtain that the original mortgagee who owns a portion of notes securing a mortgage also holds the other notes secured by the same mortgage, the makers of which are unknown. McKenzie v. Evans, 96 Mont. 1, 8, 29 P.2d 657 (1934).

Municipal Government

Authority to Act

Presume a party contracting with a public board knows its authority. State ex rel. Stuerve v. Hensen, 44 Mont. 429, 443, 120 P. 485 (1912).

City councils have only such powers that are conferred by law; there is no presumption in favor of their creating special improvement districts. Johnson v. City of Hardin, 55 Mont. 574, 579, 179 P. 824 (1919).

It is presumed that when a city board or officer exercises power of appointment it is discretionary. Horvath v. Mayor of the City of Anaconda, 112 Mont. 266, 273, 116 P.2d 874 (1940).

Bonds

Presume a city has sufficient taxable property to cover all municipal bonds issued. Clerihew v. City of Baker, 109 Mont. 317, 321, 96 P.2d 269 (1939).

Presume that official duty is regularly performed (See also R.C.M. 1947, Section 93-1301-7(15) [26-1-602]).

Presume that there was street sprinkling and an assessment therefor was properly done. City of Butte v. School District, 29 Mont. 336, 339, 74 P. 869 (1903).

Presume that necessity for passage of an ordinance did exist. State v. Mayor of Butte, 69 Mont. 232, 236, 221 P. 524 (1923).

Where the inclusion of a 40-acre tract of land within the corporate limits of a town is contested, presume that this tract was included when the town was incorporated. Ogle v. Town of Ronan, 112 Mont. 394, 396, 117 P.2d 257 (1941).

Sidewalks and Streets

There is no presumption in favor of sidewalks having been built under a uniform plan. Metz v. City of Butte, 27 Mont. 506, 509, 71 P. 761 (1903).

Presume that municipal sidewalks and roads are constructed so as to be safe. O'Flynn v. City of Butte, 36 Mont. 493, 501, 93 P. 643 (1908); Smith v. Zimer, 45 Mont. 282, 292, 125 P. 420 (1912); McCabe v. City of Butte, 46 Mont. 65, 68, 125 P. 133 (1912); Nilson v. City of Kalispell, 47 Mont. 416, 422, 132 P. 1133 (1913); Irving v. Town of Stevensville, 51 Mont. 44, 46, 149 P. 483 (1915); Olson v. City of Butte, 86 Mont. 240, 249, 283 P. 222 (1929).

Negligence

In finding negligence the presumption obtains that other persons will act in a reasonable manner:

A miner charged with contributory negligence had the right to assume that a fellow worker would proceed in a reasonable manner. Daniels v. Granite Bimetallic C. Mining Co., 56 Mont. 284, 289, 184 P. 836 (1919).

Occupants of a car involved in an accident cannot be found contributorily negligent as they may presume the driver would keep a lookout, obey the law and have the car under control. Flynn v. Helena Cab and Bus Co., 94 Mont. 204, 215, 21 P.2d 1105 (1933).

The driver of a car being passed on the highway may presume that the passing car will act in a lawful manner. Cowden v. Crippen, 101 Mont. 187, 206, 53 P.2d 98 (1936).

Knowledge of Instrumentality

The presumption of contributory negligence does not obtain because of party's knowledge of pending instrumentality at accident site; it must be shown that he had a reason to apprehend danger. Hughey v. Fergus County, 98 Mont. 98, 106, 37 P.2d 1035 (1934); McCulloch v. Horton, 105 Mont. 531, 541, 74 P.2d 1 (1937).

An instruction stating that a tenant is presumed to know defects of premises and rents subject thereto was refused where tenant fell on icy sidewalk because of neglect of adjacent property owner; a nuisance cannot be maintained by prescription. Toole v. Paumie Parisian Dye House, 98 Mont. 191, 202, 39 P.2d 965 (1934).

Facts Which Do Or Do Not Give Rise to the Presumption of Negligence

Where the cause of an accident is under the control of defendant, and but for lack of such control the accident would not have happened, presume defendant was negligent and burden rests on him to prove ordinary care. Hardesty v. Largey Lumber Co., 34 Mont. 151, 157, 86 P. 29 (1906).

Contributory negligence must appear, it will not be presumed. Kelly v. John R. Daly Co., 56 Mont. 63, 75, 181 P. 326 (1919).

Where patient is anaesthetized while still under influence of strong drink, and died shortly thereafter, negligence is not presumed because danger is present whenever an anaesthetic is administered. Loudon v. Scott, 58 Mont. 645, 657, 194 P. 488 (1920).

Presume negligence of motorman who did not ring bell when approaching an intersection and caused an accident. McManus v. Butte Railway Co., 68 Mont. 379, 391, 219 P. 241 (1923).

While negligence must be shown and may not be presumed, facts constituting it may be established by circumstantial evidence. Childers v. Deschamps, 87 Mont. 505, 516, 290 P. 261 (1930).

There is no presumption of negligence against the driver of a car which strikes a pedestrian. Johnson v. Herring, 89 Mont. 420, 425, 300 P. 535 (1931).

Res Ipsa Loquitur

Where this doctrine applies a presumption arises in the absence of explanatory evidence that the injury suffered by plaintiff was due to defendant's negligence. McGowan v. Nelson, 36 Mont. 67, 76, 92 P. 40 (1907); Lyon v. Chicago, Milwaukee & St. Paul Ry., 50 Mont. 532, 537, 148 P. 386 (1915); Johnson v. Herring, 89 Mont. 420, 426, 300 P. 535 (1931); Maki v. Murray Hospital, 91 Mont. 251, 263, 7 P.2d 228 (1932); Vonault v. O'Rourke, 97 Mont. 92, 105, 33 P.2d 525 (1934); Hickman v. First Nat'l Bank of Great Falls, 112 Mont. 398, 414, 117 P.2d 275 (1941); Davis v. Trobough, 139 Mont. 322, 324, 363 P.2d 727 (1961); Gormley v. Montana Deaconess Hosp., 149 Mont, 12, 18, 423 P.2d 301 (1967); Baker v. Rental Service, Co., 150 Mont. 166, 173, 432 P.2d 624 (1967).

The Presumption Obtains That a Person Will Be Vigilant.

A person is presumed to see everything he can by looking straight ahead and laterally, but he must be vigilant to avoid neglect. Autio Administratrix v. Miller, 92 Mont. 150, 165, 11 P.2d 1039 (1932); McNair v. Berger, 92 Mont. 441, 460, 15 P.2d 834 (1932); Koppang v. Sevier, 106 Mont. 79, 102, 75 P.2d 790 (1938); Sullivan v. Northern Pacific R.R., 109 Mont. 93, 110, 94 P.2d 651 (1939); Sullivan v. City of Butte, 117 Mont. 215, 220, 157 P.2d 749 (1945).

This presumption does not obtain where a customer falls over obstruction under the presumption that the premises were safe. Ralph v. MacMarr Stores, 103 Mont. 421, 432, 62 P.2d 1285 (1936).

New Trial

Newly Discovered Evidence

Where court passes on a motion for new trial on grounds of newly discovered evidence, presume it did so with knowledge that all presumptions indulge against the movant that he could have secured the evidence in the former trial. In re Colbert's Estate, 31 Mont. 461, 483, 78 P. 971 (1904).

Regularity of Proceedings

Presume statement for a new trial met all requirements. Murray v. Hauser, 21 Mont. 120, 125, 53 P. 99 (1898).

The trial court is presumed to have made its decision on proper foundation and sufficient evidence and acted legally in denying a motion for new trial. State v. Shepphard, 23 Mont. 323, 324, 58 P. 868 (1899).

Presume proper service even where statement shows service of request for new trial was late. Beach v. Spokane R & W Co., 25 Mont. 367, 369, 65 P. 106 (1901).

Where a court issues an order for a new trial presume it did so because of insufficient evidence preponderating against the verdict. Harrington v. Butte-Boston Mining Co., 27 Mont. 1, 12, 69 P. 102 (1902).

Presume that a statement used before the Supreme Court is the same statement used for motion for new trial. Mahoney v. Dixon, 31 Mont. 107, 113, 77 P. 519 (1904).

Presume steps taken to settle statement for motion for new trial are according to law where not shown on the record. Friel v. Kimberly Montana Gold Mining Co., 34 Mont. 54, 59, 85 P. 734 (1906).

Presume that the district court had notice before it to justify passing on a motion for new trial. Ettien v. Drum, 35 Mont. 81, 90, 88 P. 659 (1907).

Presume that the notice of intent to move for new trial is served and filed in time. The same case at 126 [sic—There was nothing at original page 126] states that it will be presumed that court's order for remission of judgment is correct. State ex rel. Cohn v. District Court, 38 Mont. 119, 124, 99 P. 139 (1909).

Presume that a notice of intent to move for new trial is filed in time. Best Mfg. Co. v. Hutton, 49 Mont. 78, 86, 141 P. 653 (1914).

The Supreme Court will presume that an order for new trial was based upon the minutes; the presumption obtains that a hearing on a motion for new trial was heard at the earliest possible time after notice in the absence of a showing that the court abused its discretion. Price v. Northern Pacific Railway, 60 Mont. 166, 170, 198 P. 439 (1921).

Even where affidavits conflict and a motion for new trial is based on them, the presumption obtains in favor of court's ruling. Benjamin v. Helena Light & Railway, 79 Mont. 144, 146, 255 P. 20 (1927).

On appeal from a general order granting new trial presume the court felt movant could prevail on retrial; it is reversible error only if abuse of discretion is shown. Parsons v. Rice, 81 Mont. 509, 517, 264 P. 396 (1928).

Presume a motion for new trial is denied where it is not heard within a specified time. Schoenborn v. Williams, 83 Mont. 477, 480, 272 P. 992 (1928).

Where motion for new trial is heard by new judge, the same presumption does not attend his acts as would have attended the judge who originally heard the case. Gibson v. Morris State Bank, 49 Mont. 60, 72, 140 P. 76 (1914); Loncar v. National Union Fire Insurance Co., 84 Mont. 141, 148, 274 P. 844 (1929).

Pleading

(Note: The following cases were decided before the Montana Rules of Civil Procedure were adopted; however, the same principles which are the foundation of the presumptions could still apply and so they are included.)

Answer

An affirmative material allegation is presumed admitted when there is no replication. McMillan v. Carter, 6 Mont. 215, 218, 9 P. 906 (1886).

Presume an admitted complaint was formal and a ruling on it correct and rights were waived by answering it. Barber v. Briscoe, 8 Mont. 214, 219, 19 P. 589 (1888).

Presume the issues raised by denials in an answer are sustained by the evidence. Hefferlin v. Krieger, 19 Mont. 123, 126, 47 P. 638 (1897).

Presume a pleader states his cause of action as strongly as he can, where complaint is attacked. Conrad National Bank v. Great Northern Ry., 24 Mont. 178, 182, 61 P.1 (1900); Montana Amusement Sec. Co. v. Goldwyn Distributing Corp., 56 Mont. 215, 224, 182 P. 119 (1919); Awbery v. Schmidt, 65 Mont. 265, 270, 211 P. 346 (1922); State ex rel. Toomey v. State Bd. of Examiners, 74 Mont. 1, 14, 238 P. 316 (1925); Northern Pacific R. R. v. Musselshell County, 96 Mont. 544, 549, 32 P.2d 1 (1934).

Judgment

The presumption is in favor of jurisdiction of all things requisite to judgment's validity even where it is deficient in some particulars. Thomson v. Nygaard, 98 Mont. 529, 538, 41 P.2d (1935).

Lease

If necessary for validity, presume a lease is in writing when pleading. Elijah v. Wright, 52 Mont. 438, 440, 158 P. 475 (1916).

On motion for directed verdict

On motion for directed verdict every fact should be deemed proved which the evidence offered by plaintiff tends to prove. Koerner v. Northern Pacific Railway, 56 Mont. 511, 518, 186 P. 337 (1919).

Motion for Non-Suit

Every fact is presumed proved which the evidence tends to prove. McCabe v. Montana Central Ry., 30 Mont. 323, 334, 76 P. 701 (1904); Dawes v. City of Great Falls, 31 Mont. 9, 14, 77

P. 309 (1904); Allen v. Bell, 32 Mont. 69, 75, 79 P. 582 (1905); Stewart v. Stone & Webster Engineering Corp., 44 Mont. 160, 171, 119 P. 568 (1911); McAllister v. Rocky Fork Coal Co., 45 Mont. 433, 438, 123 P. 696 (1912); Sprinkle v. Anderson, 57 Mont. 223, 226, 187 P. 908 (1920); Park v. Grady, 62 Mont. 246, 252, 204 P. 382 (1922).

Principle-Agent

Authority of Agent

Presume an agent is hired only to make contracts, not to rescind or modify them, affecting principle's rights or obligations without his approval. Benema v. Union Central Life Ins. Co., 94 Mont. 138, 148, 21 P.2d 69 (1933).

Existence of Relationship—Dealings

Where agent acts openly for himself or for another, do not presume he imported knowledge to his principle. Comerford v. U.S. F & G Co., 59 Mont. 243, 257, 196 P. 984 (1921).

Where an agent uses "I" in dealings, the presumption that he is dealing for principle is not overcome. Bachman v. Gerer, 64 Mont. 28, 34, 200 P. 891 (1922).

Presume the relationship of principle-agent continues in absence of showing to contrary; principle must show termination. Exchange State Bank v. Occident Elevator Co., 95 Mont. 78, 89, 24 P.2d 126 (1933).

Where an act by an agent was not repudiated, presume that that act was ratified by the principle. Miller v. Aetna Life Ins. Co., 101 Mont, 212, 225, 53 P.2d 704 (1936).

Scope of Employment

Where an employee uses his employer's truck and the employer accrues slight incidental benefit, it is presumed that the employee was acting with the scope of his employment. Monaghan v. Standard Motor Co., 96 Mont. 165, 173, 29 P.2d 278 (1934).

Where a truck driven by one defendant bore another defendant company's name and carried freight to its stores, the disputable presumption obtains that ownership is in the second company. Ashley v. Safeway Stores, Inc., 100 Mont. 312, 323, 47 P.2d 53 (1935).

Presume where driver of a car is car owner's employee, he is acting within scope of employment. Eliason v. Geil Agency, 114 Mont. 97, 99, 132 P.2d 158 (1942).

Probate

Attestation Clause

The presumption of proper execution is raised when a will is proved and admitted to probate. In re Silver's Estate, 98 Mont. 141, 156, 38 P.2d 277 (1934); In re Bragg's Estate, 106 Mont. 132, 142, 76 P.2d 57 (1938); In re Mickich's Estate, 114 Mont. 258, 276, 136 P.2d 223 (1943); In re Choiniere's Estate, 117 Mont. 65, 71, 156 P.2d 635 (1945); In re Woodburn's Estate, 128 Mont. 145, 150, 273 P.2d 391 (1954); In re Sword's Estate, 129 Mont. 165, 173, 284 P.2d 624 (1955).

Construction

Presume when one makes a will he intends to dispose of his entire estate and the will should be construed in that manner. In re Sprigg's Estate, 70 Mont. 272, 275, 225 P. 617 (1924).

When used in a will the word "relatives" is presumed to mean such relatives as are heirs under law, unless a contrary intention is apparent from the context. In re Bernheim's Estate, 82 Mont. 198, 208, 266 P. 378 (1928).

Intestacy

Where a lost will was last seen in testator's possession, presume he destroyed it. In re Colbert's Estate, 31 Mont. 461, 468, 78 P. 971 (1904).

The presumption is against intestacy and courts will sustain a will if it is possible to do so, every presumption arising in favor of its execution. In re Bragg's Estate, 106 Mont. 132, 140, 76 P.2d 57 (1938).

Executors

Presume that upon settlement an executor will be properly compensated for his services. In re Courtney's Estate, 31 Mont. 625, 630, 79 P. 317 (1905).

Property

Deed

Where county was a competitive bidder at sale and appears as grantee on a tax deed which has an invalidity, the presumption of official duty being regularly performed will not protect the county. Rush v. Lewis & Clark County, 86 Mont. 566, 570, 96 P. 943 (1908).

Presume grantee named on a deed claimed possession only to the land described therein. Northern Pac. Ry. v. Cash, 67 Mont. 585, 596, 216 P.2d 782 (1923).

Land Patents

It will not be presumed that the first publication of notice of application for patent was made on the same day the application was filed. Helbert v. Tatem, 34 Mont. 3, 5, 85 P. 733 (1906).

A public patent, being the highest evidence of title, is presumed issued upon meeting all conditions and is not open to collateral attack. Pittsmont Copper Co. v. Vanina, 71 Mont. 44, 53, 227 P.46 (1924).

Because an Indian did not express dissent at acquiring U.S. citizenship with the acceptance of a patent, it will be presumed he accepted it. State v. Monroe, 83 Mont. 556, 568, 274 P. 840 (1929).

Regularity of Proceedings or Conduct (See also Statutory Presumptions under same heading)

Presume proceedings are regular, and, in the absence of a showing to the contrary, that notice was given. Lish v. Martin, 55 Mont. 582, 583, 179 P. 826 (1919); In re McGovern's Estate, 77 Mont. 182, 203, 250 P. 812 (1926).

Where all conditions precedent to delivery of escrowed oil and gas lease have been met, presume it has been delivered under the doctrine that that which should have been done has been done. Guerin v. Sunburst Oil and Gas Co., 68 Mont. 365, 371, 218 P. 949 (1923).

Where an officer seizes property under a particular section, the state must establish jurisdictional facts and may not rely on presumptions. State v. Rouleau, 68 Mont. 529, 542, 219 P. 1096 (1923).

The court will presume an IAB [Industrial Accident Board—abolished 1971] order is correct, a preponderance of evidence against it being necessary to overturn it. Moffett v. Bozeman Canning Co., 95 Mont. 347, 351, 26 P.2d 973 (1933); Best v. London Guarantee & Accident Co., 100 Mont. 332, 340, 47 P.2d 656 (1935). (For later statutory presumption see R.C.M. 1947, section 92-1360 [repealed].)

Where board refuses to grant plaintiff a liquor license on grounds that the majority of townspeople were against it, the court will not presume the board had any other reason. State ex rel. McCarten v. Harris, 112 Mont. 344, 349, 115 P.2d 292 (1941).

In the absence of a showing to the contrary, presume appointment of special prosecutor is regularly made. State v. Cockrell, 131 M. 254, 259, 309 P.2d 316 (1957).

Sanity

The presumption of sanity is overcome whenever sufficient evidence is introduced to cast reasonable doubt on defendant's sanity. State v. Peel, 23 Mont. 358, 372, 59 P. 169 (1899).

Persons are presumed to be of sound mind when entering transactions. Sommerville v. Greenhood, 65 Mont. 101, 114, 210 P. 1048 (1922); In re Harper's Estate, 98 Mont. 356, 373, 40 P.2d 51 (1934); Lacy, Administratrix v. Harmon, 137 Mont. 489, 493, 353 P.2d 96 (1960).

Where insanity is proved, presume it continues to exist until there is a showing to the contrary. In re Murphy's Estate, 43 Mont. 353, 373, 116 P. 1004 (1911); In re Estate of Redfern, 64 Mont. 49, 57, 208 P. 1072 (1922).

Sanity will be presumed where a person suffers from temporary delirium, but is not in such a state. Sommerville v. Greenhood, 65 Mont, 101, 116, 210 P. 1048 (1922).

Schools

County school superintendents act in a quasi-judicial function and no presumption obtains in favor of the regularity of their acts. School District No. 28 v. Larson, 80 Mont. 363, 372, 260 P. 1042 (1927).

Statutory or Constitutional Construction

Constitutionality of Statutes

Statutes are presumed constitutional. People ex rel. Van Gaskin, 5 Mont. 352, 366, 6 P. 30 (1885); Spratt v. Helena Power Transmission Co., 37 Mont. 60, 87, 94 P. 631 (1908); Quong Wing v. Kirkendall, 39 Mont. 64, 68, 101 P. 250 (1909); State v. Podel, 51 Mont. 100, 105, 149 P. 481 (1915); Lewis and Clark County v. Industrial Acc. Bd., 52 Mont. 6, 12, 155 P. 268 (1916); Shea v. North Butte Mining Co., 55 Mont. 522, 536, 179 P. 499 (1919); Bonner v. Dixon, 59 Mont. 58, 75, 195 P. 841 (1921); State v. Bowker, 63 Mont. 1, 5, 205 P. 961 (1922); Mills v. Dixon, 66 Mont. 76, 84, 213 P. 227 (1923); Goodell v. Judith Basin Co., 70 Mont. 222, 228, 274 P. 1110 (1924); State ex rel. Rankin v. District Court, 70 Mont. 322, 326, 225 P. 804 (1924); State ex rel. Banker's Trust v. Walker, 70 Mont. 484, 502, 226 P. 894 (1924); State v. Pepper, 70 Mont. 596, 601, 226 P. 1108 (1924); State ex rel. Toomey v. State Bd. of Examiners, 74 Mont. 1, 6, 238 P. 316 (1925); State ex rel. Jones v. Erickson, 75 Mont. 429, 438, 244 P. 287 (1926); State ex rel. Wallace v. Callow, 78 Mont. 308, 317, 254 P. 187 (1927); State ex rel. Stevens v. Keaster, 82 Mont. 126, 133, 266 P. 387 (1928); State ex rel. Clifton, Applegate & Toole v. State Hwy. Comm., 82 Mont. 382, 388, 267 P. 499 (1928); Russell v. Sunburst Refining Co., 83 Mont. 452, 474, 272 P. 998 (1928); State ex rel. Public Serv. Comm. v. Brannon, 86 Mont. 200, 214, 283 P. 202 (1929); Fulton Oil Co. v. Toole County, 86 Mont. 367, 375, 283 P. 769 (1930); State v. Gateway Mortuaries, Inc., 87 Mont. 225, 235, 287 P. 156 (1930); Arps v. Highway Comm., 90 Mont. 152, 171, 300 P. 549 (1931); Herrin v. Erickson, 90 Mont. 259, 275, 2 P.2d 296 (1931); State ex rel. Powell v. State Bank of Moore, 90

Mont. 539, 549, 4 P.2d 717 (1931); State ex rel. City of Missoula v. Holmes, 100 Mont. 256, 273, 47 P.2d 624 (1935); State v. Stark, 100 Mont. 365, 368, 52 P.2d 890 (1935); Wheir v. Dye, 105 Mont. 347, 352, 73 P.2d 209 (1937); State v. Safeway Stores, Inc., 106 Mont. 182, 199, 76 P.2d 81 (1938); State ex rel. Siegfriedt v. Carbon County, 108 Mont. 510, 513, 92 P.2d 301 (1939); Vaughn & Ragsdale Co. v. State Board, 109 Mont. 52, 60, 96 P.2d 420 (1939); Mulholland v. Ayers, 109 Mont. 558, 567, 99 P.2d 234 (1940); Willett v. State Bd. of Examiners, 112 Mont. 317, 321, 115 P.2d 287 (1941); Gullickson v. Mitchell, 113 Mont. 359, 367, 126 P.2d 1106 (1942); State v. Thierfelder, 114 Mont. 104, 110, 132 P.2d 1035 (1943); House v. School Dist. No. 4, 120 Mont. 319, 324, 184 P.2d 285 (1947).

Two conflicting sections are both presumed to be operative and governing the title in which they appear; courts will construe them together and reconcile them. Barth v. Ely, 85 Mont. 310, 322, 278 P. 1002 (1929).

Presume a statute remains in force until its repeal is shown. Walker Motor Exchange v. Lindberg, 86 Mont. 513, 519, 284 P. 270 (1930).

Interpretation of Language

Words used in statutes and constitutions are presumed to be used in their natural, ordinary sense. State ex rel. Hinz v. Moody, 71 Mont. 473, 481, 230 P. 575 (1924); Rider v. Cooney, 94 Mont. 295, 309, 23 P.2d 261 (1933).

The meaning of a term used in the Constitution will be presumed to be the same as given it by other jurisdictions. State ex rel. Gerry v. Edwards, 42 Mont. 135, 143, 111 P. 734 (1910).

Legislative Intent

When statute is amended, presume the legislature intended to change existing law, although a mere change of words may have been made to clarify language. State ex rel. Rankin v. Wibaux County Bank, 85 Mont. 532, 540, 281 P. 341 (1929); State ex rel. Federal Land Bank v. Hays, 86 Mont. 58, 65, 282 P. 32 (1929); Nichols v. School District, 87 Mont. 181, 186, 287 P. 624 (1930); Mitchell v. Banking Corp., 95 Mont. 23, 27, 24 P.2d 124 (1933); In re Wilson's Estate, 102 Mont. 178, 192, 56 P.2d 733 (1936).

The legislature is presumed to understand meaning of words used and that they were used in their ordinary sense. Helena Light & Ry. v. Northern Pacific Ry., 57 Mont. 93, 113, 186 P. 702 (1920); State ex rel. Federal Land Bank v. Hays, 86 Mont. 58, 63, 282 P. 32 (1929).

Where a city enters into a contract with a public utility for specific rates, do not presume a surrender of state legislative power of utility rate regulation. State ex rel. City of Billings v. Billings Gas Co., 55 Mont. 102, 110, 173 P. 799 (1918).

Presume the legislature is aware of existing law in relation to a subject when it attempts to change it. State ex rel. Escar v. District Court, 56 Mont. 464, 467, 185 P. 157 (1919); State ex rel. Public Service Commission v. Brannon, 86 Mont. 200, 211, 283 P. 202 (1929); Rider v. Cooney, 94 Mont. 295, 310, 23 P.2d 261 (1933); Ex parte Sheehan, 100 Mont. 244, 253, 49 P.2d 438 (1935); In re Wilson's Estate, 102 Mont. 178, 194, 56 P.2d 733 (1936).

Presume the legislature passes acts which aim to be reasonable, just and promote convenience; therefore statutes should be construed to be beneficial. State ex rel. Mallott v. Board of Commissioners, 89 Mont. 37, 87, 296 P. 1 (1931).

Presume that the legislature acts in good faith when estimating the amount of revenue and making appropriations. State ex rel. Tipton v. Erickson, 93 Mont. 466, 475, 19 P.2d 227 (1933).

Presume the legislature knows the conditions and policies of livestock industry in order to obtain best returns on state grazing leases. Leuthold v. Brandjord, 100 Mont. 96, 106, 47 P.2d 41 (1935); Rathbone v. State Bd. of Land Commissioners, 100 Mont. 109, 123, 47 P.2d 47 (1935).

Where the legislature selects a particular class of persons for special treatment, presume it did so upon legitimate grounds of distinction. Rutherford v. City of Great Falls, 107 Mont. 512, 520, 86 P.2d 656 (1939).

Presume the legislature, in adopting a statute, is aware of the construction of similar statutes. Vantura v. Montana Liquor Control Bd., 113 Mont. 265, 270, 124 P.2d 569 (1942).

Where the Supreme Court's interpretation of a particular state policy is not changed by three legislative sessions, presume it is correct. State ex rel. Rankin v. Madison State Bank, 68 Mont. 342, 349, 218 P. 652 (1923).

Prospective and Retrospective Laws

Retrospective laws are viewed disfavorably, the presumption being that the legislature did not intend a new rule for past transactions. Sullivan v. City of Butte, 65 Mont. 495, 498, 211 P. 301 (1922).

The presumption is that the statute is intended to operate prospectively only. State ex rel. Mills v. Dixon, 68 Mont. 526, 528, 219 P.2d 637 (1923); State ex rel. City of Billings v. Osten 91

Mont. 76, 79, 5 P.2d 562 (1931) (This case states the same rule with a presumption citing R.C.M. 1947, Section 12-201 [1-2-109].)

Law of Another State

Where a showing is not made, presume the law of another state is the same as the law of Montana on a particular subject. State v. American Bank and Trust Co., 76 Mont. 445, 451, 247 P. 336 (1926); Springhorn v. Roberts, 77 Mont. 395, 398, 250 P. 1112 (1926); Harvey E. Mat Co. v. Ryan, 80 Mont. 524, 532, 261 P. 283 (1927); Quickenden v. Hulbert, 83 Mont. 501, 509, 272 P. 994 (1928); Kalman v. Treasure County, 84 Mont. 285, 295, 275 P. 743 (1929).

Presume the legislature in adopting a statute of another state adopts the interpretation given it by the highest court of the other state. Moreland v. Monarch Mining Co., 55 Mont. 419, 425, 178 P. 175 (1919).

Repeal by Implication — Inconsistent or Conflicting Statutes

Where a new statute conflicts with an existing one, repeal by implication is not presumed, the later statute merely an exception or qualification to the prior one. Special Road District No. 8 v. Millis, 81 Mont. 86, 98, 261 P. 885 (1927); State ex rel. Nagle v. The Leader Co., 97 Mont. 586, 593, 37 P.2d 561 (1934); State ex rel. Normile v. Cooney, 100 Mont. 391, 397, 47 P.2d 637 (1935); State ex rel. Haines v. District Court, 106 Mont. 470, 479, 78 P.2d 937 (1938); State ex rel. Charette v. District Court, 107 Mont. 489, 495, 86 P.2d 750 (1939).

Suicide

Presume against suicide and in favor of accidental death. Withers v. Pacific Mutual Life Ins. Co., 58 Mont. 485, 493, 193 P. 566 (1920); Nichols v. New York Life Ins., 88 Mont. 132, 140, 192 P. 253 (1930); Lewis v. New York Life Ins. Co., 113 Mont. 151, 158, 124 P.2d 579 (1942).

Tax

In General

Presume a tax is valid. Anaconda Copper Mining Co. v. Ravalli County, 52 Mont. 422, 426, 158 P. 682 (1916).

A state's taxing power is never presumed to be relinquished. Cruse v. Fischl, 55 Mont. 258, 267, 175 P. 878 (1918); Valley County v. Thomas, 109 Mont. 345, 372, 97 P.2d 345 (1939).

Courts presume the legislature discretionarily classified property for tax purposes and did not intend to grant special privileges. Hilger v. Moore County Treasurer, 56 Mont. 146, 175, 182 P. 477 (1919).

Fraud by taxing officials is never presumed. Danforth v. Livingston, 23 Mont. 558, 563, 59 P. 916 (1900); State v. State Board of Equalization, 56 Mont. 413, 455, 186 P. 697 (1920).

Non-Residents

Presume non-resident land owners take notice that if taxes are not paid annually, their property will be sold at tax sale. Sutter v. Scudder, 110 Mont. 390, 395, 103 P.2d 303 (1940).

Payment

Where a taxpayer cannot prove he paid tax in a given year, presume he paid where it is shown he paid them for a series of years and that particular year's taxes were not included in the tax bill for following years. Smith v. Blaine County, 102 Mont. 116, 119, 56 P.2d 179 (1936).

Regularity

Presume proceedings leading to issuance of order are correct, particularly where property was completely described in the order. State ex rel. State Board of Equalization v. Jacobson, 107 Mont. 461, 465, 86 P.2d 9 (1938).

The State Board of Equalization is quasi-judicial and its findings are presumed justified by evidence. IBM Corp. v. Lewis & Clark County, 111 Mont. 384, 387, 112 P.2d 477 (1941).

Situs of Personal Property

For tax purposes, intangible personal property is presumed to have situs at owner's domicile. Monidah Trust v. Sheehan, 45 Mont. 424, 430, 123 P. 692 (1912).

Usage

Usage must be well enough established as to warrant a legal presumption for the parties who contracted with reference thereto. Fitzgerald v. Hanson, 16 Mont. 474, 476, 41 P. 230 (1895).

Water Rights

Where notice of water appropriation is properly acknowledged and recorded, presume it is genuine. Cook v. Hudson, 110 Mont. 263, 284, 103 P.2d 137 (1940).

Presume that seepage water is a natural supply of a creek in the absence of a showing that it was made to rise by artificial means. Beaverhead Canal Co. v. Dillon Electric Light & Power Co., 34 Mont. 135, 140, 85 P. 880 (1906).

Part Case Notes

Persistent Felony Offender Sentence — Presumption of Constitutionality: Following a conviction for attempted deliberate homicide, the defendant was sentenced as a persistent felony

offender to 30 years in prison without parole. While the defendant claims the sentence to be unconstitutional, it was held in St. v. Karathanos, 158 M 461, 493 P2d 326 (1972), that a sentence within statutory limits is presumed to be constitutional. The defendant has the burden of overcoming the presumption and has not done so. St. v. Kirkland, 184 M 229, 602 P2d 586, 36 St. Rep. 1963 (1979).

Presumption in Jury Instruction — Interpretation: The effect of a presumption in a jury instruction is determined by the way in which a reasonable juror would have interpreted it, not by a state court's interpretation of its legal import. Sandstrom v. Mont., 442 US 510, 61 L Ed 2d 39, 99 S Ct 2450 (1979).

Supreme Court as Final Authority: The Supreme Court of Montana is the final authority on the legal weight to be given a presumption instruction under Montana law, but it is not the final authority on the interpretation which a jury could have given to the instruction. Sandstrom v. Mont., 442 US 510, 61 L Ed 2d 39, 99 S Ct 2450 (1979).

Part Law Review Articles

Presumptions in Criminal Cases: A New Look at an Old Problem, Ranney, 41 Mont. L. Rev. 21 (1980).

26-1-601. List of conclusive presumptions.

Compiler's Comments

1983 Amendment: In lead-in, after "presumptions" deleted "and no others"; deleted former (1) and (2), which read: "(1) a malicious and guilty intent, from the deliberate commission of an unlawful act for the purpose of injuring another;

(2) the truth of the facts recited, from the recital in a written instrument between the parties thereto or their successors in interest by a subsequent title; but this rule does not apply to the recital of a consideration;"; in (1), substituted "the truth of a declaration, act, or omission of a party, as against that party in any litigation arising out of such declaration, act, or omission, whenever he has, by such declaration, act, or omission, intentionally led another to believe a particular thing true and to act upon such belief" for "whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he cannot in any litigation arising out of such declaration, act, or omission be permitted to falsify it;"; deleted former (5), which read: "the issue of a wife cohabiting with her husband who is not impotent is indisputably presumed to be legitimate;"; in (3), changed "this code" to "statute", and deleted final clause, which read: "; but such judgment or order must be alleged in the pleadings if there be an opportunity to do so; if there be no such opportunity, the judgment or order may be used as evidence;"; and made minor changes in style.

Case Notes

General Cases Concerning Presumptions 84
Estoppel by Own Acts 85
Landlord's Title 92
Judgment or Order of Court 92

GENERAL CASES CONCERNING PRESUMPTIONS

No Equitable Estoppel of Defense of Sixty-Month Claim Limit on Workers' Compensation Benefits: Following a work-related injury in 1992, Wiard did not submit a medical claim within 60 months, as required under 39-71-704(1)(d) (now (1)(e)) to avoid termination of benefits. Wiard asserted that the insurer should be equitably estopped from asserting the 60-month claim limit as a defense because if he had been advised of the 60-month limit, he would have sought medical care during that period to extend the benefits. However, Wiard had an affirmative duty to exercise his medical benefits if he reasonably needed medical care within the 60-month period, and if Wiard did not need medical care within that period, then the failure to obtain medical care could not be construed as reliance. Therefore, the insurer's defense was properly allowed. Wiard v. Liberty NW. Ins. Corp., 2003 MT 295, 318 M 132, 79 P3d 281 (2003).

Disputable Presumption Created of Employee Status — List of Presumptions Held Not Exclusive: Berg was sued by the State Fund in a civil action for the recovery of workers' compensation premium payments. Earlier, at the time of an audit, Berg was asked by a State Fund auditor to submit evidence that 23 persons working for him were independent contractors as Berg claimed and was told that if he did not submit any evidence, the State Fund would presume that the 23 people were employees and that premiums must be paid for those people. Berg submitted no evidence. The Supreme Court contrasted the language of this section with the language of 26-1-602 regarding the exclusive or nonexclusive nature of the lists of presumptions in the two sections and, citing Werre v. David, 275 M 376, 913 P2d 625 (1996), stated that the

language of 39-71-120 (now repealed) should be interpreted in its usual and ordinary meaning. The Supreme Court held that 39-71-120 (now repealed) creates a disputable presumption that a person is an employee and held that the fact that the presumption created by 39-71-120 (now repealed) is not contained in the list of disputable presumptions in 26-1-602 is not controlling. The Supreme Court noted that the compiler's comment to Title 26, ch. 1, part 6, makes clear that the listing of disputable presumptions is not intended to be exclusive. State ex rel. St. Comp. Mut. Ins. Fund v. Berg, 279 M 161, 927 P2d 975, 53 St. Rep. 1098 (1996).

Constructive Trust by Deed From Aged Mother to Son — Not Conclusive Presumption: Conclusive presumption was not established in situation where court refused to impose constructive trust upon lands deeded to son by aged mother. Bodine v. Bodine, 149 M 29, 422 P2d 650 (1967).

Length of Oral Lease — Not Conclusive Presumption: Since the provision of 70-26-201 that the hiring of real property under an oral lease is presumed to be for 1 year is not listed as a conclusive presumption in this section, it is a rebuttable presumption under section 93-1301-5, R.C.M. 1947 (superseded by Rule 301, M.R.Ev.). Roseneau Foods, Inc. v. Coleman, 140 M 572, 374 P2d 87 (1962).

Knowledge of Law — Not Conclusive Presumption: While a public officer should not make a mistake as to the amount of salary the law allows him, there is no conclusive presumption that he has knowledge thereof, such presumption not being included in the enumeration of conclusive presumptions found in this section. Hicks v. Stillwater County, 84 M 38, 274 P 296 (1929), distinguished in Builders' Supply Co. v. Helena, 116 M 368, 154 P2d 270 (1944).

ESTOPPEL BY OWN ACTS

Misrepresentation of Value of Estate — Estoppel Applicable to Prevent Advantage From Misrepresentation: A conservator knew, but failed to mention, that an estate included annuities and jointly held property that was not included in the final estate inventory. Other parties, to their detriment, relied on the inventory as an accurate representation of the value of the estate. The District Court properly held that it would not be equitable for the conservator to take advantage of the misrepresentation of the value of the estate by reducing the distribution to the other parties. The Supreme Court held that the elements of equitable estoppel were met, and the District Court was affirmed. In re Estate of Stukey, 2004 MT 279, 323 M 241, 100 P3d 114 (2004). See also Elk Park Ranch, Inc. v. Park County, 282 M 154, 935 P2d 1131 (1997).

Partner Estopped From Claiming Damages From Formation of Corporation Necessitated by Partner's Own Acts: As a result of one partner's refusal to sign documents necessary for a farm partnership to qualify for federal funding benefits, the remaining partners formed a separate business and qualified for the benefits. The abstaining partner then claimed damages because of formation of the new business and its subsequent leasing of partnership property. The District Court held that the partner was estopped from complaining about the new business, and on appeal, the Supreme Court affirmed. The partner knew the history and significance of the federal benefits to the partnership and yet refused to sign the necessary documentation shortly before the deadline, which amounted to a representation or concealment of material fact, and induced the remaining partners to form the new business. The six elements of equitable estoppel as set out in Selley v. Liberty NW. Ins. Corp., 2000 MT 76, 299 M 127, 998 P2d 156 (2000), were met, and the partner was estopped from complaining that the partnership detrimentally altered its position and then denying the just and legal consequences that were caused by the partner's own conduct, act, or omission. Pankratz Farms, Inc. v. Pankratz, 2004 MT 180, 322 M 133, 95 P3d 671 (2004).

Absence of Evidence of Rescission, Release, Waiver, or Accord and Satisfaction of Contract — Reversal Warranted: Plaintiffs owned shares in defendant's corporation and sought to sell the shares back to the corporation. The corporation sent a letter offering to purchase the shares for $64,933.60, and plaintiffs were instructed that to accept the offer, they were to sign the back of the stock certificate and mail it to the corporation. Plaintiffs did so, but included with the certificate a letter stating that by accepting the offer, plaintiffs reserved their rights under federal and state law. The corporation found the language unacceptable and declined to purchase the shares, instead returning the certificate to plaintiffs. Concerned about possessing a signed stock certificate, plaintiffs ultimately visited the corporation and surrendered the endorsed certificate in exchange for a new one. Plaintiffs then brought a breach of contract suit claiming $64,933.60 in damages, asserting that the corporation had breached its offer to repurchase the stock. The corporation denied that a contract offer existed, arguing that plaintiffs' reply was not an acceptance but rather a counteroffer, and asserted that even if a contract did exist, plaintiffs had waived their rights under it by forfeiting the endorsed

certificate in favor of a new one and by failing to immediately assert their rights under the contract. A jury found that the corporation had breached its contract, causing damages in the amount of $64,933.60, but then entered a verdict for the corporation on grounds that the corporation had proved at least one of its affirmative defenses of rescission, release, waiver, or accord and satisfaction. On appeal, the Supreme Court noted that only in rare cases should a jury verdict be set aside but reversed the verdict nevertheless on grounds that, even drawing all legitimate inferences in favor of the corporation, there was a complete absence of probative evidence supporting any of the corporation's affirmative defenses. The case was remanded for entry of judgment of $64,933.60 in favor of plaintiffs. Benson v. Diverse Computer Corp., 2004 MT 114, 321 M 140, 89 P3d 981 (2004), followed in Harland v. Anderson Ranch Co., 2004 MT 132, 321 M 338, 92 P3d 1160 (2004).

Parent-Child Relationship Thwarted — Equitable Estoppel Precluding Payment of Child Support: When Stiles and his wife separated, he was given responsibility for the care of his newborn son. Because Stiles was in the military at the time, he asked his sister, Cynthia, if she would care for the child for a short time while he fulfilled his duties in the Navy. Cynthia agreed, but immediately sought legal custody of the child, and physical custody of the child was ultimately granted to her by a California court. She often did not comply with court orders resulting from her custody efforts, including orders to allow Stiles visitation with the child. Stiles initially offered to pay for the child's care, but Cynthia refused any money, saying it was not needed. Nevertheless, Stiles did provide ongoing health insurance for the child. Over a decade later, Cynthia applied for and was granted public assistance, assigning any right to child support to the state. The Child Support Enforcement Division established Stiles's support obligation at $511 a month. Stiles asked Cynthia to sign a waiver of this obligation, but she refused. Stiles petitioned for judicial review, and the District Court remanded to an administrative law judge to make findings regarding Stiles's claim that Cynthia had waived her right to receive child support or that she was equitably estopped from asserting or assigning those rights. The administrative law judge found that the requisite elements of waiver and estoppel were present, and the District Court upheld the findings, holding that because Cynthia had no right to child support, she could not convey to the state rights greater than those to which she was entitled. The state appealed, asserting that the court erred when it held that estoppel and waiver applied to relieve Stiles of the obligation to provide support. The Supreme Court concluded that all six elements of equitable estoppel were met and that Cynthia had no right to receive child support from Stiles either retroactively or prospectively. Cynthia waived her right to support through her language and conduct. Nothing in the record indicated that the child's needs were not being met, and the court declined to order additional support. Although a parent is still responsible for support even in cases of voluntary relinquishment of parental rights, Stiles's relinquishment was involuntary. The court declined to hold Stiles to normal parental responsibilities under these unique circumstances, given that the child's best interests were being served, Stiles provided health insurance for the child at all times, and Stiles was thwarted by Cynthia in his attempts to have a parent-child relationship and was not attempting to exploit narrow legal technicalities to avoid undisputed court-ordered support obligations awarded at the time of dissolution. Stiles v. Dept. of Public Health and Human Services, 2000 MT 257, 301 M 482, 10 P3d 819, 57 St. Rep. 1054 (2000), distinguishing Fitzgerald v. Fitzgerald, 190 M 66, 618 P2d 867 (1980), In re Marriage of Neiss, 228 M 479, 743 P2d 1022 (1987), and In re Support of Krug, 231 M 78, 751 P2d 171 (1988).

Truth Regarding Value of Stock Discoverable by Party Claiming Estoppel — Defense Not Available: Following termination from employment with Bitterroot International Systems, Inc. (Bitterroot), Knutson sought to exercise his buyout rights under the shareholders' agreement. Bitterroot refused to pay and sought rescission on grounds of equitable estoppel, arguing that stock had been mistakenly valued during the purchase of another business, that Spencer, majority shareholder and president of both Bitterroot and the company that was acquired, relied on Knutson's valuation to Spencer's detriment, and that Spencer was unaware of factors that Knutson failed to consider. Spencer may have been mistaken about the value of the stock, but he was in a position to discover all the information necessary to value it and participated in its valuation. The truth regarding the stocks' value was as discoverable to Spencer as to anyone else, and the District Court did not err in dismissing Bitterroot's defense of equitable estoppel. Knutson v. Bitterroot Int'l Sys., Inc., 2000 MT 203, 300 M 511, 5 P3d 554, 57 St. Rep. 800 (2000), following Elk Park Ranch, Inc. v. Park County, 282 M 154, 935 P2d 1131 (1997).

Change in Circumstances of Treating Physician in Workers' Compensation Case — Equitable Estoppel Applied to Prevent Inequitable Result: Selley suffered a work-related injury, and Liberty Northwest Insurance Corporation (Liberty) began paying wage loss and medical

benefits. Prior to beginning treatment for the injury, Selley's treating physician resigned his admitting privileges because of a move to an area outside that required by area hospitals. Liberty became aware of the situation after paying benefits for 2 years and notified Selley that payments would no longer be made to the same doctor as treating physician. The issue was submitted to the Workers' Compensation Court, which decided that Liberty was not equitably estopped from refusing reimbursement. The Supreme Court noted that estoppel generally arises when a party, through its acts, conduct, or acquiescence, has caused another party in good faith to change its position for the worse. Applying the elements of equitable estoppel outlined in Dagel v. Great Falls, 250 M 224, 819 P2d 186, 48 St. Rep. 919 (1991), the court invoked the doctrine in this case because it would be unconscionable to permit Liberty to maintain a position inconsistent with one in which it had acquiesced. Although Liberty's conduct did not amount to concealment of a material fact, nevertheless, Liberty's silence and acquiescence for 2 full years amounted to a misrepresentation that the treating physician was considered appropriate for Selley's work-related injuries. Further, it would not be fair to require Selley to determine whether the physician qualified as an appropriate treating physician because the burden of determining a physician's qualifications lies with the insurer. Requiring Selley to change physicians in the middle of the course of progressively favorable treatment would result in Selley effectively changing position for the worse and suffering a loss by being forced to forego the well-established physician-patient relationship. Thus, the Workers' Compensation Court committed reversible error in determining that Liberty was not estopped from asserting 39-71-116 as a defense to Selley's claim. Selley v. Liberty NW. Ins. Corp., 2000 MT 76, 299 M 127, 998 P2d 156, 57 St. Rep. 333 (2000), following Smith v. Krutar, 153 M 325, 457 P2d 459 (1969), and distinguishing Elk Park Ranch, Inc. v. Park County, 282 M 154, 935 P2d 1131, 54 St. Rep. 293 (1997).

Satisfaction of Elements of Estoppel as Question of Proof, Not Pleading: Poeppel asserted in District Court that he was misled by a county representative as to the proper time to file a grievance and that this act estopped the county from arguing that the request for a grievance was untimely. The county argued on appeal that the claim of estoppel was properly dismissed because Poeppel's complaint failed to allege the six elements of estoppel set forth in Dagel v. Great Falls, 250 M 224, 819 P2d 186, 48 St. Rep. 919 (1991). The question then became whether those elements must be alleged in the complaint or are factual issues of proof. Rule 9(b), M.R.Civ.P. (Title 25, ch. 20), requires particularity in pleading certain specified matters, not including estoppel, which is governed by the requirement in Rule 8(e), M.R.Civ.P. (Title 25, ch. 20), which states that pleadings must be simple, concise, and direct. The allegations in Poeppel's complaint, sparse and artless as they were, nevertheless put the county on notice so that a responsive pleading could be prepared. Whether Poeppel could satisfy the elements of estoppel was a question of proof, not pleadings, and the District Court erred in dismissing the grievance for failure to state a claim. The Supreme Court did not reach the question of whether the complaint was timely because resolution of that issue hinged upon whether Poeppel could prove the claim of estoppel at trial. The case was remanded for further proceedings. Poeppel v. Flathead County, 1999 MT 130, 294 M 487, 982 P2d 1007, 56 St. Rep. 525 (1999), following Fraunhofer v. Price, 182 M 7, 594 P2d 324 (1979).

Judicial Admission Prohibiting Introduction of Further Evidence Regarding Admitted Fact: In his second and third motions to dismiss a DUI charge, Koehn conceded in writing that he had four prior convictions of DUI in South Dakota. The writing constituted a judicial admission, an express waiver made in court conceding the truth of the alleged fact, and had a conclusive effect preventing Koehn from introducing further evidence to prove, disprove, or contradict the admitted fact. Having made the judicial admission, Koehn could not argue on appeal that there was no competent evidence of the earlier convictions. St. v. Koehn, 1998 MT 234, 291 M 87, 966 P2d 143, 55 St. Rep. 985 (1998), following Rasmussen v. St. Comp. Mut. Ins. Fund, 270 M 492, 893 P2d 337, 52 St. Rep. 317 (1995).

Equitable Estoppel Not Applicable Absent Misrepresentation or Concealment of Material Facts: When Sutey Oil Company (Sutey) requested an expansion of its convenience store business that would involve adding a room with gambling machines, Sutey was informed by the county permit official that a special permit would not be required because gambling would be considered an expansion of an existing retail and service use but that Sutey would have to adhere to all county and state requirements before construction could commence. Sutey contended that the official's statement that a special-use permit was not required equitably estopped the county from denying the request for gambling machines. The District Court properly found nothing in the record showing any conduct, act, language, or silence on the part of the county that would lend itself to equitable estoppel because, despite the official's statement,

Sutey had failed to demonstrate misrepresentation or concealment of material fact, the first element of equitable estoppel. In re Petition of Sutey Oil Co., Inc. v. Anaconda-Deer Lodge County Planning Bd., 1998 MT 127, 289 M 99, 959 P2d 496, 55 St. Rep. 499 (1998).

Defendant's Statements at Trial Not Binding Judicial Admission — New Trial Not Warranted: The defendant's testimony at trial that the automobile accident was all the defendant's fault was either a legal conclusion based on the defendant's understanding of the facts as the defendant knew them or was the expression of the defendant's personal opinion. Therefore, the statements were not statements of fact and were not judicial admissions. The District Court did not err in denying the plaintiff's alternative motions for judgment notwithstanding the verdict and new trial. DeMars v. Carlstrom, 285 M 334, 948 P2d 246, 54 St. Rep. 1178 (1997), followed in Papich v. Quality Life Concepts, Inc., 2004 MT 116, 321 M 156, 91 P3d 553 (2004).

Equitable Estoppel of Presumption of Paternity: K.E.V. was told by M.L.V. that he was the father of her child. K.E.V. accepted his responsibilities and obligations as the child's father, purchasing maternity clothes for M.L.V., paying medical expenses related to the birth, being present at the birth, attempting to have his name listed as father on the birth certificate, and living with M.L.V. in a common-law marriage. Upon dissolution of the marriage, M.L.V. sought to deny that K.E.V. was the father of the child in order to secure sole custody, and uncontroverted medical tests in fact proved that K.E.V. was not the father. Nevertheless, the District Court properly applied the doctrine of equitable estoppel in preventing M.L.V. from contesting the presumed father-child relationship. To allow M.L.V. to assert a strict legal right in determining paternity would have allowed her to take unconscionable advantage of her own wrong. M.L.V. was properly estopped from bringing an action to rebut the presumption of paternity. In re Marriage of K.E.V. & M.L.V., 267 M 323, 883 P2d 1246, 51 St. Rep. 1055 (1994), followed in In re Paternity of Vainio, 284 M 229, 943 P2d 1282, 54 St. Rep. 858 (1997), and In re Marriage of Shorten, 1998 MT 267, 291 M 317, 967 P2d 797, 55 St. Rep. 1108 (1998).

Equitable Estoppel — Elements: There are six essential elements necessary to constitute equitable estoppel: (1) there must be conduct, acts, language, or silence amounting to a representation or a concealment of material facts; (2) these facts must be known to the party estopped at the time of his conduct, or at least the circumstances must be such that knowledge of them is necessarily imputed to him; (3) the truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel at the time it was acted upon by him; (4) the conduct must be done with the intention or at least with the expectation that it will be acted upon by the other party or under the circumstances that it is both natural and probable that it will be so acted upon; (5) the conduct must be relied upon by the other party, and thus relying, he must be led to act upon it; and (6) he must in fact act upon it in such a manner as to change his position for the worse. Ducham v. Tuma, 265 M 436, 877 P2d 1002, 51 St. Rep. 595 (1994); Sweet v. Colborn School Supply, 196 M 367, 639 P2d 521, 39 St. Rep. 168 (1982), affirmed in Dagel v. Great Falls, 250 M 224, 819 P2d 186, 48 St. Rep. 919 (1991); Smith v. Krutar, 153 M 325, 457 P2d 459 (1969); Hustad v. Reed, 133 M 211, 321 P2d 1083 (1958); Mundt v. Mallon, 106 M 242, 76 P2d 326 (1938). See also Sun Dial Land Co., Inc. v. Gold Creek Ranches, Inc., 198 M 247, 645 P2d 936, 39 St. Rep. 908 (1982), Sampson v. Broadway Yellow Cab Co., 226 M 273, 735 P2d 298, 44 St. Rep. 649 (1987), Kephart v. Portmann, 259 M 232, 855 P2d 120, 50 St. Rep. 771 (1993), Wareing v. Schreckendgust, 280 M 196, 930 P2d 37, 53 St. Rep. 1362 (1996), In re Estate of Hill, 281 M 142, 931 P2d 1320, 54 St. Rep. 101 (1997), Elk Park Ranch, Inc. v. Park County, 282 M 154, 935 P2d 1131, 54 St. Rep. 293 (1997), In re Marriage of Shorten, 1998 MT 267, 291 M 317, 967 P2d 797, 55 St. Rep. 1108 (1998), Kelly v. Wallace, 1998 MT 307, 292 M 129, 972 P2d 1117, 55 St. Rep. 1271 (1998), Flaig v. Gramm, 1999 MT 181, 295 M 297, 983 P2d 396, 56 St. Rep. 710 (1999), Knutson v. Bitterroot Int'l Sys., Inc., 2000 MT 203, 300 M 511, 5 P3d 554, 57 St. Rep. 800 (2000), and Stiles v. Dept. of Public Health and Human Services, 2000 MT 257, 301 M 482, 10 P3d 819, 57 St. Rep. 1054 (2000).

Tip Income Not Included in Original Calculation of Benefit Rate — Application of Estoppel on Remand: Ten years after his injury, claimant contended that money he received in tips but never reported should have been included in his wage base. The Supreme Court found that the passage of more than 10 years, combined with the inability of claimant or his employer to submit proof of the alleged tips, indicated that the doctrine of equitable estoppel applied. The court remanded to the Workers' Compensation Court for reconsideration of the tip income issue in light of the elements constituting equitable estoppel described in Sweet v. Colborn School Supply, 196 M 367, 639 P2d 521 (1982). Sampson v. Broadway Yellow Cab Co., 226 M 273, 735 P2d 298, 44 St. Rep. 649 (1987), distinguished in Miller v. W. Guar. Fund Serv., 248 M 132, 809 P2d 1257, 48 St. Rep. 348 (1991), in which neither equitable estoppel nor laches applied because: (1) claimant was

induced by the employer as to how tips should be reported; (2) the claim for benefits specifically stated that tips were not included in wages listed; and (3) there was only a 2-year delay in asserting the claim for increased wages, during which time the insurer had constant access to claimant's employment records.

Party Precluded From Changing Position at Trial: In pretrial depositions, the claimsman and attorney for the railroad indicated that they were not contesting plaintiff's credibility as to how an accident occurred. The railroad was estopped from making a factual issue out of how the accident occurred and could not raise the issue on appeal. Plouffe v. Burlington N., Inc., 224 M 467, 730 P2d 1148, 43 St. Rep. 2341 (1986), followed in Mont. Rail Link v. Byard, 260 M 331, 860 P2d 121, 50 St. Rep. 1084 (1993), In re Marriage of McNellis, 267 M 492, 885 P2d 412, 51 St. Rep. 1125 (1994), and Rasmussen v. St. Comp. Mut. Ins. Fund, 270 M 492, 893 P2d 337, 52 St. Rep. 317 (1995). Rasmussen was distinguished in DeMars v. Carlstrom, 285 M 334, 948 P2d 246, 54 St. Rep. 1178 (1997).

Promissory Estoppel Requiring Reversal of Summary Judgment — No Will Produced: The Supreme Court reversed summary judgment, finding that genuine issues of material fact existed regarding testimony that an original will had been altered, yet no changed will was ever produced, and that all parties agreed to abide by deceased's wishes, but there was some disagreement as to what those wishes were. Further, appellant's reliance on the promise to abide resulted in potential injury and invoked the doctrine of promissory estoppel, precluding summary judgment. Tope v. Taylor, 224 M 131, 728 P2d 789, 43 St. Rep. 2074 (1986).

Insurance Estoppel Case — General Rule: In affirming a District Court ruling that Safeco Insurance Company was estopped to deny coverage as a matter of law, the Supreme Court adopted the general rule in an insurance estoppel case set forth in 14 Couch, Insurance 2d, 51.85 (2d ed. 1982), as follows: "Where an insurer, without reservation and with actual or presumed knowledge, assumes the exclusive control of the defense of claims against the insured, it cannot thereafter withdraw and deny liability under the policy on the ground of noncoverage, prejudice to the insured by virtue of the insurer's assumption of the defense being, in this situation, conclusively presumed . . . the loss of the right of the insured to control and manage the case is itself prejudicial." The court further noted the requirement in 33-18-201 that the insurer promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim. Finally, the court cited a similar decision in Transamerica Ins. Group v. Chubb & Son, Inc., 554 P2d 1080 (Wash. 1976), where insureds were defended without reservation of rights for 10 months before the insurance company withdrew from the case, noting that in that case the Washington Court found a presumption of prejudice and granted summary judgment. Safeco Ins. Co. v. Ellinghouse, 223 M 239, 725 P2d 217, 43 St. Rep. 1689 (1986).

Estoppel as to Ownership — Use of Estoppel by Third Party Claiming Conversion by Estopped Person: A dairy operation that respondent and appellants attempted to start was not successful. Respondent had contributed the use of certain equipment to the operation. Respondent was estopped from asserting ownership of equipment as against the bank which made loans to appellants with the equipment as collateral because respondent allowed the bank to believe one of the appellants owned it. However, this did not establish that respondent transferred ownership of the equipment or led appellants, who claimed respondent converted the equipment when he sold it, to act on a belief that he transferred ownership. Farmers St. Bank of Victor v. Imperial Cattle Co., 218 M 89, 708 P2d 223, 42 St. Rep. 1419 (1985).

Siting Act Decision by State Not Estoppel for PSC Ratemaking Decision: In 1973, Montana Power Co. (MPC) filed an application for a certificate of environmental compatibility and public need for Colstrip Units 3 and 4 under the Montana Major Facility Siting Act. In granting the certificate, the Board of Natural Resources and Conservation (now Department of Environmental Quality) found that there was a need for the energy which would be produced and that the units would serve the public interest, convenience, and necessity. After Unit 3 was completed, MPC filed an application with the Public Service Commission (PSC) to increase electric rates to reflect Unit 3 in its rate base. At the rate hearing, the PSC took evidence regarding whether Unit 3 was "used and useful". MPC moved to strike this testimony, contending the PSC was precluded from considering this by the certificate of need issued under the Siting Act. MPC filed an application for original jurisdiction and declaratory judgment or other appropriate relief with the Supreme Court. The PSC later concluded Unit 3 was not used and useful and could not be included in the rate base. MPC argued that the PSC was collaterally estopped from considering whether Unit 3 was "used and useful". The court held that the need issue determined in the siting process was not identical to the used and useful issue, therefore collateral estoppel was not applicable. MPC also argued that because of the certificate of need,

the State was promissorily estopped from excluding Unit 3 from the rate base. MPC contended that issuance of a certificate of need under the Siting Act established a contractual relationship between the State and MPC. The court held that issuance of a certificate by a governmental authority to engage in conduct that would be improper without a certificate does not create a contractual relationship between the State and the licensee. Neither the Siting Act nor the certificate of need contemplate a promise that a facility will be included in a utility's rate base. Promissory estoppel was also inapplicable. Mont. Power Co. v. P.S.C., 214 M 82, 692 P2d 432, 41 St. Rep. 2332 (1984).

No Reliance on Creation of Joint Savings Account: A son was added as a joint tenant on his mother's savings accounts by signing the savings institution's signature card. The card contained language declaring one-half the deposit a gift to the joint tenant. The mother later brought an action against her son, asserting that she never intended to gift any portion of the accounts to her son but merely to allow him to withdraw money for her expenses if needed. Because the son did not show he relied on a promise or representation of his mother regarding the savings accounts, the doctrine of equitable estoppel was inapplicable. Anderson v. Baker, 196 M 494, 641 P2d 1035, 39 St. Rep. 273 (1982).

Implied Waiver — Knowledge Required: Plaintiff, a custodian at the Yellowstone County courthouse for 18 years, was discharged. His employment was "at will". After discharge, he was told by the County Commissioners that he would be given a hearing. A letter was sent later, saying he would not be given a hearing. Plaintiff claimed the promise of a hearing operated as a waiver of the county's right to fire him without a hearing. A waiver is an intentional and voluntary relinquishment of a known right, claim, or privilege. The record indicated that the Commissioners were not aware that plaintiff was not entitled to a hearing at the time they offered one. If they were not aware of the right to fire plaintiff without a hearing, they could not voluntarily and intentionally waive that right. An "implied waiver" can arise by conduct. This doctrine requires a detrimental reliance by the party who is led by the conduct to believe a waiver has occurred and is akin to estoppel. The record showed no evidence of reliance by plaintiff, so the doctrines of equitable estoppel and implied waiver could not apply. Reiter v. Yellowstone County, 192 M 194, 627 P2d 845, 38 St. Rep. 686 (1981), distinguished in Boreen v. Christensen, 267 M 405, 884 P2d 761, 51 St. Rep. 1014 (1994).

Estoppel and Detrimental Reliance — Separate Instructions: In an action involving the conversion of mine tailings, the court did not err in allowing two jury instructions involving the defendant's relationship with the third-party owner of one-half of the tailings in determining defendant's acquisition of the other one-half belonging to the plaintiff. An instruction involving representations of the third party as to ownership of all of the tailings and defendant's reliance thereon does not conflict with an instruction estopping defendant from denying plaintiff's ownership if he had knowledge of that ownership. Each party based his action on one of the theories, and if the jury found knowledge of ownership, as they did, there could be no good-faith reliance, hence the instructions are not inconsistent. Rock Springs Corp. v. Pierre, 189 M 137, 615 P2d 206, 37 St. Rep. 1378 (1980).

Plaintiff Estopped From Denying Ownership of Account: There was substantial evidence to support the District's Court's conclusion that plaintiff was equitably estopped from denying his joint and beneficial ownership of a checking account by virtue of his acknowledgment and use of the account and the defendant banks' reliance thereon in crediting a check to that account. Plaintiff could not complain that he lacked authority to draw checks on the account when he could have remedied that situation simply by signing the signature card. Beyer v. First Nat'l Bank of Dillon, 188 M 208, 612 P2d 1285, 37 St. Rep. 1035 (1980).

Listing Property as Corporate Property to Secure Loan — Estoppel to Deny Corporate Ownership: In a conversion action by a bank against its corporate president for selling, in his individual capacity and retaining the proceeds, property that he had knowledge of and acquiesced to being listed as corporate property to secure a corporate loan, he could not, under the provisions of this section, allege that the corporation did not own the property. Farmers St. Bank v. Johnson, 188 M 55, 610 P2d 1172, 37 St. Rep. 880 (1980).

Property Listed as Corporate Property — Estoppel From Asserting Personal Ownership: A corporate officer was estopped from defending against a conversion action by a bank involving the sale and retention of proceeds by him of property that he claimed he personally owned but that was listed with his knowledge and acquiescence as company property in company financial statements and as company assets to secure a company loan. The Supreme Court, in applying the principles of equitable estoppel enumerated in Hustad v. Reed, 133 M 211, 321 P2d 1083 (1958), determined that by allowing others to rely on documents that purported to show company

ownership of the property, the officer may not now assert he is the true owner. Farmers St. Bank v. Johnson, 188 M 55, 610 P2d 1172, 37 St. Rep. 880 (1980).

Estoppel by Misrepresentation: Estoppel has reference to the conduct of the person estopped. Estoppel has no application where the omissions of the party claiming estoppel brought about the problem. First Security Bank v. Goddard, 181 M 407, 593 P2d 1040, 36 St. Rep. 854 (1979), followed in McGregor v. Cushman/Mommer, 220 M 98, 714 P2d 536, 43 St. Rep. 206 (1986), and Hansen v. 75 Ranch Co., 1998 MT 77, 288 M 310, 957 P2d 32, 55 St. Rep. 322 (1998).

Amended Contract for Deed: When sellers of land argued that the buyers misled them as to the effect of an escrow agreement and warranty deed, estoppel had no application since the court found that sellers possessed a copy of the instruments for a considerable length of time and had ample opportunity to examine them. Furthermore, since sellers failed to plead fraud by amending their pleadings, they were not entitled to present parol evidence to show that these instruments constituted an acceptance of the land under the doctrine of estoppel. Tschache v. Barclay, 172 M 415, 564 P2d 1299 (1977).

Failure to Object to Stock Repurchase: Director of closely held corporation who was obligated to sell his shares back to the corporation pursuant to repurchase agreement was estopped to deny has acquiescence to the terms of the sale by virtue of his response to telephone calls indicating his willingness to sell the shares and requesting the proceeds to be paid to his creditors with the remaining balance to himself, by virtue of the corporate officer's testimony that the director knew of the board of directors' resolution to exercise its option to purchase his stock at 50% of its book value, by virtue of the director's conduct which led the corporation to believe the consent to purchase would be signed, and by virtue of the director's failure to object to the proceedings of the corporation in enacting the resolution calling for the repurchase of his stock, which actions resulted in the failure of the corporation to call a meeting of the board of directors within the period during which the corporation's right to repurchase the stock could have been properly exercised. State ex rel. Howeth v. D. A. Davidson & Co., 163 M 355, 517 P2d 722 (1973), overruled, with regard to elements of collateral estoppel, in Dagel v. Great Falls, 250 M 224, 819 P2d 186, 48 St. Rep. 919 (1991).

Lessor Not Estopped Denial of Lease — Prior Lease Matter of Record: Lessors of mineral rights were not estopped from denying validity of lease by lessee's contention that lessors led him to believe that previous lease had expired by showing him a "notice" of breach sent to previous lessee where lessee actually relied upon county records and was aware of the prior lease of record covering the same land. Christian v. A. A. Oil Corp., 161 M 420, 506 P2d 1369 (1973).

Elements of Estoppel Required: The doctrine of equitable estoppel set forth in this subsection is not available as a defense when the essential elements of estoppel are lacking. Belhumeur v. Dawson, 229 F. Supp. 78, 86 (D.C. Mont. 1964).

Constitutes Principle of Equitable Estoppel:

This subsection is the statutory declaration of the doctrine of equitable estoppel. Hustad v. Reed, 133 M 211, 321 P2d 1083 (1958); Billings v. Pierce Packing Co., 117 M 255, 161 P2d 636 (1945).

This subsection is but a crystallization into statutory form of the rule stated and forms the basic principle of equitable estoppel, citing Waddell v. School District, 74 M 91, 238 P 884 (1925). Lindblom v. Employers' Liab. Assurance Corp., 88 M 488, 295 P 1007 (1930).

Priority From Unrecorded Legacy Advancement: Where executors made an advance payment out of their personal funds to the legatee of a cash bequest, they were not estopped from asserting a debt due from the legatee, as against a judgment creditor of the legatee, even though the petition for distribution and final account showed no legacy advancements had been made. Hustad v. Reed, 133 M 211, 321 P2d 1083 (1958).

Reliance on Contractor's Estimate to Grant Loan — Lien Preference by Contractor Estopped: Equitable estoppel will prevent a contractor from asserting a lien preference for an amount over the contract price against the first mortgagee where the contractor made representation as to the total price of the work to the mortgagee and knew that the loan would not have been granted had it been for a greater amount. McGaffick v. Leigland, 130 M 332, 303 P2d 247 (1956).

Earlier Statement Inconsistent With Present Stand: In action by church members to set aside a deed executed by certain persons purporting to act as trustees, they could not be estopped by statements by one of their number proposing that the church property be sold. Smith v. St. John Baptist Church, 123 M 264, 211 P2d 975 (1949).

Exercise of Option — Earlier Disinterest Expressed: Where lessee of property with option to purchase sued for specific performance, he could not be estopped from exercising his option by testimony of statements made by lessee to lessor and prospective purchaser of property from lessor, prior to time for exercise of option, that he did not intend to purchase the property if he

could get certain other property he had in mind. Fiers v. Jacobson, 123 M 242, 211 P2d 968 (1949).

Elements of Proof Required: This subsection has been construed to require all of the necessary elements of estoppel at common law, which doctrine rests largely on the facts and circumstances of the particular case; it includes the indispensable element of ignorance of the facts by the party who invokes the doctrine and that he changed his position in reliance upon the act or conduct of the party sought to be estopped, in the instant case the alleged waiver by plaintiff of any claim to the stock in question. Gerard v. Sanner, 110 M 71, 103 P2d 314 (1940).

Oral Agreement to Sell Land — Equitable Title to Other Party: Under this subsection plaintiff was estopped to deny the validity of an oral agreement for the sale of land and that he held the legal title for the benefit of defendant. Cobban v. Hecklen, 27 M 245, 70 P 805 (1902), overruled on other grounds in In re Dolezilek, 156 M 224, 478 P2d 278 (1970).

LANDLORD'S TITLE

Deed as Security of Loan: Where land was purchased by defendant and leased to plaintiff, plaintiff should not be permitted to claim that the purchase price of the land constituted a loan from defendant to plaintiff and that deed was made to defendant as security for the loan and therefore defendant held the land in trust for plaintiff. Laas v. All Persons, 121 M 43, 189 P2d 670 (1948).

JUDGMENT OR ORDER OF COURT

Decree of Distribution — Effect: A decree of distribution does not concern itself with whether a legacy has been paid, acquired by third parties, or is subject to a lien; and the decree is not the final order of the court on the point of payment in the closing of an estate, but that is the office of the decree of final discharge under section 91-3906, R.C.M. 1947 (since repealed). Hustad v. Reed, 133 M 211, 321 P2d 1083 (1958).

Matters Not Involved in Proceeding: A judgment or final order in an action or proceeding is not evidence, conclusive or otherwise, of matters that were not involved in the proceeding and not determined. Hustad v. Reed, 133 M 211, 321 P2d 1083 (1958).

Law Review Articles

Presumptions in Criminal Cases: A New Look at an Old Problem, Ranney, 41 Mont. L. Rev. 21 (1980).

Statutory and Common Law Presumptions in Montana, Clarke, 37 Mont. L. Rev. 91 (1976).

Collateral References

Bastards *key* 3; Criminal Law *key* 24; Estoppel *key* 22(1), 87; Judgment *key* 634; Landlord and Tenant *key* 61.

14 C.J.S. Children Out-of-Wedlock §§13 through 22; 22 C.J.S. Criminal Law §34; 31 C.J.S. Estoppel §§36, 78; 50 C.J.S. Judgments §§592, 593, 686, 687; 52A C.J.S. Landlord and Tenant §§1182, 1185, 1186, 1189, 1191, 1217 through 1233, 1244; 52B C.J.S. Landlord and Tenant §§1376 through 1378.

29 Am. Jur. 2d Evidence §184.

14 Am. Jur. POF2d Husband's Sterility as Rebutting Presumption of Legitimacy, pp. 409 through 481.

Deeds: effect of Uniform Probate Code §6-201, providing that certain instruments attempting to pass property at death shall be deemed nontestamentary. 81 ALR 4th 1122.

Medical malpractice: presumption or inference from failure of hospital or doctor to produce relevant medical records. 69 ALR 4th 906, superseded by 121 ALR 5th 157.

Refusal of defendant in "public figure" libel case to identify claimed sources as raising presumption against existence of source. 19 ALR 4th 919.

Proof of husband's impotency or sterility as rebutting presumption of legitimacy. 84 ALR 3d 495.

Validity and construction of statute creating presumption or inference of intent to sell from possession of specified quantity of illegal drugs. 60 ALR 3d 1128.

Presumption of legitimacy of child born after annulment, divorce, or separation. 46 ALR 3d 158.

Validity of criminal legislation making possession of gambling or lottery devices or paraphernalia presumptive or prima facie evidence of other incriminating facts. 17 ALR 3d 491.

Estoppel, by accepting new lease, to assert that article annexed to realty is not a fixture. 60 ALR 2d 1233.

Estoppel by lease: effect of lessor's after-acquired title or interest during lease term. 51 ALR 2d 1238.

Estoppel to assert forfeiture clause of lease made or held by cotenants as lessors. 50 ALR 2d 1365.

Inference in prosecution for forgery of intent to defraud by use of fictitious or assumed name. 49 ALR 2d 884.

Promissory estoppel. 48 ALR 2d 1069.

Reservations as estopping obligor to assert against transferee of conditional sale contract, installment improvement or repair contract, or related commercial paper, defenses or equities available against transferor. 44 ALR 2d 205.

Promissory estoppel based on representations of employer with respect to general pension or retirement plan. 42 ALR 2d 470.

Estoppel and waiver regarding provisions of lease fixing rental at percentage of lessee's profits or receipts. 38 ALR 2d 1119, §§10 through 12 superseded by 58 ALR 3d 384.

Separation agreement as estopping wife to claim inheritance rights in deceased spouse's estate. 34 ALR 2d 1024.

Estoppel of principal to deny broker's authority to receive payment. 30 ALR 2d 816.

Estoppel, by inconsistent acts or claims in judicial proceedings, to contest will or attack its validity. 28 ALR 2d 129.

Inference of malice or intent to kill where killing is by blow without weapon. 22 ALR 2d 854.

26-1-602. Disputable presumptions.

Compiler's Comments

1995 Amendment: Chapter 18 in (26) changed time period applicable to presumption of death from 7 years to 5 years; in (31), after "wedlock", deleted "there being no divorce from bed and board"; and made minor changes in style.

1983 Amendment: In lead-in after "presumptions are", deleted "satisfactory if uncontradicted"; in (6), substituted "More satisfactory evidence" for "higher evidence", after "would be adverse", substituted "if weaker and less satisfactory evidence is offered and it is within the power of the party to offer more satisfactory evidence" for "from inferior, being produced"; in (9), substituted "When the instrument evidencing an obligation has been delivered to the debtor, the obligation has been paid" for "an obligation delivered up to the debtor has been paid"; in (10), substituted "Prior rent" for "former rent" and substituted "later rent or installments" for "latter"; in (13), after "payment of money" changed "on" to "or"; deleted former (34), which read: "a document or writing more than 30 years old is genuine, when the same has been since generally acted upon as genuine by persons having an interest in the question and its custody has been satisfactorily explained;"; and made minor changes in style and phraseology.

Case Notes

Cases Pertaining to This Section Generally. . . . 94
Subsection (1). . . . 97
Subsection (2). . . . 98
Subsection (3). . . . 98
Subsection (4) 100
Subsection (6) 100
Subsection (8) 100
Subsection (9) 101
Subsection (11) 101
Subsection (12) 101
Subsection (14) 102
Subsection (15) 102
Subsection (16) 105
Subsection (17) 105
Subsection (18) 106
Subsection (19) 106
Subsection (20) 107
Subsection (21) 107
Subsection (23) 107
Subsection (24) 107
Subsection (25) 108
Subsection (26) 108
Subsection (27) 108
Subsection (30) 108
Subsection (31) 110

Subsection (32) 110
Subsection (33) 111
Subsection (38) 112

CASES PERTAINING TO THIS SECTION GENERALLY

Presumption That Failure to Disclose Asset Grounds to Award Asset to Other Party Considered Disputable: The husband received a bonus and profit-sharing award and deposited the funds in an investment bank account, but failed to disclose the account in the final declaration of disclosure. The account was finally disclosed 2 business days before trial. The wife contended that the presumption in 40-4-253 required the District Court to penalize the husband by awarding the late-disclosed asset to her. However, nothing in 40-4-253 states that the presumption is conclusive, so under this section, the presumption is disputable. The husband testified about why he was late in disclosing the account, and it was within the discretion of the District Court to determine the husband's credibility and decide whether the presumption was overcome. The District Court accepted the husband's explanation, and the Supreme Court declined to disturb the decision. In re Marriage of Gerhart, 2003 MT 292, 318 M 94, 78 P3d 1219 (2003).

Direct Evidence Rebutting Presumption of Regularity of Prior DUI Convictions — Remand for Evidentiary Hearing for Determination of Validity of Prior Conviction: Kvislen was charged with felony DUI based on three prior convictions. Kvislen moved to dismiss on grounds that one of the prior convictions was entered in derogation of his constitutional rights and thus could not be used to elevate the present charge to a felony. Kvislen filed an affidavit prior to trial averring that he never received notice of the prior trial and was convicted without being informed of the right to counsel. After providing the District Court with arguments to the contrary, the state moved to dismiss. The District Court, without conducting an evidentiary hearing to weigh Kvislen's affidavit against the assertions made by the state, concluded that Kvislen had not sufficiently rebutted the presumption of regularity that attaches to prior convictions and dismissed the motion, and Kvislen appealed. Citing St. v. Okland, 283 M 10, 941 P2d 431 (1997), and St. v. Jenni, 283 M 21, 938 P2d 1318 (1997), the Supreme Court noted that although a rebuttable presumption of regularity attaches to prior convictions, that presumption may be overcome by direct evidence of irregularity, and once defendant offers direct evidence, the burden shifts to the state to prove that the prior conviction was not obtained in violation of defendant's rights. Here, the state conceded that Kvislen's averments met the technical definition of direct evidence and that the state relied on insufficient evidence and failed to meet its burden of proof. Instead of denying the motion to dismiss, the District Court should have shifted the burden to the state and allowed the state to submit evidence showing that Kvislen's rights were not violated. The proper forum for consideration of the issue was through an evidentiary hearing, and the Supreme Court remanded the case for that purpose. St. v. Kvislen, 2003 MT 27, 314 M 176, 64 P3d 1006 (2003).

Sale of Lot Presumptively Including Access: It is a presumption, albeit disputable, that the complete use and enjoyment of a parcel of land includes access to that parcel. To overcome the presumption, the seller must offer evidence or some legal basis that would controvert the buyer's reliance on the presumption. Here, the Kester's sold the Erkers a house in Big Sky for approximately $310,000. The Kesters' attorney later discovered through the title company that a portion of the driveway, which provided sole access to the house, had not been conveyed by the deed to the lot and requested additional money for the deed to the driveway. There was no indication at the time of sale that any parcel was separate and distinct from the lot, nor did the Kesters reveal any intention to reserve the driveway from the purchase of the lot. Although the Erkers were charged with constructive notice of the contents of properly recorded instruments describing prior conveyances of the property, under Montana subdivision laws, the driveway was not an individual parcel of land at the time of purchase, so the Erkers could be charged only with knowledge that the purchase of the lot described in the common metes and bounds description included the driveway. Absent evidence to the contrary, the Erkers were entitled to the presumption that purchase of the lot included access to it and to summary judgment as a matter of law. Erker v. Kester, 1999 MT 231, 296 M 123, 988 P2d 1221, 56 St. Rep. 912 (1999), following Yellowstone Valley Co. v. Assoc. Mtg. Investors, Inc., 88 M 73, 290 P 255, 70 ALR 1002 (1930).

Finding That Three of Four Prior DUI Convictions Constitutionally Valid Affirmed — Use Proper to Support Felony Fifth Offense: In defending against felony DUI fifth offense, Brown raised various issues regarding the constitutionality of the prior four convictions. Allocating the respective burdens of proof as set forth in St. v. Okland, 283 M 10, 941 P2d 431, 54 St. Rep. 467 (1997), the District Court correctly found that the state met its burden of proving the

constitutional validity of three of four of Brown's prior convictions. The court balanced Brown's contentions that he did not recall being informed of his right to counsel and did not sign a waiver of his right to counsel when he pleaded guilty to the prior charges with the state's evidence in the form of the Justice's Court Judge who read Brown his rights in three of the four original trials. Declining to narrowly prescribe the type of direct, affirmative evidence necessary for the state to prove the constitutionality of prior convictions, the Supreme Court found that Brown's signature on an advisement of rights form and a waiver of rights form were but factors to be considered in the totality of the circumstances. The District Court is in the best position to weigh each party's evidence and determine which will prevail and did so here. The evidence was properly used to support enhanced felony charges. St. v. Brown, 1999 MT 143, 295 M 5, 982 P2d 1030, 56 St. Rep. 560 (1999).

Allegation of Uncounseled Waiver of Right to Attorney — Burden of Proof — Testimony of Routine of City Judge Held to Create Triable Issue of Fact: Olson moved to dismiss a felony DUI charge based upon his affidavit that in his previous DUI convictions, he was not represented by counsel and was not told that he could have a court-appointed attorney. In response to Olson's affidavit, the state presented the testimony of the city judge who convicted Olson on one of the previous DUI charges. The judge testified that although he had no specific recollection of Olson's case, he always asks defendants whether they understand their rights and always reads their rights from a prepared text that includes an advisement of the right to counsel. The Supreme Court held that pursuant to Rule 406, M.R.Ev. (Title 26, ch. 10), this testimony is substantive evidence that creates a triable issue of fact. Therefore, the Supreme Court held that the District Court erred when it held that this testimony was insufficient as a matter of law to create a triable issue of fact. St. v. Olson, 283 M 27, 938 P2d 1321, 54 St. Rep. 475 (1997), followed in St. v. Couture, 1998 MT 137, 289 M 215, 959 P2d 948, 55 St. Rep. 548 (1998), and St. v. Moga, 1999 MT 283, 297 M 1, 989 P2d 856, 56 St. Rep. 1143 (1999). See also St. v. Ailport, 1998 MT 315, 292 M 172, 970 P2d 1044, 55 St. Rep. 1292 (1998).

Record Failing to Show Specific Advisement of Right to Counsel Held Insufficient Basis for Penalty Enhancement: After three previous DUI convictions, Jenni was charged with felony DUI but moved to dismiss on the grounds that he had not been represented by an attorney and had not been advised of his right to counsel. Jenni submitted an affidavit signed by himself. The Supreme Court held that pursuant to its holding in St. v. Okland, 283 M 10, 941 P2d 431, 54 St. Rep. 467 (1997), the burden shifted to the state to prove Jenni had been advised of his right to counsel and held that a court record showing that Jenni was generally advised of his rights, without specifically showing that he was advised of his right to counsel, fails to meet the state's burden. The Supreme Court therefore affirmed the District Court's dismissal of the felony DUI charge. St. v. Jenni, 283 M 21, 938 P2d 1318, 54 St. Rep. 472 (1997).

Uncounseled Waiver of Rights Held No Basis for Enhanced DUI Penalty — Presumption of Regularity of Conviction — Burden of Proof: Okland was charged with his fourth DUI violation and, by virtue of 61-8-714 and 61-8-722, was charged with a felony. Okland filed a motion to dismiss the felony charges, asserting that because he was not represented by counsel at the three previous convictions and had not adequately been advised of his right to counsel, those convictions could not be use to enhance the penalty. With his motion, Okland submitted an affidavit and a record of his 1985 conviction in Lake County. The District Court dismissed the felony charge. The Supreme Court, relying upon United States Supreme Court cases, held that a presumption of regularity attaches to prior convictions during collateral attack and that therefore, even in the absence of a transcript or record, a rebuttable presumption attaches that the prior conviction is valid and a defendant who challenges the validity of the conviction has the burden of producing direct evidence of the conviction's invalidity. In this case, the Supreme Court noted that Okland did produce sufficient evidence to shift the burden to the state and that the copy of the letter produced by the state notifying Okland that he had to complete a financial statement before a court-appointed attorney would be appointed was insufficient to meet the state's burden of proof. For this reason, the Supreme Court held that the District Court did not err in granting the motion to dismiss the felony charges against Okland. St. v. Okland, 283 M 10, 941 P2d 431, 54 St. Rep. 467 (1997), followed in St. v. Jenni, 283 M 21, 938 P2d 1318, 54 St. Rep. 472 (1997), St. v. Perry, 283 M 34, 938 P2d 1325, 54 St. Rep. 478 (1997), St. v. Brown, 1999 MT 143, 295 M 5, 982 P2d 1030, 56 St. Rep. 560 (1999), St. v. Moga, 1999 MT 283, 297 M 1, 989 P2d 856, 56 St. Rep. 1143 (1999), St. v. Anderson, 2001 MT 188, 306 M 243, 32 P3d 750 (2001), and St. v. Kvislen, 2003 MT 27, 314 M 176, 64 P3d 1006 (2003). Okland was also followed, with a different result, in St. v. Ailport, 1998 MT 315, 292 M 172, 970 P2d 1044, 55 St. Rep. 1292 (1998).

Disputable Presumption Created of Employee Status — List of Presumptions Held Not Exclusive: Berg was sued by the State Fund in a civil action for the recovery of workers'

compensation premium payments. Earlier, at the time of an audit, Berg was asked by a State Fund auditor to submit evidence that 23 persons working for him were independent contractors as Berg claimed and was told that if he did not submit any evidence, the State Fund would presume that the 23 people were employees and that premiums must be paid for those people. Berg submitted no evidence. The Supreme Court contrasted the language of 26-1-601 with the language of this section regarding the exclusive or nonexclusive nature of the lists of presumptions in the two sections and, citing Werre v. David, 275 M 376, 913 P2d 625 (1996), stated that the language of 39-71-120 (now repealed) should be interpreted in its usual and ordinary meaning. The Supreme Court held that 39-71-120 (now repealed) creates a disputable presumption that a person is an employee and held that the fact that the presumption created by 39-71-120 (now repealed) is not contained in the list of disputable presumptions in this section is not controlling. The Supreme Court noted that the compiler's comment to Title 26, ch. 1, part 6, makes clear that the listing of disputable presumptions is not intended to be exclusive. State ex rel. St. Comp. Mut. Ins. Fund v. Berg, 279 M 161, 927 P2d 975, 53 St. Rep. 1098 (1996).

Jury Instruction on Presumption of Accidental Fire Inappropriate — Evidence of Arson: Defendant's proposed jury instruction that ". . . ordinarily, it will be presumed that an unexplained fire was caused by an accident or natural causes or, at least, that it was not of criminal origin" was properly refused when suspicious facts strongly indicating arson accompanied the fire. St. v. Atlas, 224 M 92, 728 P2d 421, 43 St. Rep. 2042 (1986).

Siting Act Decision by State Not Estoppel for PSC Ratemaking Decision: In 1973, Montana Power Co. (MPC) filed an application for a certificate of environmental compatibility and public need for Colstrip Units 3 and 4 under the Montana Major Facility Siting Act. In granting the certificate, the Board of Natural Resources and Conservation (now Department of Environmental Quality) found that there was a need for the energy which would be produced and that the units would serve the public interest, convenience, and necessity. After Unit 3 was completed, MPC filed an application with the Public Service Commission (PSC) to increase electric rates to reflect Unit 3 in its rate base. At the rate hearing, the PSC took evidence regarding whether Unit 3 was "used and useful". MPC moved to strike this testimony, contending the PSC was precluded from considering this by the certificate of need issued under the Siting Act. MPC filed an application for original jurisdiction and declaratory judgment or other appropriate relief with the Supreme Court. The PSC later concluded Unit 3 was not used and useful and could not be included in the rate base. MPC argued that the PSC was collaterally estopped from considering whether Unit 3 was "used and useful". The court held that the need issue determined in the siting process was not identical to the used and useful issue, therefore collateral estoppel was not applicable. MPC also argued that because of the certificate of need, the State was promissorily estopped from excluding Unit 3 from the rate base. MPC contended that issuance of a certificate of need under the Siting Act established a contractual relationship between the State and MPC. The court held that issuance of a certificate by a governmental authority to engage in conduct that would be improper without a certificate does not create a contractual relationship between the State and the licensee. Neither the Siting Act nor the certificate of need contemplate a promise that a facility will be included in a utility's rate base. Promissory estoppel was also inapplicable. Mont. Power Co. v. P.S.C., 214 M 82, 692 P2d 432, 41 St. Rep. 2332 (1984).

Use of Presumptions and Inferences in Instructions: In response to defendant's allegations that the use of statutory inferences and presumptions used in instructions effectively shifted the burden of proof on the issue of intent to defendant, the Supreme Court concluded that, when read in their entirety, the instructions can only be interpreted to mean that the State had a burden of proving every element of the offense beyond a reasonable doubt, and the use of the presumptions and inferences merely set forth, in terms entirely consistent with Montana law, how the State could meet this burden by proof of objective facts. St. v. McKenzie, 177 M 280, 581 P2d 1205 (1978).

Controversion of Presumption — Entitlement of Delayed Imposition of Sentence: Presumption that first offender under Dangerous Drug Act is entitled to delayed imposition of sentence is disputable and may be controverted by other evidence but controls unless so contradicted. St. v. Simtob, 154 M 286, 462 P2d 873 (1969).

Cause of Death — Presumption Against Suicide: In an action on a life insurance policy which bars liability in case of suicide but provided for liability in case of death from external, violent, and accidental means, the rebuttable presumption is in favor of accident, the burden of proving that death was due to accident resting however on plaintiff. Lewis v. N. Y. Life Ins. Co., 113 M 151, 124 P2d 579 (1942).

Instructions — Presumption as Shifting Burden to Defendant: In an action to recover on a life insurance policy which barred liability in case of suicide but provided for liability in case of death from external, violent, and accidental means, where the rebuttable presumption is in favor of accident, instruction as to presumptions was proper and not open to objection that it shifted the burden of proof from plaintiff to defendant, even though it be conceded that plaintiff's case is aided by the above presumption. Lewis v. N. Y. Life Ins. Co., 113 M 151, 124 P2d 579 (1942).

Presumption as Indirect Evidence: Under Montana statutes, a presumption remains as indirect evidence until rebutted by preponderance of contrary evidence, which must be weighed and determined by trier of facts, and disappears only when party to whom it is opposed produces sufficient evidence to preponderate against it. N. Y. Life Ins. Co. v. Gamer, 106 F2d 375 (9th Cir. 1939).

Controversion of Presumption: A disputable presumption is satisfactorily overcome by a preponderance of the evidence; it then fades away in the face of the contrary facts. Monaghan v. Standard Motor Co., 96 M 165, 29 P2d 378 (1934).

Sufficiency of Overcoming Presumption: Uncontradicted testimony is not sufficient to overcome a disputable presumption, where the inferences to be drawn from the facts and circumstances are open to different conclusions by reasonable men; nor is a mere denial by an interested witness, uncorroborated by other evidence, sufficient to overcome it. Monaghan v. Standard Motor Co., 96 M 165, 29 P2d 378 (1934).

Commercial Paper — Payment: A promissory note in the possession of the payee bearing no endorsement showing payment is presumed to be unpaid; and where the maker pleads payment, he has the burden of proving it and must produce evidence sufficient to overcome such prima facie presumption, as well as any other evidence tending to show that the note was unpaid. Vesel v. Polich Trading Co., 96 M 118, 28 P2d 858 (1934).

Presumption on Presumption: While from one fact found another fact may be presumed if the presumption is a logical result, a fact presumed may not be made the basis for a further presumption. Doran v. U.S. Bldg. & Loan Ass'n, 94 M 73, 20 P2d 835 (1933).

Trust Banking Practices — Allocation of Commingled Funds: A bank that, while acting in the capacity of a trustee in collecting a draft, mingles the money of the beneficiary thus collected with its own, in disregard of instructions to remit to him, and then uses the common fund will be presumed to have used its own money first, and the sum remaining will be considered to belong to the beneficiary as far as necessary to make up, if possible, the full amount due him. Hawaiian Pineapple Co. v. Browne, 69 M 140, 220 P 1114 (1923).

Instructions — Submission of Subsections: Error cannot be predicated upon the action of the court in refusing to include, in an instruction, the provisions of subsections (8), (11), and (12) of this section. It is not commendable practice to submit to jurors abstract rules of law, though they are correct. Cuerth v. Arbogast, 48 M 209, 136 P 383 (1913).

Railroad Practices — Ejection of Trespasser: It is a prima facie presumption that a railway brakeman on a freight train has authority, by virtue of his employment, to eject trespassers therefrom. In some states, however, the presumption is conclusive. Golden v. N. Pac. Ry., 39 M 435, 104 P 549 (1909).

SUBSECTION (1)

Any Evidence Consistent With Theory of Innocence — Jury Not Bound to Acquit: Because of the presumption of innocence, the defendant contended that the jury must accept his interpretation of facts in a criminal trial when testimony at trial could reasonably be interpreted to support either the State's or defendant's view. A jury is not bound to accept defendant's view and reject State's view simply because the defendant would be found not guilty under the former and guilty under the latter. It is the duty of the jury to resolve conflicts of evidence. St. v. Greenwell, 206 M 233, 670 P2d 79, 40 St. Rep. 1616 (1983).

Parking Ordinance — Presumption That Owner Parked Vehicle — Unconstitutional Shifting of Burden: In striking down a parking ordinance, the Supreme Court held that to make the owner of a vehicle prima facie liable upon proof that his vehicle has been parked illegally is equivalent to a presumption that the owner parked the vehicle. The effect of the presumption is to violate constitutional due process requirements by shifting the burden of persuasion to defendant and contradicting the presumption of innocence. Missoula v. Shea, 202 M 286, 661 P2d 410, 40 St. Rep. 91 (1983).

Effect of Possession of Stolen Property: Instruction taken from 45-6-304 (now repealed) that "you are instructed that possession of stolen property shall not constitute proof of the commission of the offense of theft. Such fact shall place a burden on the possessor to remove the effect of such fact as a circumstance to be considered with all the other evidence pointing to his

guilt" was reversible error as it took away defendant's presumption of innocence and forced him to testify, by placing a burden on him to either disprove unlawful possession or prove lawful possession. That section was declared unconstitutional in St. v. Kramp, 200 M 383, 651 P2d 614, 39 St. Rep. 1819 (1982). St. v. Morigeau, 202 M 36, 656 P2d 185, 39 St. Rep. 2311 (1982).

Sandstrom Instruction With Statement Instruction Disputable: Reversal of mitigated deliberate homicide conviction was required where the court gave the following Sandstrom instruction: "The law also presumes that a person intends the ordinary consequences of any voluntary act committed by him. This presumption, however, is termed a disputable presumption and may be controverted by other evidence." The error was not harmless. The instruction obviously permitted the jury to presume intent without proof beyond a reasonable doubt. Intent was hotly contested and an important element of the crime charged, and because of the instruction the jury could disregard the defendant's claim that he intended only to fire a warning shot. Then, with the presumption of intent, the jury could have concluded that defendant used deadly force to intentionally kill the victim. St. v. Musgrove, 202 M 59, 655 P2d 982, 39 St. Rep. 2327 (1982).

Jury Instructions — Intention of Consequences of Acts — Sandstrom Distinguished: Distinguishing Sandstrom, the court noted that the jury was not given a mandatory presumption, but it was told it could reasonably infer the defendant's intent for all the consequences which one acting in a like position would reasonably have expected. Nothing in the instruction lessened the duty of the State to prove every element of the crime charged beyond a reasonable doubt, nor did it affect the presumption of defendant's innocence. St. v. Bad Horse, 185 M 507, 605 P2d 1113, 37 St. Rep. 45 (1980), distinguishing Sandstrom v. Mont., 442 US 510, 61 L Ed 2d 39, 99 S Ct 2450 (1979).

Jury Instructions — Presumption of Innocence: In a criminal prosecution for theft of an automobile in which the defendant timely requested and was twice denied an instruction on the presumption of innocence, an instruction on the State's burden of proof could not supplant an instruction on the presumption of innocence. The standard for prejudicial effect of the lack of the instruction was established in St. v. Harrison, 23 M 79, 57 P 647 (1899), and is more strict than that used by the U.S. Supreme Court. It is per se reversible error to deny the instruction. St. v. Williams, 185 M 140, 604 P2d 1224, 36 St. Rep. 1959 (1979).

Presumption in Civil Cause — Fraud: In an action involving fraud, the presumptions declared by subsections (1) and (19) of this section, that a person is innocent of wrong and that private transactions have been fair and regular, prevail until overcome by evidence satisfactory to the court. Hansen v. Johnson, 90 M 597, 4 P2d 1088 (1931).

Criminal Action — Presumption Converted: When the presumption of innocence in murder cases is overcome by evidence, its office is ended and it ceases to aid the defendant further. St. v. Colbert, 58 M 584, 194 P 145 (1920).

Presumption in Civil Cause — Wrongful Death: When a railroad engine runs into a boy on the track and the engineer, in an action brought for personal injuries, is practically charged with manslaughter, the presumption is that he is innocent of that crime. Haddox v. N. Pac. Ry., 43 M 8, 113 P 1119 (1911).

SUBSECTION (2)

Homicide — Repeated Shooting: The repeated shooting into the vital parts of the body of a live human being with a deadly weapon is evidence that the gun was used intentionally and deliberately and demonstrates the intent to kill. With this fact established, the law presumes that defendant committed the unlawful act with an unlawful intent. St. v. McLeod, 131 M 478, 311 P2d 400 (1957).

SUBSECTION (3)

Sandstrom Instruction With Statement Instruction Disputable: Reversal of mitigated deliberate homicide conviction was required where the court gave the following Sandstrom instruction: "The law also presumes that a person intends the ordinary consequences of any voluntary act committed by him. This presumption, however, is termed a disputable presumption and may be controverted by other evidence." The error was not harmless. The instruction obviously permitted the jury to presume intent without proof beyond a reasonable doubt. Intent was hotly contested and an important element of the crime charged, and because of the instruction the jury could disregard the defendant's claim that he intended only to fire a warning shot. Then, with the presumption of intent, the jury could have concluded that defendant used deadly force to intentionally kill the victim. St. v. Musgrove, 202 M 59, 655 P2d 982, 39 St. Rep. 2327 (1982).

Sandstrom Instruction — Harmless Error Doctrine Correct Test — Plain Error Rule Not Applicable — Federal Habeas Corpus: In rejecting the State's contention that the giving of the Sandstrom instruction (Sandstrom v. Mont., 442 US 510, 61 L Ed 2d 39, 99 S Ct 2450 (1979)) constituted harmless error, the court stated that in applying the "harmless constitutional error" doctrine, as set out in Chapman v. Calif., 386 US 18, 17 L Ed 2d 705, 87 S Ct 824 (1967), it must be shown that the constitutional right affected is not a right basic to a fair trial and it must be found harmless beyond a reasonable doubt. For conviction the Due Process Clause requires that each element of a crime be proven beyond a reasonable doubt, this being basic to a fair trial. Sandstrom instruction by shifting the burden of proof of intent, an element of the crime of homicide, to the defendant denies him due process, and thus the court cannot consider the instruction as harmless error. The "plain error" doctrine is not applicable because it only sets a standard of "highly probable" that the instruction error "materially affected the verdict", the wrong standard by which to measure the effect of constitutional error. McGuinn v. Crist, 492 F. Supp. 478, 37 St. Rep. 1159 (D.C. Mont. 1980), reversed in 657 F2d 1107 (1981).

Sandstrom Instructions — Harmless Constitutional Error — "Overwhelming Weight of the Evidence" Test Adopted: In the Sandstrom case, the jury was instructed, "The law presumes that a person intends the ordinary consequences of his voluntary acts." This instruction was held unconstitutional because the jury might have interpreted it in one of two ways: (1) as a conclusive presumption; or (2) as shifting the burden of persuasion to the defendant to disprove an element of the crime, viz., that defendant "knowingly or purposely" killed the victim. Either interpretation would have rendered the instruction unconstitutional. Here, the instructions included various clarification statements, including one that, unless otherwise instructed, all presumptions are rebuttable. The first Sandstrom objection was thus met. The second objection raises the question of whether the federal constitutional error was harmless beyond a reasonable doubt. The Montana Supreme Court adopted the test that measures the evidence as a whole and excludes the constitutional infirmity where overwhelming evidence supports the conviction. Here the evidence was undisputed, overwhelming, and uncontradicted and permitted only one rational conclusion, that the defendant had the requisite intent when he kidnapped and killed the victim. A reasonable juror could not have found otherwise. Therefore, the unconstitutional jury instructions were harmless beyond a reasonable doubt in the context of the undisputed evidence in the case, and the assigned error could not have contributed to the verdict. St. v. McKenzie, 177 M 280, 608 P2d 428, 37 St. Rep. 325 (1980).

Jury Instructions — Intention of Consequences of Acts — Sandstrom Distinguished: Distinguishing Sandstrom, the court noted that the jury was not given a mandatory presumption, but it was told it could reasonably infer the defendant's intent for all the consequences which one acting in a like position would reasonably have expected. Nothing in the instruction lessened the duty of the State to prove every element of the crime charged beyond a reasonable doubt, nor did it affect the presumption of defendant's innocence. St. v. Bad Horse, 185 M 507, 605 P2d 1113, 37 St. Rep. 45 (1980), distinguishing Sandstrom v. Mont., 442 US 510, 61 L Ed 2d 39, 99 S Ct 2450 (1979).

Unconstitutional Presumption of Intent — Sandstrom Decision: Upon finding proof of one element of the crime of deliberate homicide and of facts insufficient to establish the second, the voluntariness and ordinary consequences of defendant's action, the jurors could reasonably have concluded, in light of the instruction that a person intends the ordinary consequences of his voluntary acts, that they were directed to find against defendant on element of intent; the State was thus not forced to prove beyond a reasonable doubt every fact necessary to constitute the crime charged, and defendant was deprived of his constitutional rights. Sandstrom v. Mont., 442 US 510, 61 L Ed 2d 39, 99 S Ct 2450 (1979).

Instruction as to Intent: The instruction to the jury that "the law presumes that a person intends the ordinary consequences of his voluntary acts" did not violate due process standards as defined by the United States or Montana Constitution and as interpreted by relevant case authority and thus did not constitute reversible error. St. v. Sandstrom, 176 M 492, 580 P2d 106, 35 St. Rep. 744 (1978), reversed and remanded, Sandstrom v. Mont., 442 US 510, 61 L Ed 2d 39, 99 S Ct 2450 (1979).

Homicide — Repeated Shooting: The repeated shooting into the vital parts of the body of a live human being with a deadly weapon is evidence that the gun was used intentionally and deliberately and demonstrates the intent to kill. With this fact established, the law presumes that defendant intended the ordinary consequences of his voluntary act. This is a rebuttable presumption. St. v McLeod, 131 M 478, 311 P2d 400 (1957).

Instituting Criminal Proceedings: A person instituting a criminal proceeding for passing a fraudulent check intends to vex, annoy, and injure such person within the meaning of the word malice in 1-1-204. Rickman v. Safeway Stores, 124 M 451, 227 P2d 607 (1951).

Fraudulent Conveyance — Voluntary Act: Where one makes a voluntary conveyance of his property without retaining sufficient property to satisfy the legal demands of his creditors, plaintiff in his action to set it aside as fraudulent is not required to show the existence of an actual fraudulent intent, the law presuming that by her voluntary act she intended the natural and inevitable consequences to flow therefrom, namely, to hinder, delay, or defraud the plaintiff in the collection of his judgment secured after the conveyance, the result being fraud in fact. Nat'l Bank of Anaconda v. Yegen, 83 M 265, 271 P 612 (1928).

SUBSECTION (4)

Tort — Failure to Exercise Ordinary Care for Own Safety: Damages were properly denied where the uncontroverted evidence showed that the plaintiff, while working near overhead power lines, had failed to exercise ordinary care for his own safety, which failure proximately caused his injuries. Sprankle v. DeCock, 165 M 274, 530 P2d 457 (1974).

Negligence by Deceased — Wrongful Death: Deceased was presumed to have taken ordinary care of his own concerns; however, plaintiff's evidence in wrongful death action showing deceased's failure to properly test empty gasoline tank before welding it, which could very well have been cause of accident, contradicted presumption. Knowlton v. Sandaker, 150 M 438, 436 P2d 98 (1968).

Auto and Train Accident — Good Visibility: Truck driver could not recover damages from railroad where passenger train plainly visible from the truck crossed the highway and collided with the truck when it started to cross the railroad track. Monforton v. N. Pac. Ry., 138 M 191, 355 P2d 501 (1960).

Presumption Disputable — Surrounding Facts and Circumstances: The presumption that a person takes ordinary care of his own concerns is a disputable one and does not apply where the surrounding facts and circumstances show the contrary. Roberts v. Chicago, Milwaukee & St. Paul Ry., 67 M 472, 216 P 332 (1923).

Instruction — Improper When Contributory Negligence Involved: An instruction that the law presumed that plaintiff's decedent at the time of the accident was exercising ordinary care for his safety was properly refused where the question of negligence on the part of defendant and that of contributory negligence on his part were issues of fact to be determined by the jury. Osterholm v. Butte Elec. Ry., 60 M 193, 199 P 252 (1921).

Contributory Negligence — Plaintiff Established: Although, under subsection (4) of this section, the law presumes that a person exercises ordinary care for his own safety, yet where plaintiff's own case presents evidence which, if unexplained, establishes prima facie contributory negligence, there must be evidence exculpating him or he cannot recover. Meehan v. Great N. Ry., 43 M 72, 114 P 781 (1911).

Contributory Negligence — Burden on Defendant: In an action to recover for personal injuries to a child, the burden of alleging and proving contributory negligence is upon the defendant, in the first instance, since there is a presumption of law that the plaintiff exercised ordinary care. Harrington v. Butte, Anaconda & Pac. Ry., 37 M 169, 95 P 8 (1908).

Accidental Contact With Live Wire — Tort: Where a workman, while working on a wet scaffold, slipped and in throwing out his hands came in contact with an electric company's live wire and was injured, the accidental slipping cannot be said to be negligence per se on his part, since the law presumes that plaintiff exercised ordinary care in the premises. Birsch v. Citizens' Elec. Co., 36 M 574, 93 P 940 (1908).

SUBSECTION (6)

Use of Presumption Not Shifting Burden — Relates to Type or Lack of Evidence: Although incompetence or undue influence is never presumed and it is clearly the burden of the plaintiff to prove such matters, when the defendant failed to engage in the usual practice of calling upon doctors and nurses from the confining hospital to clearly show mental capacity at the time the instrument was signed, it was not error for the District Court to rely on the presumption of this subsection because it relates only to the type and lack of evidence of the defendant, not on the plaintiff's burden of proof. Adams v. Allen, 209 M 149, 679 P2d 1232, 41 St. Rep. 610 (1984).

SUBSECTION (8)

Land and Water — Abandonment to Possessing Partner: Where the record owner of land and appurtenant water rights abandoned the land, left in possession the person with whom he had farmed the land in partnership, and never returned to claim possession, the presumption is that

the person in possession had become the owner. Cook v. Hudson, 110 M 263, 103 P2d 137 (1940), overruled in Grimsley v. Spencer's Estate, 206 M 184, 670 P2d 85 (1983).

Rebuttal of Presumption: The presumption that a thing delivered by one to another belongs to the latter is rebuttable and must give way to proved facts. Hoppin v. Lang, 81 M 330, 263 P 421 (1928).

Mortgage on Record: Evidence consisting of a note given by the apparent owner of cattle and a chattel mortgage to secure the debt evidenced by it, the mortgage remaining of record uncanceled for more than a month at the time defendant claimed to have bought the livestock, was competent for the purpose of reenforcing the presumptions relative to the possession and ownership of property contained in subsections (8), (11), and (12) of this section. Cuerth v. Arbogast, 48 M 209, 136 P 383 (1913).

SUBSECTION (9)

Pledge of Automobile Title: In action by administratrix to recover amount of automobile purchase loan made by decedent to defendant, it was a question for the jury whether title certificate was first surrendered as evidence of a pledge and then returned as evidence of payment. Olson v. McLean, 132 M 111, 313 P2d 1039 (1957).

SUBSECTION (11)

Possession of Personal Property: Possession of personal property creates a rebuttable presumption that the possessor owns the property. Farmers St. Bank of Victor v. Imperial Cattle Co., 218 M 89, 708 P2d 223, 42 St. Rep. 1419 (1985), citing Park v. Grady, 62 M 246, 204 P 382 (1922).

Rebuttal of Presumption: The statutory presumption that things which a person possesses are owned by him is not allowable against ascertained and established facts to the contrary. Smith v. Armstrong, 118 M 290, 166 P2d 793 (1946).

Possession of Land: Where a person remained in possession of land and appurtenant water rights for several years after delivery to him by the owner and without any other claim being asserted, the presumption created by this subsection reinforced the presumption arising out of subsection (8) of this section that he had become the owner. Cook v. Hudson, 110 M 263, 103 P2d 137 (1940), overruled in Grimsley v. Spencer's Estate, 206 M 184, 670 P2d 85 (1983).

Fence on Land of Another — Landowner Presumed to Own: Where one places a fence on the land of another without an agreement permitting him to do so, it belongs to the owner of the land unless he chooses to require him to remove it, the presumption, disputable in nature, being that one in possession of land is also the owner of the fixtures thereon. Schmuck v. Beck, 72 M 606, 234 P 477 (1925), distinguished in Thibault v. Flynn, 133 M 461, 325 P2d 914 (1958).

Present Not Past Possession: The presumption declared by this subsection has reference to the present and not to the past; therefore an offered instruction in an action in conversion that if plaintiff's husband was in possession of the property in question prior to the time it was attached, the law presumes that he and not plaintiff was its owner, was properly refused. Wray v. Great Falls Paper Co., 72 M 461, 234 P 486 (1925).

Possession of Real Property by Mortgagee: Where the mortgagee is in possession of real property by consent of the mortgagor, he can maintain such possession against the mortgagor or any other person who cannot show title paramount to that of the mortgagor and may by ejectment recover possession as against an intruder, his possession being a sufficient prima facie showing to support a recovery, the burden being then cast upon defendant to show a superior title or right. Stack v. Coyle, 59 M 444, 197 P 747 (1921).

Possession of Cattle: A person's possession of cattle is prima facie evidence that he owns them. Kerr v. Blaine, 49 M 602, 144 P 566 (1914).

Mortgage of Cattle on Record: Evidence consisting of a note given by the apparent owner of cattle and a chattel mortgage to secure the debt evidenced by it, the mortgage remaining of record uncanceled for more than a month at the time defendant claimed to have bought certain livestock, was competent for the purpose of reenforcing the presumptions relative to the possession and ownership of property contained in subsections (8), (11), and (12) of this section. Cuerth v. Arbogast, 48 M 209, 136 P 383 (1913).

SUBSECTION (12)

Horses — Rebuttal by Agreement Over Possession: Presumption of ownership of horses by rancher from possession thereof and exercising acts of ownership was not allowable in face of established fact that owner left the horses with rancher for sale with understanding that owner was to pay for pasture and if they could not be sold to be used by rancher for breeding purposes. Smith v. Armstrong, 118 M 290, 166 P2d 793 (1946).

Rebuttal of Presumption: The statutory presumption that a person is the owner of property from exercising acts of ownership over it is not allowable against ascertained and established facts to the contrary. Smith v. Armstrong, 118 M 290, 166 P2d 793 (1946).

Possession of Land and Water: Where a person remained in possession of land and appurtenant water rights for several years after delivery to him by the owner and without any other claim being asserted, the presumption created by this subsection reinforced the presumption arising out of subsection (8) of this section that he had become the owner, and further strength is derived from the common reputation clause of this subsection. Cook v. Hudson, 110 M 263, 103 P2d 137 (1940), overruled in Grimsley v. Spencer's Estate, 206 M 184, 670 P2d 85 (1983).

Mortgage of Cattle on Record: Evidence consisting of a note given the apparent owner of cattle and a chattel mortgage to secure the debt evidenced by it, the mortgage remaining of record uncanceled for more than a month at the time defendant claimed to have bought livestock, was competent for the purpose of reenforcing the presumptions relative to the possession and ownership of property contained in subsections (8), (11), and (12) of this section. Cuerth v. Arbogast, 48 M 209, 136 P 383 (1913).

SUBSECTION (14)

Action on Official Bond — Sureties Estopped: In an action on the official bond of a Justice of the Peace, the sureties are estopped to deny the legal presumptions of regularity of the election or appointment of their principal, created by this section, or to deny his title to the office. Murphy v. Johns, 56 M 134, 182 P 115 (1919).

SUBSECTION (15)

Official Duty: The recommendation of a county officer regarding establishment of a public road cannot be viewed as giving rise to an official duty that would invoke the 26-1-602(15) presumption. Even if the presumption was applicable, a lack of any record that such "duty" was performed would rebut the presumption. Oates v. Knutson, 182 M 195, 595 P2d 1181, 36 St. Rep. 1011 (1979).

Official Certificate — Rebutted by Own Contents: Statutory presumption of correctness of Secretary of State's certification as to total number of electors voting at election on the 1972 Montana Constitution was overcome by demonstrable fact, apparent from other figures in his certificate, that not that many electors cast valid votes on either side of the question. State ex rel. Cashmore v. Anderson, 160 M 175, 500 P2d 921 (1972), certiorari denied in Burger v. Anderson, 410 US 931, 35 L Ed 2d 593, 93 S Ct 1372 (1973).

Official Act by State Officer — Summary Judgment: Statutory presumption in this subsection imposed a heavy burden upon party attacking Bank Superintendent's (now State Banking Board) order permitting establishment of another bank in a community, and where Superintendent made a thorough investigation, secured opposing views, and considered all evidence, including some confidential evidence as to economic prospects within the community, the evidence that he acted within his discretionary powers was so great as to support a summary judgment denying injunction or prohibition against the Superintendent's action. Miners & Merchants Bank v. Dowdall, 158 M 142, 489 P2d 1274 (1971).

Findings of District Court: Findings and conclusions of District Court are presumed correct and will not be reversed on appeal unless evidence, even though conflicting, preponderates against them. Breen v. Indus. Accident Bd., 150 M 463, 436 P2d 701 (1968).

Maintenance of Official's Road — Established Public Highway: On basis of statutory presumption and on basis of testimony of county employee that he had been ordered to maintain road by County Commissioner who was also owner of the land, court concluded that then owner of land regarded road as public highway, in determining that public highway had been established by prescriptive use. Kostbade v. Metier, 150 M 139, 432 P2d 382 (1967).

Excusing Jurors — Presumption Upheld: Statutory presumption that "official duty has been regularly performed" was not overcome where defendant offered no evidence to show that any prospective juror was improperly excused from service and where judge testified that no prospective juror was excused from service without valid statutory excuse. St. v. Corliss, 150 M 40, 430 P2d 632 (1967).

Challenge to Conviction: Where petitioner claimed, 14 years after his conviction, that his confession had been coerced and records of the proceedings against him were incomplete but he had counsel to represent him on a second charge brought against him a few days later, presumption that petitioner had voluntarily waived right to counsel on the first charge, besides the fact that he had pleaded guilty to it so that confession was not used against him, reinforced

presumption that the proceedings had not violated his constitutional rights. Frost v. St., 249 F. Supp. 349 (D.C. Mont. 1966).

Form of State Agency — Used as Required: The law presumes that the Commissioner of Agriculture [now Director, Department of Agriculture] performed his official duty as required by 80-4-224 (now repealed) and that the form of warehouse receipt used and issued by plaintiff is in the form prescribed by law and the rules and regulations of the Commissioner of Agriculture, of which the Supreme Court may take judicial notice. N. Mont. Mustard Growers Co-op v. Britton, 128 M 553, 280 P2d 1078 (1955).

Sheriff — Conversion of Personal Property — Writ of Execution: In an action for the conversion of household goods and similar items against one who had been placed in possession of plaintiff's property under Writ of Execution, it will be presumed in the absence of a showing that defendant was wrongfully in possession, that the Sheriff regularly performed his official duty, and that the goods and chattels in question were removed to the highway at his direction, where they were stolen or destroyed. Beyerlein v. Whitcomb, 95 M 293, 26 P2d 349 (1933).

Sheriff — Search in Levy of Execution: In the absence of evidence showing that a Sheriff, in attempting to make a levy of execution, made no search for personal property, it may be presumed from the recital in his return that he was unable to find any and that he had made a search. Stone-Ordean-Wells Co. v. Strong, 94 M 20, 20 P2d 639 (1933).

Conflicts of Presumptions on Officials — District Judge Prevails Over Clerk of Court: The presumption attaching to the official act of a District Judge in appointing a receiver, that he did so in consideration of a proper motion for his appointment and that notice thereof had been given, is of greater dignity than the presumption that if the motion and notice of hearing had been given, the Clerk of the District Court would have made proper entry thereof in his register of actions. Burgess v. Lasby, 91 M 482, 9 P2d 164 (1932).

School District Trustees — Election Duties: In the absence of proof in support of the contention that the trustees of a joint school district had not established polling places or defined the boundaries of election precincts for the holding of the election and that therefore the election was invalid, it will be presumed that official duty had been regularly performed. Buckhouse v. School District, 85 M 141, 277 P 961 (1929).

Act by Police Magistrate — False Imprisonment: The presumption is that a Police Magistrate [now City Court Judge] regularly performed his official duties, and to make out a cause of action against him for false imprisonment, it was necessary for plaintiff to overcome that presumption and to disclose wherein that officer was without jurisdiction, failing in which a demurrer to the complaint was properly sustained. Shampagne v. Keplinger, 78 M 114, 252 P 803 (1927).

Search Presumed Legal: The presumption that official duty has been regularly performed has the effect of evidence and is satisfactory if not controverted, and under that rule it will be presumed, in the absence of countervailing proof, that an officer in making a search and seizure did not act illegally, the burden of showing that he did being upon him who makes the assertion. State ex rel. Brown v. District Court, 72 M 213, 232 P 201 (1925).

District Judge — Approval of County Attorney in Issuing Search Warrant: Conceding (without deciding) that a District Judge may not issue a search warrant without the approval of the County Attorney, in the absence of a showing that such approval had not been given, it will be presumed that official duty was regularly performed and approval had in the manner required by law. St. v. Tesla, 69 M 503, 223 P 107 (1924).

Clerk of School Board — Acting Within Authority: Evidence that the clerk of defendant school board notified plaintiff prior to the end of his term of employment that he was discharged was sufficient without a showing that the board had acted and authorized the clerk to give the notice, the presumption being that the clerk as an officer of the board in sending the notice regularly performed his official duties, the burden of showing that he acted in excess of his authority having been upon defendant. O'Brien v. School District, 68 M 432, 219 P 1113 (1923).

Parole of Prisoner: In the absence of countervailing evidence, the presumption obtains that the State Prison Board (now Board of Pardons and Parole), in paroling a prisoner sentenced to life imprisonment for murder, regularly performed its duty and before granting the parole commuted his sentence, since without commutation in such case parole is not authorized by law. Anderson v. Wirkman, 67 M 176, 215 P 224 (1923).

Election Judges — Change of Polling Place: Where a Board of County Canvassers refused to canvass election returns from a precinct on the ground that the election had not been held at the place designated by the Board of County Commissioners, and on application for Writ of Mandate to compel them to act, it was not shown that the judges of election at the precinct had not pursued the statute giving them authority to change the place of election, it will be presumed that official

duty was regularly performed by them and that they did change it, and the Writ will issue commanding action. State ex rel. Moore v. Patch, 65 M 218, 211 P 202 (1922).

Action of District Court: Upon appeals to the Supreme Court, the presumption must always be indulged that the action of the District Court proceeded, not only according to law, but that it was done in the regular mode. Marcellus v. Wright, 61 M 274, 202 P 381 (1921).

Act of Regulatory Agency — Establishing Rates: Since the presumption obtains that the Railroad Commission (now Public Service Commission) fixed and established reasonable rates in obedience to 69-14-301 (now repealed) and that the rate as established is in accordance with the approved and published tariff, a complaint which fails to allege that freight charges were not in accordance with such tariff is defective. Doney v. N. Pac. Ry., 60 M 209, 199 P 432 (1921), explained in Mont. Horse Prod. Co. v. Great N. Ry., 91 M 194, 7 P2d 919 (1932), and Great N. Ry. v. Sunburst Oil & Ref. Co., 287 US 358, 77 L Ed 60, 53 S Ct 145 (1932); overruled because of statutory misinterpretation in Sunburst Oil & Ref. Co., 91 M 216, 7 P2d 927 (1932).

Service of Summons: Before the District Court could set aside a default judgment on the ground of nonservice of summons, the defendant was obliged not only to overcome the presumption accorded to official acts but the testimony of the officer making service as well, failing in which the motion was properly denied. Gilliland v. Palatine Ins. Co., 59 M 267, 196 P 151 (1921).

Action on Official Bond — Sufficiency of Allegations: In an action on an official bond, an allegation that the official in question was by the Board of County Commissioners duly appointed and thereafter qualified and ever since has been and is now a duly appointed, qualified, and acting Justice of the Peace of a designated township is sufficient, aided by the statutory presumptions of subsections (15) and (33) of this section. Murphy v. Johns, 56 M 134, 182 P 115 (1919).

Arrest as Official Duty: In an action for false imprisonment against a Town Marshal for unlawfully and wrongfully arresting the plaintiff, the latter has the burden of proving facts sufficient to overcome the presumption that the officer who made the arrest performed an official duty in a regular manner. Grant v. Williams, 54 M 426, 171 P 276 (1918).

Record of State Agency: When the record required by law to be kept by the Montana State Board of Medical Examiners has been properly identified by an officer of the Board, the presumption attaches that it has been correctly kept. St. v. Hopkins, 54 M 52, 166 P 304 (1917).

Jury List — All Named Competent to Serve: The presumption is, when the Sheriff receives a venire for service, that every man whose name appears upon it is competent for jury service. The defendant in a criminal case who interposes a challenge to the panel on the ground that the Sheriff failed to summon all of the jurors may, therefore, rely on such presumption to establish a prima facie case to that extent. St. v. Groom, 49 M 354, 141 P 858 (1914).

Prison Warden: The presumption that official duty was regularly performed attaches to the acts of the Warden of the penitentiary. Stephens v. Conley, 48 M 352, 138 P 189 (1914).

Jurisdiction of Justice's Court: The presumptions found in this subsection and subsection (16) of this section do not relieve a party who alleges in his pleading that a judgment of a Justice of the Peace was "duly given or made" from establishing on the trial the facts concerning jurisdiction, where such allegation is controverted. Miller v. Miller, 47 M 150, 131 P 23 (1913).

Stay of Proceedings by Supreme Court — Requirement of Security: Assuming that the Supreme Court should, in a proper case where a stay of proceeding has been ordered by the trial court, use the Writ of Mandamus to compel the requirement of security pending the motion for a new trial, the presumption must be indulged that the defendant regularly pursued his duty and that the order complained of was the result of the exercise of a wise discretion. State ex rel. Robinson v. Clements, 37 M 96, 94 P 837, 95 P 845 (1908).

Official Sale of City Lots: It must be presumed that an officer complied with the statute in the sale of a city lot, though it was composed of two parcels and was sold in gross, since the parcels may not have been known or may have been offered separately and sold in gross only after it was found that there were no bidders for the parcels. Burton v. Kipp, 30 M 275, 76 P 563 (1904). See also Thomas v. Thomas, 44 M 102, 119 P 283 (1911).

City Officials — Performed Duty Regularly: It is presumed, in the absence of any showing to the contrary, that city officials did not certify an assessment prematurely to the county officials but performed their duty regularly. Beck v. Holland, 29 M 234, 74 P 410 (1903).

Correctness of Jury Instructions in Appeal Record: Under this subsection, it will be presumed, in the absence of a showing to the contrary, that instructions found in the proper place in a record on appeal, with proper endorsements thereon, were put there by the trial court and its officers. Wastl v. Mont. Union Ry., 24 M 159, 61 P 9 (1900).

SUBSECTION (16)

Favors District Judge Over Clerk of Court: The presumption attaching to the official act of a District Judge in appointing a receiver, that he did so in consideration of a proper motion for his appointment and that notice thereof had been given, is of greater dignity than the presumption that if the motion and notice of hearing had been given, the Clerk of the District Court would have made proper entry thereof in his register of actions. Burgess v. Lasby, 91 M 482, 9 P2d 164 (1932).

Bill of Exceptions — Not Within Presumption: That a bill of exceptions was presented, settled, and signed within the time provided by statute must be made to appear affirmatively in the record and may not be supplied by the presumption that the trial court in settling and signing it was acting in the lawful exercise of its jurisdiction. O'Donnell v. Butte, 72 M 449, 235 P 707 (1925), distinguished in Atlantic-Pacific Oil Co. of Mont. v. Gas Dev. Co., 105 M 1, 69 P2d 750 (1937); Ingman v. Hewitt, 107 M 267, 86 P2d 653 (1938); Pierce v. Pierce, 108 M 42, 89 P2d 269 (1939); and Erdmann v. Erdmann, 127 M 252, 261 P2d 367 (1953).

Jurisdiction Presumption — Habeas Corpus: On application for Writ of Habeas Corpus, which presents the inquiry whether the trial court had jurisdiction of the subject matter of the prosecution of the defendant to render such a judgment as the law authorizes in the particular case, the presumption of jurisdiction is conclusive unless want of it appears on the face of the record, and express recitals of jurisdictional facts cannot be rebutted by evidence dehors [not within] the record. In re Shaffer, 70 M 609, 227 P 37 (1924).

Burden to Assert Lack of Jurisdiction: The presumption obtains that in rendering a judgment the court was acting in the lawful exercise of jurisdiction, and the burden of showing the contrary is upon him who makes the assertion of lack of jurisdiction. Bury v. Bury, 69 M 570, 223 P 502 (1924).

District Court Proceedings: Upon appeal to the Supreme Court, the presumption must always be indulged that the action of the District Court proceeded, not only according to law, but that it was done in the regular mode. Marcellus v. Wright, 61 M 274, 202 P 381 (1921).

Jurisdiction of Justice's Court: The presumptions found in this subsection and subsection (15) of this section do not relieve a party who alleges in his pleading that a judgment of a Justice of the Peace was "duly given or made" from establishing on the trial the facts concerning jurisdiction, where such allegation is controverted. Miller v. Miller, 47 M 150, 131 P 23 (1913).

SUBSECTION (17)

Client Bound by Attorney's Waiver of Right to Speedy Trial — Purpose of Statute: After defendant's attorney orally waived defendant's rights to a speedy trial in Justice's Court, defendant argued in his trial de novo appeal to District Court that he, the defendant, was not bound by his attorney's waiver. Defendant asserted that 37-61-401 makes the waiver binding only if it was entered with the defendant's knowledge or upon the record in open court. Citing Bush v. Baker, 46 M 535, 129 P 550 (1913), the Supreme Court ruled that 37-61-401 has been applied only as to agreements between attorneys and that the purpose of that section is to relieve the presiding judge of the burden of determining disputes between attorneys concerning their unexecuted agreements. The Supreme Court stated that it would not apply 37-61-401 literally as to agreements between an attorney and the court; to do so would lead to absurd consequences and greatly retard the business of the courts. The Supreme Court held that the defendant was thus bound by his counsel's waiver. St. v. Nelson, 251 M 139, 822 P2d 1086, 48 St. Rep. 1129 (1991).

Speedy Trial Clock to Start With Date of De Novo Appeal From Justice's Court to District Court: After defendant's attorney orally waived defendant's rights to a speedy trial in Justice's Court, defendant argued in his trial de novo appeal to District Court that his right to a speedy trial was violated because the clock should have started with the date of his arrest, not the date of appeal to District Court. Citing St. v. Sanders, 163 M 209, 516 P2d 372 (1973), the Supreme Court noted that it had adopted Standard 12-2.2(c) of the American Bar Association Standards for Criminal Justice. The standard provides that in cases of appeal or an order for a new trial, the time for trial should begin running with the order granting the new trial or, in this case, the date of appeal to District Court. The Supreme Court determined not to abandon that standard and therefore held that defendant's trial was within the 6-month limitation of 46-13-401. St. v. Nelson, 251 M 139, 822 P2d 1086, 48 St. Rep. 1129 (1991).

Speedy Trial Not Denied by Application of Six-Month Speedy Trial Limitation to De Novo Appeal From Justice's Court to District Court: After defendant's attorney orally waived defendant's rights to a speedy trial in Justice's Court, defendant argued in his trial de novo appeal to District Court that his right to a speedy trial was violated because it is prejudicial to

apply the speedy trial standards of 46-13-401 to an appeal from Justice's Court to District Court. The Supreme Court held that the argument was without merit because the 6-month limit was met in this case, both in the time for trial in Justice's Court and in the time for trial de novo in District Court. St. v. Nelson, 251 M 139, 822 P2d 1086, 48 St. Rep. 1129 (1991).

Uncertain Testimony of Defense Counsel Insufficient to Disprove Oral Waiver of Right to Speedy Trial: At the time scheduled for defendant's trial in Justice's Court on a DUI charge, the Justice of the Peace called defense counsel into his chambers and informed him that a different date for trial was necessary because of another trial then in progress. The Justice of the Peace then issued a written order reciting the fact that an oral motion for a continuance was made by defense counsel, along with an oral waiver of defendant's right to a speedy trial. Trial was then set for a date beyond the 6-month limitation provided for in 46-13-401. In a de novo appeal to District Court, defendant raised the issue of his right to a speedy trial, and defense counsel testified he could not remember whether he made an oral motion for continuance and a waiver. The Supreme Court found that the Justice's Court's order was presumed correct under subsection (17) of this section and that the testimony of defense counsel did not demonstrate that the order was in error in reciting the waiver. St. v. Nelson, 251 M 139, 822 P2d 1086, 48 St. Rep. 1129 (1991).

Determination of Probable Cause to File Criminal Charges — No Preclusion of Later Malicious Prosecution Suit: A judicial determination of probable cause to hold a party answerable to criminal charges does not preclude the party from subsequently bringing suit for malicious prosecution. The fact that the party was held to answer the criminal charge is considered presumptive but not conclusive evidence of the existence of probable cause to initiate the criminal action. The party in a malicious prosecution action can overcome the presumption by showing by a preponderance of the evidence that there was no probable cause for filing the original criminal action. Watkins v. Spring Creek Colony, 188 M 467, 614 P2d 508, 37 St. Rep. 1176 (1980).

Default Judgment — Presumed Correct: Absent proof that evidence at hearing on entry of default judgment was insufficient or that an erroneous standard of damages was used, presumption that judgment was correct controlled on appeal, and aggrieved party could not attack evidence on which default judgment was based by introducing evidence in support of his proposed defense at hearing on his motion to vacate default judgment. Uffleman v. Labbit, 152 M 238, 448 P2d 690 (1968).

Attack on Conviction Record: Where petitioner claimed, 14 years after his conviction, that his confession had been coerced and records of the proceedings against him were incomplete, the facts that defendant had pleaded guilty to the crime charged so that confession was not used and that the record stated he had waived right to counsel reinforced presumption under this subsection that defendant's constitutional rights to counsel and against self-incrimination had not been violated. Frost v. St., 249 F. Supp. 349 (D.C. Mont. 1966).

Res Judicata — Judgment of Former Suit Relied Upon: Where, in a suit for damage to crops resulting from wrongful diversion of water, the judgment in a former suit between the same parties was relied on in aid of the plea of res judicata, the disputable presumption is that the proceedings had in such suit were regular. Cocanougher v. Mont. Life Ins. Co., 103 M 536, 64 P2d 845 (1936).

SUBSECTION (18)

Jury Finding Only on Defendant's Counterclaim: Presumption was not overcome where jury found in favor of defendant on his counterclaim filed in response to plaintiff's action for negligence from which may be inferred fact that issue of defendant's negligence was before the jury and that in not finding for plaintiff jury concluded that defendant was not negligent. Ratcliff v. Murphy, 150 M 31, 430 P2d 627 (1967).

SUBSECTION (19)

Rebuttal of Presumption: In an action involving fraud, the presumptions declared by subsection (1) of this section and this subsection, that a person is innocent of wrong and that private transactions have been fair and regular, prevail until overcome by evidence satisfactory to the court. Hansen v. Johnson, 90 M 597, 4 P2d 1088 (1931).

Fraud Not Presumed:

The law presumes that private transactions have been fair and regular. Where the record does not contain any evidence of fraud on plaintiff's part, the Supreme Court will not assume that she acted with any fraudulent intent. Citing Floyd-Jones v. Anderson, 30 M 351, 76 P 751

(1904). Mayger v. St. Louis Min. & Mill. Co., 68 M 492, 219 P 1102 (1923), distinguished in Holmes v. Potts, 132 M 477, 319 P2d 232 (1957).

Where the record contains no evidence of fraud, it will not be presumed that a party acted with fraudulent intent. Floyd-Jones v. Anderson, 30 M 351, 76 P 751 (1904).

SUBSECTION (20)

Replevin — Possession of Article: Admissions by defendants, who were engaged in the pawnbroking business, that they had a ring which was the subject matter of a suit in replevin, on the day before suit and on the day action was begun, are aided by the presumption that the ordinary course of business had been followed and were sufficient to make out a prima facie case of the present actual possession by defendants at the time the action was commenced. Sullivan v. Girson, 39 M 274, 102 P 320 (1909).

SUBSECTION (21)

Existence of Promissory Notes Creating Rebuttable Presumption of Sufficient Consideration — Speculative Statements Insufficient to Demonstrate Genuine Issue of Material Fact: Defendant Moon contended that the District Court erred in granting summary judgment to plaintiff on promissory notes because there was a genuine issue of material fact regarding whether the notes were unenforceable for lack of consideration. However, this section creates a rebuttable presumption arising from the fact of the promissory note itself that the note was given for sufficient consideration. Under Rule 301(b)(2), M.R.Ev. (Title 26, ch. 10), Moon was required to show a preponderance of evidence contrary to the presumption in order to overcome it, otherwise the court was bound to find the assumed fact in accordance with the presumption. Moon's conclusory and speculative statements in the pleadings, briefs, and affidavits did not constitute sufficient factual evidence to demonstrate that a genuine issue of material fact existed contrary to the presumption of valid consideration, so the grant of summary judgment was proper. Envtl. Contractors, LLC v. Moon, 1999 MT 178, 295 M 268, 983 P2d 390, 56 St. Rep. 696 (1999).

SUBSECTION (23)

Rebut Presumption — Parol Evidence Acceptable: The presumption that an instrument was executed on the date set forth therein may be rebutted by evidence outside the instrument, including parol testimony. Harrison St. Bank v. USF & G Co., 94 M 100, 22 P2d 1061 (1933).

SUBSECTION (24)

Failure of Licensing Board to Overcome Presumption That License Renewal Timely Mailed and Received: Dr. Baldwin's chiropractor license renewal was due September 1, and the renewal packet was mailed to the Board of Chiropractors on August 17, but the Board never received it. After seeing two patients on September 2, the doctor called the Board to inquire whether the license had been reissued. The doctor was instructed to stop seeing patients because the license had not been renewed. The doctor was subsequently found to have engaged in unprofessional conduct for practicing without a license and placed on probation for 1 year, and a private letter of reprimand was placed in the doctor's license file. The doctor appealed the decision, but the District Court denied the request to reverse the decision. On appeal, the Supreme Court reversed. The Board did not dispute that the packet was mailed on August 17, but simply asserted that the packet was not received without offering any additional evidence of nonreceipt. Absent additional evidence, the Board failed to overcome the rebuttable presumption in subsection (24) of this section that a letter duly directed and mailed was received in the regular course of the mail. The District Court erred in affirming the Board's decision that the doctor failed to renew the license on time and practiced without a license. Baldwin v. Bd. of Chiropractors, 2003 MT 306, 318 M 188, 79 P3d 810 (2003).

Regular Mail — When Received and Who Received: Fact that letter addressed to County Department of Public Welfare was mailed does not establish when it was received or that it was received by a responsible official. Application of Hendrickson, 159 M 217, 496 P2d 1115 (1972).

Certified Mail — Required Notice: Testimony that notice was signed, placed in properly addressed envelope with sufficient postage thereon, and mailed by certified mail was sufficient foundation for District Court to admit original document into evidence and make finding that required notice was given. Treasure St. Indus., Inc. v. Leigland, 151 M 288, 443 P2d 22 (1968).

Factual Matters Strengthening Presumption: Presumption under this subsection that condemnee had received revised contract from state was strengthened by facts that condemnee received other documents enclosed in the same envelope, the envelope was not returned to the state office and the condemnee was well-known in the vicinity. Crissey v. St. Highway Comm'n,

147 M 374, 413 P2d 308 (1966), followed in Gen. Mills, Inc. v. Zerbe Bros., Inc., 207 M 19, 672 P2d 1109, 40 St. Rep. 1830 (1983).

Evidence to Give Rise to Presumption: Where the original of a business letter containing an order for merchandise could not be produced at the trial and particularly where it was conceded that the accompanying order was received, a copy thereof properly admitted, after showing payment of postage, return address on envelope, and sender's agent placing it in United States mail box, was sufficient to show that the letter was duly directed or mailed so as to give rise to the presumption of receipt thereof in the regular course of the mail. W. J. Lake & Co. v. Mont. Horse Prod. Co., 109 M 434, 97 P2d 590 (1939).

Rebuttal by Addressee — Jury Question: Positive testimony by the addressee of nonreceipt of a letter properly mailed does not overcome the presumption, rebuttable in character, that a letter duly directed and mailed was received in the regular course of mail, but the question is one of fact for the jury's determination from all of the evidence. Renland v. First Nat'l Bank, 90 M 424, 4 P2d 488 (1931), followed in Gen. Mills, Inc. v. Zerbe Bros., Inc., 207 M 19, 672 P2d 1109, 40 St. Rep. 1830 (1983). See also Billings v. Lindell, 236 M 519, 771 P2d 134, 46 St. Rep. 557 (1989).

Mail to Known Places of Residence — Summons and Complaint: Defendants, to each of whom copies of the summons and complaint were mailed at their known places of residence, are presumed to have had actual notice of the pendency of the action. Smith v. Collis, 42 M 350, 112 P 1070 (1910).

SUBSECTION (25)

Identity of Person Previously Convicted — No Identity Presumption:

Where a defendant was charged with a prior conviction of a felony, there must be some evidence aside from the judgment itself that the person who stood convicted by the prior judgment of conviction was the defendant in the instant case. St. v. Nelson, 130 M 466, 304 P2d 1110 (1956).

When defendant was charged with the crime of grand larceny and with the prior conviction of a like offense and the only evidence introduced for the purpose of identifying defendant as the person formerly convicted was the judgment roll in the prior action, an instruction to the jury that the name of the defendant being the same in both cases, the presumption followed that he was the same person and that unless such presumption was controverted, they were bound to find accordingly, was prejudicial error in that the instruction took from the jury the question whether defendant was in fact the same person who had suffered prior conviction. St. v. Livermore, 59 M 362, 196 P 977 (1921).

SUBSECTION (26)

Presumed Not to Have Left Issue: While there is a presumption that a person not heard from for 7 years is dead, there is none that he did not leave issue. In re Baxter's Estate, 98 M 291, 39 P2d 186 (1934).

Presumption Available for All Legal Purposes: The disputable presumption declared by this subsection is available for all legal purposes and presents a prima facie case sufficient to warrant a grant of letters of administration on the estate of the absentee, the proceedings being void only when knowledge that he is alive is obtained, this being true whether the proceedings rest upon a misapprehension of the fact of death or upon the presumption. Williams v. Hefner, 89 M 361, 297 P 492 (1931).

Diligent Search — Death Presumed: The law presumes the death of a person who is shown to have departed from her home more than 14 years prior to application for letters of administration and has never returned and who has never been heard of by her mother and sisters for more than 14 years, although they have made diligent search in the attempt to find her. In re Liter's Estate, 19 M 474, 48 P 753 (1897).

SUBSECTION (27)

Possession of Land and Water: Where a person remained in possession of land and appurtenant water rights for several years after delivery to him by the owner and without any other claim being asserted, the presumption arising out of this subsection reinforced the presumption of ownership arising out of subsections (8), (11), and (12) of this section. Cook v. Hudson, 110 M 263, 103 P2d 137 (1940), overruled on other grounds in Grimsley v. Spencer's Estate, 206 M 184, 670 P2d 85 (1983).

SUBSECTION (30)

Sufficient Showing of Common-Law Marriage: After Ober died, Selma came forward and asserted that she was Ober's common-law wife and should be appointed personal representative

of Ober's estate. Two of Ober's brothers contested Selma's claims, noting that: (1) Selma did not assume Ober's last name; (2) the parties maintained separate property and bank accounts; (3) the parties filed tax returns and documents with the farm service agency as single persons; (4) Ober did not designate Selma as a beneficiary on a life insurance policy; (5) Ober did not report Selma as his spouse to his employer; (6) Ober granted one brother power of attorney in three separate documents; (7) Ober continued to pay rent on an apartment in Conrad even after he moved into Selma's apartment near Power; and (8) Selma continued to receive her widow's survivor benefit from the Social Security Administration under the name of her deceased husband. Contrarily, Selma testified that: (1) Ober had proposed to her and she had accepted; (2) the couple had exchanged rings shortly after the proposal; (3) Ober had used address labels that read "John or Selma Ober"; and (4) Ober carried a photograph of Selma in his wallet on which he had written "my wife". The District Court properly assessed the credibility of the witnesses and concluded that a common-law marital relationship existed by mutual consent. The court further evaluated the testimony of more than 30 witnesses as to their opinions about the relationship in concluding that Ober and Selma had established a common-law marriage by public repute. The Supreme Court held that based on the evidence in the record and testimony given by Selma as surviving spouse, the burden of proving mutual consent and confirmation of common-law marriage by public repute was satisfied. The District Court was affirmed. In re Estate of Ober, 2003 MT 7, 314 M 20, 62 P3d 1114 (2003). See also In re Estate of Alcorn, 263 M 353, 868 P2d 629 (1994), and In re Estate of Hunsaker, 1998 MT 279, 291 M 412, 968 P2d 281 (1998).

Common-Law Marriage — Not Necessary to Prove Exact Date Mutual Consent and Agreement to Enter Into Marriage Takes Place — District Court Overturned: Anne and Maurice lived together 9 years. After Maurice's death, his family challenged Anne's status as the deceased's spouse and sole heir of the estate. The District Court ruled that the evidence did not establish common-law marriage. Although mutual consent and agreement to enter into a marriage must take place at a set time, the party asserting that a common-law marriage exists does not need to prove the exact date that it occurred. However, the party must prove that the three elements for a common-law marriage all existed at one time. The Supreme Court held that a sign in front of the couple's home indicating that it was the Hunsakers' and a grandfather clock engraved with their initials, among other things, indicated that the couple held themselves out as a married couple. Although there was substantial evidence to support the District Court's findings of fact, the Supreme Court stated that its review of the record led it to believe that the court misapprehended the effect of the evidence and erred in ruling that the evidence presented did not establish that Anne was the common-law wife of Maurice. In re Estate of Hunsaker, 1998 MT 279, 291 M 412, 968 P2d 281, 55 St. Rep. 1144 (1998).

Necessary Proof: Parties seeking to establish a common-law marriage must prove: (1) that the parties were competent to enter into a marriage; (2) that they assumed a marriage relationship by mutual consent and agreement; and (3) cohabitation and repute. In re Estate of Alcorn, 263 M 353, 868 P2d 629, 51 St. Rep. 87 (1994).

Substantial Evidence of Common-Law Marriage:

Kathee's ring, which she claimed was a wedding ring Fred gave her, had intertwining horseshoes, and the sidewalk of the ranch house in which they cohabited had intertwining horseshoes with the couple's names written beneath the horseshoes. The two owned racehorses and were racing enthusiasts. They had joint checking accounts and entertained together, and she cared for him when he was ill, which was often. Others testified that they acted as a married couple and were so thought of. Kathee testified that she and Fred had agreed to a common-law marriage. They cohabited for about 9 years, from the day they met until Fred died. The law did not require her to assume Fred's last name or to list him as her beneficiary on insurance, retirement, or health insurance forms, and she testified that she filed a separate income tax return because her accountants told her to and because she thought she had to since the marriage was not recorded. There was much evidence that they held themselves out as married. The lower court properly found that a common-law marriage existed, even though other evidence was to the contrary, such as Fred's wills in which he stated that he was single. In re Estate of Alcorn, 263 M 353, 868 P2d 629, 51 St. Rep. 87 (1994).

The District Court correctly deduced that Boyd and Peggy were married by mutual agreement and established the marriage by cohabitation and repute upon a showing of substantial evidence that the parties: (1) were competent to consent to marriage; (2) exchanged wedding rings, intending to be husband and wife and go through the actual ceremony at a later time; (3) lived together and held themselves out to be a married couple; (4) were presumed to be married by friends, family, coworkers, and the contractor who designed their home; and (5) issued invitations for the wedding of Peggy's daughter in the name "Mr. and Mrs. Boyd

Mahaffey". It was further noted that Boyd introduced Peggy as "my wife" and insured her on his automobile liability policy as Peggy Mahaffey. In re Marriage of Mahaffey, 245 M 424, 801 P2d 1335, 47 St. Rep. 1172 (1990).

Burden of Proof in Assertion of Common-Law Marriage: Although the public policy generally favors a finding of a valid marriage, the burden of proof remains upon the person asserting a common-law marriage. In re Marriage of Geertz, 232 M 141, 755 P2d 34, 45 St. Rep. 942 (1988).

Evidence Considered — Marriage Found: Evidence that man and woman exchanged wedding rings, mutually declared their marriage, and thereafter openly lived together supported finding that they were married. Estate of Swanson, 160 M 271, 502 P2d 33 (1972), distinguished in Estate of Slavens, 509 P2d 293 (1973).

Formal Marriage to Another: Presumption of valid common-law marriage may be overcome if divorce records from the residences of alleged common-law husband reveal that he was not divorced from former wife or had not had former marriage annulled. Spradlin v. U.S., 284 F. Supp. 763 (D.C. Mont. 1968).

Common-Law Marriage Considered: In view of statute recognizing common-law marriage, presumption that man and woman deporting themselves as husband and wife have entered into lawful contract of marriage is itself proof of marriage and is overcome as matter of law only when in light of proved facts reasonable men could no longer find in accordance with presumed fact. Spradlin v. U.S., 262 F. Supp. 502 (D.C. Mont. 1967).

Rebutted by Contrary Facts:

The disputable presumption declared by this subsection must be repelled by the party disputing it, and this may be done only by satisfactory evidence. Elliott v. Indus. Accident Bd., 101 M 246, 53 P2d 451 (1936).

Marriage cannot arise from the mere cohabitation of two persons reputed to be husband and wife, such cohabitation and reputation being merely evidence of the existence and reality of their consent; the fact that children have been born to them is not enough, and while the law will imply consent from the conduct of the parties when the facts will permit and will presume that a man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage, such presumption disappears in the face of contrary facts. Welch v. All Persons, 85 M 114, 278 P 110 (1929).

Strength of Presumption — Morality Presumed: Among the disputable presumptions specified by statute is that "a man and a woman deporting themselves as husband and wife have entered into a lawful contract of marriage". Every intendment of the law is in favor of matrimony. The presumption of matrimony is one of the strongest known to the law. The law presumes morality and not immorality, marriage and not concubinage, legitimacy and not bastardy. Citing In re Rash's Estate, 21 M 170, 53 P 312 (1898). St. v. Newman, 66 M 180, 213 P 805 (1923).

SUBSECTION (31)

Controverted by Preponderance of Evidence: The disputable presumption that a child born in lawful wedlock is legitimate is successfully controverted by other evidence when the preponderance of the evidence is contrary thereto. In re Wray's Estate, 93 M 525, 19 P2d 1051 (1933).

SUBSECTION (32)

Injury Presumed to Continue: The Supreme Court reversed a Workers' Compensation Court decision that denied claimant recovery for work-related injuries. The court rejected employer's argument that claimant's present symptoms were unrelated to the prior work-related injuries, finding substantial evidence in the record in support of the presumption that injuries are presumed to continue until proved otherwise. Shupert v. Anaconda Aluminum Co., 215 M 182, 696 P2d 436, 42 St. Rep. 277 (1985).

Frequent Mortgage Transfer — Presumption Not Found: In view of the ease with which a note and mortgage may be transferred without the necessity of making a public record thereof, the fact that a previous mortgage was at one time not owned by the plaintiff did not support a conclusion that plaintiff never owned the mortgage; and with respect to a subsequent mortgage given in exchange, there was no prima facie case of want or absence of consideration, particularly after a lapse of 15 years. Sommer v. Wigen, 103 M 327, 62 P2d 333 (1936).

Presumption Diminishes With Lapse of Time: The force of the presumption set forth in this subsection diminishes with lapse of time. Sommer v. Wigen, 103 M 327, 62 P2d 333 (1936).

Existence in Past: From the fact that a condition exists at a particular time, it may not be presumed that it existed in the past. Doran v. U.S. Bldg. & Loan Ass'n, 94 M 73, 20 P2d 835 (1933).

Situation to Be Considered in Application of Presumption: In determining whether, in a given case, the presumption declared by this subsection applies, the elements of intervening time and the permanent or temporary nature of the particular condition must be considered. Doran v. U.S. Bldg. & Loan Ass'n, 94 M 73, 20 P2d 835 (1933).

Acquisition to Title of Land — Title Continues: Proof by plaintiff that in a given year he acquired title to the land, possession of which he seeks to recover in an action in ejectment, supplemented by the legal presumption that a thing once proved to exist continues so long as is usual with things of that nature, is sufficient, in the absence of proof to the contrary, to make out a prima facie case in his behalf. Miner v. Cook, 87 M 500, 288 P 1016 (1930).

Robbery — Defendant Knew Location of Property: In a prosecution for robbery, evidence that defendant knew that the witness 9 days before had placed his wallet containing the money in his inside vest pocket where he kept his money, which pocket had been cut out after the witness had been knocked down, was sufficient to establish the taking. St. v. Olson, 87 M 389, 287 P 938 (1930).

Continuing Corporate Ownership: In the absence of a showing by plaintiff corporation that it was no longer the owner of practically all of the capital stock of the company which distributed the natural gas conveyed into the state by the former, the presumption declared by this subsection that the proven conditions continue obtains. Gallatin Natural Gas Co. v. P.S.C., 79 M 269, 256 P 373 (1927).

Banking Procedure in Crediting Drafts and Checks: Where a bank had for some 2 years refused to credit checks and drafts to a remitting bank until after collection thereof, the presumption obtains, in the absence of a showing to the contrary, that the method adopted continued at the time it transmitted certain paper to it which was not received until the receiving bank had closed its doors, and therefore the relationship of debtor and creditor did not then exist between them, and title to the funds collected remained in the remitting bank. State ex rel. Rankin v. Banking Corp. of Mont., 74 M 491, 241 P 626 (1925).

Continuance of Agency Relationship: Under this subsection, in view of the plaintiff's agents' transactions had with the defendants and their continued visitations to the vicinity of the property sold to the defendants and repair work done, a disputable presumption existed as to the continuance of the agency relationship. Healy v. Ginoff, 69 M 116, 220 P 539 (1923).

Judge Admitted as Unbiased — Continues Lack of Bias: Where a litigant, at the time he asked for a transfer of his cause to another district, indicated that the Judge of that district was free from the bias and prejudice imputed to the former, the condition thus set forth will be presumed to continue until the contrary is shown. Stair v. Lunke, 56 M 130, 180 P 569 (1919).

Application Based Upon Nature of Thing:

The law presumes that a thing once proved to exist continues as long as is usual with things of that nature. Collins v. Thode, 54 M 405, 170 P 940 (1918).

The presumption mentioned in this subsection does not apply regardless of the nature of the thing or condition in question. It applies only to those conditions which, from their nature, must continue for some appreciable length of time. In re Murphy's Estate, 43 M 353, 116 P 1004 (1911).

Lunacy or Insanity: When lunacy or insanity of a general, habitual, or permanent nature is once shown to exist, it is presumed to continue until the presumption is overturned by countervailing evidence because it is known from experience that the condition usually continues; but such presumption does not apply to cases of intermittent or occasional insanity, as in the very nature of things the idea of continuity is excluded. In re Murphy's Estate, 43 M 353, 116 P 1004 (1911).

Increase in Water Flow — Conjectural Not Presumption: If lateral ditches are run from a canal toward the head of a swamp, the question whether the increase of flow in the canal is permanent is conjectural and the presumption embodied in this subsection cannot be indulged. Smith v. Duff, 39 M 382, 102 P 984 (1909).

Collectible Accounts Receivable: Accounts which are shown to have once been good and collectible are presumed to continue so under this subsection. Thornton-Thomas Mercantile Co. v. Bretherton, 32 M 80, 80 P 10 (1905).

SUBSECTION (33)

Findings and Conclusions of District Court: Findings and conclusions of District Court are presumed correct and will not be reversed on appeal unless the evidence, even though

conflicting, preponderates against them. Breen v. Indus. Accident Bd., 150 M 463, 436 P2d 701 (1968).

Overcoming Presumption — Question for Trier of Facts: A statutory disputable presumption, such as that the law has been obeyed, is satisfactory if uncontradicted; the sufficiency of sworn testimony to overcome such a presumption is a question for the trier of facts, except where the facts proved are overwhelmingly against the presumed facts and permit but one rational and reasonable conclusion. McMahon v. Cooney, 95 M 138, 25 P2d 131 (1933).

Recitals Within Judgment Roll: Where, in the record on appeal from an order confirming a resolution of the Board of Commissioners of an irrigation district that a proposed contract be executed and an assessment levied on all irrigable lands in the district, it was stipulated that the judgment roll of the formation of the district was admitted in evidence but was not incorporated in the record, it will be presumed on appeal that it contained and recited all the law required. In re Fort Shaw Irrigation District, 81 M 170, 261 P 962 (1927).

Setting of Railway Rates: Since the presumption obtains that the Railroad Commission (now Public Service Commission) fixed and established reasonable rates in obedience to 69-14-301 (now repealed) and that the rate as established is in accordance with the approved and published tariff, a complaint which fails to allege that freight charges were not in accordance with such tariff is defective. Doney v. N. Pac. Ry., 60 M 209, 199 P 432 (1921), explained in Mont. Horse Prod. Co. v. Great N. Ry., 91 M 194, 7 P2d 919 (1932), and Great N. Ry. v. Sunburst Oil & Ref. Co., 287 US 358, 77 L Ed 60, 53 S Ct 145 (1932); overruled on basis of misinterpretation of statute in Sunburst Oil & Ref. Co. v. Great N. Ry., 91 M 216, 7 P2d 927 (1932).

Allegation Relating to Qualification of Officer: In an action on an official bond, an allegation that the official in question was by the Board of County Commissioners duly appointed and thereafter qualified and ever since has been and is now a duly appointed, qualified, and acting Justice of the Peace of a designated township is sufficient, aided by the statutory presumptions of subsections (15) and (33) of this section. Murphy v. Johns, 56 M 134, 182 P 115 (1919).

Chattel Mortgages — Endorsement or Filing: The presumption that the law has been obeyed applies to the endorsement of a satisfaction of a chattel mortgage or the filing thereof. Kerr v. Blaine, 49 M 602, 144 P 566 (1914).

SUBSECTION (38)

Warranty Deed — Donative Intent — No Fraud or Lack of Consideration: Plaintiff filed an action to set aside a warranty deed to defendant transferring land that plaintiff had received originally as a tenant in common with defendant's father under the condition that they deed the land to defendant "when they were done with it". The District Court found that defendant was not guilty of deceit or false representation and that there was fair and adequate consideration for the transfer and refused to void the deed. The Supreme Court affirmed, holding that there was sufficient evidence to support the District Court's findings. Although the land was valued at $300,000 to $600,000 and the consideration for the transfer was $1, plaintiff's performance of the condition requiring transfer of the land to defendant, coupled with the payment of $1, constituted fair and adequate consideration in this case. Wright v. Blevins, 217 M 439, 705 P2d 113, 42 St. Rep. 1311 (1985).

Promissory Note: The presumption is that promissory notes were supported by a sufficient consideration, and the burden of proving want of consideration is upon the party alleging it. Bielenberg v. Higgins, 85 M 69, 277 P 636 (1929); Dilts v. Brooks, 66 M 346, 213 P 600 (1923).

Allegation of Consideration: Where, in an action by the vendor to compel the purchaser to specifically perform a land contract by payment of a balance due on the purchase price, the contract was attached to and made a part of the complaint, it was error to sustain an objection to the introduction of testimony on the ground that the complaint failed to allege an adequate consideration, the burden of showing a want of it having been upon defendant. Saint v. Beal, 66 M 292, 213 P 248 (1923).

Deed — Burden on Him Who Seeks to Invalidate It: Under this subsection, a deed to land furnishes presumptive evidence of a consideration, and the burden of showing want of consideration sufficient to support it is upon him who seeks to invalidate it or avoid its effect. Lee v. Laughery, 55 M 238, 175 P 873 (1918).

Law Review Articles

Presumptions in Criminal Cases: A New Look at an Old Problem, Ranney, 41 Mont. L. Rev. 21 (1980).

Statutory and Common Law Presumptions in Montana, Clarke, 37 Mont. L. Rev. 91 (1976).

Finishing Off Forced Fatherhood: Does It Really Matter if Blood or DNA Evidence Rebut the Presumption of Paternity?, Testa, 108 Pa. St. L. Rev. 1295 (2004).

Collateral References

Evidence *key* 89.

31A C.J.S. Evidence §115.

Presumption or inference that accidental death of employee engaged in occupation of manufacturing or processing arose out of and in course of employment. 47 ALR 5th 801.

Presumption or inference, in products liability action based failure to warn, that user of product would have heeded an adequate warning had one been given. 38 ALR 5th 683.

Adverse presumption or inference based on party's failure to produce or examine transferor, transferee, broker, or other person allegedly involved in transaction at issue—modern cases. 81 ALR 4th 939.

Adverse presumption or inference based on state's failure to produce or examine law enforcement personnel—modern cases. 81 ALR 4th 872.

Adverse presumption or inference based on state's failure to produce or examine informant in criminal prosecution—modern cases. 80 ALR 4th 547.

Adverse presumption or inference based on party's failure to produce or examine witness with employment relationship to party—modern cases. 80 ALR 4th 405.

Adverse presumption or inference based on party's failure to produce or examine family member other than spouse—modern cases. 80 ALR 4th 337.

Adverse presumption or inference based on party's failure to produce or examine friend—modern cases. 79 ALR 4th 779.

Adverse presumption or inference based on party's failure to produce or examine spouse—modern cases. 79 ALR 4th 694.

Adverse presumption or inference based on party's failure to produce or examine witness who was occupant of vehicle involved in accident—modern cases. 78 ALR 4th 616.

Adverse presumption or inference based on party's failure to produce or examine that party's attorney—modern cases. 78 ALR 4th 571.

Adverse presumption or inference based on party's failure to produce or question examining doctor—modern cases. 77 ALR 4th 463.

Presumptions and evidence respecting identification of land on which property taxes were paid to establish adverse possession. 36 ALR 4th 843.

Proceeds or derivatives of real property held by entirety as themselves held by entirety. 22 ALR 4th 459.

Establishment of "family" relationship to raise presumption that services were rendered gratuitously, as between persons living in same household but not related by blood or affinity. 92 ALR 3d 726.

Who may dispute presumption of legitimacy of child conceived or born during wedlock. 90 ALR 3d 1032.

Presumption of payment as applicable to bank deposit. 69 ALR 3d 1284.

Applicability and application, in civil case, of presumption of addressee's receipt of telegram. 24 ALR 3d 1434.

Relation back of presumption of continuance of condition of property. 7 ALR 3d 1302.

Taking or negotiation of unsecured note of owner or contractor as raising presumption of payment waiving mechanic's lien. 91 ALR 2d 437, 470.

Testamentary capacity as affected by guardianship of adult, burden of proof and presumptions as to. 89 ALR 2d 1120.

Upon whom rests burden of proof, where bail is sought before judgment but after indictment in capital case, as to whether proof is evident or the presumption great. 89 ALR 2d 355.

Homicide: presumption of deliberation or premeditation from act of killing. 86 ALR 2d 656.

Burden of proof and presumptions as to claimed change of conditions since accident or incident, asserted as ground for denying view by jury in civil personal injury or death action. 85 ALR 2d 519.

Mental capacity to marry, presumption and burden of proof as to. 82 ALR 2d 1053.

Common-law marriage between parties previously divorced, burden of proof and presumptions with respect to. 82 ALR 2d 688.

Adverse possession between cotenants, burden of proof and presumption in action involving. 82 ALR 2d 284, 292.

Hostility of possession involving ignorance or mistake as to boundaries, presumption of. 80 ALR 2d 1181.

Presumption of proper exercise of power of assistant or deputy prosecuting or District Attorney to file information, or to sign or prosecute it, in his own name. 80 ALR 2d 1073.

Rights in wedding presents as between spouses, presumptions as to. 75 ALR 2d 1365.

Acceptance of deed by grantee, inferences as to. 74 ALR 2d 1006.

Zoning regulations affecting churches, burden of proof and presumptions with respect to administration of. 74 ALR 2d 387, §19 superseded by 62 ALR 3d 197.

Presumption of continuance of relationship of employer and employee so as to justify comment, in argument of civil case, on adversary's failure to call employee as witness. 68 ALR 2d 1078.

Estate by entirety in personal property, presumption as to. 64 ALR 2d 8, §§16, 18 through 20 superseded by 22 ALR 4th 459.

Presumption that child's clothes were furnished by parent. 61 ALR 2d 1272.

Presumption as to performance of duty in selling mortgaged real estate at foreclosure sale as a whole or in parcels. 61 ALR 2d 548.

Bailor's action for recovery of money deposited for indefinite time, presumption of payment as affecting. 57 ALR 2d 1051.

Application of payments as between debts for which a surety or guarantor is bound and those for which he is not, presumption as to. 57 ALR 2d 862.

Presumption of legitimacy, or of paternity, of child conceived or born before marriage. 57 ALR 2d 729.

Usury, inference or presumption as to. 51 ALR 2d 1090.

Presumption of consideration from revenue stamps on deed. 51 ALR 2d 1004.

Forgery prosecution: inference of intent to defraud by use of fictitious or assumed name. 49 ALR 2d 884.

Admissibility of admissions and acknowledgments to rebut presumption of payment from lapse of time. 48 ALR 2d 865.

Adverse possession under parol gift of land, presumptions and burden of proof as to. 43 ALR 2d 11.

Continuity of labor union's status or authority as bargaining agent, presumption of. 42 ALR 2d 1423.

Continuing situation, presumption of, on issue of who, among occupants of vehicle, was driving or piloting it at time of accident, in absence of direct testimony by survivors or eyewitnesses. 36 ALR 2d 1290; 32 ALR 2d 992.

Reduction of capital stock, presumption of regularity of. 35 ALR 2d 1166.

Ownership of vehicle causing highway accident, presumption as to. 27 ALR 2d 167.

Continuing insanity, presumption as applied to accused in criminal case. 27 ALR 2d 121.

Inference of malice or intent to kill where killing is by blow without weapon. 22 ALR 2d 854.

Continuation of insanity, presumption in action for divorce or separation on other grounds. 19 ALR 2d 180.

Acts of public officers affecting public debt limitation, presumptions and burden of proof as to. 16 ALR 2d 515.

Presumption as to validity of second marriage. 14 ALR 2d 7.

Presumptions and burden of proof or of evidence where goods stored in situation governed by Uniform Warehouse Receipts Act are stolen, or are damaged or lost by fire or water. 13 ALR 2d 681.

Proof of death from injury from external and violent means as supporting presumption or inference of death by accidental means within policy of insurance. 12 ALR 2d 1264.

Presumption of negligence of carrier in leaving open door through which passenger steps or falls. 7 ALR 2d 1427.

26-1-603. Books containing laws presumed correct.

Case Notes

Proof of Foreign Law: Proof of the written law of another state must be made in compliance with the methods prescribed in this section and the next succeeding section. Ridpath v. Heller, 46 M 586, 129 P 1054 (1913), decided prior to the adoption of Rule 202, M.R.Ev. (see Title 26, ch. 10).

Collateral References

Statutes *key* 289.

82 C.J.S. Statutes §458.

26-1-604. When recitals in statutes conclusive.

Case Notes

Legislative Findings Rejected: The Supreme Court found 2-9-107 unconstitutional, stating that the liability limits contained therein violated Art. II, sec. 4 and 16, Mont. Const. In reaching

this result, the court rejected legislative findings contained in 2-9-106, stating ". . . we find little more in the quoted legislative findings supporting §2-9-107 than a legislative plea not to require the legislature and other political entities to provide the funds necessary to pay the just obligations of those entities". Pfost v. St., 219 M 206, 713 P2d 495, 42 St. Rep. 1957 (1985).

Collateral References

Statutes *key* 286.

82 C.J.S. Statutes §318.

26-1-605. Entries in official books and records prima facie evidence.

Case Notes

Highway Map: Where official highway map shows that the town of Greycliff is 10 miles east of Big Timber on the Yellowstone River, the courts will take judicial notice of such facts. St. v. Widdicombe, 130 M 325, 301 P2d 1116 (1956).

Examiner's Report: A report of a Deputy State Examiner (now in Department of Administration) as to the result of his investigation of a county office is not a public or official book or record within the meaning of this section and is inadmissible in a prosecution of the officer for larceny of public funds, especially where it is based not only upon books and records but upon affidavits. St. v. Ray, 88 M 436, 294 P 368 (1930).

School Census — Age of Statutory Rape Victim: In a prosecution for statutory rape, the school census of the county in which the prosecutrix attended school, required by law to be kept, was a public record and as such admissible as prima facie evidence of the age of the prosecutrix. St. v. Vinn, 50 M 27, 144 P 773 (1914).

Collateral References

Evidence *key* 383(2), (3).

32 C.J.S. Evidence §648; 32A C.J.S. Evidence §§763, 765, 766, 773.

26-1-607. When writings of a decedent prima facie evidence.

Compiler's Comments

1983 Amendment: In lead-in, inserted "when the decedent was" and before "prima facie evidence", changed "may be read as" to "are"; and in (1), inserted "writing or".

Case Notes

Suicide Note: A suicide note written by decedent's stockbroker which stated that the stockbroker had, over a course of years, misappropriated large amounts of stock certificates entrusted to him was admissible to show that securities had been stolen prior to decedent's death and that such securities were not an "asset" for which the executor could be held responsible in an action instituted by beneficiary of decedent's estate alleging that executor had negligently failed to collect assets of decedent. In re Estate of Schueren, 162 M 417, 512 P2d 1283 (1973).

Collateral References

Evidence *key* 355(7).

32 C.J.S. Evidence §696, et seq.

26-1-622. Official reports and records made pursuant to federal law prima facie evidence.

Compiler's Comments

1983 Amendment: In middle of section, after "authorized by" deleted "the act referred to in 26-1-621 or by any other"; and made minor changes in sentence structure.

26-1-623. Presumption of authenticity of finding, report, or record.

Compiler's Comments

1983 Amendment: Near beginning of section, before "26-1-622" deleted "26-1-621 and".

Part 7
Voluntary Payment of Claims

Part Compiler's Comments

Not Severable: Section 93-2201-10 R.C.M. 1947, which was not codified because it is a severability clause, reads: "Parts of Act Not Severable. It is the intent of the legislative assembly that each part of this act is essentially dependent upon every other part, and if one part is held unconstitutional or invalid, all other parts are invalid." This section has not been repealed and is still valid law. Citation may be made to sec. 4, Ch. 222, L. 1973.

26-1-701. Legislative policy.

Case Notes

Voluntary Payment Not Qualified as Credit Against Judgment: Shilhaneks were injured in a vehicle accident, and defendants were ordered to pay more than $3 million in damages. Defendants deposited money with the federal District Court for payment of Shilhaneks' accrued medical expenses, which subsequently became the subject of an interpleader action between Shilhaneks and their health insurance provider, and then sought to reduce the damage award commensurate with the amount deposited with the federal court, contending that the funds were deposited in accordance with Ridley v. Guar. Nat'l Ins. Co., 286 M 325, 951 P2d 987, 54 St. Rep. 1430 (1997), and constituted a voluntary payment for which defendants were entitled to a corresponding offset against the judgment. Without prejudice, the state District Court denied the request for an offset pending the eventual decision of the federal court. The Supreme Court concurred, noting that although the payments were made on behalf of defendants, the payments were not made to Shilhaneks or anyone on their behalf; thus, the voluntary payment in this case did not currently qualify for a credit against the judgment in favor of Shilhaneks under 26-1-706. Shilhanek v. D-2 Trucking, Inc., 2000 MT 16, 298 M 101, 994 P2d 1105, 57 St. Rep. 89 (2000).

26-1-703. Voluntary partial payment of claim not an admission of fault or waiver.

Case Notes

Separate Suits Against Copartner and Bank — Settlement With One — No Release of Other: Bank depositor sued his bank and his partner in separate actions after the partner induced the bank to change a signature card requiring both partners' signatures so that defendant partner could make withdrawals on his signature alone. Depositor did not release his claim against the bank when he settled with his partner because: (1) the claims against the two were not based entirely on the same conduct; (2) assuming the two were joint tortfeasors, any release of one might specifically exclude the other; and (3) nothing in the record indicated either a release or nonrelease of the bank. Tribby v. NW. Bank of Great Falls, 217 M 196, 704 P2d 409, 42 St. Rep. 1133 (1985).

Plaintiff's Refusal of Settlement — Not Relevant to Mitigation of Damages or to Defendant's Intent: The District Court properly excluded evidence of defendant's offer to compromise and settle plaintiff's claim. The court was not persuaded by defendant's argument that refusing a settlement offer is a failure to mitigate damages and that the offer showed defendant did not seek to act towards plaintiff in an oppressive or retaliatory fashion. Tribby v. NW. Bank of Great Falls, 217 M 196, 704 P2d 409, 42 St. Rep. 1133 (1985).

26-1-706. Effect of payment on judgment.

Case Notes

Appeal Moot for Inability of Supreme Court to Grant Relief: Plaintiffs owned a ranch, but being in default and facing foreclosure, they made a deal with defendant Bell whereby Bell would borrow money to pay off plaintiffs' debt and plaintiffs would receive an ownership interest in Bell's company formed to manage the ranch. However, the mortgage was never transferred into the company, and plaintiffs sued Bell for fraud and breach of contract. A jury granted plaintiffs $500,000 in damages for Bell's breach of contract, and Bell appealed. Bell ultimately declared bankruptcy and sold the ranch to pay off the loan and to pay off the money judgment owed to plaintiffs, whereby plaintiffs' mortgage on the ranch was released. Plaintiffs moved that Bell's appeal be dismissed for mootness, and the Supreme Court agreed. The $500,000 judgment could not simply be reversed with plaintiffs retaining ownership because the ranch had been sold, and Bell would be considerably richer than he was at the beginning of the deal, having invested little of his own money, and plaintiffs would have nothing. Therefore, applying Turner v. Mtn. Eng'r & Constr., Inc., 276 M 55, 915 P2d 799 (1996), the Supreme Court held that Bell's claim was moot based on the court's inability to grant effective relief. Graveyard Creek Ranch, Inc. v. Bell, 2005 MT 172, 327 M 491, 116 P3d 779 (2005).

Negligence Judgment for Plaintiff Not Reducible by Medical Payments Made by Defendants' Insurer Under No-Fault Coverage: Medical payments coverage amounts that defendants' insurer paid plaintiff injured when she fell on defendants' property were made under a no-fault coverage provision and thus were not voluntary payments under this section. Because the insurer was contractually required to make the payments on demand, the judgment for plaintiff should not have been reduced by the amount of the payments. The payments were less than the statutorily required amount of $50,000 at which the collateral source reduction rule in 27-1-308 applies. O'Hern v. Pankratz, 2001 MT 35, 304 M 194, 19 P3d 807 (2001).

Voluntary Payment Not Qualified as Credit Against Judgment: Shilhaneks were injured in a vehicle accident, and defendants were ordered to pay more than $3 million in damages. Defendants deposited money with the federal District Court for payment of Shilhaneks' accrued medical expenses, which subsequently became the subject of an interpleader action between Shilhaneks and their health insurance provider, and then sought to reduce the damage award commensurate with the amount deposited with the federal court, contending that the funds were deposited in accordance with Ridley v. Guar. Nat'l Ins. Co., 286 M 325, 951 P2d 987, 54 St. Rep. 1430 (1997), and constituted a voluntary payment for which defendants were entitled to a corresponding offset against the judgment. Without prejudice, the state District Court denied the request for an offset pending the eventual decision of the federal court. The Supreme Court concurred, noting that although the payments were made on behalf of defendants, the payments were not made to Shilhaneks or anyone on their behalf; thus, the voluntary payment in this case did not currently qualify for a credit against the judgment in favor of Shilhaneks under this section. Shilhanek v. D-2 Trucking, Inc., 2000 MT 16, 298 M 101, 994 P2d 1105, 57 St. Rep. 89 (2000).

Involuntary Satisfaction of Judgment — Request for Stay of Execution Not Required: Following entry and satisfaction of judgment in District Court, the parties were aware of a contemplated appeal, but no stay of execution was requested or supersedeas bond posted. After plaintiff acquired title to the disputed property pursuant to the judgment, defendant filed a notice of appeal and lis pendens, effectively preserving the status quo pending appeal. Plaintiff moved to dismiss, contending that by voluntarily satisfying the judgment, defendants waived their right to appeal. Applying Turner v. Mtn. Eng'r & Constr., Inc., 276 M 55, 915 P2d 799, 53 St. Rep. 23 (1996), the Supreme Court held that the parties' course of conduct illustrated the involuntary, rather than voluntary nature of the satisfaction of judgment. Because satisfaction was involuntary, the right to appeal was not waived. Further, under Rule 7, M.R.App.P. (Title 25, ch. 21), a party may request a stay of execution, but the request is not mandatory, even though a party choosing not to seek a stay runs the risk of having the appeal become moot. Plaintiff's motion to dismiss was denied. Kennedy v. Dawson, 1999 MT 265, 296 M 430, 989 P2d 390, 56 St. Rep. 1078 (1999).

Mootness as Separate From Question of Waiver of Appeal Rights — Voluntary Versus Involuntary Performance: The question of whether compliance with a judgment was voluntary or not has bearing on whether a party has waived the right to appeal, but it has no bearing on the question of mootness, which arises when an appellate court cannot grant effective relief. The issue of mootness is separate and distinct from the question of waiver of appeal rights. Complying with the judgment does not necessarily render the appeal moot. However, if compliance is voluntary, the party may be said to have waived any objection to the judgment. In deciding whether a case is moot, it must be determined whether effective relief is available. The fact that a party has not voluntarily waived the right to appeal does not necessarily mean that effective relief can still be provided on appeal, nor may a party claim an exception to the mootness doctrine when the case became moot through that party's own failure to seek a stay of judgment. Turner v. Mtn. Eng'r & Constr., Inc., 276 M 55, 915 P2d 799, 53 St. Rep. 23 (1996), following and clarifying State ex rel. Hagerty v. Rafn, 130 M 554, 304 P2d 918 (1956), and Martin Dev. Co. v. Keeney Co., 216 M 212, 703 P2d 143 (1985), and overruling any contrary holding in Mont. Nat'l Bank of Roundup v. Dept. of Revenue, 167 M 429, 539 P2d 722 (1975), First Nat'l Bank in Eureka v. Giles, 225 M 467, 733 P2d 357 (1986), Moore v. Hardy, 230 M 158, 748 P2d 477 (1988), LeClair v. Reiter, 233 M 332, 760 P2d 740 (1988), and Traders St. Bank of Poplar v. Mann, 258 M 226, 852 P2d 604 (1993). Turner was followed in Kennedy v. Dawson, 1999 MT 265, 296 M 430, 989 P2d 390, 56 St. Rep. 1078 (1999). See also Gates v. Deukmejian, 987 F2d 1392 (9th Cir. 1993).

Cause Not Moot Upon Voluntary Payment: Voluntary payment of a money judgment does not automatically render a cause moot. The standard is that a defeated party's compliance with the judgment renders his appeal moot only where the compliance makes the granting of effective relief by the appellate court impossible. Moore v. Hardy, 230 M 158, 748 P2d 477, 45 St. Rep. 108 (1988), citing Mont. Nat'l Bank of Roundup v. Dept. of Revenue, 167 M 429, 539 P2d 722 (1975). *Moore* and *Mont. Nat'l Bank of Roundup* were overruled, with regard to voluntary versus involuntary payment or performance as affecting waiver of right to appeal without having bearing on mootness, in Turner v. Mtn. Eng'r & Constr., Inc., 276 M 55, 915 P2d 799, 53 St. Rep. 23 (1996).

Part 8
Privileges

Part Case Notes

Alcohol Abuse Program — Confidential Information — Use in Drunk Driving Prosecution or Arrest: Concerned that Magnuson was intoxicated, Kee attempted to keep him from driving away from the Kee ranch and, when the attempt failed, called the local Alcoholics Anonymous and talked of her fears to House, not knowing that Magnuson was in counseling with House under a federally funded program. Federal law provides that patients' records are confidential and that information received while performing any alcohol abuse prevention function cannot be used to initiate or substantiate any criminal prosecution. House called an undersheriff and told him Magnuson was intoxicated, was driving a Ford Bronco, that Tracy's Bar was his usual hangout, and that the undersheriff should watch out for Magnuson. While driving around, the undersheriff saw Magnuson driving erratically. When stopped, Magnuson smelled of alcohol, appeared drunk, and failed onsite sobriety tests. The information House gave the undersheriff was not tainted with the federal prohibition, and dismissal of a DUI charge on the grounds of taint would be reversed. House was not performing an alcohol abuse prevention function when he received the information from Kee, and thus the information he gave the undersheriff was not federally prohibited confidential records information. In addition, the information the undersheriff received from House was not used to initiate or substantiate any charge; the undersheriff's own observations were. St. v. Magnuson, 210 M 401, 682 P2d 1365, 41 St. Rep. 1121 (1984).

Management Consultant/Client Relationship: The relationship between a management consultant and his clients is not considered privileged under Montana law. Therefore, husband with such a position, who sought modification of child support payments granted wife pursuant to divorce, could not avoid wife's interrogatories seeking information as to his clients and income received from them on the ground it was privileged confidential information. Hughes v. Hughes, 205 M 69, 666 P2d 739, 40 St. Rep. 1102 (1983).

Right of Privacy Not Dependent on Statutory Privilege: The Human Rights Commission (HRC) issued a subpoena to the city of Billings to produce personnel files. The city refused to deliver the subpoenaed material, arguing that to do so would violate Montana's right of privacy. HRC argued that no privacy exists where there is no statutory privilege and where an employee or applicant voluntarily submits the information to the city. The court found that the information sought by the HRC is protected by Montana's constitutional right of privacy. Mont. Human Rights Div. v. Billings, 199 M 434, 649 P2d 1283, 39 St. Rep. 1504 (1982).

Part Law Review Articles

Protecting the President's Limited Expectation of Privacy During an Investigation May Justify the Protective Function Privilege for the Secret Service, Weeden, 60 Mont. L. Rev. 109 (1999).

E-Mail Discovery and Privilege, Shapiro & Kilpatrick, 30 Advocates' Q. 258 (2005).

How Much Can I Refresh My Recollection? Preparing the Trial Witness While Preserving Privilege, Iwan & Samuelson, 55 Fed'n Def. & Corp. Couns. Q. 391 (2005).

Part Collateral References

Police surveillance privilege. 67 ALR 5th 149.

Testimonial privilege for confidential communications between relatives other than husband and wife—state cases. 62 ALR 5th 629.

Reportorial privilege as to nonconfidential news information. 60 ALR 5th 75.

Waiver of evidentiary privilege by inadvertent disclosure—state law. 51 ALR 5th 603.

Discovery of trade secret in state court action. 75 ALR 4th 1009.

Insured-insurer communications as privileged. 55 ALR 4th 336.

Exclusion of public from state criminal trial in order to preserve confidentiality of undercover witness. 54 ALR 4th 1156, superseded by 100 ALR 5th 171.

Constitutionality, with respect to accused's rights to information or confrontation, of statute according confidentiality to sex crime victim's communications to sexual counselor. 43 ALR 4th 395.

Privileged communications between accountant and client. 33 ALR 4th 539.

Construction and application, under state law, of doctrine of "executive privilege". 10 ALR 4th 355.

Testimony before or communications to private professional society's judicial commission, ethics committee, or the like, as privileged. 9 ALR 4th 807.

Libel and slander: privileged nature of communication to other employees or employees' union of reasons for plaintiff's discharge. 60 ALR 3d 1080.

Libel and slander: privileged nature of communications made in course of grievance or arbitration procedure provided for by collective bargaining agreement. 60 ALR 3d 1041.

Confidentiality of records as to recipients of public welfare. 54 ALR 3d 768.

Right of member, officer, agent, or director of private corporation or unincorporated association to assert personal privilege against self-incrimination with respect to production of corporate books or records. 52 ALR 3d 636, §9 superseded by 87 ALR Fed. 177.

Communications to social worker as privileged. 50 ALR 3d 563.

Privilege against self-incrimination as ground for refusal to produce noncorporate documents in possession of person asserting privilege, but owned by another. 37 ALR 3d 1373.

Communications by corporation as privileged in stockholders' action. 34 ALR 3d 1106.

Federal courts as following law of forum state with respect to privileged communications. 95 ALR 2d 320.

Sound recordings, admissibility in evidence as affected by privileged nature of communications. 58 ALR 2d 1037.

Court's power to determine, upon government's claim of privilege, whether official information contains state secrets or other matters disclosure of which is against public interest. 32 ALR 2d 391.

Right of one against whom testimony is offered to invoke privilege of communication between others. 2 ALR 2d 645.

26-1-801. Policy to protect confidentiality in certain relations.

Case Notes

Subpoena Duces Tecum — Subject Matter — Court's Inspection: Motion to quash was properly denied since newspaper reporter had not produced item for court's inspection and determination as to relevancy, materiality, necessity, or applicability of statutes as to possible applicable privileges. State ex rel. Adams v. District Court, 169 M 336, 546 P2d 988 (1976).

Collateral References

Testimonial privilege for confidential communications between relatives other than husband and wife—state cases. 6 ALR 4th 528.

26-1-802. Spousal privilege.

Compiler's Comments

2005 Amendment: Chapter 158 substituted first two sentences providing that spousal privilege applies only to communications made between spouses during their marriage for former language that read: "A husband cannot be examined for or against his wife without her consent or a wife for or against her husband without his consent; nor can either, during the marriage or afterward, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception" and at end of third sentence after "other" inserted "or against a child of either spouse"; and made minor changes in style. Amendment effective April 8, 2005.

Case Notes

Testimony Allowed Despite Marriage Between Defendant and Witness After Crime Charged but Before Trial — Applicability of Spousal Privilege — Harmless Error: After Baldwin was charged for several drug crimes, he married one of the witnesses who was to testify against him. The District Court cited 46-16-212 and allowed the witness to testify. Baldwin asserted error, and the Supreme Court agreed. The language of 46-16-212 applies to the competency of a spouse to testify, not to spousal privilege. Because Baldwin and the witness were married at the time of trial, under this section, the testimony should have been excluded based on spousal privilege. However, admission of the testimony in this case was harmless error because the testimony of several other witnesses was sufficient to support Baldwin's conviction. St. v. Baldwin, 2003 MT 346, 318 M 489, 81 P3d 488 (2003).

Preindictment Delay — No Violation of Due Process: Defendant forged and cashed a check of his wife's and kept the proceeds for himself. The County Attorney's office investigated in March 1988 but declined to prosecute because the wife was barred from testifying against defendant by 46-16-212 (competency of spouses) and this section. The couple was divorced in May 1989. On December 12, 1989, defendant was charged with theft and forgery and was eventually convicted of theft. The Supreme Court affirmed and found that defendant had not shown actual, substantial prejudice as a result of the delay in prosecution. Prosecution was commenced within the applicable 5-year statute of limitations. The fact that defendant could no longer rely on the

spousal privilege and competency of spouses statutes to prevent a witness from coming into court and testifying about the theft does not constitute "prejudice" to defendant. St. v. Krinitt, 251 M 28, 823 P2d 848, 48 St. Rep. 1088 (1991).

Presence of Third Party — Waiver of Privileged Communication: A spouse can waive spousal privilege by making an alleged privileged communication in the presence of a third party. St. v. Nettleton, 233 M 308, 760 P2d 733, 45 St. Rep. 1512 (1988).

Threshold for Privileged Spousal Communications: A full and workable definition of the threshold for communications between spouses considered privileged requires two elements: (1) the communications must be utterances or other expressions intended to convey a message from one spouse to the other, rather than acts; and (2) the message must be intended by the communicating spouse to be confidential in that it was conveyed in reliance on the confidence of the marital relationship. Therefore, statements made as threats or to assert control through fear were not considered privileged. St. v. Nettleton, 233 M 308, 760 P2d 733, 45 St. Rep. 1512 (1988).

Child Molestation Revealed in Previous Case — Testimony Thereto Not Privileged: Where the former wife of a child molester, while a witness for other parties in an unrelated custody action, testified to her former husband's acts of child molestation, the District Court did not err in admitting the wife's testimony over objection that the testimony was privileged. The testimony was properly admitted, under the rationale of In re J.H., 196 M 482, 640 P2d 445, 39 St. Rep. 267 (1982), and because the subject of the supposedly privileged communication (the husband's child molestation) had already been revealed to several other persons. The basis for the privilege, to protect the secrets of the husband, had thereby already disappeared. Sarsfield v. Sarsfield, 206 M 397, 671 P2d 595, 40 St. Rep. 1736 (1983). (See 2005 amendment.)

Youth in Need of Care Proceeding — Spouse May Testify — Section Constitutional: The Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) filed a petition in District Court alleging that J. H. was a youth in need of care. The boy, his mother, and a social worker all testified that the father sexually abused the boy. The father contended that the wife's testimony was a violation of the spousal privilege. The Supreme Court held the wife could testify. The purpose of the spousal privilege is to protect the sanctity of the marriage and home. However, once a family member has been sexually abused, the sanctity of the home and the reason for the rule have been destroyed. Sexual abuse of the son by the father is also a special wrong to the wife and has particularly and directly affected her in a manner other than that suffered by the public in general. Thus, the wrong against the child is nothing more or less than a wrong against the other spouse. As such it falls into one of the exceptions to the spousal privilege. The father claimed that it was unclear whether 41-3-404 (renumbered 41-3-437) allows parents to testify in youth in need of care proceedings and therefore the section was unconstitutionally vague. The court, having found that the wife could testify against the husband, determined that the statute was not void due to vagueness. In re J. H., 196 M 482, 640 P2d 445, 39 St. Rep. 267 (1982). (See 2005 amendment.)

Admission of Adverse Testimony of Wife — Harmless Error: The trial court erroneously allowed defendant's wife to testify over his objection under 46-16-212, which indicates that a wife is not a competent witness against her husband without his consent in a criminal proceeding against him regardless of whether the testimony pertains to observations of the spouse's actions or whether the testimony consists of communications made between spouses. That must be distinguished from this section, which indicates that if a defendant is not married at the time of trial, his former spouse is competent to testify but cannot be examined without his consent as to any communication made between the spouses during the marriage. In the present case, the trial court's error was harmless since the wife's testimony was essentially identical to the defendant's and thus did not affect any substantial right of the defendant and there was no reasonable possibility that the wife's testimony could have contributed to defendant's conviction. St. v. Roberts, 194 M 189, 633 P2d 1214, 38 St. Rep. 1551 (1981).

Homicide Prosecution: Section 46-16-212, rather than this section, was applicable in determining existence of marital privilege in homicide prosecution. St. v. Taylor, 163 M 106, 515 P2d 695 (1973).

Statements Made to Others Besides Wife — Not Confidential: Testimony by widow as to statements made by deceased spouse was properly admitted where it was shown that deceased did not regard the communications as confidential, in that he had made the communications to others beside his wife. Thompson v. Steinkamp, 120 M 475, 187 P2d 1018 (1947), distinguished in Platts v. Platts, 134 M 474, 334 P2d 722 (1959).

Objection Required:

To take advantage of this section prohibiting wife from being examined for or against her husband without his consent, objection to competency of evidence or of the witness must be made. St. v. Palen, 119 M 600, 178 P2d 862 (1947).

Where, in a suit by a divorced husband against the representative of the estate of his deceased wife to establish a resulting trust in their former home the consideration for which was paid by plaintiff and title thereto placed in wife's name, there was no objection to plaintiff's testimony relating to direct transactions and oral communications between them affecting the property, the point will be considered waived on appeal. Lewis v. Bowman, 113 M 68, 121 P2d 162 (1942).

Christmas Card Accompanying Gift of Stolen Jewelry: Receipt by defendant's former wife of some of the articles of stolen jewelry as a Christmas gift, with an enclosed card bearing the words "May from Bernard" was not a communication within the meaning of the statute; as to the card, considering it as a communication, its admission was nonprejudicial under the facts in the case. St. v. Dixson, 80 M 181, 260 P 138 (1927).

Collateral References

Witnesses *key* 188(1), et seq.

98 C.J.S. Witnesses §297, et seq.

81 Am. Jur. 2d Witnesses §284, et seq.

Competency of one spouse to testify against other in prosecution for offense against third party as affected by fact that offense against spouse was involved in same transaction. 74 ALR 4th 277.

Crimes against spouse within exception permitting testimony by one spouse against other in criminal prosecution—modern state cases. 74 ALR 4th 223.

Communications between spouses as to joint participation in crime as within privilege of interspousal communications. 62 ALR 4th 1134.

Presence of child at communication between husband and wife as destroying confidentiality of otherwise privileged communication between them. 39 ALR 4th 480.

Applicability of marital privilege to written communications between spouses inadvertently obtained by third person. 32 ALR 4th 1177, superseded by 51 ALR 5th 603.

Existence of spousal privilege where marriage was entered into for purpose of barring testimony. 13 ALR 4th 1305.

Testimonial privilege for confidential communications between relatives other than husband and wife—state cases. 6 ALR 4th 544, superseded by 62 ALR 5th 629.

Communication between unmarried couple living together as privileged. 4 ALR 4th 422.

Spouses' betrayal or connivance as extending marital communications privilege to testimony of third person. 3 ALR 4th 1104.

Effect, on competency to testify against spouse or on marital communication privilege, of separation or other marital instability short of absolute divorce. 98 ALR 3d 1285.

Husband or wife as competent witness for or against co-offender with spouse. 90 ALR 2d 648.

Calling or offering accused's spouse as witness for prosecution as prejudicial misconduct. 76 ALR 2d 920.

Divorce or annulment as affecting admissibility of testimony of former spouse as witness against other in criminal prosecution. 38 ALR 2d 579.

Admissibility, on issue of child's legitimacy or parentage, of confidential communication between husband and wife. 31 ALR 2d 1032.

"Communications" within testimonial privilege of confidential communications between husband and wife as including knowledge derived from observation by one spouse of acts of another spouse. 10 ALR 2d 1387.

Admissibility, in divorce action for adultery, of wife's statement that husband was not father of her child. 4 ALR 2d 567.

26-1-803. Attorney-client privilege.

Compiler's Comments

1989 Amendment: Near end of (1), after "given", substituted "to the client" for "thereon"; and inserted (2) relating to examination of client. Amendment effective March 23, 1989.

Preamble: The preamble to Ch. 276, L. 1989, provided: "WHEREAS, a majority of courts in the United States have broadly construed the attorney-client privilege as protecting the client as well as his attorney from being compelled to disclose their confidential communications; and

WHEREAS, the United States District Court for the District of Montana, in the recent case of Lane v. All Nation Insurance Company, CV-86-054-GF (June 17, 1987), strictly construed

Montana's statute regarding attorney-client privilege to allow the client to be examined concerning his confidential communications with his attorney; and

WHEREAS, the Legislature intends to amend and clarify the Montana statute to make it clear that, contrary to the Lane decision, the attorney-client privilege extends to protect the client from being required to disclose confidential communications between him and his attorney; and

WHEREAS, the courts through the common law have developed several exceptions to the attorney-client privilege; and

WHEREAS, the Legislature does not intend by this act to abolish, amend, or otherwise affect any other exceptions to the attorney-client privilege.

THEREFORE, the Legislature of the State of Montana finds it appropriate to amend the statute regarding attorney-client privilege."

Case Notes

Discovery of Corporate Communications Conducted During Former Director's Tenure — No Violation of Attorney-Client Privilege: Plaintiff corporation sought a writ of supervisory control on grounds that the District Court was proceeding under a mistake of law by controlling a discovery attempt by the former director of a corporation to discover communications between the corporation's current directors and corporate counsel that occurred while the former director was a director. Plaintiff contended that allowing discovery violated the attorney-client privilege. The Supreme Court concluded that although the corporation was the client, the directors were jointly responsible for the management of the corporation and that, consistent with this responsibility, the directors must be treated as joint clients with the corporation when legal advice is rendered to the corporation through its officers or directors. When the former director was a corporate officer, he was entitled to access attorney-client communications, and the fact that he was no longer a director was not sufficient cause to render those communications privileged against him. The confidentiality of the attorney-client privilege is not violated when a former director of a closely held corporation who brings claims against the corporation is allowed to discover communication between corporate counsel and other directors that occurred during the former director's tenure as a director. Thus, the Supreme Court declined to accept supervisory control. Inter-Fluve v. District Court, 2005 MT 103, 327 M 14, 112 P3d 258 (2005).

Use of Police Informant to Obtain Taped Conversation Not Violative of Right to Counsel or Attorney-Client Privilege — When Right to Counsel Attaches: Police used Reavley's girlfriend to obtain a taped conversation that included statements that could be viewed as incriminating. The District Court granted Reavley's motion to suppress the statements, based on Escobedo v. Ill., 378 US 478 (1964), on grounds that the right to counsel extends to all stages preceding trial, beginning when an accused first becomes the focus of a police investigation. The District Court also concluded that Reavley's attorney-client privilege was violated when the girlfriend probed into conversations that Reavley had with his counsel. The Supreme Court disagreed and reversed. Under Moran v. Burbine, 475 US 412 (1986), the right to counsel does not attach until after the initiation of formal charges. Reavley was not formally charged, and adversarial proceedings had not begun, so the right to counsel had not attached. Further, the record did not reflect that law enforcement directed the girlfriend to deliberately seek privileged information, nor did she purposely intrude into the attorney-client relationship or ask questions aimed at eliciting privileged information regarding Reavley's conversations with counsel. Rather, Reavley voluntarily disclosed the privileged communications without prompting from the girlfriend, which was sufficient to waive the right to their privileged nature. St. v. Reavley, 2003 MT 298, 318 M 150, 79 P3d 270 (2003).

Implied Attorney-Client Relationship — Motion for Disqualification of Attorney — Client's Burden of Showing Reasonable Belief That Attorney-Client Relationship Exists: Defendant telephoned attorney Penwell's office and spoke to the legal secretary regarding possible representation in this action, but never spoke personally to Penwell. Defendant was informed that Penwell was accepting no new cases and was referred to another attorney. Penwell ultimately appeared as counsel for plaintiff, and defendant moved to disqualify Penwell, asserting that confidential information was disclosed during the telephone conversation with the secretary and that the information was imputed to Penwell, creating an attorney-client relationship. At the hearing on the motion, defendant did not disclose what type of information was allegedly disclosed, relying on the conclusory statement that what was disclosed was confidential. The District Court denied the motion, holding that defendant had failed to meet the burden of conclusively establishing the existence of an attorney-client relationship. Defendant appealed, but the Supreme Court affirmed. Although an alleged client should not be required to reveal actual confidences at a disqualification hearing, the alleged client must at least inform the

court of the nature of the information disclosed so that the court can make a reasoned judgment. Under the circumstances, defendant could not have reasonably believed that an attorney-client relationship was formed with Penwell, based upon two telephone conversations with the secretary, when defendant never spoke or met with Penwell, and was advised that Penwell would not take the case. Pro-Hand Serv. Trust v. Monthei, 2002 MT 134, 310 M 165, 49 P3d 56 (2002).

Application of Privilege to Attorneys and Witnesses Regarding Conversations Before Third Parties: Hayworth was charged with attempted deliberate homicide. During Hayworth's trial, he attempted to call as witnesses Marra who was the attorney for codefendant Maier and Albers who was the former attorney for Mogensen, another participant in the events leading to the attempted homicide. After conferring with their clients, Marra and Albers indicated that their clients would waive the attorney-client privilege and that they (the attorneys) would testify if the District Court would limit Hayworth's questioning. The District Court refused to make that ruling limiting Hayworth's questioning, so Maier and Mogensen refused to waive the privilege, and their attorneys didn't testify. Hayworth argued during his appeal of his conviction that the District Court erred in refusing to grant the protective order, thereby keeping the attorneys from testifying, and also argued that Maier and Mogensen were not protected by the privilege because the conversations about which he wanted Marra and Albers to testify took place "in the presence of third parties". The Supreme Court held that because the privilege applied to what the attorneys would say as witnesses and not to what they heard or said in front of their clients and third parties, the District Court did not to abuse its discretion in refusing to call the attorneys as witnesses once their clients refused to waive the privilege. St. v. Hayworth, 1998 MT 158, 289 M 433, 964 P2d 1, 55 St. Rep. 631 (1998).

Afterhours Conversation With Own Paralegal Not Entitled to Privilege: A purely personal conversation between the defendant and a paralegal employed by the defendant is not entitled to attorney-client privilege. St. v. Ingraham, 1998 MT 156, 290 M 18, 966 P2d 103, 55 St. Rep. 611 (1998).

Admissibility of Deputy Sheriff's Testimony of Phone Conversation With Defendant's Attorney: Deputy Sheriff's testimony of phone conversations with defendant's attorney, who was inquiring about and attempting to resolve charges against defendant, was not impermissible hearsay. It was admissible as statements of a party made through an agent. The testimony was not a violation of the attorney-client privilege, which protects communications between an attorney and a client, not those between an attorney and a third party. St. v. Ahmed, 278 M 200, 924 P2d 679, 53 St. Rep. 804 (1996).

Abrogation of Attorney-Client Privilege by Compelled Discovery — Remand: Palmer brought a bad faith suit against Farmers Insurance Exchange (Farmers) after receiving privileged material from a Farmers' attorney. The District Court, apparently confusing the attorney-client privilege with the work-product doctrine, ordered production of the Farmers' files and all confidential attorney-client communications between Farmers and its attorneys. At no time did Farmers voluntarily relinquish the attorney-client privilege. In abrogating Farmers' attorney-client privilege by ordering production of privileged material and admitting it into evidence, the District Court misconstrued the law and materially affected Farmers' substantial rights, preventing Farmers from having a fair trial. The District Court decision was vacated and remanded for a new trial, allowing Farmers to reassert its attorney-client privilege. Palmer v. Farmers Ins. Exch., 261 M 91, 861 P2d 895, 50 St. Rep. 1210 (1993).

Waiver:

The subject matter and author of each exhibit is critical in determining whether the attorney-client privilege prevents its discovery. Absent a voluntary waiver or an exception, the privilege applies to all communications from the client to the attorney and to all advice given to the client by the attorney in the course of the professional relationship. The privilege of nondisclosure is not lost merely because the communications contain relevant nonlegal considerations. The protection applies unless the communications fall within some exception to the privilege or are voluntarily waived. Palmer v. Farmers Ins. Exch., 261 M 91, 861 P2d 895, 50 St. Rep. 1210 (1993).

Case was remanded with direction to hold a hearing with respect to evidence bearing upon whether the documents were involuntarily produced pursuant to court order (thus no waiver) or disseminated widely enough without legal objection by Goodyear as to constitute a waiver of the attorney-client privilege or work product rule. Kuiper v. District Court, 193 M 452, 632 P2d 694, 38 St. Rep. 1288 (1981).

Applicability of Attorney-Client Privilege to Inadvertently Released Documents: Pacificorp inadvertently produced eight documents during discovery that it claimed were subject to the

attorney-client privilege. The Supreme Court held that Pacificorp took immediate steps to protect its privilege upon learning of the inadvertent disclosure and that therefore it had not relinquished its rights. Because the privileged documents might have contributed to the decision, the lower court erred in allowing the State Tax Appeal Board to consider the documents. Pacificorp v. Dept. of Revenue, 254 M 387, 838 P2d 914, 49 St. Rep. 774 (1992).

Correspondence Between Insurer and Attorneys Privileged: Correspondence between an insurer and its attorneys relating to litigation that occurred after litigation was begun is privileged from disclosure in a bad faith claim filed by the insured against the insurer after resolution of the underlying insurance claim. Unless there is a conflict of interest, the attorneys hired by the insurer to defend its insured also represent the insurer, and therefore communications between the attorneys and insurer are protected by the common-law attorney-client privilege that has been codified in this section. Adopting the reasoning of a recent federal case, Admiral Ins. v. U.S. District Court, 881 F2d 1486 (9th Cir. 1989), which enumerated the essential elements of the privilege, the Supreme Court held that although a showing of need may overcome the immunity given to an attorney work product, a similar showing cannot be invoked to overcome the attorney-client privilege. State ex rel. USF&G Co. v. District Court, 240 M 5, 783 P2d 911, 46 St. Rep. 1896 (1989), followed in Palmer v. Farmers Ins. Exch., 261 M 91, 861 P2d 895, 50 St. Rep. 1210 (1993).

Bad Faith Litigation — Attorney-Client Privilege: In interpreting Montana state law to determine the scope of protection afforded by the attorney-client privilege in an action for bad faith by an insured against an insurer, the District Court found that letters written to the insurer by the insurer's attorney concerning the underlying insurance claim are protected by the attorney-client privilege and work product doctrine codified in this state under this section. The court rejected plaintiff's contention that the documents were not protected by the privilege because the attorney represented only the insured, not the insurer, in the underlying claim and therefore his communications with the insurer were not communications between an attorney and his client. The attorney was acting in a dual capacity as attorney for both the insurer and insured, which is recognized as proper as long as a conflict of interest does not arise. The court further determined that documents clearly prepared in the ordinary course of the insurer's business, and not for the purpose of this litigation, are discoverable because they are not protected by the work product doctrine. Baker v. CNA Ins. Co., 45 St. Rep. 2400 (D.C. Mont. 1988) (apparently not reported in Federal Supplement).

Attorney's Voluntary Disclosure of Confidential Statements — No Waiver of Attorney-Client Privilege: Defendant's court-appointed attorney called himself to the stand to testify about defendant's inconsistent statements. Based on the District Court's acceptance of the testimony, the Supreme Court found the following factors prejudiced defendant's right to a fair trial: (1) the attorney's testimony of defendant's statements was extremely prejudicial and had limited probative value; (2) the state presented no evidence that defendant intended to waive his right not to divulge this privileged information; and (3) given defendant's unfamiliarity with courtroom procedure, defendant's right against self-incrimination need not be surrendered in order to assert a statutory right. Conviction was reversed. St. v. Statczar, 228 M 446, 743 P2d 606, 44 St. Rep. 1668 (1987).

Driver's Statement to Defendant's Insurer Not Within Work Product Exception: The driver of a vehicle involved in an accident gave a statement to his employer's insurance company before a complaint was filed. There was no indication that an attorney had been hired or that the statement was made at the request of an attorney. Thus, the Supreme Court held that Kuiper v. District Court, 193 M 452, 632 P2d 694, 38 St. Rep. 1288 (1981), did not apply. An insurance claim file is not the same as an attorney's claim file for purposes of the work product rule. The driver's statement was not made "in anticipation of litigation" under Rule 26(b), M.R.Civ.P. The District Court's order denying plaintiffs' motion to compel discovery was reversed. Cantrell v. Henderson, 221 M 201, 718 P2d 318, 43 St. Rep. 745 (1986).

Ineffective Assistance of Counsel Claim — Effect on Attorney-Client Privilege: When a convicted person files a petition for relief based on grounds of ineffective assistance of counsel, the petitioner's comprehension of waiver of privilege or his knowledge and consent to waiver are irrelevant. The attorney in question has a duty to respond by affidavit or other sworn testimony to admit, deny, or qualify the allegations of fact made in the petition. In future cases, if a response from a defense attorney so charged is necessary, the Attorney General shall first apply to the Supreme Court for an order preserving the responding attorney from charges of discipline or malpractice for revealing necessary confidential information from such convicted person. Petition of Gillham, 216 M 279, 704 P2d 1019, 42 St. Rep. 806 (1985). See also Bone v. St., 284 M 293, 944 P2d 734, 54 St. Rep. 890 (1997), wherein it was held that failure to secure an order from

the Supreme Court pursuant to Petition of Gillham did not constitute prejudice to defendant because the District Court that ruled on the petition did not rely on preliminary findings on the issue.

Privilege Unavailable to Parties to Lawsuit Claiming Under a Deceased Client: The plaintiffs brought an action against their stepmother to collect the proceeds of their deceased father's life insurance policy, which had been paid to the defendant in accordance with the terms of the policy but contrary to the provisions of a divorce decree. The District Court did not err in relying upon attorney Sternhagen's deposition and file in the prior divorce proceedings between the deceased and his first wife in order to determine the true intentions of the deceased. Where both parties to a lawsuit claim under a deceased client, neither can assert the attorney-client privilege against the other. Herrig v. Herrig, 199 M 174, 648 P2d 758, 39 St. Rep. 1274 (1982).

House Counsel to Liability Carriers and Corporate Employer: Under this section the attorney-client privilege: (1) relates to legal advice given by house counsel to the corporate employer, but analysis of results of closed product liability files given by house counsel is not legal advice; (2) does not relate to communications between house counsel and personnel employed by Goodyear's liability carriers because house counsel is not a lawyer for those liability carriers; (3) applies to communication between retained counsel and Goodyear; and (4) does not, as raised by Goodyear, apply to documents prepared by an employee of the liability insurance company and circulated within the same insurance company. Kuiper v. District Court, 193 M 452, 632 P2d 694, 38 St. Rep. 1288 (1981).

Former Counsel — Matters Testified to Discussed Before Third Party: In a dissolution of marriage case, there was offered testimony of the respondent's first attorney in the action (who later withdrew). The trial court refused to allow his examination, citing the attorney-client privilege. On review, the Supreme Court found error in the trial court, holding that in this case the testimony of the attorney was not privileged because it related to conversations that occurred in the presence of a third person. In re Jones v. Jones, 190 M 221, 620 P2d 850, 37 St. Rep. 1973 (1980), followed in Noonan v. First Bank Butte, 227 M 329, 740 P2d 631, 44 St. Rep. 1124 (1987).

House Counsel: Opinions of house counsel rendered to an employer were entitled to the attorney-client privilege, and where portions of them had been disclosed in camera, the client was entitled to a protective order preventing their further disclosure or use in pleadings by the opponent. State ex rel. Union Oil Co. of Calif. v. District Court, 160 M 229, 503 P2d 1008 (1972).

Loss of Confidential Character: When a party ceases to treat a matter as confidential, it loses its confidential character; and where statements made were made in the presence of others or within their hearing, they cannot be said to have been of a confidential nature. Ludwig v. Mont. Bank & Trust Co., 109 M 477, 98 P2d 377 (1939).

Clients in Different Actions: Where the attorney for plaintiff in an action to set aside an alleged fraudulent deed had theretofore represented defendant in a matter relating to a right-of-way over the land in question, one in no way connected with the suit in equity, and the attorney advised defendant that he was plaintiff's attorney, statements made to him by defendant as to plaintiff's demand were not privileged. Piersky v. Hocking, 88 M 358, 292 P 725 (1930).

What Communications Qualify: For a communication from a client to his attorney to be privileged, it must be of a confidential nature (at least regarded so by the client), and must relate to a matter which in its nature is private and properly the subject of confidential disclosure, as well as to the subject matter of the employment, and be made to the attorney for the purpose of enabling him properly to understand the matter in which he is employed. Piersky v. Hocking, 88 M 358, 292 P 725 (1930).

Attorney for Both Parties:

Where in an action by father against son to establish a resulting trust in real property, the parties after transfer of the property by the former to the latter had occasion to consult an attorney whose services were paid for by plaintiff, relative to securing payment of rentals from the tenant, admission of testimony by the attorney that the trend of the conversation in his office was that the father was the owner and the son his agent was not error as violative of this section. McQuay v. McQuay, 81 M 311, 263 P 683 (1928).

Communications to an attorney for both parties, made to him while acting as such, do not come within the prohibition of this section when a controversy arises as to a matter about which he was the common adviser. McQuay v. McQuay, 81 M 311, 263 P 683 (1928).

Communications made to an attorney while acting for both parties do not fall within the prohibition of this section, and when a controversy arises as to the matter about which he has thus been the common adviser, a statement by an attorney as to what transpired between

plaintiff and defendant touching a settlement of their partnership affairs while he was acting as attorney for the firm was properly admitted. Lenahan v. Casey, 46 M 367, 128 P 601 (1912).

Former Client: An attorney may not testify to matters of which he could have gained knowledge only through conferences with his client, in a proceeding between that client and another arising out of such matters, even though he is no longer his former client's attorney. August v. Burns, 79 M 198, 255 P 737 (1927).

Statement Intended to Be Communicated: An attorney is not prohibited by this section from disclosing a statement made by his client with the express intention that it be communicated to another; hence the former attorney of defendant in a proceeding looking to the annulment of letters of guardianship was properly permitted to produce in court his office copy of a letter to plaintiff to show the purpose for which plaintiff's consent to the appointment of the guardian was desired. August v. Burns, 79 M 198, 255 P 737 (1927).

Timely Objection Required: Objections to evidence of admissions made to an attorney are waived where timely objection is not made either to the competency of the evidence or of the witness. Wilson v. Wilson, 64 M 533, 210 P 896 (1922).

Casual Legal Advice: Information obtained by an attorney from the defendant, in an action brought by a trustee in bankruptcy to recover the amount of an alleged preference, who, while introducing to the attorney the person who made the preference and who was then in search of legal advice, made certain statements in relation to the business affairs of the person so introduced, is not privileged, and the Supreme Court, upon review, is not bound to accept the assertion of the attorney that "they called upon me for the purpose of obtaining my services as an attorney at law" as conclusive. Mackel v. Bartlett, 33 M 123, 82 P 795 (1905).

Attorney Not Acting as Such: Information incidentally obtained by one while acting merely as a scrivener in drawing up a deed, though he is also an attorney, is not privileged where advice had not been asked of him and he gave none. Smith v. Caldwell, 22 M 331, 56 P 590 (1899).

Nature of Advice — Evading Creditors: The rule declared by this section applies where one seeks advice upon communications made to an attorney, as such, even though the advice sought is for the purpose of aiding the client to evade his creditors. Smith v. Caldwell, 22 M 331, 56 P 590 (1899); Davis v. Morgan, 19 M 141, 47 P 793 (1897).

Law Review Articles

An Accountant Employed by an Attorney Is Within the Attorney-Client Privilege, Foster, 23 Mont. L. Rev. 238 (1962).

Balancing Fundamental Civil Liberties and the Need for Increased Homeland Security: The Attorney-Client Privilege After September 11th, Ruzenski, 19 St. John's J. Legal Commentary 467 (2005).

Privilege and the Work Product Doctrine in Tax Cases, McMahon & Shepard, 58 Tax Law. 405. (2005).

Recent Developments Relating to the Attorney-Client Privilege, Hancock, 21 Corp. Couns. Q. 64 (2005).

The Scope of In-Firm Privilege, Chambliss, 80 Notre Dame L. Rev. 1721 (2005).

The Search and Seizure of Privileged Attorney-Client Communications, McArthur, 72 U. Chi. L. Rev. 729 (2005).

Another Misunderstood Relation: Confidentiality and the Duty to Report, Rolfes, 14 Geo. J. Legal Ethics 621 (2001).

Attorney-Client Confidentiality and the Assessment of Claimants Who Allege Posttraumatic Stress Disorder, Aronson, Rosenwald, & Rosen, 76 Wash. L. Rev. 313 (2001).

Clients, Their Confidences, and Internet Communications, Dolak, 36 Tort & Ins. L.J. 829 (2001).

Inadvertent Disclosure and the Attorney-Client Privilege: Looking to the Work Product Doctrine for Guidance, Zeidner, 22 Cardozo L. Rev. 1315 (2001).

Legal Ethics in Cyberspace: Keeping Lawyers and Their Computers Out of Trouble, Kirkey, 18 Thomas M. Cooley L. Rev. 37 (2001).

The Attorney-Client and Work Product Privileges of Government Entities, Radson & Waratuke, 30 Stetson L. Rev. 799 (2001).

Transmitting Legal Documents Over the Internet: How to Protect Your Clients and Yourself, Anderson, 27 Rutgers Computer & Tech. L.J. 1 (2001).

Collateral References

Witnesses *key* 198(1), et seq.

98 C.J.S. Witnesses §§297, 316, et seq.

81 Am. Jur. 2d Witnesses §§325 through 327.

What persons or entities may assert or waive corporation's attorney-client privilege—modern cases. 28 ALR 5th 1.

What corporate communications are entitled to attorney-client privilege—modern cases. 27 ALR 5th 76.

Determination of whether a communication is from a corporate client for purposes of the attorney-client privilege—modern cases. 26 ALR 5th 628.

Involuntary disclosure or surrender of will prior to testator's death. 75 ALR 4th 1144.

Attorney-client privilege: who is "representative of the client" within state statute or rule privileging communications between an attorney and the representative of the client. 66 ALR 4th 1227.

Propriety of governmental eavesdropping on communications between accused and his attorney. 44 ALR 4th 841.

Privilege as to communications between lay representative in judicial or administrative proceedings and client. 31 ALR 4th 1226.

Attorney-client privilege as extending to communications relating to contemplated civil fraud. 31 ALR 4th 458.

Work product privilege as applying to material prepared for terminated litigation or for claim which did not result in litigation. 27 ALR 4th 568.

Applicability of attorney-client privilege to communications made in presence of or solely to or by third person. 14 ALR 4th 594.

Applicability of attorney-client privilege to evidence or testimony in subsequent action between parties originally represented contemporaneously by same attorney, with reference to communication to or from one party. 4 ALR 4th 765.

Propriety of attorney who has represented corporation acting for corporation in controversy with officer, director, or stockholder. 1 ALR 4th 1124.

Applicability of attorney-client privilege to matters relating to drafting of nonexistent or unavailable nontestamentary documents. 55 ALR 3d 1322.

Defense attorney as witness for his client in state criminal case. 52 ALR 3d 887.

Disclosure of name, identity, address, occupation, or business of client as violation of attorney-client privilege. 16 ALR 3d 1047.

Attorney-client privilege as affected by its assertion as to communications, or transmission of evidence relating to crime already committed. 16 ALR 3d 1029.

Attorney-client privilege as affected by communications between several attorneys. 9 ALR 3d 1420.

Applicability of attorney-client privilege to communications with respect to contemplated tortious acts. 2 ALR 3d 861.

Comment note: right of corporation to assert attorney-client privilege. 98 ALR 2d 241.

Persons other than client or attorney affected by, or included within, attorney-client privilege. 96 ALR 2d 125, §16 superseded by 31 ALR 4th 1226.

Prosecution's privilege against disclosure of identity of informer. 76 ALR 2d 262.

Waiver of attorney-client privilege by personal representative or heir of deceased client or by guardian of incompetent. 67 ALR 2d 1268.

Privilege as to communications to attorney in connection with drawing of will. 66 ALR 2d 1302, §2 superseded by 75 ALR 4th 1144.

Party's waiver of privilege as to communications with counsel by taking stand and testifying. 51 ALR 2d 521.

Proof of due execution of lost will as affected by privilege attaching to attorney-client communications. 41 ALR 2d 401.

What matters are protected by attorney-client privilege or are proper subject of inquiry by Internal Revenue Service where attorney is summoned in connection with taxpayer-client under federal tax examination. 15 ALR Fed. 771.

26-1-804. Confessions made to member of clergy.

Case Notes

Testimonial Privilege Not Extended to Nonclerical Church Member — No Prejudice in Admission of Member's Testimony: Testimonial privileges must be strictly construed because they contravene the fundamental principle that the public has the right to everyone's evidence; however, the clergy-penitent privilege in this section will not be so strictly construed as to violate the right to freedom of religion in Art. II, sec. 5, Mont. Const. Here, Gooding claimed that testimony regarding his confessions of sexual molestation of his stepdaughter in the presence of the wife of a nonordained junior minister was privileged. However, nothing in the record

indicated that the wife was a clergy member acting in a professional character, a counselor, or anything more than an ordinary confidant. The Supreme Court declined to extend the clergy-penitent privilege to nonclerical church members and, in light of overwhelming uncontradicted evidence of Gooding's guilt, affirmed his conviction regardless of the wife's testimony. St. v. Gooding, 1999 MT 249, 296 M 234, 989 P2d 304, 56 St. Rep. 977 (1999). See also St. v. MacKinnon, 1998 MT 78, 288 M 329, 957 P2d 23, 55 St. Rep. 331 (1998).

Clergy-Penitent Privilege Applicable to Confidential Nonpenitential Communications Between Laity and Clergy: Adopting the interpretation in Scott v. Hammock, 870 P2d 947 (Utah 1994), the Supreme Court held that the clergy-penitent privilege applies to nonpenitential communications between laypersons and clergy if the communications are made in confidence and for the purpose of seeking or receiving religious guidance, admonishment, or advice and if the cleric is acting in a religious role pursuant to the practice and discipline of the church. In the present case, public statements made in the presence of church leaders who were not acting as ministers or counselors; with no reasonable expectation of confidentiality; and without the purpose of receiving forgiveness or spiritual or religious counseling, guidance, admonishment, or advice did not constitute privileged communications under this section. St. v. MacKinnon, 1998 MT 78, 288 M 329, 957 P2d 23, 55 St. Rep. 331 (1998).

Law Review Articles

The Priest-Penitent Privilege: An Hibernocentric Essay in Postcolonial Jurisprudence, Walsh, 80 Ind. L.J. 1037 (2005).

The Constitutional Fate of Mandatory Reporting Statutes and the Clergy-Communicant Privilege in a Post-Smith World, Pudelski, 98 Nw. U.L. Rev. 703 (2004).

The Priest-Penitent Privilege: Its Constitutionality and Doctrine, Whittaker, 13 Regent U.L. Rev. 145 (2000).

When Silence Resounds: Clergy and the Requirement to Report Elder Abuse Neglect, Moskowitz & DeBoer, 49 DePaul L. Rev. 1 (1999).

A Broad Interpretation of Clergy and Patient Confidentiality, 1995 Utah L. Rev. 308 (1995).

Collateral References

98 C.J.S. Witnesses §§359, 360.

81 Am. Jur. 2d Witnesses §§493, 494, 496, 501, 502, 504.

Who are "clergy" or like within privilege attaching to communications to clergy members or spiritual advisers. 101 ALR 5th 619.

Subject matter and waiver of privilege covering communications to clergy member or spiritual adviser. 93 ALR 5th 327.

Matters to which the privilege covering communications to clergyman or spiritual adviser extends. 71 ALR 3d 1117.

Who is "clergyman" or the like entitled to assert privilege attaching to communications to clergymen or spiritual advisers. 49 ALR 3d 1205, superseded by 101 ALR 5th 619.

26-1-805. Doctor-patient privilege.

Compiler's Comments

1987 Amendment: Near middle of section, after "surgeon", inserted "or dentist".

Applicability: Section 2, Ch. 400, L. 1987, which amended this section, provided: "This act applies to civil actions initiated on or after the effective date of this act." Effective October 1, 1987.

1983 Amendment: Inserted exception clause.

Case Notes

Discovery of Medical Records Upon Commencement of Action for Damages Placing Mental and Physical Condition at Issue — Waiver of Physician-Patient Privilege as to Condition in Controversy: Plaintiff's child fell through the second story railing at the Montana State University-Bozeman library and suffered brain injuries. Plaintiff brought damage claims related to the child's injuries and claims related to plaintiff's own emotional distress, loss of consortium, and posttraumatic stress disorder. The state moved to compel production of all of plaintiff's health care records from before and after the fall. The District Court denied the motion, holding that the records were constitutionally protected and irrelevant to the case and therefore not discoverable. On appeal, the Supreme Court noted plaintiff's constitutional right to confidentiality of medical records, but cited State ex rel. Mapes v. District Court, 250 M 524, 822 P2d 91 (1991), for the holding that that right must be balanced against a defendant's right to defend itself in an informed manner and that records of prior physical or mental conditions are discoverable only if they relate to currently claimed damages. Here, plaintiff commenced an

action for damages that placed in issue the mental and physical condition arising from the accident, thus waiving any physician-patient privilege as to the condition in controversy, and the state had the right to discover evidence related to prior medical conditions that was possibly connected to plaintiff's current damages. Denial of the discovery motion prejudiced the state's right to defend itself in an informed manner, constituting reversible error. Henricksen v. St., 2004 MT 20, 319 M 307, 84 P3d 38 (2004).

Revealing Limited Medical Information During Police Interview Not Considered Waiver of Constitutional Right to Confidentiality in Medical Records — Voluntary Medical Information Outside Scope of Fruit of Poisonous Tree Doctrine — Adequate Probable Cause for Investigative Subpoena of Medical Records: Bilant was involved in a three-car accident and was subsequently arrested for DUI and a seat belt violation. During an interview following the arrest, Bilant revealed to an officer that he had taken pain medication on the day of the accident. The officer called Bilant's health care provider for confirmation, and the provider confirmed that Bilant had a prescription for a drug similar to the pain medication that he mentioned. The officer then procured an investigative subpoena regarding documentation on all prescriptions issued to Bilant, including any advisory warnings, and the provider sent Bilant's entire medical file. Bilant contended that the state violated both his constitutional right to privacy and the statutory protections of 50-16-535. The state maintained that Bilant waived his claim of confidentiality in his medical information when he voluntarily revealed his use of pain medication to the officer. The Supreme Court agreed with Bilant. Medical records are quintessentially private and deserve the utmost constitutional protection. None of the statutory prerequisites for disclosure of the medical records were met. In deciding to reveal limited medical information in a police interview, Bilant did not forfeit his constitutional right to subsequently claim confidentiality in his medical records. The officer conducted an illegal search in seeking the constitutionally protected private medical information without probable cause and the benefit of an investigative subpoena under 46-4-301, and the information gleaned from the telephone call should have been suppressed. Bilant then contended that the use of the illegally obtained information formed an improper basis for the investigative subpoena and that the results of the subpoena should also have been suppressed pursuant to the fruit of the poisonous tree doctrine, which forbids the use of evidence that comes to light as the result of an initially illegal act. However, on this point, the Supreme Court disagreed with Bilant. One exception to the doctrine is that the derivative evidence is admissible if it is obtained from an independent source. Here, Bilant himself provided the source by giving voluntary medical information from other than the illegal telephone inquiry. The Supreme Court recognized that an investigative subpoena seeking constitutionally protected medical information requires greater justification for state access than the administration of justice rationale used to obtain public information under 46-4-301, so in reviewing the probable cause basis for constitutionally protected material, the court excised the illegal evidence from the application and reviewed the remaining information de novo to determine whether probable cause existed for issuing the subpoena. In this case, even when the information subject to suppression was excised, the remaining evidence established probable cause that a DUI was committed and underscored a compelling state interest in medical records related to prescription medicines in order to confirm Bilant's initial admission to the officer. Thus, the subpoena was issued in accordance with the statutory requirements for constitutionally protected medical records, and Bilant's conviction was affirmed. St. v. Bilant, 2001 MT 249, 307 M 113, 36 P3d 883 (2001). See also St. v. New, 276 M 529, 917 P2d 919 (1996), and St. v. Nelson, 283 M 231, 941 P2d 441 (1997).

Doctor-Patient Privilege as Precluding Physician Private Interviews in Workers' Compensation Case: The doctor-patient privilege set out in this section prevents the defendant from conducting private interviews with a claimant's physician. Linton v. St. Comp. Ins. Fund, 230 M 122, 749 P2d 55, 45 St. Rep. 68 (1988), citing Japp v. District Court, 191 M 319, 623 P2d 1389, 38 St. Rep. 280 (1981).

Waiver of Physician-Patient Privilege by Workers' Compensation Claimant — Discovery: Although there is no direct statement in the Workers' Compensation Act or in the Procedural Rules of the Workers' Compensation Court regarding waiver of the physician-patient privilege, 39-71-604 and 39-71-605 imply that an injured employee, to sustain a right to workers' compensation benefits, must waive any privilege or claim of confidentiality as to medical information relating to compensability of his claim. If a claimant exercises his right under this section or 50-16-525 to prevent any medical witness from disclosing confidential health information, and subsequently application is made by the adverse party to the Workers' Compensation Court for an order authorizing discovery, the court should authorize such discovery as is relevant to the subject involved in the pending action. The information obtained

must be reasonably necessary to determine compensability. Bowen v. Liberty Mut. Ins. Co., 229 M 84, 745 P2d 330, 44 St. Rep. 1799 (1987).

Defense Communication With Plaintiff's Physician: It was not error to allow defense counsel to communicate with the plaintiff's treating physician during the trial. As the plaintiff stated he did not intend to call the physician as a witness and because the inquiry was made during the course of the trial, normal discovery limitations did not apply. Ostermiller v. Alvord, 222 M 208, 720 P2d 1198, 43 St. Rep. 1180 (1986).

Criminal Action — Privilege Not Available to Defendant: The physician-patient privilege under this section is not available to a defendant in a criminal action since 46-16-201, incorporating the civil rules of evidence into the criminal law "except as otherwise provided", pertains to the language of this section that specifically limits the privilege to civil actions. St. v. Campbell, 146 M 251, 405 P2d 978, 22 ALR 3d 824 (1965).

Patient's Waiver of Privilege: The purpose of this section is not absolutely to disqualify a physician, and the patient is privileged to waive the objection, in which event the court may compel the physician to testify; the physician, however, cannot waive the statutory privilege and testify against the wishes of the patient. Calling the witness is itself a waiver. Hier v. Farmers Mut. Fire Ins. Co., 104 M 471, 67 P2d 831, 110 ALR 1051 (1937).

Factual Statement to Physician — Where Injury Occurred: A statement made to a physician immediately after her fall by plaintiff in an action for personal injuries sustained by a fall on an icy sidewalk, that she fell at a place different from the place alleged in the complaint, was not privileged. Garrett v. Butte, 69 M 214, 221 P 537 (1923).

Qualification of Statement: To render statements made to a physician by his patient privileged under this section, they must have related to the particular injury or disease and been necessary to enable the former to properly prescribe for the latter or act in his professional capacity. Garrett v. Butte, 69 M 214, 221 P 537 (1923).

Examination of Physician — Client First Testifies Regarding Treatment: Where plaintiff on cross-examination admitted that a certain physician had attended and treated her for the injuries complained of, without detailing any conversation with him or telling of the character or extent of his treatment, it was proper to refuse to permit defendant to examine the physician as to plaintiff's condition at the time he attended her. May v. N. Pac. Ry., 32 M 522, 81 P 328 (1905).

Law Review Articles

Confidentiality, Codes and Courts: An Examination of the Significance of Professional Guidelines on Medical Ethics in Determining the Legal Limits of Confidentiality, Moodie & Wright, 29 Anglo-Am. L. Rev. 39 (2000).

Discovery of Non-Parties' Medical Records in the Face of the Physician-Patient Privilege, White, 36 Cal. W.L. Rev. 523 (2000).

A Physician's Duty to Warn a Patient's Relatives of a Patient's Genetically Inheritable Disease, Burnett, 36 Hous. L. Rev. 559 (1999).

Online Without a Net: Physician-Patient Communication by Electronic Mail, Spielberg, Am. J.L. & Med. 267 (1999).

Protecting Patient-Doctor Discourse: Informed Consent and Deliberative Autonomy, Gatter, 78 Or. L. Rev. 941 (1999).

Collateral References

Witnesses *key* 208(1), et seq.

98 C.J.S. Witnesses §§341, 347, et seq.

81 Am. Jur. 2d Witnesses §§416, 449.

Scope and extent of protection from disclosure of medical peer review proceedings relating to claim in medical malpractice action. 69 ALR 5th 559.

Right of voluntary disclosure of privileged proceedings of hospital medical review or doctor evaluation processes. 60 ALR 4th 1273.

Physician's tort liability for unauthorized disclosure of confidential information about patient. 48 ALR 4th 668.

Validity, construction, and application of statute limiting physician-patient privilege in judicial proceedings relating to child abuse or neglect. 44 ALR 4th 649.

Physician-patient privilege as extending to patient's medical or hospital records. 10 ALR 4th 552.

Admissibility of physician's testimony as to patient's statements or declarations, other than res gestae, during medical examination. 37 ALR 3d 778.

Pretrial testimony or disclosure on discovery by party to personal injury action as to nature of injuries or treatment as waiver of physician-patient privilege. 25 ALR 3d 1401.

Applicability in criminal proceedings of privilege as to communications between physician and patient. 7 ALR 3d 1458.

Waiver of privilege as regards one physician as a waiver as to other physicians. 5 ALR 3d 1244.

Physician-patient privilege: testimony as to communications or observations as to mental condition of patient treated for other condition. 100 ALR 2d 648.

Who may waive privilege of confidential communication to physician by person since deceased. 97 ALR 2d 393.

Right of physician, notwithstanding physician-patient privilege, to give expert testimony based on hypothetical question. 64 ALR 2d 1056.

Evidence: privilege of communications by or to nurse or attendant. 47 ALR 2d 742.

Construction and effect of statute removing or modifying, in personal injury actions, patient's privilege against disclosure by physician. 25 ALR 2d 1429.

Competency of hospital physician or attendant to testify as to condition of patient. 22 ALR 1217.

26-1-806. Speech-language pathologist, audiologist-client privilege.

Compiler's Comments

1989 Amendment: Changed reference to speech pathologist to reference to speech-language pathologist.

Collateral References

98 C.J.S. Witnesses §§297, 356, et seq.

81 Am. Jur. 2d Witnesses §536, et seq.

26-1-807. Psychologist-client privilege.

Case Notes

Testimony at Sentencing Hearing by Counselor Who Evaluated Defendant in Different Case Not Violation of Privileged Communication: At defendant's sentencing hearing, the court allowed testimony from a counselor who had performed a psychosexual evaluation on defendant in connection with an earlier unrelated case. Defendant contended on appeal that the counselor's testimony should not have been allowed under the rules of evidence. The Supreme Court disagreed, noting that under St. v. Race, 285 M 177, 946 P2d 641 (1997), the rules of evidence are not applicable or controlling in sentencing hearings and that a statement covered by the psychotherapist-patient privilege that may be inadmissible at trial is admissible at a sentencing hearing. Further, the counselor's statement in question here was a matter of public record and did not constitute violation of a privileged communication. A sentencing court is allowed to have the fullest information possible concerning a defendant's life and characteristics in order to individualize punishment, and the testimony at issue helped the sentencing court frame the punishment in this case. St. v. J.C., 2004 MT 75, 320 M 411, 87 P3d 501 (2004).

Reasonableness of In Camera Review of Exculpatory Evidence in Balancing Defendant's Right to Review With Victim's Right to Confidentiality: Duffy sought access to confidential reports, many of which were handwritten notes from mental health professionals who were involved in the treatment of Duffy's daughters whom Duffy was alleged to have assaulted. The District Court examined the documents in camera and ordered a redacted one-page copy to be disclosed to defense counsel. Duffy asserted that the in camera procedure was unfair because review by a judge is no substitute for review by the defendant's advocate. However, equally important to the defendant's right to discover exculpatory evidence is the victim's right to protect confidential relations. When these competing interests conflict, they must be balanced by the District Court through in camera review, and the court did not err in doing so. To allow defense counsel general access to a victim's confidential records could adversely affect the state's interest in uncovering and treating abuse. St. v. Duffy, 2000 MT 186, 300 M 381, 6 P3d 453, 57 St. Rep. 734 (2000), following St. v. Donnelly, 244 M 371, 798 P2d 89 (1990). See also Pa. v. Ritchie, 480 US 39 (1986).

Disclosure of Complete Defense Psychiatric Report at Sentencing Phase When Doctor to Testify: Section 46-14-217 and this section, relating to confidentiality of communications between a psychologist or psychiatrist and client, are codifications of rules of evidence. Rules of evidence are not applicable or controlling at a sentencing hearing. Furthermore, appellant waived any privilege as to his psychiatric report when he decided to present the doctor's testimony at the sentencing hearing. At that point, the complete report was necessary for the court to properly evaluate the doctor's testimony. The court did not err in ordering the defense to provide the court with the complete report for the court to consider in relation to sentencing. St. v. Race, 285 M 177, 946 P2d 641, 54 St. Rep. 1099 (1997).

Denial of Defendant's Access to Rape Victim's Counselor and Counselor's Records Upheld: Muir was convicted of sexual intercourse without consent with a victim under 16 years of age. Prior to and during trial, Muir requested access to the victim's psychological counselor and to the counselor's records because the counselor was listed as a potential witness. However, after an in camera review of the records by the District Court, Muir was given access only to an investigator's note of an interview with the victim's counselor. The Supreme Court held that Muir was properly denied access to the counselor and the counselor's records because the victim's conversations with the counselor are privileged and the District Court found no exculpatory evidence in the records. Citing St. v. Reynolds, 243 M 1, 792 P2d 1111 (1990), the Supreme Court also reasoned that a defendant's right to pretrial discovery is not equivalent to a defendant's constitutional right of confrontation and that Muir had shown no correlation between the victim's emotional problems and her consent to sexual intercourse. St. v. Muir, 263 M 211, 867 P2d 1094, 51 St. Rep. 19 (1994).

Defendant's Discovery Needs Balanced by Plaintiff's Right to Privacy: The defendant in a personal injury case sought access to the files of Mapes's psychologist. Mapes resisted the motion on the basis that it violated his right to privacy. The Supreme Court held that granting the supervisory writ was necessary because the defendant's discovery rights and the plaintiff's statutory privacy rights were in conflict. The court further held that the defendant could seek information pertaining only to prior physical or mental conditions that might relate to the damages being claimed in the present action. State ex rel. Mapes v. District Court, 250 M 524, 822 P2d 91, 48 St. Rep. 954 (1991), followed in Park v. District Court, 1998 MT 164, 289 M 367, 961 P2d 1267, 55 St. Rep. 657 (1998), and Winslow v. Mont. Rail Link, Inc., 2001 MT 269, 307 M 269, 38 P3d 148 (2001).

Disclosure of Medical Records by Third Party — Testimonial Privileges Outweigh Defendant's Need for Information: Medical records pertaining to a victim's psychotherapeutic treatment are protected from disclosure by recognized testimonial privileges that outweigh a defendant's purported need for or limited right to that information in the hands of a nonadversary third party. St. v. Reynolds, 243 M 1, 792 P2d 1111, 47 St. Rep. 1143 (1990), followed in St. v. Donnelly, 244 M 371, 798 P2d 89, 47 St. Rep. 1600 (1990). See also St. v. Imlay, 249 M 82, 813 P2d 979, 48 St. Rep. 588 (1991), which overruled Donnelly with regard to augmentation of sentence for failure to admit guilt, and St. v. Duffy, 2000 MT 186, 300 M 381, 6 P3d 453, 57 St. Rep. 734 (2000).

Court-Ordered Evaluation — No Psychologist-Client Relationship: The Supreme Court rejected appellant's contention that because she trusted a psychologist and expected their communications to remain confidential her expectation should be honored. There was in fact no psychologist-client relationship. Appellant did not seek out and retain the psychologist for professional help but was ordered by the lower court to undergo an evaluation; nor were the communications between the two directed toward securing professional assistance for appellant. In re A.J.S., 193 M 79, 630 P2d 217, 35 St. Rep. 947 (1981).

Psychologist/Patient Privilege — Exception: The court properly permitted testimony of respondent's institutional psychologist and psychiatrist in spite of the psychologist/patient and physician/patient privileges because mental health professionals on the hospital staff qualify as "neutral factfinders". In re Miller, 175 M 318, 573 P2d 1155 (1977); In re Sonsteng, 175 M 307, 573 P2d 1149 (1977).

Law Review Articles

The Lingering Questions of a Supreme Court Decision: The Confines of the Psychotherapist-Patient Privilege, Odrobina, 52 Clev. St. L. Rev. 551 (2004).

The Psychotherapist-Patient Privilege, Orenstein, 20 Touro L. Rev. 679 (2004).

Collateral References

98 C.J.S. Witnesses §§341, 347, et seq.

81 Am. Jur. 2d Witnesses §§416, 449.

Privilege, in judicial or quasi-judicial proceedings, arising from relationship between psychiatrist or psychologist and patient. 44 ALR 3d 24.

26-1-809. Confidential communications by student to employee of educational institution.

Case Notes

Child Dependent and Neglect Actions: Confidentiality of privileged communications does not prevent disclosure of information obtained by school nurse, public nurse, and social welfare

workers as evidence at custody hearing for dependent and neglected children. In re Declaring Jones and Peterson Children Dependent and Neglected Children, 168 M 1, 539 P2d 1193 (1975).

Law Review Articles

Privilege in Academia: A Consideration of the Power to Resist Disclosure of Information Obtained by Academics in Confidence, McNicol, 9 U. Tas. L. Rev. 205 (1989).

26-1-810. Confidential communications made to public officer.

Case Notes

Communications to Parole Officer Not Privileged: After his arrest for burglary, the defendant called his parole officer and told him of the crime. The defendant's motion to suppress the parole officer's testimony was denied on the basis that the parole officer was not an elected officer or director and therefore communications made to him were not subject to a statutory privilege. The Supreme Court also held that the probative value of the evidence outweighed the relatively slight prejudicial impact the evidence carried in showing the jury that the defendant had been convicted of a prior crime. St. v. Higareda, 238 M 130, 777 P2d 302, 46 St. Rep. 1146 (1989).

Collateral References

Witnesses *key* 216(1) through (3), 216.1.

98 C.J.S. Witnesses §§361, 362, 367, 369.

Construction and application, under state law, of doctrine of "executive privilege". 10 ALR 4th 355.

Testimony before or communications to private professional society's judicial commission, ethics committee, or the like, as privileged. 9 ALR 4th 807.

Validity, construction, and effect of state laws requiring public officials to protect confidentiality of income tax returns or information. 1 ALR 4th 959.

26-1-812. Advocate privilege.

Compiler's Comments

Severability: Section 11, Ch. 484, L. 1997, was a severability clause.

Effective Date: Section 13, Ch. 484, L. 1997, provided that this section is effective July 1, 1997.

26-1-813. Mediation — confidentiality — privilege — exceptions.

Compiler's Comments

Effective Date: This section is effective October 1, 1999.

26-1-814. Statement of apology, sympathy, or benevolence — not admissible as evidence of admission of liability for medical malpractice.

Compiler's Comments

Saving Clause: Section 3, Ch. 42, L. 2005, was a saving clause.

Effective Date: Section 4, Ch. 42, L. 2005, provided: "[This act] is effective July 1, 2005."

Applicability: Section 5, Ch. 42, L. 2005, provided: "[This act] applies to causes of action arising after [the effective date of this act]." Effective July 1, 2005.

Part 9
Media Confidentiality Act

Part Law Review Articles

Fair Trial and Free Press: The Courtroom Door Swings Open, Carey, 45 Mont. L. Rev. 323 (1984).

Diverging Interests: The Saga of Matt Cooper and Judith Miller Raises Serious Questions About Notes, E-Mail and Anonymous Sources, Penrod, 29 News Media & L. 4 (2005).

Journalists and Confidential Sources (Symposium on Media Ethics), Zelnick, 19 Notre Dame J. L., Ethics & Pub. Pol'y 541 (2005).

The Demise of the First Amendment-Based Reporter's Privilege: Why This Current Trend Should Not Surprise the Media, Larsen, 37 Conn. L. Rev. 1235 (2005).

Negotiating Media Confidentiality Agreements, Tanick, 52 Bench & B. Minn. 29 (1995).

Part Collateral References

Privilege of newsgatherer against disclosure of confidential sources or information. 99 ALR 3d 37.

Libel and slander: employer's privilege as to communications to news media concerning employees. 52 ALR 3d 739.

26-1-902. Extent of privilege.

Case Notes

Exclusion of Testimony by Newspaper Editor and Reporter — Harmless Error: Defendant subpoenaed a newspaper editor and a reporter who had interviewed defendant's assault victim, but the District Court quashed the subpoenas pursuant to the Media Confidentiality Act, Title 26, ch. 1, part 9. Defendant contended that the District Court's action deprived him of the right to compel the attendance of witnesses and that his constitutional right should prevail over the media shield statutes. However, the state met its burden of showing that defendant was not prejudiced by the trial error because defendant was able to introduce the same evidence during cross-examination of the victim and made no additional offer of proof demonstrating the additional evidence that defendant sought to introduce through the editor and reporter. The media testimony would have added little or nothing to the report in the newspaper and other evidence introduced at trial. Absent a reasonable possibility that excluding the testimony contributed to defendant's conviction, quashing of the subpoenas was affirmed. St. v. Slavin, 2004 MT 76, 320 M 425, 87 P3d 495 (2004).

Testimony of Reporter Precluding Confidentiality of Notes: While Title 26, ch. 1, part 9, generally protects the confidentiality of a reporter's notes and sources, that privilege is waived under this section when the reporter voluntarily takes the witness stand or testifies by way of deposition, at which time the notes are subject to discovery. Sible v. Lee Enterprises, Inc., 224 M 163, 729 P2d 1271, 43 St. Rep. 2101 (1986).

Subject of Subpoena Duces Tecum — Inspection by Court: In an application by a newspaper reporter for a Writ of Supervisory Control to quash a subpoena duces tecum served upon him in a pending criminal case where District Court denied motion to quash, the court held since reporter had not produced item for inspection to District Court, it could not determine the relevancy, materiality, necessity, or applicability of statutes unless item is first presented to court for examination, it being reporter's duty to bring what the court requires so the court can then to its own satisfaction determine by inspection whether documents produced are irrelevant or privileged. State ex rel. Adams v. District Court, 169 M 336, 546 P2d 988 (1976).

Collateral References

Witnesses *key* 196.

98 C.J.S. Witnesses §358.

81 Am. Jur. 2d Witnesses §§525, 526, 528.

Privilege of newsgatherer against disclosure of confidential sources or information. 99 ALR 3d 37.

26-1-903. Waiver of privilege.

Compiler's Comments

1989 Amendment: In (2), near beginning, substituted "testifies" for "voluntarily offers to testify or to produce the source", near middle substituted "he does not waive" for "he or it waives", and near end inserted "unless the person voluntarily agrees to waive the privilege or voluntarily discloses the source in the course of his testimony"; and made minor changes in phraseology.

Case Notes

Exclusion of Testimony by Newspaper Editor and Reporter — Harmless Error: Defendant subpoenaed a newspaper editor and a reporter who had interviewed defendant's assault victim, but the District Court quashed the subpoenas pursuant to the Media Confidentiality Act, Title 26, ch. 1, part 9. Defendant contended that the District Court's action deprived him of the right to compel the attendance of witnesses and that his constitutional right should prevail over the media shield statutes. However, the state met its burden of showing that defendant was not prejudiced by the trial error because defendant was able to introduce the same evidence during cross-examination of the victim and made no additional offer of proof demonstrating the additional evidence that defendant sought to introduce through the editor and reporter. The media testimony would have added little or nothing to the report in the newspaper and other evidence introduced at trial. Absent a reasonable possibility that excluding the testimony contributed to defendant's conviction, quashing of the subpoenas was affirmed. St. v. Slavin, 2004 MT 76, 320 M 425, 87 P3d 495 (2004).

Part 10
Affidavits

Part Case Notes

Unsigned Affidavit Not Basis for Relief From Default Judgment: After a default judgment was entered against defendant property management firm for conversion of plaintiffs' rentals, one of the defendants filed an unsigned affidavit with the District Court, alleging that defendants were Canadian citizens unfamiliar with Montana laws, that they were representing themselves pro se, that they in fact did file an answer, and other factual allegations. The Supreme Court held that the facts alleged were not established by an unsigned affidavit and, citing Gergen v. Pitsch, 194 M 70, 634 P2d 652 (1981), concluded that defendants were both intelligent and literate and could not have so misunderstood the proceedings against them as to warrant setting the judgment aside. The court, citing Schmidt v. Jomac, Inc., 196 M 323, 639 P2d 517 (1982), further held that the default judgment should not be set aside for failure of defendants to receive notice of the entry of the default judgment because notice was not required to be sent by the Clerk of the District Court. Bd. of Directors of Edelweiss Owners' Ass'n v. McIntosh, 251 M 144, 822 P2d 1080, 48 St. Rep. 1131 (1991).

Part Law Review Articles

Good Riddance to Good Faith? Deciphering Montana's New Test for Subfacial Challenges to Search Warrant Affidavits, Mickelson, 62 Mont. L. Rev. 175 (2001).

Attacking Errors in Affidavits Used as Summary Judgment Proof, Rambin, 46 Baylor L. Rev. 789 (1994).

Part Collateral References

Proper execution of self-proving affidavit as validating or otherwise curing defect in execution of will itself. 1 ALR 5th 965.

Disputation of truth of matters stated in affidavit in support of search warrant—modern cases. 24 ALR 4th 1266.

Impeachment of witness: admissibility of affidavit to impeach witness. 14 ALR 4th 828.

Affidavit or motion for disqualification of judge as contempt. 70 ALR 3d 797.

26-1-1001. Affidavit defined.

Case Notes

Affidavit in Support of Recall Petition — "Best of Knowledge" Insufficient: Allegations in an affidavit seeking recall of a public official must be sworn to from the knowledge of the affiant and not from a lesser basis so that the electors, in voting on the recall petition, may rely on the truth of the grounds set forth. An affidavit based only on the "best" of the affiant's knowledge is deficient. Sheehy v. Ferda, 235 M 63, 765 P2d 722, 45 St. Rep. 2162 (1988).

Verified Petition as Affidavit:

The affidavit requirement of 40-4-220 may be satisfied by a verified petition. In re Marriage of Stout, 216 M 342, 701 P2d 729, 42 St. Rep. 856 (1985).

A verified petition, being a written declaration under oath, is equivalent to and may be used as an affidavit in instituting proceeding for Writ of Prohibition. State ex rel. Redle v. District Court, 102 M 541, 59 P2d 58 (1936).

Signature of Affiant: In the absence of a statute requiring an affidavit to be signed by the affiant, the affidavit will be held sufficient though not signed if it appears by the certificate of a competent attesting officer that affiant made oath thereto. Int'l Harvester Co. v. Embody, 89 M 402, 298 P 348 (1931).

Oath Required: A paper intended as an affidavit for an attachment is insufficient upon its face where the declarations therein contained do not purport to have been made under oath or before an officer authorized to administer an oath. Cont. Oil Co. v. Jameson, 53 M 466, 164 P 727 (1917), distinguished in Union Bank & Trust Co. v. Himmelbauer, 56 M 82, 181 P 332 (1919).

Collateral References

Perjury conviction as affected by notary's nonobservance of formalities for administration of oath to affiant. 80 ALR 3d 278.

26-1-1002. Permissible uses for affidavits.

Case Notes

Venue Properly Based Solely Upon Allegations in Complaint — Affidavits Not Considered — Venue Found Proper for Both Defendants: The Department of Health and Environmental Sciences (now Department of Environmental Quality) brought an action in Lewis and Clark County against Pegasus Gold Corporation (Pegasus) and Zortman Mining, Inc. (ZMI), for

numerous violations of the Montana water quality laws at the Zortman and Landusky mines located in Phillips County. The complaint alleged that Pegasus owned or controlled the mines and that both Pegasus and ZMI did business in Lewis and Clark County, making that county a proper place for venue. ZMI moved to change venue to Phillips County, alleging that Pegasus did not own or control ZMI, and attached affidavits of Fletcher and Erickson to support its motion. Citing Petersen v. Tucker, 228 M 393, 742 P2d 483 (1987), the Supreme Court held that the District Court properly relied upon the allegations in the complaint without considering the two affidavits. The Supreme Court held that inasmuch as Pegasus was a named defendant at the time of the complaint and did business in Lewis and Clark County, that county was proper for venue. The Supreme Court noted that because the motion for change of venue did not refer to or rely upon the Fletcher affidavit, it was properly not considered by the District Court. The Supreme Court also noted that because the Erickson affidavit did not contradict the allegations in the complaint that Pegasus owned or controlled ZMI, the District Court was correct in focusing on the allegations in the complaint. The Supreme Court held that venue was properly found in Lewis and Clark County for both defendants because under the provisions of 25-2-117, a county that is proper venue for one defendant is proper for both. State ex rel. Dept. of Health and Environmental Sciences v. Pegasus Gold Corp., 270 M 32, 889 P2d 1197, 52 St. Rep. 64 (1995).

Court's Use of Affidavits and Discovery Material in Its File to Determine Jurisdiction: Plaintiffs appealed the use of affidavits and discovery material in the court file in the court's determination of whether an employee was acting within the scope of his employment by a certain defendant. The plaintiffs complained the court's determination amounted to a decision of the defendant's ultimate tort liability, rather than a factual determination of the court's jurisdiction over some defendants. While agreeing that jurisdiction and ultimate liability in tort where disputes of fact exist are not subject to determination by motion, the Supreme Court held that common collateral issues related to the defendant's connection with the tortious act are jurisdictional issues which may be resolved before trial and the trial court's use of affidavits for the purpose was correct under Rules 12(d) and 43(e), M.R.Civ.P. In so holding, the court noted that the discovery materials and affidavits were extensive and that the plaintiffs were given a sufficient opportunity to examine the nonresident defendants through depositions and interrogatories and thereby to develop their argument regarding jurisdiction. Knoepke v. SW. Ry., 190 M 238, 620 P2d 1185, 37 St. Rep. 1910 (1980).

Weight of Affidavits: An affidavit filed with a motion to set aside a default judgment is not the sole basis upon which a court should base its decision even if no other counteraffidavits are presented. Affidavits are self-serving documents that are weak evidence to be received with caution, and they are not conclusive of the facts stated therein even though not contradicted by counteraffidavit. Audit Serv. Inc. v. Kraus Constr. Inc., 189 M 94, 615 P2d 183, 37 St. Rep. 1225 (1980).

Answer to Affidavit for Citation: In proceedings to modify child custody orders, defendant divorced father properly filed a verified answer controverting the mother's affidavit on which citation for hearing was issued. Trudgen v. Trudgen, 134 M 174, 329 P2d 225 (1958).

Order to Show Cause: Under this section the affidavit is simply the means of instituting the proceeding and furnishes the basis on which an order to show cause may issue. Stefonick v. Stefonick, 118 M 528, 167 P2d 867 (1946).

Petition for Costs and Fees: The function of an affidavit where wife seeks allowance of attorney's fees and costs in resisting appeal of husband in divorce action is to tender issues much as a complaint in an action. Stefonick v. Stefonick, 118 M 528, 167 P2d 867 (1946).

Proof by Affidavit: Where objection is made to affidavit as evidence and where there is a contest involved and where effect of adverse order is tantamount to a judgment for money, proof of facts may not be made by ex parte affidavit without right of cross-examination. Stefonick v. Stefonick, 118 M 528, 167 P2d 867 (1946).

Counteraffidavits: Under the rule that where an affidavit is used by one party, a counteraffidavit may be used by his adversary, where a motion to suppress evidence was made upon affidavit, the State could properly oppose it by counteraffidavit. State ex rel. Merrell v. District Court, 72 M 77, 231 P 1107 (1924).

Appeal of Ruling on Affidavit — Interlocutory: An affidavit filed in support of a motion to modify a decree of divorce is merely a tender of evidence in support of the motion; hence an order overruling a motion to strike such affidavit is nothing more than an interlocutory ruling upon the admissibility of evidence and is not appealable as a special order made after final judgment. Weed v. Weed, 55 M 599, 179 P 827 (1919), distinguished in State ex rel. Monteath v. District Court, 97 M 530, 37 P2d 567 (1934).

Evidentiary Value of Verification: An affidavit may be used to verify a pleading or paper required to be verified, but it gives no evidentiary value to a paper not required to be verified. State ex rel. Wood v. Bd. of County Comm'rs, 49 M 165, 140 P 728 (1914).

Collateral References

Affidavits *key* 18; Pleading *key* 301(1).
2A C.J.S. Affidavits §22; 71 C.J.S. Pleading §486, et seq.
3 Am. Jur. 2d Affidavits §§6, 18, 19.
Admissibility of affidavit to impeach witness. 14 ALR 4th 828.
Necessity and propriety of counteraffidavits in opposition to motion for new trial in civil case. 7 ALR 3d 1000.

26-1-1003. Affidavits made in this state — before whom taken.

Collateral References

Affidavits *key* 5.
2A C.J.S. Affidavits §9.
Disqualification of attorney, otherwise qualified, to take oath or acknowledgment from client. 21 ALR 3d 483.

26-1-1004. Affidavits made in another state — before whom taken.

Collateral References

Affidavits *key* 14.
Disqualification of attorney, otherwise qualified, to take oath or acknowledgment from client. 21 ALR 3d 483.

26-1-1005. Affidavits made in foreign country — before whom taken.

Case Notes

Federal Court Proceedings: Federal District Court properly considered affidavits executed before notaries in foreign countries in determining motion to dismiss for improper service of process, although such affidavits did not comply with this section. Bucholz v. Hutton, 153 F. Supp. 62 (D.C. Mont. 1957).

26-1-1006. Verification of affidavit taken out of state.

Collateral References

Affidavits *key* 15.
2A C.J.S. Affidavits §18.

26-1-1011. Affidavit of printer or publisher as evidence of publication.

Collateral References

Process *key* 138.
72 C.J.S. Process §104.
62 Am. Jur. 2d Process §157.

26-1-1012. Affidavit of publication — where filed, prima facie evidence.

Collateral References

62 Am. Jur. 2d Process §157.

CHAPTER 2
SUBPOENAS AND WITNESSES

Part 1
Subpoenas

Part Law Review Articles

Subpoenas Duces Tecum vs. HIPAA: Which Wins? (Health Insurance Portability and Accountability Act of 1996), Buchanan, 79 Fla. B.J. 39 (2005).

26-2-101. Subpoena defined.

Case Notes

Unreasonable Search and Seizure — Showing of Need Required: A compulsory production of private books and papers by means of a subpoena duces tecum constitutes a violation of the constitutional protection against unreasonable searches and seizures under Art. III, sec. 7, 1889

Mont. Const. (Art. II, sec. 11, 1972 Mont. Const.), unless the books and documents have first been shown to be material or relevant to the issues in a cause and the court is apprised of the nature of the action and the necessity for their production. Where petitioner made no request or showing, the order violated the constitutional guaranty. State ex rel. Smith v. District Court, 112 M 506, 118 P2d 141 (1941).

Collateral References

Witnesses *key* 8.

98 C.J.S. Witnesses §§20 through 22.

Subpoena duces tecum for production of items held by a foreign custodian in another country. 82 ALR 2d 1403.

Statements of witnesses as subject, under subpoena duces tecum, to order for production on trial. 73 ALR 2d 146.

Propriety of compelling witness to testify, in pretrial proceeding, as to matters which would be prohibited in trial testimony by dead man's statute. 42 ALR 2d 578.

Forms, particularity, and manner of designation required in subpoena duces tecum for production of corporate books, records, and documents. 23 ALR 2d 862.

26-2-102. Issuance of subpoena.

Compiler's Comments

"Contumacy" Defined: Chiefly ecclesiastical law: intentional refusal of cited person to appear and defend charge laid against him. (Black's Law Dictionary, revised 4th edition (1968).)

Collateral References

Witnesses *key* 10.

98 C.J.S. Witnesses §24.

81 Am. Jur. 2d Witnesses §§6 through 10, 15.

Search and seizure of bank records pertaining to customer as violation of customer's rights under state law. 33 ALR 5th 453.

Compelling testimony of opponent's expert in state court. 66 ALR 4th 213.

Sufficiency of evidence to support or require finding that in-state witness in criminal case is "material and necessary" justifying issuance of summons directing attendance of witness under Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings. 12 ALR 4th 771.

Sufficiency of evidence to support or require finding that out-of-state witness in criminal case is "material witness" justifying certificate to secure attendance under Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings. 12 ALR 4th 742.

Availability under uniform act of subpoena duces tecum to secure the attendance of witness from without a state in a criminal proceeding. 7 ALR 4th 836.

Accused's right, under Federal Constitution's Sixth Amendment, to compulsory process for obtaining witnesses in accused's favor—Supreme Court cases. 98 L. Ed. 2d 1074.

26-2-104. Disobedience — how punished.

Compiler's Comments

1983 Amendment: After "court", deleted "or officer"; and after "to be so sworn", inserted ", to so answer, or to so subscribe".

Case Notes

Constitutionality: The Supreme Court will not, by prohibition, restrain the District Court from entertaining and determining a motion to strike an answer from the files and enter judgment by default under this section on the ground that such section is unconstitutional, although the District Court may have erroneously decided to uphold the constitutionality of the section and may, in consequence, eventually make an order which will be in excess of its jurisdiction. State ex rel. Heinze v. District Court, 32 M 394, 80 P 673 (1905), distinguished in State ex rel. Stewart v. District Court, 103 M 487, 63 P2d 141 (1936).

Deposition Subpoena: Query, whether the District Court, under this section, may lawfully find a person in contempt for refusing to obey an order of a notary public when cited to appear before such officer and give his deposition for use in a cause pending in the District Court. State ex rel. Heinze v. District Court, 32 M 394, 80 P 673 (1905).

Collateral References

Witnesses *key* 21.

98 C.J.S. Witnesses §§53 through 56, 59 through 61.

Compelling testimony of opponent's expert in state court. 66 ALR 4th 213.

Tort or statutory liability for failure or refusal of witness to give testimony. 61 ALR 3d 1297.
Refusal of expert to testify as contempt. 77 ALR 2d 1182, §3 superseded by 66 ALR 4th 213.
Contempt proceedings against prosecution witness for refusal to disclose identity of informer. 76 ALR 2d 306.
Refusal to answer questions on cross-examination as ground for new trial or reversal. 57 ALR 70.
Duration of imprisonment for refusal to answer question before grand jury. 28 ALR 1364.
Privilege of corporate officers to refuse to produce books and records before grand jury. 27 ALR 145.

26-2-105. Disobedience — civil damages.

Case Notes

Void Subpoena: A subpoena duces tecum issued by a notary public for the purpose of taking a deposition was void because issued before the required affidavit and notice were served upon the adverse party, and there could be no disobedience thereof upon which to base an action for the penalty prescribed by this section. Hiber v. Morrill, 105 M 323, 72 P2d 685 (1937).

Collateral References

Witnesses *key* 22.
98 C.J.S. Witnesses §§62 through 64.

26-2-106. Warrant to arrest and bring in disobedient witness.

Collateral References

Witnesses *key* 17.
98 C.J.S. Witnesses §§57, 58.

Part 2
Securing Testimony of Witness Who Is a Prisoner

Part Collateral References

Propriety of telephone testimony or hearings in prison proceedings. 9 ALR 5th 451.
Propriety and prejudicial effect of witness testifying while in prison attire. 16 ALR 4th 1356.
Accused's right to interview witness held in public custody. 14 ALR 3d 652.

26-2-201. Court order to obtain deposition or attendance of prisoner.

Collateral References

Depositions *key* 17; Witnesses *key* 18.
26B C.J.S. Depositions §§11, 12; 98 C.J.S. Witnesses §§7, 12.
Accused's right to depose prospective witnesses before trial in state court. 2 ALR 4th 704.

Part 3
Duties of Witnesses

26-2-301. Witness required to attend when subpoenaed.

Case Notes

No Duty to Appear if No Subpoena Issued: A physician who failed to appear to testify at his patient's trial was not issued a subpoena compelling his attendance. There is no duty for a physician to testify at the trial of a patient, absent compulsory process. Knight v. Johnson, 237 M 230, 773 P2d 293, 46 St. Rep. 760 (1989).

Exclusion of Witnesses From Courtroom When Others Testifying: Defendant sought to exclude witnesses from the courtroom when others were testifying. The ruling was granted except that it was not extended to rebuttal witnesses. After defendant rested his case in chief, he sought to have one of his case in chief witnesses present during the testimony of the State's rebuttal witnesses. This request was refused, but the refusal was held to be within the court's discretion since the witness fit squarely under the exclusionary ruling, the defense had been supplied with the reports of the rebuttal witnesses, and because there was time to prepare rebuttal testimony after the State's experts testified to answer any additional testimony. St. v. McKenzie, 186 M 481, 608 P2d 428, 37 St. Rep. 325 (1980).

Collateral References

Witnesses *key* 6.
98 C.J.S. Witnesses §§20, 25.
17 Am. Jur. 2d Contempt §18; 81 Am. Jur. 2d Witnesses §§1 through 3.
Closed-circuit television witness examination. 61 ALR 4th 1155.

Failure or refusal of insured to attend trial or to testify as breach of co-operation clause. 9 ALR 4th 218.

26-2-302. Witness required to answer questions.

Compiler's Comments

1983 Amendment: Deleted last sentence, which read: "But a witness must answer as to the fact of his previous conviction for felony."

Case Notes

Degrading Questions:

This section and 26-2-401 are designed to protect a witness from improper and irrelevant questions and questions intended merely to degrade him, but if a particular question is pertinent and otherwise proper, the fact that it may tend to prejudice the witness before the jury furnishes no ground for its exclusion. Lukert v. Eldridge, 49 M 46, 139 P 999 (1914).

A judgment will be reversed where questions asked of a witness in a criminal case were totally foreign to the matter before the court, where they could have no bearing whatever on the guilt or innocence of the defendant, and where they could subserve no purpose whatever, except to degrade and discredit the witness. St. v. Crowe, 39 M 174, 102 P 579 (1909).

Where, in a prosecution for burglary, a witness who was jointly indicted with defendant testified to having taken a fishing trip with defendant about the time of the burglary, questions on cross-examination to show that the trip was for the purpose of committing robbery were improper, as tending to degrade and discredit the witness and defendant, though the witness answered in the negative. St. v. Rogers, 31 M 1, 77 P 293 (1904).

Cross-Examination Attack on Credibility — Prior Conviction of Felony: Where the defendant testifies on his own behalf, it is competent and material to show, on cross-examination, that he had been convicted of a felony, in order to discredit him and to attack his credibility. (See 1983 amendment.) St. v. Black, 15 M 143, 38 P 674 (1894).

Collateral References

Witnesses *key* 292, et seq.

98 C.J.S. Witnesses §§528, 532, 543, et seq.

81 Am. Jur. 2d Witnesses §§66, 73 through 75.

Failure or refusal of insured to attend trial or to testify as breach of co-operation clause. 9 ALR 4th 218.

Privilege of witness to refuse to give answers tending to disgrace or degrade him or his family. 88 ALR 3d 304.

Refusal to answer questions before state grand jury as direct contempt of court. 69 ALR 3d 501.

Tort or statutory liability for failure or refusal of witness to give testimony. 61 ALR 3d 1297.

Sufficiency of witness' claim of privilege against self-incrimination. 51 ALR 2d 1178.

Right of witness to refuse to answer, on ground of self-incrimination, as to membership in or connection with party, society, or similar organization or group. 19 ALR 2d 388.

26-2-303. Person present required to testify.

Collateral References

Witnesses *key* 4.

98 C.J.S. Witnesses §§7, 12.

Compelling expert to testify. 77 ALR 2d 1182, §3 superseded by 66 ALR 4th 213.

Part 4
Protection of Witnesses

26-2-401. Right of witness to protection from harassment.

Case Notes

Protection of Witness by Court: The court may protect a witness from a question intended to insult and degrade him by refusing to require him to answer. St. v. Biggs, 45 M 400, 123 P 410 (1912).

Reversible Error: To permit questions to be asked a witness other than the defendant, which subserve no purpose other than to degrade and discredit him in the eyes of the jury, constitutes reversible error. St. v. Crowe, 39 M 174, 102 P 579 (1909); St. v. Rogers, 31 M 1, 77 P 293 (1904).

Collateral References

Witnesses *key* 225.

98 C.J.S. Witnesses §§392, 396, 406, 408, 434.

Privilege of witness to refuse to give answers tending to disgrace or degrade him or his family. 88 ALR 3d 304.

Admissibility of expert testimony as to proper techniques for interviewing children or evaluating techniques employed in particular case. 87 ALR 5th 693.

Propriety of allowing absent witness to be examined over closed-circuit television. 80 ALR 3d 1212.

26-2-402. Witness protected from arrest when attending, going, and returning.

Collateral References

5 Am. Jur. 2d Arrest §§138, 142, 143, 199; 62 Am. Jur. 2d Process §140.

Privilege of party, witness, or attorney while going to, attending, or returning from court as extending to privilege from arrest for crime. 74 ALR 2d 592.

Public policy as ground for exemption of parties and witnesses from services of civil process. 85 ALR 1341.

Nonresident requested or required to remain in state pending investigation of accident. 59 ALR 51.

Waiver of privilege against or nonliability to arrest in civil action. 8 ALR 754.

26-2-403. Arrest void — punishment and liability.

Collateral References

Arrest *key* 9; Contempt *key* 12; False Imprisonment *key* 7(4).

6A C.J.S. Arrest §§27, 28; 17 C.J.S. Contempt §22; 35 C.J.S. False Imprisonment §§3, 6, 7, 16 through 18.

26-2-404. Affidavit of arrested witness — exoneration of arresting officer.

Compiler's Comments

1983 Amendment: In lead-in to (1)(a) through (1)(c), changed "party" to "witness" twice, and after "is not liable", deleted "to the party".

Collateral References

False Imprisonment *key* 7(3).

35 C.J.S. False Imprisonment §§22, 23, 27, 28, 35, 43.

26-2-405. Discharge of witness from arrest by court or judge.

Collateral References

Arrest *key* 47, 48.

6A C.J.S. Arrest §§73, 74.

Part 5
Witness Fees

26-2-501. Witnesses in courts of record and before certain court officers.

Compiler's Comments

2005 Amendment: Chapter 449 in (1) at beginning inserted exception clause; and made minor changes in style. Amendment effective April 28, 2005.

Saving Clause: Section 78, Ch. 449, L. 2005, was a saving clause.

Case Notes

Costs — Expert Witness Fees: A District Court cannot award costs in excess of $10 a day per witness as costs for expert witnesses. The statute specifically limiting expert witness fees to $10 a day controls the general statute authorizing a District Court to award costs in accordance with the course and practice of the court. (See 2005 amendment.) Witty v. Pluid, 220 M 272, 714 P2d 169, 43 St. Rep. 354 (1986), followed in Goodover v. Lindey's Inc., 255 M 430, 843 P2d 765, 49 St. Rep. 1059 (1992).

Former Attorney as Witness: An attorney, nonresident of Montana at the time he was subpoenaed as a witness for plaintiff in a suit to set aside a fraudulent default judgment, who had acted as plaintiff's counsel in the action out of which the equitable suit arose but was not representing him therein was properly entitled to mileage from the state line to the place of trial and return, under this section. Bullard v. Zimmerman, 88 M 271, 292 P 730 (1930).

Per Diem — How Computed: A material witness who resided outside the county in which the case was tried at a distance greater than 30 miles and voluntarily attended the trial at the request of the prevailing party and who, after his arrival on the day set for trial, had to wait for about a week before he was required to testify on account of congestion of court business was

entitled to per diem for the whole time he was in attendance and not only for the day on which he gave his testimony, as well as to mileage, the service of a subpoena not being a prerequisite to their allowance. Helena Adjustment Co. v. Claflin, 75 M 317, 243 P 1063 (1926).

"Fees" Defined: The word "fees", as used in this section, refers to the per diem and mileage of witnesses. St. v. Story, 53 M 573, 165 P 748 (1917).

Mileage Limited to Within State: The mileage of witnesses in civil actions allowed litigants under this section is limited to travel within the state. Chilcott v. Rea, 52 M 134, 155 P 1114 (1916), followed in Billings v. Hunt, 257 M 99, 847 P2d 715, 50 St. Rep. 175 (1993).

How Mileage Computed: The mileage of his witnesses, which a successful party to an action may recover under this section and 25-10-201, is not limited to travel from and to their place of residence; whether the mileage shall be computed from the place of residence will depend upon the circumstances of each case. Lynes v. N. Pac. Ry., 43 M 317, 117 P 81 (1911).

Mileage of Witnesses — Subpoena Not Required: A party to whom costs are awarded is entitled to mileage of witnesses who appeared and testified, although the record does not show that they were subpoenaed. McGlauflin v. Wormser, 28 M 177, 72 P 428 (1903). See also Lynes v. N. Pac. Ry., 43 M 317, 117 P 81 (1911).

Attorney General's Opinions

Witness Fees as District Court Costs: Witness fees are District Court costs and may be paid out of the fund established by 7-6-2511. 38 A.G. Op. 31 (1979).

Collateral References

Witnesses *key* 27, 29.

98 C.J.S. Witnesses §§70 through 86.

Allowance of mileage or witness fees with respect to witnesses who were not called to testify or not permitted to do so when called. 22 ALR 3d 675.

Right of witness detained in custody for future appearance to fees for such detention. 50 ALR 2d 1439.

26-2-502. Witnesses in courts not of record — civil actions.

Compiler's Comments

1985 Amendment: Increased witness fee from $3 to $10.

Collateral References

Witnesses *key* 27, 29.

98 C.J.S. Witnesses §§71, 82 through 84.

26-2-503. Witnesses in courts not of record — criminal actions and on coroner's inquests.

Compiler's Comments

1985 Amendment: Increased witness fee from $3 to $10.

26-2-504. Interpreters to be paid as witnesses.

Collateral References

Courts *key* 56.

21 C.J.S. Courts §110.

26-2-505. Expert witnesses.

Case Notes

Fees of Expert Considered Damages Rather Than Witness Fees: Plaintiff employed an engineer to assess problems with a tennis facility constructed by defendant, and the engineer testified as an expert at trial regarding water damage and radon problems discovered as part of the assessment. Defendant moved to exclude evidence of the amount plaintiff paid the engineer for the consulting work, but the District Court allowed evidence of the amount plaintiff paid the expert. On appeal, defendant contended that the engineer should receive only expert witness fees as provided in this section. The Supreme Court disagreed. The record showed that the engineer was employed prior to litigation and reflected that the engineer's time was spent investigating the cause of the construction defects, rather than preparing to testify at trial. As such, the engineer's fees were properly assessed as damages instead of expert witness fees. Glacier Tennis Club at The Summit, LLC v. Treweek Constr. Co, Inc., 2004 MT 70, 320 M 351, 87 P3d 431 (2004).

Costs — Expert Witness Fees: A District Court cannot award costs in excess of $10 a day per witness as costs for expert witnesses. The statute specifically limiting expert witness fees to $10 a day controls the general statute authorizing a District Court to award costs in accordance with

the course and practice of the court. (See 2005 amendment to 26-2-501.) Witty v. Pluid, 220 M 272, 714 P2d 169, 43 St. Rep. 354 (1986), followed in Goodover v. Lindey's Inc., 255 M 430, 843 P2d 765, 49 St. Rep. 1059 (1992).

Exclusion of Fees From Costs: Expert witness fees are excluded from costs in a condemnation case. St. v. Heltborg, 140 M 196, 369 P2d 521 (1962).

Collateral References

Witnesses *key* 28.

98 C.J.S. Witnesses §§85, 86.

Right of indigent defendant in state criminal case to assistance of fingerprint expert. 72 ALR 4th 874.

Right of indigent defendant in state criminal case to assistance of ballistics experts. 71 ALR 4th 638.

Condemnor's liability for cost of condemnee's expert witness in eminent domain. 68 ALR 3d 546.

Fees for expert witness appointed by trial court in civil case. 95 ALR 2d 402.

Amount of fees allowable to examiners of questioned documents or handwriting experts for serving and testifying. 86 ALR 2d 1283.

Power of court which appoints or employs expert witnesses to tax their fees as costs. 39 ALR 2d 1376.

26-2-506. Fees paid by party subpoenaing in civil actions.

Compiler's Comments

2005 Amendment: (Version effective July 1, 2006) Chapter 449 in (1) at beginning inserted exception clause and after "all" inserted "criminal and"; inserted (2)(a) through (2)(c) designating when witness fees and expenses must be paid by office of state public defender or office of court administrator; and made minor changes in style. Amendment effective July 1, 2006.

Saving Clause: Section 78, Ch. 449, L. 2005, was a saving clause.

Collateral References

Witnesses *key* 30.

98 C.J.S. Witnesses §70.

26-2-507. Demand for advance payment of witness fees in civil action.

Case Notes

Only One Witness Fee Allowable to One Testifying Once Under Stipulation Determining Three Cases: Where it was stipulated that determination of one of three cases involving the same nature of alleged wrong, but affecting different defendants, should determine the other two, and the witnesses testified but once, their testimony being used in all three cases, it was error to allow the witnesses fees for all three cases; but one fee should have been allowed to each. McKee v. Clark, 115 M 438, 144 P2d 1000 (1943), explained in Humphries v. Starns, 87 F. Supp. 374 (D.C. Alaska 1949).

Collateral References

Costs *key* 184(1); Witnesses *key* 14.

Continuance of civil case as conditioned upon applicant's payment of costs of expenses incurred by other party. 9 ALR 4th 1144.

26-2-508. Witnesses on behalf of state or county — advance payment not required.

Compiler's Comments

2005 Amendment: (Version effective July 1, 2006) Chapter 449 in first sentence after "county attorney" inserted reference to any public defender and after "witnesses" deleted "on behalf of the state or county"; and made minor changes in style. Amendment effective July 1, 2006.

Saving Clause: Section 78, Ch. 449, L. 2005, was a saving clause.

Collateral References

Witnesses *key* 14.

98 C.J.S. Witnesses §71.

26-2-509. Certificate of clerk to witness to obtain payment.

Case Notes

Jurors' Certificates: The rule applicable to jurors' certificates applies also to witnesses' certificates; the Clerk must observe the same formalities in issuing them. County of Silver Bow v. Davies, 40 M 418, 107 P 81 (1910).

Payment of Certificates: This section does not require the certificates to be addressed to the Treasurer; his duty requires him to pay upon their presentation. County of Silver Bow v. Davies, 40 M 418, 107 P 81 (1910).

Collateral References

Witnesses *key* 29.

26-2-510. Application of sections exempting from advance payment.

Compiler's Comments

2005 Amendment: (Version effective July 1, 2006) Chapter 449 at end after "county" inserted reference to any other person for benefit of public defender; and made minor changes in style. Amendment effective July 1, 2006.

Saving Clause: Section 78, Ch. 449, L. 2005, was a saving clause.

26-2-515. State employees — compensation for time spent answering subpoena.

Compiler's Comments

Effective Date: Section 3, Ch. 450, L. 1995, provided that this section is effective July 1, 1995.

Part 6
Expert Witness Qualifications — Medical Malpractice

26-2-601. Medical malpractice expert witness qualifications.

Compiler's Comments

Saving Clause: Section 2, Ch. 49, L. 2005, was a saving clause.

Effective Date: Section 3, Ch. 49, L. 2005, provided: "[This act] is effective July 1, 2005."

Applicability: Section 4, Ch. 49, L. 2005, provided: "[This act] applies to causes of action that arise after [the effective date of this act]." Effective July 1, 2005.

CHAPTER 3
EFFECT OF FORMER JUDGMENTS AND ORDERS

Chapter Case Notes

Ex-Wife Not Named in Foreclosure Action Against Husband: In a prior suit, the defendant had brought a foreclosure action against the plaintiff's ex-husband but did not name the plaintiff as a party. In the first action, the court had allowed the foreclosure on the basis that an equitable mortgage existed. In the second suit, the defendant argued that the plaintiff's rights in the property had been extinguished on the basis that the original sales agreement was a contract for deed rather than an equitable mortgage. The Supreme Court ruled that the defendant was collaterally estopped from arguing that a contract for deed existed when in the first suit, a final judicial decision held that the agreement constituted an equitable mortgage. Smith v. Schweigert, 241 M 54, 785 P2d 195, 47 St. Rep. 77 (1990).

Res Judicata Inapplicable — Issues Not Same: Plaintiff suffered a back injury in October 1980, underwent surgery, and was judged to have reached a stationary state. Plaintiff was given an impairment rating of 25% and in August 1981 entered a final settlement for 125 weeks of permanent and partial disability benefits. In June 1981, while employed by a different employer, plaintiff experienced a sexual incident which she characterized as a sexual assault. In September 1981, while employed by a third employer, plaintiff suffered an industrial accident. In March 1984, the Workers' Compensation Court determined that the sexual incident did not constitute a compensable injury and that plaintiff as of that date was entitled to temporary total disability benefits by reason of the September 1981 injury. The benefits were to continue until the disability ceased. In October 1984, plaintiff sought to have the settlement entered in August 1981 set aside, claiming mutual mistake of fact. The Workers' Compensation Court held that its March 1984 decision barred this issue as res judicata. On appeal, the Supreme Court held that the issues were not identical so that res judicata was inapplicable. In the first case, the question was basically one of amount. In the second case, the question went to the validity of the settlement itself. The mistake plaintiff alleged was her total disability by reason of the second industrial accident. No ruling in the first case addressed whether the settlement had to be reopened in light of the Supreme Court's decision in Holton v. F.H. Stoltze Land & Lumber Co., 195 M 263, 637 P2d 10, 38 St. Rep. 1835 (1981). The court also noted that the question of mutual

mistake of fact could not have been raised in the first case. The case was reversed and remanded with directions to hear the petition on its merits. Phelan v. St. Paul Mercury Ins. Co. 220 M 296, 716 P2d 601, 43 St. Rep. 381 (1986).

Part 1
General Provisions

Part Collateral References

Former jeopardy: conviction or acquittal in federal court as bar to prosecution in state court for state offense based on same facts—modern view. 6 ALR 4th 802.

26-3-101. Kinds of jurisdiction necessary to sustain a record.

Collateral References

Judgment *key* 15, 16.
49 C.J.S. Judgments §19.

26-3-102. What considered adjudged in a judgment.

Case Notes

Relitigating Issues Raised in Bankruptcy Proceeding Barred by Res Judicata: In defendants' bankruptcy proceeding, they contended that notes issued by plaintiff contained a usurious interest rate and were prompted by fraud. The Bankruptcy Court determined that the notes were valid, enforceable, and unaffected by usury or fraud. During plaintiff's subsequent collection proceeding in District Court, defendants sought to amend their answer to allege usury, but the District Court held that the Bankruptcy Court's judgment barred defendants' claim under res judicata and granted summary judgment for plaintiff. On appeal, the Supreme Court affirmed. The Bankruptcy Court's judgment was accorded finality as to the issues raised or that could fairly have been raised in the adversary proceeding. Defendants were not precluded from litigating any of their defenses to the notes in the bankruptcy proceeding and thus were barred from relitigating the usury issue in District Court. Absent a genuine issue of material fact relating to defendants' default on the notes, summary judgment for plaintiff was proper. Olympic Coast Inv., Inc. v. Wright, 2005 MT 4, 325 M 307, 105 P3d 743 (2005), following Fox v. 7L Bar Ranch Co., 198 M 201, 645 P2d 929 (1982), and distinguishing Traders St. Bank of Poplar v. Mann, 258 M 226, 852 P2d 604 (1993).

Claim for Punitive Damages Not Precluded by Estoppel — Issues of Previous Litigation Not Identical: Finstad was injured by asbestos in defendant's mine. A jury trial resulted in a verdict for Finstad and an award of $400,000 in compensatory damages, as well as a determination that punitive damages were warranted. The District Court conducted a minitrial on the issue of punitive damages, and the jury awarded $83,000. Defendant contested the award of punitive damages and moved for dismissal on grounds that Finstad's claim was barred by collateral estoppel by virtual representation because the issue had already been litigated in two previous Lincoln County cases against defendant. Defendant contended that the issues were identical, that final judgment had been rendered, and that Finstad was a party to or in privity with a party in the previous cases and thus was virtually represented by those parties in the previous cases. The District Court denied the motion to dismiss, finding that the issues were not identical, and also ruled for Finstad on the question of estoppel by virtual representation. On appeal, the Supreme Court reviewed the record, noting that although some of the evidence and witnesses regarding the punitive damages claim were the same as in the previous cases, several significant factual distinctions and legal claims existed. Because the first element of collateral estoppel regarding identical parties was not met, the Supreme Court affirmed without reaching the question of estoppel by virtual representation. Finstad v. W.R. Grace & Co., 2000 MT 228, 301 M 240, 8 P3d 778, 57 St. Rep. 934 (2000), following Holtman v. 4-G's Plumbing & Heating, Inc., 264 M 432, 872 P2d 318 (1994).

Clarification of "Parties or Their Privies" Element of Res Judicata: The concept of "privy" in the context of a judgment applies to one whose interest has been represented at trial. Privies are also defined as those so connected in estate, in blood, or in law as to be identified with the same interest and consequently affected with each other by litigation. However, mutual conduct between parties does not necessarily establish a shared legal interest. In this case, absent a showing of an agency relationship, the mere fact that two parties were involved in related elements of the same occurrence did not form a sufficient basis for summary judgment on the issue of privity or shared legal interest between the parties. Holtman v. 4-G's Plumbing & Heating, Inc., 264 M 432, 872 P2d 318, 51 St. Rep. 340 (1994).

Defendants Estopped From Questioning Permanent Partial Disability Rate in Second Trial on Different Issues: The claimant argued that the Workers' Compensation Court applied the wrong standard in the first trial with respect to what elements the claimant had to establish in a claim for permanent partial disability. The first case was remanded with specific instructions to the lower court to apply the proper standard in determining permanent partial disability. On remand, the defendants attempted to challenge the amount of payments they had stipulated prior to the first trial. The Supreme Court ruled that the defendants had ample opportunity to challenge the stipulated payment rate in the first trial and that they were therefore estopped from questioning the rate in the second trial by the doctrine of res judicata. Beck v. Flathead County, 240 M 128, 783 P2d 383, 46 St. Rep. 1996 (1989).

Res Judicata Inapplicable to Bankruptcy Court Proceedings and Federal District Court Appeal: A Bankruptcy Court dismissed with prejudice a debtor's Chapter 11 proceedings on the grounds that no plan had been filed, no assets remained in the estate, costs of administration exceeded assets, and there was no chance of reorganization. The dismissal included all adversary matters pending in relation to the Chapter 11 proceedings. The dismissal was affirmed on appeal by the U.S. District Court. Plaintiff, a third party creditor, filed a complaint in state court that set forth theories of liability based on misrepresentation, equitable estoppel, fraud, and bad faith. Plaintiff asserted that because the Bankruptcy Court decided only the issue of equitable subordination, the effect of the dismissal was to restore all parties to the status quo before the bankruptcy petition was filed. The Supreme Court found that res judicata was inapplicable to plaintiff's claim because the subject matter of the actions was not the same and the issues relating to them were not the same. Phil-Co Feeds, Inc. v. First Nat'l Bank in Havre, 238 M 414, 777 P2d 1306, 46 St. Rep. 1380 (1989).

Question of Identical Issues as Bar to Second Action: In determining if the principle of res judicata was a bar to a second action when there was a question of whether the issues were the same, the court relied on its decision in Brannon v. Lewis & Clark County, 143 M 200, 387 P2d 706 (1963), citing Phoenix Mut. Life Ins. Co. v. Brainard, 82 M 39, 265 P 10 (1928), where it found that "[u]nless it clearly appears that the precise question involved in the second case was raised and determined in the former, the judgment is no bar to the record action". Baertsch v. Lewis & Clark County, 223 M 206, 727 P2d 504, 43 St. Rep. 1660 (1986), followed in DeMers v. Roncor, Inc., 249 M 176, 814 P2d 999, 48 St. Rep. 629 (1991), and Slater v. Cent. Plumbing & Heating Co., 1999 MT 257, 297 M 7, 993 P2d 654, 56 St. Rep. 1023 (1999).

Judgment Final — Law of the Case — Issues Outside Scope of Original Action: Plaintiff moved for relitigation of contractual issues on which judgment was final and also moved for consideration of new contractual issues that had arisen after judgment. All issues previously ruled upon were subject to the law of the case doctrine and could not be relitigated. See Schmidt v. Colonial Terrace Associates, 202 M 46, 656 P2d 807, 39 St. Rep. 2318 (1982); on remand, Schmidt v. Colonial Terrace Associates, 215 M 62, 694 P2d 1340, 42 St. Rep. 182 (1985). Contractual issues arising after the judgment were outside the scope of the original action. Rule 60(b)(5), M.R.Civ.P. (Title 25, ch. 20), did not give the court power to preside over controversies throughout the life of the contract. Schmidt v. Colonial Terrace Associates, 223 M 8, 723 P2d 954, 43 St. Rep. 1489 (1986).

Barring of Action by Res Judicata — Criteria: The Supreme Court, in State ex rel. Sullivan v. School District, 100 M 468, 50 P2d 252 (1935), originally stated the criteria to be used in determining whether an action is barred by res judicata as follows: (1) the parties or their privies must be the same; (2) the subject matter of the action must be the same; (3) the issues must be the same and must relate to the same subject matter; and (4) the capacities of the persons must be the same in reference to that subject matter and to the issues between them. Since the claim by appellant in the case at bar failed as it related to criteria (2) and (3), the court upheld the District Court finding that all matters relating to a lease agreement were res judicata with the exception of a security deposit which was not contemplated in the previous action. Geissler v. Nelson, 222 M 409, 722 P2d 632, 43 St. Rep. 1372 (1986). This criteria was applied in C B & F Dev. Corp. v. Culbertson St. Bank, 256 M 1, 844 P2d 5, 49 St. Rep. 1122 (1992).

Probate Distribution — Not Res Judicata for Corporate Liquidation: In a previous probate proceeding, the plaintiff, as one of several legatees of a corporation, moved to have the corporation liquidated and distributed in cash or assets. The District Court, in an interpretation of the will, denied the motion and ordered distribution to be made "in kind". This ruling was not res judicata in a subsequent action for liquidation of the corporation based on oppression and shareholder deadlock. Although seeking the same relief, the two actions rested on a different set of facts. Fox v. 7L Bar Ranch Co., 198 M 201, 645 P2d 929, 39 St. Rep. 862 (1982).

Conscionability of Divorce Settlement Agreement Not Same as Sufficiency — Finding of Conscionability Not Res Judicata on Completeness of Agreement: At the conclusion of a hearing on the enforcement of his divorce settlement agreement several months after his divorce, the former husband moved to amend the finding of deficiency of the settlement agreement or, in the alternative, to grant a new trial. The motion was denied and the former husband appealed. The District Court had found in its decree of legal separation that the settlement agreement executed by the parties and incorporated into the decree was conscionable and should be approved. The husband appealed that this finding was res judicata as to the issue of the marital agreement, thus barring any further requests by the wife. The Supreme Court found that the res judicata requirement of identity of issue was not met because there was sufficient dissimilarity between the issues in the two actions. The agreement disposed of the marital property but made no provision for any future support. The property disposition had no direct bearing on any contemporary agreement for obligations to be fulfilled in the near future. Res judicata, therefore, did not bar further action on any alleged agreements between the parties as to matters not involving the disposition of marital property. In re Harris v. Harris, 189 M 509, 616 P2d 1099, 37 St. Rep. 1696 (1980).

Refusal of Court in Original Action to Adjudicate Present Issue — Refusal Not Prior Judicial Determination: Buyers of land under contract for deed were not estopped from bringing an action to establish beneficial ownership of water rights evidenced by ditch company stock under the contract for deed by virtue of having brought a prior action for specific performance of the contract where the District Court, in the first case, refused to adjudicate the water rights as an issue that was beyond the scope of the controversy presented to it; failure to take an appeal from the trial court's denial to decide the controversy in the prior case did not effect a judicial determination of the controversy. Schwend v. Jones, 163 M 41, 515 P2d 89 (1973).

Probate Proceedings — Parties: Denial by probate court of motion of brother of decedent to vacate decree of distribution, which confirmed in decedent's widow whatever title passed to her in certain stock by virtue of death of decedent, was not an adjudication of title to the stock as between the widow and the brother. Roberts v. Roberts, 286 F2d 647 (9th Cir. 1961).

Creek Adjudicated — Binding as to All Possible Issues — Binding on Successors: A final decree adjudicating the rights and priorities of numerous parties to the waters of a creek is binding and conclusive between all the parties, their privies and successors in interest as to all matters adjudicated, and as to all issues which could have been properly raised, irrespective as to whether they were in fact litigated, for all time, unless and until regularly modified, the rights given to each litigant under the decree being property rights which it is the duty of the courts to protect. Kramer v. Deer Lodge Farms Co., 116 M 152, 151 P2d 483 (1944), followed with respect to enforcement of mechanics' liens in Orlando v. Prewett, 236 M 478, 771 P2d 111, 46 St. Rep. 520 (1989). Orlando was followed in Hall v. Heckerman, 2000 MT 300, 302 M 345, 15 P3d 869, 57 St. Rep. 1266 (2000).

Successive Decrees: While a decree in a water right suit is res judicata as to the parties to the action in which rendered, where subsequently the matter in issue is relitigated and readjudicated, the last decree controls, determines the rights of the parties, and cannot be collaterally impeached by showing the first. Gans & Klein Inv. Co. v. Sanford, 91 M 512, 8 P2d 808 (1932).

Defendant's Burden — Contrary Facts Beyond Record of Judgment: In the absence of any evidence in the record on appeal in a chattel mortgage foreclosure suit in which the defense was res judicata, the Supreme Court in determining what was adjudicated in the former action is limited to what appears on the face of the judgment relied upon; in such a case the burden of showing any contrary facts affecting the scope of the judgment rests upon defendant. Stockgrowers' Fin. Corp. v. Nett, 91 M 334, 7 P2d 540 (1932).

Mandamus Judgment: Mandamus being an action at law, judgment therein is conclusive of all of relator's rights properly involved therein; hence inclusion of a clause in the decree that it was given without prejudice to his right to recover the damages sustained by him on account of the proceeding was surplusage. State ex rel. Golden Valley County v. District Court, 75 M 122, 242 P 421 (1925). See also Solberg v. Sunburst Oil & Gas Co., 76 M 254, 246 P 168 (1926).

Issues Adjudicated — Scope and Effect:

An adjudication is final and conclusive not only as to the matter actually determined but as to every matter which the parties might have litigated and have decided as an incident to or essentially connected with the subject matter of the litigation. State ex rel. Golden Valley County v. District Court, 75 M 122, 242 P 421 (1925).

As between the parties to an action, the judgment is an adjudication not merely of the conclusions expressed but of everything necessarily included in them. Lyon v. USF&G Co., 48 M 591, 140 P 86 (1914).

Water Rights: Where the rights of the parties defendant in a water right suit are not, as between themselves, presented to the court by the pleadings for determination, the decree will not estop them from having such rights determined in a subsequent case. Sloan v. Byers, 37 M 503, 97 P 855 (1908), distinguished in Bennett v. Quinlan, 47 M 247, 131 P 1067 (1913); Cocanougher v. Mont. Life Ins. Co., 103 M 536, 64 P2d 845 (1936).

Injunction Proceedings: A judgment in a prior action, which adjudicated the ultimate right of the parties in the subject in controversy, meets the requirements of this section and was erroneously rejected on the hearing of an order to show cause why an injunction should not issue to restrain defendant from operating a certain mine pending a suit for an interest therein. Wetzstein v. Boston & Mont. Consol. Copper & Silver Min. Co., 26 M 193, 66 P 943 (1901).

Collateral References

Judgment *key* 725(1).

50 C.J.S. Judgments §§724, 727.

26-3-103. When parties are considered to be the same.

Case Notes

Foreign Judgment — Summary Judgment Proper: A New Mexico bank successfully sued New Mexico defendants in New Mexico on defaulted loans secured by mortgages on Montana property. The bank then sought foreclosure in Montana. The law of the state where a judgment is rendered controls the interpretation of the effect of the foreign judgment in any subsequent actions between the parties or those with whom there is privity. Under a collateral estoppel analysis, the bank was entitled to summary judgment in Montana. The bank is entitled to attorney fees and costs, including attorney fees on appeal. First Nat'l Bank of Albuquerque v. Quinta Land & Cattle Co., 238 M 335, 779 P2d 48, 46 St. Rep. 1313 (1989).

Parties the Same When Plaintiff and Defendant in First Action Switch Places in Second: For res judicata purposes, the parties were the same when the plaintiff in the first action was the defendant in the second and the defendant in the first was the plaintiff in the second. In applying the res judicata rule, parties means all persons who have a direct interest in the subject matter of the action and a right to control the proceedings, defend, examine witnesses, and appeal. Burgess v. St., 237 M 364, 772 P2d 1272, 46 St. Rep. 870 (1989).

Siting Act Decision Not Estoppel for PSC Ratemaking Decision: In 1973, Montana Power Co. (MPC) filed an application for a certificate of environmental compatibility and public need for Colstrip Units 3 and 4 under the Montana Major Facility Siting Act. In granting the certificate, the Board of Natural Resources and Conservation (now Department of Environmental Quality) found that there was a need for the energy which would be produced and that the units would serve the public interest, convenience, and necessity. After Unit 3 was completed, MPC filed an application with the Public Service Commission (PSC) to increase electric rates to reflect Unit 3 in its rate base. At the rate hearing, the PSC took evidence regarding whether Unit 3 was "used and useful". MPC moved to strike this testimony, contending the PSC was precluded from considering this by the certificate of need issued under the Siting Act. MPC filed an application for original jurisdiction and declaratory judgment or other appropriate relief with the Supreme Court. The PSC later concluded Unit 3 was not used and useful and could not be included in the rate base. MPC argued that the PSC was collaterally estopped from considering whether Unit 3 was "used and useful". The court held that the need issue determined in the siting process was not identical to the used and useful issue, therefore collateral estoppel was not applicable. MPC also argued that because of the certificate of need, the State was promissorily estopped from excluding Unit 3 from the rate base. MPC contended that issuance of a certificate of need under the Siting Act established a contractual relationship between the State and MPC. The court held that issuance of a certificate by a governmental authority to engage in conduct that would be improper without a certificate does not create a contractual relationship between the State and the licensee. Neither the Siting Act nor the certificate of need contemplate a promise that a facility will be included in a utility's rate base. Promissory estoppel was also inapplicable. Mont. Power Co. v. P.S.C., 214 M 82, 692 P2d 432, 41 St. Rep. 2332 (1984).

Union-Employer Trust Fund for Employees and Union — Suing Employer in Separate Actions: A union sued an electrical contractor in federal court, claiming that the contractor failed to hire persons referred by the union and failed to require persons he hired to join the union and that persons referred who were not hired lost compensation and contributions to a benefit trust fund administered by the union and an electrical contractors' association. The

assignee of the trust fund's claim against the contractor sued the contractor in a state District Court for contributions due the trust fund. The federal action was dismissed with prejudice by stipulation of the union and contractor. The state District Court then held that the state action was barred by res judicata. That ruling was erroneous, for the rights and claims sought to be enforced in the two actions were not the same and the claimants in the two actions were not in privity. Their functions and duties were different. Audit Services, Inc. v. Anderson, 211 M 323, 684 P2d 491, 41 St. Rep. 1388 (1984).

District Court Jurisdiction — Invoked by Probable Cause in Leave to File Information — Res Judicata After Appeal Process: The issue of subject matter jurisdiction cannot be waived or conferred by consent of a party and may be raised at any stage of a judicial proceeding or sua sponte by the court; but if the question of jurisdiction turns upon a finding of whether the affidavit of application for leave to file an information shows probable cause and the defendant has been found guilty and the judgment has not been appealed or has been affirmed on appeal, the issue of probable cause is res judicata. St. v. Davis, 210 M 28, 681 P2d 42, 41 St. Rep. 898 (1984).

Collateral References

Judgment *key* 665.

50 C.J.S. Judgments §§763, 764.

26-3-104. Principal bound when surety bound.

Collateral References

Principal and Surety *key* 145(1).

72 C.J.S. Principal and Surety §261.

26-3-105. Impeachment of a judicial record.

Case Notes

Section a Rule of Evidence: Appellant sought to use this section as an authority for setting aside judgment in a partition of property action. The District Court properly found that this section is a rule of evidence that merely sets forth circumstances under which a judicial record may be impeached and does not provide a remedy for setting aside a partition judgment. Brown v. Jensen, 231 M 340, 753 P2d 870, 45 St. Rep. 665 (1988).

Motion to Set Judgment Aside Followed by Suit Attacking Judgment for First Time on Jurisdictional Ground — Res Judicata Applied: In 1971 a default judgment had been entered against present plaintiffs, granting sole ownership of certain property to present defendant E.G.W., who sold the property to present codefendants in 1972. Plaintiffs' 1971 motion to set aside the default was denied. In 1981 plaintiffs sued for a one-half quieted interest, or in the alternative, an accounting and one-half the proceeds of the 1972 sale. The complaint was based on the claim that the 1971 judgment was void because it granted relief beyond that prayed for in the pleadings and the court lacked jurisdiction to grant the relief it granted. Res judicata barred litigation of the voidness issue because plaintiffs failed to raise it in their 1971 motion to set aside the default. Once there has been full opportunity to present an issue for judicial decision in a given proceeding, including jurisdiction issues, the court's determination in that proceeding must be accorded full finality as to all issues raised or which fairly could have been raised and their later consideration is precluded by res judicata. Wellman v. Wellman, 198 M 42, 643 P2d 573, 39 St. Rep. 752 (1982), followed in Tungsten Holdings, Inc. v. Kimberlin, 2000 MT 24, 298 M 176, 994 P2d 1114, 57 St. Rep. 125 (2000).

Collateral References

Judgment *key* 510, 511, 589.

49 C.J.S. Judgments §§421, 434.

Part 2
Effect of Specific Kinds of Judicial Records

26-3-201. Effect of judgment or final order — when conclusive.

Case Notes

No Res Judicata Absent Final Judgment in Related Case: Brown was one of 64 prisoners who filed a complaint in 2002 alleging that the Department of Corrections improperly transferred prisoners to prisons where treatment, training, and rehabilitation opportunities were not available. While that case was pending, Brown filed suit in 2004 against the Department, alleging that his liberty interest in parole was violated because the Department transferred him to locations where he was unable to obtain the sex offender treatment required for parole

eligibility. The District Court concluded that the 2004 case was barred by res judicata because Brown was a plaintiff in the 2002 case, which presented identical claims. Brown appealed, and the Supreme Court reversed and remanded. Under Audit Serv., Inc. v. Anderson, 211 M 323, 684 P2d 491 (1984), the primary requirement necessary to sustain a plea of res judicata is that there be a judgment on the merits. Because the 2002 case was still pending, dismissal of the 2004 case on res judicata grounds was error. Brown v. Dept. of Corrections, 2005 MT 58, 326 M 231, 108 P3d 498 (2005).

Relitigating Issues Raised in Bankruptcy Proceeding Barred by Res Judicata: In defendants' bankruptcy proceeding, they contended that notes issued by plaintiff contained a usurious interest rate and were prompted by fraud. The Bankruptcy Court determined that the notes were valid, enforceable, and unaffected by usury or fraud. During plaintiff's subsequent collection proceeding in District Court, defendants sought to amend their answer to allege usury, but the District Court held that the Bankruptcy Court's judgment barred defendants' claim under res judicata and granted summary judgment for plaintiff. On appeal, the Supreme Court affirmed. The Bankruptcy Court's judgment was accorded finality as to the issues raised or that could fairly have been raised in the adversary proceeding. Defendants were not precluded from litigating any of their defenses to the notes in the bankruptcy proceeding and thus were barred from relitigating the usury issue in District Court. Absent a genuine issue of material fact relating to defendants' default on the notes, summary judgment for plaintiff was proper. Olympic Coast Inv., Inc. v. Wright, 2005 MT 4, 325 M 307, 105 P3d 743 (2005), following Fox v. 7L Bar Ranch Co., 198 M 201, 645 P2d 929 (1982), and distinguishing Traders St. Bank of Poplar v. Mann, 258 M 226, 852 P2d 604 (1993).

Easement Issue Resolved Against Predecessor in Interest Barred by Res Judicata and Collateral Estoppel: Plaintiffs claimed an easement by necessity over Skyline Drive. Defendants asserted that the action was barred by res judicata and collateral estoppel based on a prior District Court ruling that another property owner did not have an easement over Skyline Drive. The District Court agreed and granted summary judgment to defendants, and plaintiffs appealed. The Supreme Court affirmed. As set out in Hall v. Heckerman, 2000 MT 300, 302 M 345, 15 P3d 869 (2000), res judicata applies if: (1) the parties or their privies are the same; (2) the subject matter of the present and past action is the same; (3) the issues are the same and relate to the same subject matter; and (4) the capacities of the persons are the same in reference to the subject matter and to the issues between them. A form of res judicata, collateral estoppel, applies if: (1) the identical issue raised was previously decided in a prior adjudication; (2) a final judgment of the merits was issued in the prior litigation; and (3) the party against whom the plea is now asserted was a party or in privity with a party in the prior adjudication (see Finstad v. W.R. Grace & Co., 2000 MT 228, 301 M 240, 8 P3d 778 (2000)). In this case, plaintiffs attempted to raise an easement issue that was previously adjudicated and conclusively resolved against their predecessor in interest, so plaintiffs' claim was barred by res judicata and collateral estoppel. Kullick v. Skyline Homeowners Ass'n, Inc., 2003 MT 137, 316 M 146, 69 P3d 225 (2003).

Claim for Punitive Damages Not Precluded by Estoppel — Issues of Previous Litigation Not Identical: Finstad was injured by asbestos in defendant's mine. A jury trial resulted in a verdict for Finstad and an award of $400,000 in compensatory damages, as well as a determination that punitive damages were warranted. The District Court conducted a minitrial on the issue of punitive damages, and the jury awarded $83,000. Defendant contested the award of punitive damages and moved for dismissal on grounds that Finstad's claim was barred by collateral estoppel by virtual representation because the issue had already been litigated in two previous Lincoln County cases against defendant. Defendant contended that the issues were identical, that final judgment had been rendered, and that Finstad was a party to or in privity with a party in the previous cases and thus was virtually represented by those parties in the previous cases. The District Court denied the motion to dismiss, finding that the issues were not identical, and also ruled for Finstad on the question of estoppel by virtual representation. On appeal, the Supreme Court reviewed the record, noting that although some of the evidence and witnesses regarding the punitive damages claim were the same as in the previous cases, several significant factual distinctions and legal claims existed. Because the first element of collateral estoppel regarding identical parties was not met, the Supreme Court affirmed without reaching the question of estoppel by virtual representation. Finstad v. W.R. Grace & Co., 2000 MT 228, 301 M 240, 8 P3d 778, 57 St. Rep. 934 (2000), following Holtman v. 4-G's Plumbing & Heating, Inc., 264 M 432, 872 P2d 318 (1994).

Findings and Conclusions of Federal Bankruptcy Court Binding Upon State District Court — Forum Selection Clause in Bankruptcy Settlement Agreement Binding: After a federal Bankruptcy Court in Missouri issued a judgment against Lurie, Lurie and the liquidating

trustee, Blackwell, held settlement negotiations resulting in three settlement agreements. The agreements were signed by Blackwell but not by Lurie. The Bankruptcy Court gave Lurie an extended period of time in which to close the agreements. Later, after the Bankruptcy Court issued findings and conclusions and an order finding that Lurie could not, as a matter of law, comply with the agreements and that certain release language in the agreements was therefore unenforceable, Lurie filed "releases" in a Montana District Court and moved the District Court to order the release of the judgment of the Bankruptcy Court, which had been filed against Lurie as a foreign judgment. The Supreme Court held that the District Court had properly concluded that the findings and conclusions and the order of the Missouri Bankruptcy Court were binding upon the District Court under this section. The Supreme Court further held that whether the three settlement agreements, unsigned but "released" by Lurie, satisfied the judgment against Lurie under 25-9-311 was not a matter for the District Court to decide because the settlement agreements contained forum selection clauses designating the federal Bankruptcy Court in Missouri as the only court in which issues relating to the enforcement of the agreements could be litigated. Blackwell v. Lurie, 284 M 351, 943 P2d 1318, 54 St. Rep. 916 (1997). See also Lurie v. Blackwell, 285 M 404, 948 P2d 1161, 54 St. Rep. 1215 (1997), and Lurie v. Sheriff, 2000 MT 103, 299 M 283, 999 P2d 342, 57 St. Rep. 414 (2000).

Preclusive Effect of Res Judicata as to Claims That Could Have Been Raised Previously: Res judicata precludes claims that could have been raised in a prior lawsuit as well as those actually adjudicated. However, the preclusive effect applies only to claims raised in subsequent lawsuits between the parties in the original action or their privies. Therefore, when two parties shared no legal interest, adjudication of a claim against one party did not bar a claim against the other on grounds of res judicata. Holtman v. 4-G's Plumbing & Heating, Inc., 264 M 432, 872 P2d 318, 51 St. Rep. 340 (1994).

Tort and Contract Defenses in Bank's Foreclosure Action Following Borrowers' Tort Action Against Bank: In Mann I, the borrowers sued Traders State Bank for tort damages. In this case, Mann II, the bank sought foreclosure against the borrowers, who asserted both tort and contract defenses. The subject matter of the two cases is generally the same because both suits revolve around the borrower-lender banking relationship. The issues in the Mann I tort case are distinct from those inherent in the Mann II contract case. The fundamental question in the first case was whether the bank violated a standard of care, and the fundamental question in the second case is whether the mortgage, security interests, and underlying notes are valid and enforceable contracts. Therefore, res judicata does not bar the contract defenses. It was not necessary to raise the issue of the validity of the notes in Mann I; thus, res judicata did not bar the contract defenses in Mann II on the grounds that the notes' validity should have been raised in Mann I. The entire tort action occurred during the borrowers' bankruptcy proceeding, during which the debtor could not challenge the validity of the notes. By the time of Mann II, however, the bankruptcy action had been dismissed; thus, issues as to the validity of the notes had not been decided, and the borrowers could assert the contract defenses. However, the tort defenses were barred because they could have been raised in Mann I. Traders St. Bank of Poplar v. Mann, 258 M 226, 852 P2d 604, 50 St. Rep. 509 (1993), overruled, with regard to voluntary versus involuntary payment or performance as affecting waiver of right to appeal without having bearing on mootness, in Turner v. Mtn. Eng'r & Constr., Inc., 276 M 55, 915 P2d 799, 53 St. Rep. 23 (1996).

Failure to Show Unfair Denial of Opportunity to Have Case Heard — Res Judicata: Richland County sought to enforce a 6 ¼% oil, gas, and mineral royalty interest reserved prior to a 1937 quiet title decree by asserting that there was extrinsic fraud upon the court because plaintiff's attorney in the quiet title action, who also happened to be the Richland County Attorney, failed to appear on behalf of the county, resulting in a default judgment against the county and denying the county the opportunity to litigate the reservation. However, the county failed to produce facts to substantiate its theory that the county's interest was subverted or that the county was unfairly denied an opportunity to have its case heard. Absent such a showing, relitigation of the reservation claim was barred by res judicata. Filler v. Richland County, 247 M 285, 806 P2d 537, 48 St. Rep. 200 (1991).

Ineffective Assistance Claim on Direct Appeal — Res Judicata: An evidentiary hearing held on the issue of ineffective assistance of counsel resulted in a District Court decision that the Supreme Court reviewed and affirmed. On direct appeal, the claim was held to have been fully litigated and reconsideration was barred because additional review of the same issue between the same parties would negate the intent of the doctrines of res judicata and law of the case. St. v. Black, 245 M 39, 798 P2d 530, 47 St. Rep. 1677 (1990), distinguished in St. v. Lindeman, 285 M 292, 948 P2d 221, 54 St. Rep. 1156 (1997).

Personal Representative's Removal for Cause Not Stayed by Bankruptcy: The personal representative argued that his removal for cause in a probate proceeding should have been stayed by his filing for bankruptcy. The Supreme Court ruled that the removal for cause was not stayed because it was an action in the probate of the decedent's estate and not an action against the personal representative or his property even though the removal order might preserve and determine the petitioner's cause of action against the personal representative following the bankruptcy proceedings. Brown v. Robbins, 243 M 276, 794 P2d 677, 47 St. Rep. 1218 (1990).

Defendants Estopped From Questioning Permanent Partial Disability Rate in Second Trial on Different Issues: The claimant argued that the Workers' Compensation Court applied the wrong standard in the first trial with respect to what elements the claimant had to establish in a claim for permanent partial disability. The first case was remanded with specific instructions to the lower court to apply the proper standard in determining permanent partial disability. On remand, the defendants attempted to challenge the amount of payments they had stipulated prior to the first trial. The Supreme Court ruled that the defendants had ample opportunity to challenge the stipulated payment rate in the first trial and that they were therefore estopped from questioning the rate in the second trial by the doctrine of res judicata. Beck v. Flathead County, 240 M 128, 783 P2d 383, 46 St. Rep. 1996 (1989).

Claim of Federal Constitution Violation in First Action and State Constitution Violation in Second: For res judicata purposes, the issues were not different when the claim in the first action was that a statute violated the federal constitution and the claim in the second action was that the statute violated the state constitution. Once a party has had full opportunity to present a claim or issue, the judgment is final as to all claims or issues that have or could have been raised. Burgess v. St., 237 M 364, 772 P2d 1272, 46 St. Rep. 870 (1989), followed in Bozeman v. AIU Ins. Co., 272 M 349, 900 P2d 296, 52 St. Rep. 823 (1995).

Parties the Same When Plaintiff and Defendant in First Action Switch Places in Second: For res judicata purposes, the parties were the same when the plaintiff in the first action was the defendant in the second and the defendant in the first was the plaintiff in the second. In applying the res judicata rule, parties means all persons who have a direct interest in the subject matter of the action and a right to control the proceedings, defend, examine witnesses, and appeal. Burgess v. St., 237 M 364, 772 P2d 1272, 46 St. Rep. 870 (1989).

Judgment Final — Law of the Case — Issues Outside Scope of Original Action: Plaintiff moved for relitigation of contractual issues on which judgment was final and also moved for consideration of new contractual issues that had arisen after judgment. All issues previously ruled upon were subject to the law of the case doctrine and could not be relitigated. See Schmidt v. Colonial Terrace Associates, 202 M 46, 656 P2d 807, 39 St. Rep. 2318 (1982); on remand, Schmidt v. Colonial Terrace Associates, 215 M 62, 694 P2d 1340, 42 St. Rep. 182 (1985). Contractual issues arising after the judgment were outside the scope of the original action. Rule 60(b)(5), M.R.Civ.P. (Title 25, ch. 20), did not give the court power to preside over controversies throughout the life of the contract. Schmidt v. Colonial Terrace Associates, 223 M 8, 723 P2d 954, 43 St. Rep. 1489 (1986).

Collateral Estoppel Not Applicable: Citing the test pronounced in Beckman v. Chamberlain, 673 P2d 480 (1983) (apparently not reported in Montana Reports), the Supreme Court held that the doctrine of collateral estoppel was not applicable when it found that certain critical issues had not been previously litigated and the appeal from the original judgment, having been dismissed, had never been decided. St. Dept. of Commerce v. Gallatin Dairies, Inc., 221 M 492, 719 P2d 790, 43 St. Rep. 1001 (1986).

Court Ruling on Use of Prior DUI Conviction — Later Civil License Revocation for Second Offense: A Justice's Court ruled that a prior DUI conviction could not be used in sentencing defendant for a second DUI offense because the prior record did not show that defendant was advised of and waived his rights before he pleaded guilty. A District Court then decided that the prior conviction could be used by the Division of Motor Vehicles in revoking defendant's license. The issues in the two causes were not the same, and therefore the prior ruling was not res judicata. Lancaster v. Dept. of Justice, 218 M 97, 706 P2d 126, 42 St. Rep. 1425 (1985).

Siting Act Decision Not Estoppel for PSC Ratemaking Decision: In 1973, Montana Power Co. (MPC) filed an application for a certificate of environmental compatibility and public need for Colstrip Units 3 and 4 under the Montana Major Facility Siting Act. In granting the certificate, the Board of Natural Resources and Conservation (now Department of Environmental Quality) found that there was a need for the energy which would be produced and that the units would serve the public interest, convenience, and necessity. After Unit 3 was completed, MPC filed an application with the Public Service Commission (PSC) to increase electric rates to reflect Unit 3 in its rate base. At the rate hearing, the PSC took evidence regarding whether Unit 3 was "used

and useful". MPC moved to strike this testimony, contending the PSC was precluded from considering this by the certificate of need issued under the Siting Act. The PSC concluded Unit 3 was not used and useful and could not be included in the rate base. MPC argued that the PSC was collaterally estopped from considering whether Unit 3 was "used and useful". The court held that the need issue determined in the siting process was not identical to the used and useful issue, therefore collateral estoppel was not applicable. MPC also argued that because of the certificate of need, the State was promissorily estopped from excluding Unit 3 from the rate base. MPC contended that issuance of a certificate of need under the Siting Act established a contractual relationship between the State and MPC. The court held that issuance of a certificate by a governmental authority to engage in conduct that would be improper without a certificate does not create a contractual relationship between the State and the licensee. Neither the Siting Act nor the certificate of need contemplate a promise that a facility will be included in a utility's rate base. Promissory estoppel was also inapplicable. Mont. Power Co. v. P.S.C., 214 M 82, 692 P2d 432, 41 St. Rep. 2332 (1984).

Union-Employer Trust Fund for Employees and Union — Suing Employer in Separate Actions: A union sued an electrical contractor in federal court, claiming that the contractor failed to hire persons referred by the union and failed to require persons he hired to join the union and that persons referred who were not hired lost compensation and contributions to a benefit trust fund administered by the union and an electrical contractors' association. The assignee of the trust fund's claim against the contractor sued the contractor in a state District Court for contributions due the trust fund. The federal action was dismissed with prejudice by stipulation of the union and contractor. The state District Court then held that the state action was barred by res judicata. That ruling was erroneous, for the rights and claims sought to be enforced in the two actions were not the same and the claimants in the two actions were not in privity. Their functions and duties were different. Audit Services, Inc. v. Anderson, 211 M 323, 684 P2d 491, 41 St. Rep. 1388 (1984).

Estoppel by Judgment — Test: Plaintiff's suit against the Myllymakis failed because of a complete lack of proof on his part. He sued Chamberlain for the same alleged wrongs to the same property during the same time period. The suit was barred by estoppel by judgment. That Chamberlain was not a party to the Myllymaki suit did not preclude application of the bar, as strict mutuality of parties is no longer a necessity in such situations. The more relevant considerations are whether: (1) the party adversely affected by estoppel has had a full and fair opportunity to litigate the critical issues; (2) the assertion of estoppel by a stranger to the original judgment would create analogous results in the latter case; (3) the party affected by estoppel has sound reasons why he or she should not be bound by the previous judgment; (4) the previous judgment was the result of thorough litigation; and (5) there was an appeal from the original judgment. Beckman v. Chamberlain, 673 P2d 480, 40 St. Rep. 2044 (1983) (apparently not reported in Montana Reports).

Complaint Dismissal as Collateral Attack on Another Judgment: The Public Service Commission (P.S.C.) found that Intermountain could not be depended upon to provide adequate telephone service to the people in its service area and invited other private telephone companies to come into the service area. Following that order, Mid-Rivers began moving into the area. On appeal to District Court, the P.S.C. obtained a judgment affirming the order. Intermountain brought another suit seeking a permanent injunction against Mid-Rivers. Intermountain alleged that it was providing reasonably adequate service to the area. The District Court properly dismissed the complaint because it was a collateral attack upon the judgment on the same issue obtained by the P.S.C. Intermountain Tel. & Power Co. v. Mid-Rivers Tel. Co-op, Inc., 201 M 448, 655 P2d 491, 39 St. Rep. 2226 (1982).

Motion to Set Judgment Aside Followed by Suit Attacking Judgment for First Time on Jurisdictional Ground — Res Judicata Applied: In 1971 a default judgment had been entered against present plaintiffs, granting sole ownership of certain property to present defendant E.G.W., who sold the property to present codefendants in 1972. Plaintiffs' 1971 motion to set aside the default was denied. In 1981 plaintiffs sued for a one-half quieted interest, or in the alternative, an accounting and one-half the proceeds of the 1972 sale. The complaint was based on the claim that the 1971 judgment was void because it granted relief beyond that prayed for in the pleadings and the court lacked jurisdiction to grant the relief it granted. Res judicata barred litigation of the voidness issue because plaintiffs failed to raise it in their 1971 motion to set aside the default. Once there has been full opportunity to present an issue for judicial decision in a given proceeding, including jurisdiction issues, the court's determination in that proceeding must be accorded full finality as to all issues raised or which fairly could have been raised and their later consideration is precluded by res judicata. Wellman v. Wellman, 198 M 42, 643 P2d

573, 39 St. Rep. 752 (1982), followed in Tungsten Holdings, Inc. v. Kimberlin, 2000 MT 24, 298 M 176, 994 P2d 1114, 57 St. Rep. 125 (2000). See also First Bank v. District Court, 226 M 515, 737 P2d 1132, 44 St. Rep. 861 (1987), Orlando v. Prewett, 236 M 478, 771 P2d 111, 46 St. Rep. 520 (1989), and Higham v. Red Lodge, 247 M 400, 807 P2d 195, 48 St. Rep. 273 (1991). Orlando was followed in Hall v. Heckerman, 2000 MT 300, 302 M 345, 15 P3d 869, 57 St. Rep. 1266 (2000).

Civil Rights Action — State Court Ruling — Res Judicata: A state prison inmate was denied relief in a civil rights action brought under 42 U.S.C. §1983, instituted in state court. Because the principle of res judicata is applicable to civil rights actions, the inmate was barred from bringing the same action against the same parties in federal court. Harvey v. Pomroy, 535 F. Supp. 78, 39 St. Rep. 657 (D.C. Mont. 1982).

Quiet Title Action Not Res Judicata Where Deed Executed After Action: A quiet title action as to mineral interests reserved by the county was not res judicata because the quiet title action occurred before the deed in question was executed, delivered, and accepted. McSweyn v. Musselshell County, 193 M 525, 632 P2d 1095, 38 St. Rep. 1260 (1981), distinguishing Smith v. County of Musselshell, 155 M 376, 472 P2d 878 (1970).

Judgment Res Judicata — Precedent for Standing Subsequently Overruled: The res judicata consequences of a final unappealed judgment on the merits are not altered by the fact that the judgment may have rested on a legal principle pertaining to standing that was subsequently overruled in another case. Thus, defendants may not now avoid the effect of a final judgment by complaining that if the suit were to be brought after the time of judgment, plaintiffs would not have standing. Libby Rod & Gun Club v. Moraski, 519 F. Supp. 643, 38 St. Rep. 1213 (D.C. Mont. 1981).

Judgment for Property Settlement Upon Dissolution of Marriage — Jurisdiction to Determine Conscionability of Agreement — Res Judicata: The District Court had no jurisdiction to determine conscionability when its earlier decree of dissolution found the agreement to be not unconscionable and the parties, subject matter of the action, issues, and capacities of the parties were the same. The issue of conscionability was thus res judicata. Hopper v. Hopper, 183 M 543, 601 P2d 29, 36 St. Rep. 1695 (1979).

Enforcement of Foreign Divorce Decree: Plaintiff in an action to enforce alimony provisions of a final, unappealed foreign divorce decree was properly granted summary judgment when no factual issues were raised by defendant but ultimate issues of law that are res judicata. Cicinia v. Cicinia, 173 M 39, 566 P2d 61 (1977).

Decree of Distribution — Not Final Judgment: A decree of distribution does not concern itself with and is not the final order of the court on the payment of legacies, but that is the office of the decree of discharge under section 91-3906, R.C.M. 1947 (since repealed). Hustad v. Reed, 133 M 211, 321 P2d 1083 (1958).

Matters Not Determined: A judgment or final order in an action or proceeding is not evidence, conclusive or otherwise, of matters that were not involved in the proceeding and not determined. Hustad v. Reed, 133 M 211, 321 P2d 1083 (1958).

Sale of Estate Property — Confirmation of Sale as Judgment: A proceeding for the sale of estate property is a continuous one, commencing with the filing of the petition and ending with the order of confirmation of the sale, which is the only judgment or final order in the proceeding finally determining the rights of the parties and adjudicating that the property shall be sold to a certain person for a certain amount. Until then, the heirs' or devisees' title is not divested. Hence, up until the time of valid sale, the District Court has the right to set aside the order of sale if it finds that action for the best interests of the estate and those interested therein. In re Ryan's Estate, 114 M 281, 134 P2d 732 (1943).

Title Acquired Pending Action:

In an action to quiet title secured through a decree of foreclosure in a federal court, defendant's claim that when he acquired his interest he had no knowledge of the action was not meritorious, where a lis pendens had been filed in due form on the day the foreclosure action was commenced, thus imparting constructive notice to him and other defendants claiming under him. Thomson v. Nygaard, 98 M 529, 41 P2d 1 (1935).

Under this section, a person acquiring title to property during the pendency of an action affecting it is concluded by the judgment if he has notice of the pendency of the action. Griffiths v. Thrasher, 95 M 238, 26 P2d 983 (1933); State ex rel. Thelen v. District Court, 93 M 149, 17 P2d 57 (1932).

Title Acquired Before Action: Where defendant in an action to quiet title (one in personam or quasi in rem) was not a party to a prior action to set aside a mortgage on the same property on the ground of fraud and acquired his interest therein long before the defendant in the former parted

with title or interest in the land, judgment in the former suit was not res judicata or binding on defendant in the second suit. Teisinger v. Hardy, 86 M 180, 282 P 1050 (1929).

Decedents' Estates — Judgments Against:

A judgment against an executor or administrator upon a claim against the estate establishes the claim to be paid in due course of administration. In re Smith's Estate, 60 M 276, 199 P 696 (1921).

A judgment against an executor or administrator of an estate is in effect a judgment against the estate, and all persons interested in the estate, whether they be heirs, legatees, or creditors, as privies are foreclosed by it on the merits of the claim. In re Smith's Estate, 60 M 276, 199 P 696 (1921).

Adoption Decree: The rule that a judgment valid on its face is not subject to collateral attack based upon considerations dehors (not within) the record is especially applicable to a decree of adoption. In re Pepin's Estate, 53 M 240, 163 P 104 (1917).

Erroneous Decision: Where a judgment is rendered on the merits and not thereafter reversed, modified, or set aside, it is res judicata as to the cause of action, without regard to whether it was right or wrong. Peterson v. Butte, 52 M 13, 155 P 265 (1916).

Prior Action — Barred by Statute of Limitations: A judgment which recited that, as shown by the evidence, it was barred by 27-2-204, being upon the merits, was conclusive on that point and, in the absence of a timely appeal, became final and constituted a bar to another action on the same cause. Peterson v. Butte, 52 M 13, 155 P 265 (1916).

Setting Aside Judgment: When a final judgment has once been rendered, it cannot be set aside by the court which has rendered it, except upon motion for a new trial or some other method authorized by statute, and unless void upon its face, it is conclusive as to the matter adjudged upon the parties and their successors. State ex rel. Working v. District Court, 50 M 435, 147 P 614 (1915).

One Party Not Bound: One not a party to a judgment is not bound thereby. Conrow v. Huffine, 48 M 437, 138 P 1094 (1914).

Injunction Proceedings: A judgment in a prior action, which adjudicated the ultimate rights of the parties in the subject in controversy, meets the requirements of this section and was erroneously rejected on the hearing of an order to show cause why an injunction should not issue to restrain defendant from operating a certain mine pending a suit for an interest therein. Wetzstein v. Boston & Mont. Consol. Copper & Silver Min. Co., 26 M 193, 66 P 943 (1901).

Law Review Articles

Time of Attachment of Jeopardy, Rotering, 38 Mont. L. Rev. 426 (1977).

State v. Cunningham and Montana's Rule on Double Jeopardy, Rotering, 37 Mont. L. Rev. 238 (1976).

Collateral References

Executors and Administrators *key* 315(6); Judgment *key* 678(1), 707, 749, 822(1).

34 C.J.S. Executors and Administrators §§574 through 576; 50 C.J.S. Judgments §§689, 787, 816, 820.

47 Am. Jur. 2d Judgments §§37, 133, 199, 221 through 223.

Recognition and enforcement of out-of-state custody decree under §13 of the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental Kidnapping Prevention Act (PKPA), 28 USCS §1738A (a). 40 ALR 5th 227.

Doctrine of res judicata or collateral estoppel as barring relitigation in state criminal proceedings of issues previously decided in administrative proceedings. 30 ALR 4th 856.

Judgment favorable to convicted criminal defendant in subsequent civil action arising out of same offense as ground for reversal of conviction. 96 ALR 3d 1174.

Judgment in death action as precluding subsequent personal injury action by potential beneficiary of death action or vice versa. 94 ALR 3d 676.

Consent judgment: modern views of state courts as to whether consent judgment is entitled to res judicata or collateral estoppel effect. 91 ALR 3d 1170.

Acquittal in criminal action as bar to prosecution of accused for perjury committed at trial. 89 ALR 3d 1098.

Effect, in subsequent proceedings, of paternity findings or implications in divorce or annulment decree or in support or custody order made incident thereto. 78 ALR 3d 846.

Probate of copy of lost will as precluding later contest of will under doctrine of res judicata. 55 ALR 3d 755.

Judgment in action against codefendants for injury or death of person or for damage to property, as res judicata in subsequent action between codefendants as to their liability inter se. 24 ALR 3d 318.

Judgment granting or denying Writ of Mandamus or prohibition as res judicata. 21 ALR 3d 206.

Modern status of doctrine of res judicata in criminal cases. 9 ALR 3d 203.

Res judicata as affected by limitation of jurisdiction of court which rendered judgment. 77 ALR 2d 1425.

Action for personal injury prosecuted to judgment as barring later action for property damage simultaneously arising and vice versa. 62 ALR 2d 988.

Applicability of res judicata to decrees or judgments in adoption proceedings. 52 ALR 2d 406.

Res judicata effect of judgment denying relief for lack of jurisdiction or venue. 49 ALR 2d 1036.

Decree granting or refusing injunction as res judicata in action for damages in relation to matter concerning which injunction was asked in first suit. 26 ALR 2d 446.

Judgment denying validity of will because of undue influence, lack of mental capacity, or the like, as res judicata as to validity of another will, deed, or other instrument. 25 ALR 2d 657.

Status of judgment or order as res judicata as affected by subsequent dismissal, discontinuance or nonsuit. 11 ALR 2d 1420.

Judgment in suit for cancellation of restrictive covenant on ground of change in neighborhood as res judicata in suit for injunction against enforcement of covenant on that ground, and vice versa. 10 ALR 2d 357.

Judgment as res judicata pending appeal or motion for a new trial, during the time allowed therefor. 9 ALR 2d 984.

Conclusiveness of allowance of account of trustee or personal representative as respects self-dealing in assets of estate. 1 ALR 2d 1060.

26-3-202. Effect of other judicial orders — when disputable presumption created.

Collateral References

Judgment *key* 678(1), 822(1).

50 C.J.S. Judgments §§787, 816, 889, 891.

26-3-203. Effect of judicial record of another state.

Case Notes

Full Faith and Credit Afforded Out-of-State Renewable Child Support Judgment — Res Judicata Applicable: Article IV, sec. 1, U.S. Const., provides that full faith and credit be given in each state to the public acts, records, and judicial proceedings of every other state. As restated in Baker v. Gen. Motors Corp., 522 US 222, 139 L Ed 2d 580, 118 S Ct 657 (1998), a final judgment in one state, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land. When issues of jurisdiction have been determined by one court, the doctrine of res judicata precludes a second court from considering jurisdiction as long as the first court fully and fairly considered the issue, and that judgment, as to jurisdiction, is entitled to full faith and credit in the second court. In the present case, a Utah renewable child support judgment, in which the Utah court established jurisdiction of the parties, was entitled to full faith and credit in Montana, despite contentions by the husband that he no longer had minimum contacts with Utah after moving to Montana. The jurisdiction arguments raised before the Montana Supreme Court were identical to the arguments that were previously raised, fairly considered, and finally decided in Utah, precluding relitigation by the Montana court under res judicata. In re Child Support of Mason, 1998 MT 192, 290 M 253, 964 P2d 743, 55 St. Rep. 803 (1998).

Defendant's Sufficient Contact With Alaska to Allow Binding In Personam Judgment Enforceable: Defendant's continuous and extensive presence in Alaska, and the fact that his acts and omissions in Alaska gave rise to the claims against him, constituted sufficient contact with Alaska to make the binding judgment in personam reasonable and just and in conformance with notions of fair play and substantial justice. Lewis v. Lewis, 239 M 505, 784 P2d 897, 46 St. Rep. 1868 (1989), citing Int'l Shoe Co. v. Wash., 326 US 310, 90 L Ed 95, 66 S Ct 154 (1945).

Nonapplicability of North Dakota Dram Shop Law to Montana Bar — Liability Under Montana Law Not Litigated in North Dakota: In a wrongful death action, the personal representative filed suit in North Dakota and Montana. The North Dakota Supreme Court dismissed the action with prejudice, narrowly holding that a Montana bar could not be liable under the North Dakota Dram Shop Act; however, the issue of liability under Montana law was

never litigated. The Montana Supreme Court held that, under the Full Faith and Credit Clause, Art. IV, sec. 1, U.S. Const., and under this section, relitigation of the issue of extraterritorial effect of the North Dakota Dram Shop Act was barred by res judicata. However, factual questions precluded summary judgment in Montana, and as the liability issue was not litigated, Montana courts were free to examine the issue. Thoring v. LaCounte, 225 M 77, 733 P2d 340, 44 St. Rep. 264 (1987). See also Thoring v. Bottensek, 350 NW 2d 586 (N.D. 1984), Nehring v. LaCounte, 219 M 462, 712 P2d 1329, 43 St. Rep. 93 (1986), and St. v. Ailport, 1998 MT 315, 292 M 172, 970 P2d 1044, 55 St. Rep. 1292 (1998).

Applicability of Collateral Estoppel to Judgment Made in Another State: Aetna Life Insurance Company (Aetna) contended that the Montana District Court erred in failing to give collateral estoppel effect to a South Dakota District Court judgment. Aetna asserted that the South Dakota decision, holding that Aetna was not guilty of fraud, was entitled to full faith and credit in Montana and conclusively defeated the fraud allegations. The Montana District Court apparently declined full faith and credit because that decision was on appeal to the South Dakota Supreme Court at the time of the Montana trial. The Montana Supreme Court found that this approach ignored the fact that in South Dakota a judgment on appeal can have collateral estoppel or res judicata effect; therefore, the judgment was entitled to the same effect in Montana, since the requirements for applicability of collateral estoppel outlined in Aetna Life & Cas. Ins. Co. v. Johnson, 207 M 409, 673 P2d 1277, 41 St. Rep. 40 (1984), were met. Aetna Life Ins. Co. v. McElvain, 221 M 138, 717 P2d 1081, 43 St. Rep. 697 (1986).

Error to Refuse Intervention in Proceeding to Enforce Foreign Divorce Decree: An Oregon divorce decree awarded Montana property to the wife. Before the wife filed an action under 26-3-203 to enforce the foreign decree, husband conveyed the Montana property to Christiana, who later proposed to intervene in the instant action. The Supreme Court held that the District Court erroneously refused intervention. Insofar as the Oregon court attempted to directly transfer husband's Montana property to wife, its act was not effective in this state. The District Court erred in treating the foreign decree as a direct and self-executing transfer of Montana property. However, in an enforcement action in this state, the Oregon decree is an enforceable determination of the rights and equities of husband and wife with respect to the Montana real property in question. Gammon v. Christiana, Inc., 210 M 463, 684 P2d 1081, 41 St. Rep. 1161 (1984). For application of principle to effect of Montana divorce decree on out-of-state property, see In re Marriage of Bahm, 225 M 331, 732 P2d 846, 44 St. Rep. 279 (1987).

Dismissal of Other State's Judgment Not a Judgment on the Merits — Montana Action Not Barred: Plaintiff brought an action to enforce a Colorado judgment. Neither the pleadings nor the stipulated dismissal of the enforcement action with prejudice raised any issue regarding the merits of the underlying obligation; nor was it the function of the court in which the enforcement action was brought to reconsider the merits of the Colorado action. Therefore, the dismissal was not a judgment on the merits of the underlying obligation and did not bar an original Montana action on that underlying obligation. Hughes v. Salo, 203 M 52, 659 P2d 270, 40 St. Rep. 289 (1983).

Effect of Void Judgment of Another State on Action in Montana: Colorado judgment against Montana defendant was void from its inception because the court did not have personal jurisdiction over defendant. It thus did not bar subsequent Montana action by same plaintiff against same defendant on same cause of action, filed after plaintiff's Montana proceeding to enforce the Colorado judgment was dismissed with prejudice by stipulation of the parties with no statement as to the reason for the stipulation or dismissal. The fact that the nullity of the Colorado judgment was not explicitly recognized by the parties until plaintiff appealed the judgment in the Montana action did not make the Colorado judgment valid as of the time the Montana action was filed for purposes of barring the Montana action under the doctrine of merger and the rule against splitting causes of action. Hughes v. Salo, 203 M 52, 659 P2d 270, 40 St. Rep. 289 (1983).

Valid Final Judgment Necessary to Doctrines of Merger and Splitting Causes of Action: Both the rule against splitting causes of action and the doctrine of merger are inextricably related to the principles of res judicata, and the application of either to bar a subsequent action depends upon the existence of a valid and final prior judgment. Hughes v. Salo, 203 M 52, 659 P2d 270, 40 St. Rep. 289 (1983), followed in Baertsch v. Lewis & Clark County, 223 M 206, 727 P2d 504, 43 St. Rep. 1660 (1986).

Void Foreign Judgment — Res Judicata Not Applicable: Colorado judgment against Montana defendant was void from its inception because the court did not have in personam jurisdiction over defendant. Therefore, res judicata did not apply to Montana action by same

plaintiff against same defendant on same cause of action. Hughes v. Salo, 203 M 52, 659 P2d 270, 40 St. Rep. 289 (1983).

Enforcement of Tribal Court Judgment — Special Proceeding Required: Plaintiffs, tribal members, obtained a loan from the Blackfeet Tribe. Plaintiffs defaulted, and the tribe obtained a judgment in tribal court. The tribe filed notice of the judgment with the Clerk and Recorder as a lien in the District Court. Plaintiffs agreed to sell their ranch to Robertson and to provide title insurance. A portion of the purchase price was to be kept in escrow to cover the amount owing the tribe. A year after the conveyance, plaintiffs filed a complaint against Robertson and the tribe requesting that the tribe set forth the nature of its claims to the ranch and the escrow funds and that the court adjudicate the rights of all parties. Defendants both counterclaimed. The trial court ruled in favor of the defendants, holding that the tribal court judgment was entitled to full faith and credit as a matter of comity. On appeal, the Supreme Court noted that there is no Montana law allowing a tribe or foreign nation to place a lien against property by filing a notice of judgment. An action or special proceeding must be instituted in the District Court of the county where the judgment is sought to be enforced. The District Court acted properly in ordering the tribe's notice of judgment stricken from the court's records and in declaring it was not a lien on plaintiffs' property. Here, the action filed by plaintiffs laid the foundation for the court's inquiry into the validity of the tribal court's judgment. The only question was of the amount of the judgment, and the case was remanded for that determination. Wippert v. Blackfeet Tribe, 201 M 299, 654 P2d 512, 39 St. Rep. 2117 (1982).

Foreign Jurisdiction — Lack of Personal Jurisdiction: Figgins entered into a collective bargaining agreement with the Teamsters Union. The agreement contained provisions concerning payment to the Teamsters Pension Trust Fund located in Seattle. The agreement did not specify where the contributions were to be made, but Figgins agreed to execute all necessary forms. One form designated a bank in Colorado as the depositary bank. Figgins sent payments to the Colorado bank. Later, Figgins was audited and an action brought in Colorado to collect delinquent contributions. Figgins did not defend the Colorado suit. Plaintiff brought suit in Montana to enforce the Colorado default judgment. The Montana Supreme Court said that Figgins did not have sufficient contacts or ties to the state of Colorado to make it reasonable and just, according to our traditional conception of fair play and substantial justice, to enforce the Colorado judgment. May v. Figgins, 186 M 383, 607 P2d 1132, 37 St. Rep. 493 (1980), followed (same fact situation) in Hughes v. Salo, 203 M 52, 659 P2d 270, 40 St. Rep. 289 (1983).

Certified Copy of Judicial Record: The effect of a judicial record of a sister state, when proved, is the same in Montana as in the state where it was made, and a certified copy thereof is admissible in evidence in the courts of this state. Quickenden v. Hulbert, 83 M 501, 272 P 994 (1928).

Administrator From Another State: An administrator appointed in another state cannot maintain an action in the courts of this state in his representative capacity. Lefebure v. Baker, 69 M 193, 220 P 1111 (1923), distinguished in In re Livingston's Estate, 91 M 584, 9 P2d 159 (1932).

Attorney General's Opinions

Tribal Court Judgment Not to Be Filed as Foreign Judgment — Exception: A judgment, decree, or order of an Indian tribal court may not be filed as a foreign judgment under the Uniform Enforcement of Foreign Judgments Act unless the judgment, decree, or order concerns an Indian child custody proceeding. 44 A.G. Op. 15 (1991).

Law Review Articles

Jurisdictional Problems of Foreign Divorce Decrees Under the Full Faith and Credit Clause, Muckelston, 31 Mont. L. Rev. 107 (1969).

Collateral References

Judgment *key* 822(1).

50 C.J.S. Judgments §§889, 891.

Construction and effect of provision of Uniform Reciprocal Enforcement of Support Act that no support order shall supersede or nullify any other order. 31 ALR 4th 347.

Attorney's conviction in foreign or federal jurisdiction as ground for disciplinary action. 98 ALR 3d 1170.

Res judicata or collateral estoppel effect, in state where real property is located, or foreign decree dealing with such property. 32 ALR 3d 1330.

Doctrine of res judicata as applied to default judgment rendered by court of another state. 77 ALR 2d 1425.

Identification of parties in action on foreign judgment. 60 ALR 2d 1024.

Fraud as defense to action on judgment of sister state. 55 ALR 2d 673.

26-3-204. Effect of judicial record of foreign court of admiralty.

Collateral References

Judgment *key* 382.
50 C.J.S. Judgments §904.

26-3-205. Effect of judgments of other foreign tribunals.

Case Notes

Full Faith and Credit Afforded Out-of-State Renewable Child Support Judgment — Res Judicata Applicable: Article IV, sec. 1, U.S. Const., provides that full faith and credit be given in each state to the public acts, records, and judicial proceedings of every other state. As restated in Baker v. Gen. Motors Corp., 522 US 222, 139 L Ed 2d 580, 118 S Ct 657 (1998), a final judgment in one state, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land. When issues of jurisdiction have been determined by one court, the doctrine of res judicata precludes a second court from considering jurisdiction as long as the first court fully and fairly considered the issue, and that judgment, as to jurisdiction, is entitled to full faith and credit in the second court. In the present case, a Utah renewable child support judgment, in which the Utah court established jurisdiction of the parties, was entitled to full faith and credit in Montana, despite contentions by the husband that he no longer had minimum contacts with Utah after moving to Montana. The jurisdiction arguments raised before the Montana Supreme Court were identical to the arguments that were previously raised, fairly considered, and finally decided in Utah, precluding relitigation by the Montana court under res judicata. In re Child Support of Mason, 1998 MT 192, 290 M 253, 964 P2d 743, 55 St. Rep. 803 (1998).

Enforcement of Tribal Court Judgment — Special Proceeding Required: Plaintiffs, tribal members, obtained a loan from the Blackfeet Tribe. Plaintiffs defaulted, and the tribe obtained a judgment in tribal court. The tribe filed notice of the judgment with the Clerk and Recorder as a lien in the District Court. Plaintiffs agreed to sell their ranch to Robertson and to provide title insurance. A portion of the purchase price was to be kept in escrow to cover the amount owing the tribe. A year after the conveyance, plaintiffs filed a complaint against Robertson and the tribe requesting that the tribe set forth the nature of its claims to the ranch and the escrow funds and that the court adjudicate the rights of all parties. Defendants both counterclaimed. The trial court ruled in favor of the defendants, holding that the tribal court judgment was entitled to full faith and credit as a matter of comity. On appeal, the Supreme Court noted that there is no Montana law allowing a tribe or foreign nation to place a lien against property by filing a notice of judgment. An action or special proceeding must be instituted in the District Court of the county where the judgment is sought to be enforced. The District Court acted properly in ordering the tribe's notice of judgment stricken from the court's records and in declaring it was not a lien on plaintiffs' property. Here, the action filed by plaintiffs laid the foundation for the court's inquiry into the validity of the tribal court's judgment. The only question was of the amount of the judgment, and the case was remanded for that determination. Wippert v. Blackfeet Tribe, 201 M 299, 654 P2d 512, 39 St. Rep. 2117 (1982).

Comity — Definition and Standards: Comity is the basis for the voluntary enforcement or recognition by one state of the judicial proceedings of a sister state. It is not a binding obligation but rather a courtesy voluntarily extended to another state for reasons of practice, convenience, and expediency. However, deference is not offered when it would contravene the public or judicial policy of the state. Kane v. Kane, 198 M 335, 646 P2d 505, 39 St. Rep. 1036 (1982).

Comity — Divorce Proceeding Arising in Another State — Dispute Over Montana Land: Wyoming residents were divorced under a Wyoming divorce decree that provided that disagreements between the parties arising out of any transaction relating to the decree were to be submitted to the Wyoming District Court for resolution. A disagreement arose in connection with the parties' interests in property located in Montana. Husband filed suit in Montana, and wife sought a ruling that the Montana court lacked jurisdiction and that the Wyoming court was the proper forum. The Montana District Court properly decided that it should decline to exercise jurisdiction on the basis of the doctrine of comity, though it did have jurisdiction. Application of the comity doctrine did not contravene the public policy of Montana or the open court policy mandated by the Montana Constitution. Kane v. Kane, 198 M 335, 646 P2d 505, 39 St. Rep. 1036 (1982).

Federal Full Faith and Credit — Montana Jurisdiction Over Transitory Action Arising in Another State: The Full Faith and Credit Clause of the United States Constitution does not prohibit a state from exercising jurisdiction in a transitory cause of action, even though a sister

state has provided that action on the particular claim may not be brought outside its territory. Kane v. Kane, 198 M 335, 646 P2d 505, 39 St. Rep. 1036 (1982).

Collateral References

Judgment *key* 831.

49 C.J.S. Judgments §448; 50 C.J.S. Judgments §906.

46 Am. Jur. 2d Judgments §§582, 600.

Validity, construction, and application of Uniform Enforcement of Foreign Judgments Act. 31 ALR 4th 706.

Judgment of court of foreign country as entitled to enforcement or extraterritorial effect in state court. 13 ALR 4th 1109.

CHAPTER 10
MONTANA RULES OF EVIDENCE

Chapter Compiler's Comments

Annotator's Preface to Rules of Evidence and Commission Comments: The Montana Rules of Evidence were formulated by the Montana Supreme Court Commission on Evidence, submitted to the Supreme Court on November 3, 1976, and adopted by the Supreme Court on December 29, 1976, effective July 1, 1977, pursuant to Administrative Supreme Court Order 12729, under authority granted the Supreme Court by Article VII, section 2(3), Montana Constitution.

The commission comments on the Montana Rules of Evidence and Table "C" (found in these compiler's comments), Table "D" (found at part compiler's comment, Title 26, ch. 1, part 6), and Table "E" (found at compiler's comment, Rule 902, Montana Rules of Evidence) were prepared by the Supreme Court Commission on Evidence. The commission comments and Tables "D" and "E" are presented verbatim; any changes made by the annotator, other than the correction of obvious typographical errors, are set off in brackets. Cites to the Revised Codes of Montana, 1947, (R.C.M. 1947) have been updated, giving in brackets the current section number in the Montana Code Annotated or, if the section is not currently in the MCA, whether the section has been superseded by Supreme Court Order, repealed, or not codified.

Cases Case Noted: Only those cases interpreting the Montana Rules of Evidence have been case noted for inclusion in this chapter. Cases interpreting superseded statutes and common-law cases on evidence have not been included. Because the Montana Rules of Evidence present a break with former Montana law on evidence, the annotator believes that any method of case noting other than that used would be misleading and probably erroneous. That is because some Montana law on evidence is carried forward into the rules and some is specifically superseded. The problem of properly categorizing and making judgments on them is best left to the analysis of case law in the Commission Comments following each rule. Under the annotations of the Revised Codes of Montana, 1947, only those cases interpreting a specific statute were annotated; because much of the former law of evidence was nonstatutory, a great body of evidentiary case law has never been case noted. To do so now would be inexpedient because of the rules and would be time consuming and expensive.

Effect of Publishing Rules: Sec. 2, Ch. 1, L. 1979, provided: "(1) The legislature recognizes the supreme court's authority pursuant to Article VII, section 2, of the Montana Constitution to make rules governing procedure and practice before the courts.

(2) The legislature also recognizes that the practice of printing such rules with the Montana statutes is of benefit to code users and facilitates implementation of Article VII, section 2(3), of the Montana Constitution concerning disapproval by the legislature.

(3) Therefore, the Montana Rules of Civil Procedure, printed as chapter 20, Title 25, MCA; the Montana Rules of Appellate Civil Procedure [now Montana Rules of Appellate Procedure], printed as chapter 21, Title 25, MCA; and the Montana Rules of Evidence, printed as chapter 10, Title 26, MCA, appear only for the purpose of facilitating use of the code. Neither this act nor publication of the rules may be construed as an attempt to readopt or promulgate the rules."

Superseded Statutes: Supreme Court Order 12729 (July 10, 1979) provided:

"1. Pursuant to Article VII, Section 2, of the 1972 Montana Constitution, the following sections of the Revised Codes of Montana, 1947, are declared to have been superseded by the provisions of the Montana Rules of Evidence:

Sections 93-301-3; 93-301-4; 93-301-5; 93-301-6; 93-301-7; 93-301-8; 93-301-12; 39-301-13[sic]; 93-301-14; 93-301-17; 93-401-2; 93-401-3; 93-401-5; 93-401-6; 93-401-9; 93-401-10; 93-401-11; 93-401-12; 93-401-20; 93-401-24; 93-401-25; 93-401-27; 93-501-1 through

93-501-8; 93-701-2; 93-701-3; 93-701-5; 93-701-6; 93 801-1 through 93-801-6; 93-901-1 through 93-901-5; 93-1001-13; 93-1001-14; 93-1001-17; 93-1001-18; 93-1001-19; 93-1001-30; 93-1001-31; 93-1001-33 and 93-1001-34; 93-1001-35; 93-1001-36; 93-1101-8; 93-1101-9; 93-1101-10; 93-1101-11; 93-1101-12; 93-1101-14; 93-1101-15; 93-1101-18; 93-1101-19; 93-1101-21; 93-1201-1; 93-1301-3; 93-1301-5; 93-1401-1; 93-1401-2; 93-1601-1; 93-1601-5; 93-1901-1; 93-1901-2; 93-1901-3; 93-1901-6; 93-1901-7; 93-1901-8; 93-1901-9; 93-1901-10; 93-1901-11; 93-1901-12; 93-1901-13; 93-1901-14; 93-2201-5; and 93-2501-3.

2. The foregoing superseded sections were superseded upon the adoption of the Montana Rules of Evidence by order of this Court dated December 29, 1976, and were thereby rendered obsolete, unnecessary and redundant; the continued presence of said sections as a part of the law of Montana tends to lead to confusion, uncertainty and conflict in the law, all of which are contrary to the spirit and purpose of the Montana Rules of Evidence and the ends of justice."

Wigmore Cites: Cites to *Wigmore on Evidence* in the collateral references to each rule are to the 3rd Edition, 1940, with revised editions of volumes 2 through 8 (Chadbourn and McNaughton editions), including the 1988 pocket supplements by Walter A. Reiser.

Rules as Differing From Federal Rules — Table C: The following table lists the Montana Rules of Evidence by number, giving their source and how they differ from that source. The table was prepared by the Montana Supreme Court Commission on the Rules of Evidence in 1977 as a guide to consideration of the rules.

The table uses the following abbreviations: "FRE" means the Federal Rules of Evidence adopted by Congress in 1975. They are roughly based upon an original version proposed by the U.S. Supreme Court in 1972. "Cal. Ev. Code" means the California Evidence Code of 1965; and "URE" followed by a date means the Uniform Rules of Evidence of that date.

The Revised Codes of Montana, 1947, sections cited in the table have been superseded by the Montana Rules of Evidence (see compiler's comments: *Superseded Statutes*).

TABLE C
MONTANA RULES OF EVIDENCE DIFFERING FROM
FEDERAL RULES OF EVIDENCE

RULE	SOURCE	REMARKS
100	Based on FRE 1103	Title of rules changed
101(a)	Based on FRE 101	Scope of rules changed to reflect Montana law and different scheme used in Rule 101 which eliminates need for Article XI of FRE
101(b)	Based on FRE 1101(c)	Change in phraseology in reference to Article V
101(c)	Based on FRE 1101(d)	Change Federal reference to area where rules are inapplicable to conform to Montana needs
104(a)	Based on FRE 104(a)	Delete reference to 104(b)
104(b)	Original	States connecting-up rule rather than FRE's rule of conditional relevance
106(a)	Based on FRE 106 and R.C.M. 1947, section 93-401-11	Change Rule of Completeness to incorporate FRE and Montana law
106(b)	Original	Addition based on same concept from Nebraska and Nevada Rules of Evidence not limiting rights of party to use evidence under Rule of Completeness
201(a)	Based on FRE 201(a)	Change FRE concept of legislative and adjudicative facts so court can take judicial notice of all facts
201(b)	Based on FRE 202(b)	Change in phraseology for clarity
202(a)-(e)	Original, patterned after FRE 201(a) - (e)	Rule added to allow court to take judicial notice of law
301(a)	Based on Cal. Ev. Code section 600(a)	Change Federal rule on presumptions by adding two subdivisions, including (a) giving a definition
301(b)	Original	Retains Montana law on effect of presumptions

301(c)	URE (1974) 301(b)	Adopted Uniform Rules of Evidence (1974) 301(b) on inconsistent presumptions
302	URE (1974) 302	Changed FRE concerned with presumptions arising under state law to presumptions arising under Federal law
401	Based on FRE and Cal. Ev. Code section 210	Definition of relevant evidence same as FRE, added from Cal. Ev. Code definition concerning credibility of witnesses and hearsay declarants
402	Based on FRE 402	Exceptions clause in FRE referring to Federal law changed for exceptions clause used throughout Rules
404(a)(2)	Based on FRE 404	Added clause to allow the character of victim also where victim cannot testify
404(c)	Original	Added subdivision specifically allowing character evidence where character is in issue
405(b)	Based on FRE 405(b)	Added phrase to be consistent with Montana law and allowing specific instances of conduct to show reasonableness of force based in self-defense
406(a)	Original	Added subdivision to provide definition
406(b)	Based on FRE 406	Reworded because of definition in (a)
406(c)	URE (1974) 406(b)	Added subdivision concerned with methods of proof
409 statutes	Based on FRE 409	Changed to avoid problems and be consistent with Montana
410	Based on FRE 410 as originally enacted	Retained original FRE enacted by Congress but later amended
501	Based on URE 501	Single general rule of privileges changed from FRE, used Uniform Rules (1974) for this and following rules
502(a)-(c)	Based on URE 509	Identity of informer privilege
503	URE 510	Waiver of privilege
504	URE 511	When disclosure not waiver of privilege
505	Based on URE 512	Comment upon or reference to claim of privilege
601(a)	Based on FRE 601	Second sentence of FRE 601 deleted, refers to Federal law
601(b)	Cal. Ev. Code section 701	Allows court to prevent witness from testifying where witness not capable of expressing himself or of telling truth
606(a)	Based on FRE 606(a)	Changes in language for sake of clarity
606(b)	Based on URE 606(b)	Changes in language for sake of clarity, substantive content the same as FRE, addition made to conform to Montana law
607(b)	Original	Added to insure party not bound by testimony of any witness
608(b)	Based on FRE 608(b)	Change in language to conform to Rule 609
609	Original	Conviction of crime not allowed as ground of impeachment
611(b)(2)	Original	Added to insure evidence developed on cross-examination may be used for any purpose
611(d)	Based on R.C.M. 1947, section 93-1901-10	Added to retain existing Montana law in statute
611(e)	Based on R.C.M. 1947, section 93-401-3	Added to retain existing Montana law in statute
612	Based on FRE 612	Clause referring to Federal law deleted

614(b)	Based on New Mexico Rule 614(b)	Clause added to insure court's questions are not construed as a comment upon the evidence
706	None	Federal Rule allowing court to appoint expert deleted
801(d)(1)(A)	Based on FRE 801(d)(1)(A)	Allows prior inconsistent statements without necessity that they be made under oath
801(d)(1)(B)	Based on FRE 801(d)(1)(B)	Change to clarify language
802	Based on FRE 802	Exceptions clause in FRE referring to Federal law changed for exceptions clause used throughout Rules
803(3)	Based on FRE 803(3)	Clause inconsistent with Montana probate law deleted from state of mind exception
803(6)	Based on FRE 803(6)	Clause requiring strict personal knowledge deleted from business record exception
803(8)	Based on URE 803(8)	Uniform Rule adopted, more restrictive as to admissibility of official reports than FRE
803(19)	Based on FRE 803(19)	Clause added to refer to dissolution of marriage
803(22)	Based on FRE 803(22)	Clause deleted to be consistent with Rule 609
803(24)	Based on Sp. Ct. version of FRE	Open-end version of FRE hearsay exception without restrictions placed on it by Congress
804(a)(5)	Based on Sp. Ct. version of FRE	Definition of unavailability where absent from jurisdiction not require witness attempted to be deposed
804(b)(1)	Based on FRE 804(b)(1)	Former testimony exception follows Sp. Ct. version for civil cases and FRE criminal cases
804(b)(2)	Based on FRE 804(b)(2)	Clause restricting dying declarations to homicide prosecutions and civil cases deleted
804(b)(3)	Based on FRE 804(b)(3)	Added clause contained in Supreme Court version allowing statements against social interest
804(b)(4)	Based on FRE 804(b)(4)	Clause added referring to dissolution of marriage
804(b)(5)	Based on Sp. Ct. version of FRE 804(b)(5)	Open-ended hearsay exception adopted without restrictions imposed by Congress
901(b)(10)	Based on FRE 901(b)(10)	Language changed to refer to Montana law rather than Federal law
902(2)	Based on FRE 902(2)	Clause added to conform to Montana statutes
902(4)	Based on URE 902(4)	Uniform Rule language used because of reference to Federal law
902(10)	Based on URE 902(10)	Uniform Rule language used because of reference to Federal law
1001(5)	Based on R.C.M. 1947, section 93-1101-18	Definition added to retain existing Montana law
1003	Based on FRE 1003	Clauses added to retain existing Montana law and to be consistent with Montana probate law
1008	Based on FRE 1008	Sentence deleted allowing jury to make determination of admissibility of evidence

Chapter Case Notes

Error in Denial of Continuance so That New Psychosexual Evaluation Might Be Performed Without Polygraph Test: As part of a plea agreement in an incest case, Anderson was required to voluntarily submit to a psychosexual evaluation, which included a polygraph test. Results of the test were considered in the preparation of the presentence sexual offender evaluation. Anderson moved for a continuance of the sentencing hearing so that a new psychosexual evaluation could be performed without the use of a polygraph, but the continuance motion was denied. Noting that pursuant to St. v. Staat, 248 M 291, 811 P2d 1261 (1991), polygraph evidence may not be

used in any proceeding in a Montana court, the Supreme Court reversed and ordered a new psychosexual evaluation performed without the use of a polygraph and the preparation of a new presentence sexual offender evaluation in light of the new psychosexual evaluation. St. v. Anderson, 1999 MT 58, 293 M 472, 977 P2d 315, 56 St. Rep. 243 (1999), followed in In re N.V., 2004 MT 80, 320 M 442, 87 P3d 510 (2004).

Introduction of Polygraph Results in Custody or Visitation Dispute Prohibited: As part of a modification of Robert's visitation rights, the District Court required that Robert undergo a sex offender evaluation. Robert argued that the results of a polygraph test taken as a part of the sex offender evaluation should not be introducible. Citing St. v. Staat, 248 M 291, 811 P2d 1261 (1991), and 37-62-302 (now repealed), the Supreme Court held that the results of a polygraph test taken as part of a court-ordered sex offender evaluation would not be admissible in subsequent proceedings in the case. In re Marriage of Njos/Allard, 270 M 54, 889 P2d 1192, 52 St. Rep. 74 (1995), followed in St. v. Anderson, 1999 MT 58, 293 M 472, 977 P2d 315, 56 St. Rep. 243 (1999).

Use of Polygraph Results to Elicit Confession Prohibited: It is unacceptable for police to use the results of a polygraph examination to tell a defendant that the defendant has lied in order to elicit a statement or confession. St. v. Craig, 262 M 240, 864 P2d 1240, 50 St. Rep. 1533 (1993).

Polygraph Examination Results Barred From All Court Proceedings: In light of the untrustworthiness of the results of polygraph tests, the mandatory prohibition on the introduction of polygraph evidence in 37-62-302 (now repealed) was not limited to court proceedings in which the rules of evidence govern but was extended to every proceeding in Montana courts of law, including limited circumstances involving admission of the evidence by stipulation of the parties. St. v. Staat, 248 M 543, 810 P2d 314, 48 St. Rep. 331 (1991), overruling St. v. McPherson, 236 M 484, 771 P2d 120 (1989), and followed in St. v. Hensley, 250 M 478, 821 P2d 1029, 48 St. Rep. 1018 (1991), St. v. Anderson, 1999 MT 58, 293 M 472, 977 P2d 315, 56 St. Rep. 243 (1999), and In re N.V., 2004 MT 80, 320 M 442, 87 P3d 510 (2004).

Admissibility in Police Disciplinary Hearing of Fact Witness Took Polygraph Test: Although the results of a witness's polygraph exam were not admitted in evidence, she was asked if she took a test and answered that she had. There was no objection, and the chairman of the Police Commission sitting at a police officers' disciplinary hearing admonished the Commission that evidence of taking the exam was to be ignored. On appeal, the District Court found no prejudice. The Supreme Court agreed. Gentry v. Helena, 237 M 353, 773 P2d 309, 46 St. Rep. 862 (1989).

Rules of Evidence Inapplicable to Sentencing: Defendant contended that the court erred in adding 10 years to his sentence for being a persistent felony offender because the court relied on evidence improperly before it. The Supreme Court affirmed the sentence because the rules of evidence do not apply to sentencing and because the evidence was competent. St. v. Smith, 232 M 156, 755 P2d 569, 45 St. Rep. 955 (1988), followed in St. v. Farnsworth, 240 M 328, 783 P2d 1365, 46 St. Rep. 2165 (1989).

Inadmissibility of Polygraph Evidence — Decision Prior to Statutory Effective Date: An insurer contended that because it was being sued for bad faith, polygraph results ought to be admissible as proof of the insurer's good faith in refusing to pay the claim. The Supreme Court held that the District Court Judge properly followed Gropp v. Lotton, 160 M 415, 503 P2d 661 (1972), in denying evidence of the polygraph results, even though his ruling preceded the effective date of 37-62-302 (now repealed). Britton v. Farmers Ins. Group, 221 M 67, 721 P2d 303, 43 St. Rep. 641 (1986).

Admissions Made to Polygraph Examiner After Polygraph Examination Finished — Admissible: Admissions made to a polygraph examiner in a postexamination interview were not inadmissible because they were somehow tied to the inadmissibility of polygraph examination results. The admissions were made after disconnection from the device and in another room and were made in response to a note given to the examiner while the postexamination interview was being conducted. The evidence of the accused's admissions had nothing to do with polygraph test results wherein the operator evaluated the credibility of a witness. The operator merely related admissions he perceived from the accused, and it was then the jury's province to evaluate the testimony. St. v. Smith, 220 M 364, 715 P2d 1301, 43 St. Rep. 449 (1986).

Parol Evidence Rules Substantive, Not Procedural — Subject to Rules of Evidence and Common-Law Exceptions: The Montana Uniform Commercial Code's parol evidence rule contained in 30-2-202 continues the operation of the traditional law of contracts parol evidence rule, though with some modifications. Each is a principle of substantive law, not a procedural rule of evidence. Thus, the admissibility of any evidence is ultimately subject to the provisions of the Montana Rules of Evidence, and the traditional common-law exceptions to the contract law parol evidence rule, such as proof of fraud, misrepresentation, or mistake, remain exceptions to

the parol evidence rule in the Montana Uniform Commercial Code. Norwest Bank Billings v. Murnion, 210 M 417, 684 P2d 1067, 41 St. Rep. 1132 (1984).

Admissibility of Evidence Contrary to Motion In Limine — Review in Federal Habeas Corpus Proceeding: The trial court granted a motion in limine to exclude threats made by the defendant to persons other than the victim. Nevertheless, such threats were admitted and the admission was upheld by the Montana Supreme Court. This ruling was not disturbed by the federal District Court because states are given a wide latitude in developing their own rules of evidence, and a habeas corpus action is not considered the proper remedy to correct trial errors absent a denial of fundamental fairness. Bashor v. Risley, 539 F. Supp. 259, 39 St. Rep. 960 (D.C. Mont. 1982).

Admissibility of Polygraph Evidence — Review in Federal Habeas Corpus Proceeding: The longstanding rule in Montana is that polygraph evidence is inadmissible at trial. Because states are afforded wide latitude in developing their own rules of evidence, the petitioner in a federal habeas corpus proceeding must prove that an exclusion of polygraph evidence so fatally infected the trial as to deprive him of the fundamental fairness mandated by due process. Where the examinee was allowed to testify at trial to those items raised in the polygraph examination, fundamental fairness was not affected. Bashor v. Risley, 539 F. Supp. 259, 39 St. Rep. 960 (D.C. Mont. 1982).

Jury Instructions — Presumption of Innocence: In a criminal prosecution for theft of an automobile in which the defendant timely requested and was twice denied an instruction on the presumption of innocence, an instruction on the State's burden of proof could not supplant an instruction on the presumption of innocence. The standard for prejudicial effect of the lack of the instruction was established in St. v. Harrison, 23 M 79, 57 P 647 (1899), and is more strict than that used by the U.S. Supreme Court. It is per se reversible error to deny the instruction. St. v. Williams, 185 M 140, 604 P2d 1224, 36 St. Rep. 1959 (1979).

Chapter Law Review Articles

Montana Rules of Evidence: A General Survey, Clarke, 39 Mont. L. Rev. 79 (1978).

An Overview of Ninth Circuit Decisions in Evidence Law (Ninth Circuit Survey), Bandle, 41 Willamette L. Rev. 507 (2005).

Article I
General Provisions

Rule 100. Short title.

Compiler's Comments

Source: Based on Federal Rule 1103.

Rule 101. Scope.

Commission Comments

(a) Proceedings Generally. This subdivision is identical to Federal and Uniform Rules (1974) Rule 101 with these exceptions: "all" is added to modify both proceedings and courts; "in the state of Montana" is substituted for the Federal phrase making the rules apply in Federal courts and before Federal magistrates and the Uniform Rule phrase "of this state"; "to the extent and" is deleted from both rules; and "exceptions stated in this rule" is substituted for the Federal and Uniform Rules phrase "exceptions stated in Rule 1101".

The first two changes are added to make it clear that the Montana Rules of Evidence will apply in all proceedings and in all courts in the state of Montana unless there is an exception stated in the rules. The third and fourth changes are made to conform to the different scheme employed in setting forth the exceptions. The Federal Rules contain a separate rule (Rule 1101) to provide for their application. Exceptions to the Montana Rules of Evidence are not nearly as complex as the Federal Rules and are placed in the first rule to provide clearer organization and easier understanding.

The Supreme Court's authority to promulgate these rules is Article VII, Section 2(3) of The 1972 Constitution of Montana, allowing the court to make rules of practice and procedure for all courts. A similar provision establishing such authority is Section 93-2801-1, R.C.M. 1947 [3-2-701]. Existing Montana law covers the application of the law of evidence quite generally rather than applying it to specific proceedings. Section 93-2501-3, R.C.M. 1947 [superseded], provides that the law of evidence applicable in jury trials is equally applicable where there is no jury. Section 95-3001, R.C.M. 1947 [46-16-201], provides that rules of evidence applicable in civil cases are also applicable in criminal cases, except as otherwise provided in the Montana Code of Criminal Procedure. Therefore the Commission feels that the Supreme Court has the authority

to make these rules consistent with existing Montana law or practice or, if there is neither, with what makes clear good sense.

(b) Privileges. This subdivision is identical to Federal Rule 1101(c) except that "found in Article V" is included as reference to the rules of privilege. Existing Montana law on privileges is contained in Section 93-701-4, R.C.M. 1947 [26-1-801], which states in part: "There are particular relations in which it is the policy of the law to encourage confidence and to *preserve it inviolate...*" (emphasis added). Therefore the proposed rule is consistent with this statute and what the Commission believes to be the rule in Montana on privileges.

(c) Rules inapplicable. This subdivision is identical to Federal Rule 1101(d) in paragraphs (1) and (2). Paragraph (3) is identical to Federal Rule 1101(d)(3) except that the following additions are made to conform to Montana practice: "and proceedings on applications for leave to file informations" after "preliminary examinations"; "dispositional hearings in youth court proceedings" after "sentencing"; "or parole" after "probation"; and "notices to appear" after "criminal summonses". Paragraph (4) is based on Rule 1101(b)(4) of the Uniform Rules of Evidence (1974). Paragraph (5) is original.

The reason for these changes is to extend the exceptions of the Federal Rules to follow the Montana practice of not applying rules of evidence in the following instances. Paragraph (1) is consistent with section 93-2501-2, R.C.M. 1947 [26-1-201], calling for the court to make determinations of this sort and with the view that it is impractical to require the court to observe rules of evidence when determining the admissibility of evidence under Rule 104(a).

Paragraph (2) is consistent with Section 95-1408(a), R.C.M. 1947 [46-11-314], covering grand juries and with the view that it is impossible for rules of evidence to be applied in grand jury proceedings when there is no one to object and no one to rule on objections.

Paragraph (3) is consistent with Montana practice in criminal and youth court proceedings where application of rules of evidence would be impractical. The Commission does not intend that substantive due process be abrogated by suspension of the rules in the proceedings covered in paragraph (3); the rules may be applied when the court finds it necessary. An example of this problem can be found in Section 95-1506, R.C.M. 1947 [46-13-108], where an increased sentence for prior conviction is not allowed unless the prosecution proves it at a separate hearing. In this situation, it is possible that the provision of this rule on sentencing would exclude the use of rules of evidence; however, as the Commission does not intend to abrogate due process by suspension of the rules, where the court feels that the rules should apply, they shall apply.

The statutes which the Commission believes cover most of the various criminal proceedings are as follows: extradition or rendition under Section 95-3101, et seq., R.C.M. 1947 [46-30-101]; preliminary examination under Section 95-1202, R.C.M. 1947 [46-10-202], and applications for leave to file information under Section 95-1301, et seq., R.C.M. 1947 [Title 46, ch. 11, part 2]; sentencing under Section 95-2201, et seq., R.C.M. 1947 [Title 46, ch. 18]; granting or revoking probation or parole under Section 95-3201, et seq., R.C.M. 1947 [Title 46, ch. 23, part 11]; issuance of arrest warrants under Section 95-603, R.C.M. 1947 [46-6-201, 46-6-214, 46-6-215], criminal summonses under Section 95-612, R.C.M. 1947 [46-6-213], and notices to appear under Section 95-614, R.C.M. 1947 [46-6-310]; issuance of search warrants under Section 95-704, R.C.M. 1947 [46-5-221]; and proceedings with respect to bail or otherwise under Section 95-1101, et seq., R.C.M. 1947 [46-9-102, et seq.]. Youth court dispositional hearings are covered under Section 10-1221, R.C.M. 1947 [41-5-522, renumbered 41-5-1511].

Paragraph (4) is consistent with practical considerations and the Montana provision on direct contempt, Section 93-9803, R.C.M. 1947 [3-1-511], allowing the court to act summarily in punishing such conduct. It is conceivable that other provisions of the law may allow the court to act in such a manner, and if the court points out where it is authorized by law to so act, the rules may be suspended. A specific instance where this rule does not apply is Rule 56, M.R.Civ.P., motions for summary judgment.

Paragraph (5) is consistent with practical considerations and the Montana practice that where the proceedings are such that no rules of evidence will be invoked, there is no need to have the rules apply.

Case Notes

Consideration at Sentencing of Alleged Crimes Dismissed by Plea Bargain Not Violative of Due Process: At sentencing, the District Court considered allegations of other crimes for which Mason had been initially charged but that had been dismissed by plea agreement. Mason contended that consideration of statements related to unproved conduct violated the right to due process. The Supreme Court noted that due process protects a defendant from being sentenced based on misinformation and requires that a defendant be given an opportunity to rebut any information that may lead to deprivation of life, liberty, or property, but does not protect against

all misinformation unless the sentence is premised on materially false misinformation. The court also noted that St. v. Collier, 277 M 46, 919 P2d 376 (1996), allows a sentencing court to consider any evidence that has probative force, including other acts that have been dismissed by plea agreement, as in St. v. Baldwin, 192 M 521, 629 P2d 222 (1981). Nothing in Mason's plea agreement prevented the state from presenting the facts of the case during the sentencing hearing, and in fact, that inquiry is required as part of the presentence investigation report under 46-18-112. Mason failed to show that the sentencing court relied on misinformation and thus was not entitled to resentencing on due process grounds. Further, the plea agreement required relinquishment of Mason's parental rights, so the sentencing court properly considered evidence of the danger Mason posed to the other children in order to approve that portion of the agreement. St. v. Mason, 2003 MT 371, 319 M 117, 82 P3d 903 (2003).

No Constitutional Violation in Admission of Telephonic Testimony at Revocation Hearing — No Abuse of Discretion Upon Good Cause: To accommodate counsel, the state moved to allow the admission of telephonic testimony from two law enforcement officers who could not attend Megard's sentence revocation hearing in person. Megard objected, relying on Rule 611, M.R.Ev., and In re Marriage of Bonamarte, 263 M 170, 866 P2d 1132 (1994). The District Court held that neither the rule nor Bonamarte applied and that Megard's fundamental rights would be adequately protected, so the motion was granted. On appeal, Megard also contended that allowing the telephonic testimony violated his due process right and the right to confront witnesses. The Supreme Court affirmed. The District Court was familiar with the witnesses. Allowing telephonic testimony did not impede the ability to judge a witness's credibility in relation to other witnesses, who corroborated the testimony, because knowledge of a witness's identity and credentials may constitute a special circumstance under which telephonic testimony is allowed. Although telephonic testimony is generally not allowed in trials absent special circumstances or the parties' consent, evidentiary rules do not apply to revocation proceedings. Because a revocation hearing is not a criminal trial, Megard had no constitutional right to confront witnesses at the hearing. Further, Megard's due process rights were not violated because his counsel actually cross-examined the witnesses, and good cause existed for the District Court to admit the telephonic testimony to address scheduling conflicts. Even if error occurred, it was harmless, given Megard's failure to establish prejudice pursuant to St. v. Pedersen, 2003 MT 315, 318 M 262, 80 P3d 79 (2003). St. v. Megard, 2004 MT 67, 320 M 323, 87 P3d 448 (2004).

Plea to Lesser Included Offense — Introduction at Sentencing of Evidence of Commission of Charged Offense — Language of Plea Agreement: Collier was arrested and charged with solicitation of deliberate homicide, which was reduced to criminal endangerment by a plea bargain. At the District Court level and on appeal, Collier challenged the state's introduction of evidence tending to prove her commission of the originally charged offense. The Supreme Court upheld the introduction of the evidence, noting not only that the rules of evidence do not apply in sentencing, but also that the plea agreement provided that "counsel for the State may make any recommendation and may introduce . . . evidence in support thereof at the time of sentencing". St. v. Collier, 277 M 46, 919 P2d 376, 53 St. Rep. 534 (1996).

Consideration of Polygraph Test in Mental Health Evaluations — No Error in Sentencing: Defendant presented the sentencing court with three evaluations that were conducted at his request and submitted by him in support of his recommendation for sentencing. On appeal, he complained that the court improperly considered the report of a lie detector test referred to in two of the evaluations. The judge was not required to consider the evaluations, but under the relaxed standards of evidence in a sentencing situation, he was free to do so. Polygraph information is inadmissible as evidence at trial; however, the Montana Rules of Evidence do not apply to sentencing hearings. Defendant invited consideration of the evaluations and could not complain on appeal that it was in the record. Therefore, the court did not err in considering the evidence of the polygraph test at sentencing. St. v. McPherson, 236 M 484, 771 P2d 120, 46 St. Rep. 525 (1989).

Sentencing — Rules Not Applicable:

Defendant contended that the court erred in adding 10 years to his sentence for being a persistent felony offender because the court relied on evidence improperly before it. The Supreme Court affirmed the sentence because the rules of evidence do not apply to sentencing and because the evidence was competent. St. v. Smith, 232 M 156, 755 P2d 569, 45 St. Rep. 955 (1988), followed in St. v. Farnsworth, 240 M 328, 783 P2d 1365, 46 St. Rep. 2165 (1989).

The Montana Rules of Evidence do not apply to sentencing hearings. The court correctly used relaxed rules of evidence during the sentencing hearing. St. v. Holmes, 207 M 176, 674 P2d 1071, 40 St. Rep. 1973 (1983).

Probation Revocation Hearings — Rules Not Applicable: The Montana Rules of Evidence do not apply to probation revocation hearings. St. v. Nelson, 225 M 215, 731 P2d 1299, 44 St. Rep. 181 (1987).

Felony Offender Hearings — Rules Not Applicable: Subsection (c)(3) of this rule exempts sentencing proceedings from evidentiary constraints, and because felony offender hearings are part of the sentencing proceedings, they too are subject to the Montana Rules of Evidence. St. v. Lamere, 202 M 313, 658 P2d 376, 40 St. Rep. 110 (1983).

Collateral References

31 C.J.S. Evidence §§1 through 5.

29 Am. Jur. 2d Evidence §9.

Applicability of rules of evidence to juvenile transfer, waiver, or certification hearings. 37 ALR 5th 703.

Applicability of rules of evidence in juvenile delinquency proceeding. 43 ALR 2d 1128.

Rule 102. Purpose and construction.

Commission Comments

This rule is identical to Federal and Uniform Rules (1974) Rule 102. The general philosophy followed in drafting the Federal Rules was to allow a court to "...admit the evidence unless some good reason exists to exclude it." Statement attributed to Albert Jenner, Chairman, Federal Rules Advisory Committee, in Schwartz, "The Proposed Federal Rules of Evidence: An Introduction and Critique", 38 U. Cinn. L. Rev. 449, 453 (1969). The Commission feels that this rule is a good statement of the purpose of the rules and how they should be construed; it also concurs in the statement of their philosophy. There is no existing law in Montana specifically on this point; however a statement of similar policy is found in Section 93-2801-1, R.C.M. 1947 [3-2-701], granting the Supreme Court the authority to make rules: "...for the purpose of simplifying judicial proceedings... and for promoting the speedy determination of litigation upon its merits".

Collateral References

7 Wigmore §8(e).

Rule 103. Rulings on evidence.

Commission Comments

(a) Effect of erroneous ruling. This subdivision is identical to Federal and Uniform Rules (1974) Rule 103(a). It was adopted because the Commission feels that it accurately states what is good about existing Montana law and overrules what is not.

The first clause of this rule states the harmless error provision of the rules. In allowing error to be predicated only where "a substantial right of the party is affected", the rule is consistent with the following Montana provisions:

1. Section 93-5603, R.C.M. 1947 [25-11-102], (grounds for new trial): "The former verdict or other decision may be vacated and a new trial granted...for any of the following causes, materially affecting the substantial rights of the parties...."

2. Rule 61, M.R.Civ.P. (harmless error): "...The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

3. Rule 14, M.R.App.Civ.P. [now M.R.App.P.—wording of rule has changed somewhat] (following review of rulings against the respondent on appeal): "...any order, ruling, or proceeding of the trial court against the respondent, affecting his substantial rights on the appeal of said cause...".

4. Section 95-2425, R.C.M. 1947 [46-20-701(2)], (appeals in criminal cases): "Any error, defect, irregularity or variance which does not affect substantial right shall be disregarded".

Cases in Montana following these statutes have held that technical errors in rulings on evidence will not be grounds for reversal and in order to allow reversal the ruling must affect substantial rights. White v. Chicago, M & PS Ry. 49 Mont. 419, 429, 143 P. 561 (1914); Roper v. Caterpillar Tractor Co., 98 Mont. 76, 97, 37 P2d 812 (1934); Lewis v. New York Life Ins. Co., 113 Mont. 151, 166, 124 P2d 579 (1942); State v. Romero, 161 Mont. 333, 341, 505 P2d 1207 (1973).

(1) Objection. This first paragraph presents the rule that an error may not be predicated unless the "substantial right of the party is affected" and, if the "ruling is one admitting evidence", an objection or motion to strike is made. The requirements for an objection or motion to strike are the same: it must be timely and it must state the specific ground of objection. This is consistent with Montana law: cases dealing with the proposition that an objection be specific are based on early cases: Herman v. Jeffries, 4 Mont. 513, 522, 1 P 11 (1883) and City of Helena v.

Albertose, 8 Mont. 499, 504, 20 P 817 (1889). The requirement was also part of Section 93-5503 (superseded) stating: "...the grounds of the objection shall be particularly stated", and is part of Rule 46, M.R.Civ.P. which reads: "...his objection to the action of the court and his grounds therefor...." A motion to strike must be preceded by a timely objection. Yoder v. Reynolds, 28 Mont. 183, 194, 72 P 417 (1903) and Poindexter & Orr Livestock Co. v. Oregon Short Line Ry., 33 Mont. 338, 341, 83 P 886 (1905). It must also be specific as to what testimony should be excluded, for there is no error in denying a motion that is too broad. Dorais v. Doll, 33 Mont. 314, 319, 83 P 884 (1905); Copenhaver v. Northern Pacific Ry., 42 Mont. 453, 469, 113 P 467 (1911); and Baldwin v. Silver, 58 Mont. 495, 499, 193 P 750 (1920).

An exception to the requirement that the objection be specific is the last phrase of paragraph (1) of this rule: "...if the specific ground was not apparent from the context...." The Commission feels that this is a good rule; however it is not clear whether or not this exception is consistent with Montana law. Cases have referred to evidence which is determined to be inadmissible from the context of the transcript of the trial, and one in particular, Yoder v. Reynolds, supra at 193, indicates that a general objection can be properly made when it appears that the evidence is entirely inadmissible from the context of the case. In another circumstance, where grounds are apparent from the context, the court may sustain an objection before counsel is able to state his grounds. On appeal the proponent of the evidence may claim that the court improperly sustained the objection. Although the Supreme Court could presume the ruling of the trial court is correct (see appended Table D for cases [at part compiler's comment, Title 26, ch. 1, part 6]), the objecting party could be penalized for not stating the grounds for his objection. The Commission feels that this is unfair, for the party is being penalized for an action of the trial court when there is good reason for the objection. This exception solves this problem.

An exception to the timeliness requirement not found in this rule is in Rule 46, M.R.Civ.P.: "...if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him". However rarely this exception would be invoked, it is unfair to require a timely objection or motion to strike when there appears to be no reason for either. Therefore application of this exception allows a party to make an objection and motion to strike when the grounds therefor only become apparent sometime after both should have been made.

Barring the application of any of these exceptions, the Commission intends the rule of this paragraph to mean that if an objection or motion to strike is not made, it is waived. Labbitt v. Bunston, 84 Mont. 597, 599, 277 P 620 (1929) and Estate of Schueren v. Union Bank & Trust Co., 162 Mont. 417, 433, 512 P2d 1283 (1973). The effect of this rule is to allow any inadmissible evidence which is admitted without objection to be treated the same as any admissible evidence.

(2) Offer of proof. The second paragraph of this subdivision presents the rule that an error may not be predicated unless the "substantial right of the party is affected" and if the "ruling is one excluding evidence" an offer of proof was made. The offer of proof is incorporated in Rule 43(c), M.R.Civ.P., but this rule is only codification of prior practice in Montana. The reason for the offer was succinctly stated in Milwaukee Gold Extraction Co. v. Gordon, 37 Mont. 209, 223, 95 P 995 (1908): "It is impossible for this court to say whether certain evidence was improperly excluded, unless the record discloses the offered evidence". The offer must be specific as to the facts that would be proved. Palmer v. McMaster, 10 Mont. 390, 396, 25 P 1056 (1891).

Two exceptions to these rules are contained in Montana cases. The adoption of Rule 43(c) of the the M.R.Civ.P. did not answer the problem raised by them, for it only states: "In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, the examining attorney *may make* a specific offer..." (emphasis added).

The first case law exception deals with offers of proof on cross-examination: "The rule which requires that an offer of proof be made has no application to cross-examination." Herzig v. Sandberg, 54 Mont. 538, 542, 172 P 132 (1918), citing other cases, and followed in Budd v. N. Pac. Ry., 59 Mont. 238, 242, 195 P 1109 (1921) and Loncar v. National Union Fire Ins. Co., 84 Mont. 141, 151, 274 P 844 (1929).

The Commission specifically rejects this exception to the offer of proof rule by not including it in Rule 103(a)(2). The rationale of the exception is not stated in the cases, but according to McCormick, Handbook on the Law of Evidence 111 n.9(2nd ed. 1972): "On cross-examination, the examining counsel is ordinarily assumed not to have had an advance opportunity to know what the witness will answer...." This is no longer true because of the extensive discovery now allowed. The rationale for the exception fails when considering that the scope of cross-examination is usually limited to matters brought out on direct examination and matters of credibility: the likelihood of counsel not knowing what the answer to his question will be in this context is small. The purposes of an offer of proof are to show the trial court what error might

be committed if the evidence is excluded, to give it a chance to change its mind, and to show the appellate court what evidence has been excluded so it can determine whether there has been error. These purposes are defeated by the exception. The Commission therefore rejects this exception to the requirement of an offer of proof because it is no longer valid, defeats the purpose of the offer of proof, and is not good law.

The second exception is contained in the Federal and Montana Rule. It allows the offer to be dispensed with where the substance of the offer is apparent from the context. This exception is recognized in Montana to the extent that the court was unwilling to rule on the propriety of excluding evidence because that evidence was not apparent from the context. First National Bank of Portland v. Carroll, 35 Mont. 302, 309, 88 P 1012 (1907) and Trogdon v. Hanson Sheep Co., 49 Mont. 1, 4, 139 P 792 (1914). The exception is followed in Herzig v. Sandberg, supra at 541; Henderson v. Campbell, 95 Mont. 180, 184, 26 P2d 351 (1933); and Koppang v. Sevier, 106 Mont. 79, 97, 75 P2d 790 (1938).

(b) Record of offer and ruling. This subdivision is identical to Federal and Uniform Rules (1974) Rule 103(b). It was adopted to improve the practice of submitting offers of proof. The first sentence of the subdivision is the third sentence of Rule 43(c), M.R.Civ.P. The provision is meant to allow the trial court to clarify the record for the appellate court's review. The final sentence is derived from the final sentence of Rule 43(c), M.R.Civ.P. It allows the court to direct the offer of proof to be made in question and answer form.

(c) Hearing of jury. This subdivision is identical to Federal and Uniform Rules (1974) Rule 103(c). It clarifies Rule 43(c), M.R.Civ.P. which states: "The court may require the offer to be made out of the hearing of the jury" and expands the rule to include any mention of inadmissible evidence within the hearing of the jury. The Commission feels that this is the practice in Montana and therefore adopts the rule. It may also be noted that the rule conforms to Canons of Professional Ethics DR-7-106(c)(1) and (7) adopted by the Supreme Court of Montana, 160 Mont. XXIII, XLVI (1972), prohibiting an attorney from asking questions which are not supported by admissible evidence or intentionally or habitually violating established rules of evidence.

(d) Plain error. This subdivision is identical to Federal and Uniform Rules (1974) Rule 103(d). The Commission feels that although this rule is not formally recognized in Montana, it is consistent with Rule 102, purpose and construction, particularly allowing "elimination of unjustifiable expense and delay" and providing "that the truth may be ascertained and proceedings justly determined". Having the rule formally recognized is not intended to negate subdivision (a) of this rule, which can be distinguished from this subdivision as follows: under subdivision (a) the party can, as a right, predicate error only when a substantial right is affected and an objection, motion to strike, or offer of proof is made. However, under subdivision (d), while a party may point out that an error affecting a substantial right has been made (for the first time on appeal), only the court has the power to invoke the rule. Therefore this rule will be used in exceptional cases and should not be relied upon by counsel. It should also be noted that while this rule is generally one of appellate review, it is not intended to preclude the trial court from allowing a new trial because of plain error.

Case law in Montana under subdivision (a) of this rule holds that the general rule is that unless a point is raised in the trial court, the Supreme Court will not hear the point on appeal; one of the latest examples is Spencer v. Robertson, 151 Mont. 507, 511, 445 P2d 48 (1968). However, the Supreme Court has settled cases in accord with its view of substantial justice and ignored the general view. In one example, Tracy v. Harmon, 17 Mont. 465, 468, 43 P 500 (1896), the court allowed counsel to raise the vagueness of the description of land in a judgment for the first time on appeal, and found the judgment void for this reason. In another example, State v. Duran, 127 Mont. 233, 235, 259 P2d 1051 (1953), the Supreme Court reversed a conviction on a point raised at trial level, but not argued by either side on appeal, noted by the dissent at 240. The Supreme Court will also consider jurisdictional questions (O'Donnell v. City of Butte, 72 Mont. 449, 457, 235 P 707 (1925)) and constitutional questions (In re Clark's Estate, 105 Mont. 401, 410, 74 P2d 401 (1937)) on its own motion. Therefore, rather than ignore such actions by the Supreme Court, the Commission adopts this rule.

Case Notes

Objection 171
Offer of Proof 174
Plain Error 176
General 178

OBJECTION

Failure to Object to Firefighter's Lay Testimony Regarding Burn Patterns — Admissibility Affirmed: During Henderson's arson trial, the state sought to introduce testimony of a firefighter who was at the scene. Defense counsel objected that because the firefighter was not a qualified expert, the firefighter's opinion testimony should not be allowed. The trial court allowed counsel to voir dire the firefighter in the presence of the jury, and the firefighter responded by explaining how to find a point of origin of a fire, describing indications of arson, and discussing pour patterns. Defense counsel did not move to strike the testimony or move for a limiting instruction after the court allowed the firefighter to testify as a lay witness, nor did counsel register a continuing objection to ensuing testimony that was based in part on the voir dire responses. Following conviction, Henderson contended that the testimony amounted to impermissible expert testimony, but the Supreme Court affirmed. By eliciting the evidence on voir dire, Henderson waived the right to object on appeal. Additionally, even though the testimony went beyond personal observations made at the scene, given Henderson's failure to object to the voir dire testimony regarding pour patterns, the trial court did not err in allowing testimony concerning the firefighter's observation of pour patterns at the scene. St. v. Henderson, 2005 MT 333, 330 M 34, 125 P3d 1132 (2005).

No Objection at Trial — Same Objection Barred on Appeal:

At Brasda's assault trial, the state offered Brasda's knife into evidence. Brasda objected on the basis of the knife's condition; the trial court heard evidence explaining the knife's condition; and the state again moved to admit the knife. Brasda did not object, argue that the knife had been tampered with, request a mistrial or new trial, move to reconsider admissibility, or propose a cautionary instruction for the jury. Nevertheless, Brasda claimed error on appeal. The Supreme Court found that the knife was properly admitted into evidence and that Brasda's failure to object constituted a waiver of the right to claim error on appeal. St. v. Brasda, 2003 MT 374, 319 M 146, 82 P3d 922 (2003).

As defendant made no objection at trial to the introduction of any of the testimony he now claims was improperly admitted hearsay, he is barred from predicating error on its admission on appeal. St. v. Owens, 182 M 338, 597 P2d 72, 36 St. Rep. 1182 (1979). See also Spraggins v. Elvidge, 199 M 155, 647 P2d 859, 39 St. Rep. 1229 (1982); Flanigan v. Prudential Fed. S&L Ass'n, 221 M 419, 720 P2d 257, 43 St. Rep. 941 (1986).

Deposition of Witness Taken During Trial — Insurer's Counsel Allowed to Testify at Trial — Objection to Testimony Not Preserved for Appeal: Defendant insurer assumed that its attorney was listed as a witness and called the attorney at trial, but the attorney was not a listed witness, so plaintiffs objected. The trial court took steps to abate any prejudice to plaintiffs by continuing the trial, reopening discovery, and allowing plaintiffs to depose the attorney and examine the correspondence file that the attorney would rely on during testimony. When trial resumed the following day, the court noted that it had granted the motion to add the attorney as a witness with the understanding that the relevant files would be made available to plaintiffs and inquired whether the issue had been resolved. Both parties responded affirmatively, plaintiffs stipulated to admitting the correspondence file as an exhibit, and the attorney went on to testify without further objection from plaintiffs. On appeal, plaintiffs contended that the trial court abused its discretion in allowing the attorney to testify. The Supreme Court found no fault in allowing the attorney to testify when plaintiffs' actions indicated agreement and acquiescence with the court's resolution of the initial objection to the testimony. Further, plaintiffs' objection was not preserved for appeal because plaintiffs made no renewed objection following the trial court's resolution of the matter. Nelson v. Farmers Union Mut. Ins. Co., 2003 MT 101, 315 M 268, 68 P3d 689 (2003). See also Schuff v. Jackson, 2002 MT 215, 311 M 312, 55 P3d 387 (2002).

Sufficiency of Objection to Expert Testimony — Failure to Disclose Expert Witness: Defendant contended that because plaintiff did not object at trial to the expert witness called by the defense for impeachment purposes, the objection could not be raised for the first time on appeal. In order to preserve an objection to admission of evidence for purposes of appeal, the objecting party must make a timely objection stating the specific ground of objection, if the specific objection is not apparent from the context. An objection is sufficiently specific if accompanied by a reasonably definite statement of the grounds for objection. Here, plaintiff's objection advised the District Court that defendant had never disclosed that it intended to call the witness as an expert or otherwise. The Supreme Court declined to draw a distinction between the failure to disclose a witness and the failure to disclose an expert witness, concluding that plaintiff's objection was adequate. Superior Enterprises, LLC v. Mont. Power Co., 2002 MT 139, 310 M 198, 49 P3d 565 (2002). See also Kizer v. Semitool, Inc., 251 M 199, 824 P2d 229 (1991).

Objection to Qualifications of Pathologist to Testify Regarding Gunshot Wound: At Clausell's deliberate homicide trial, objection was made to the testimony of a Board-certified clinical pathologist who offered opinions regarding a gunshot wound, on grounds that the pathologist was not a Board-certified forensic pathologist and therefore was not qualified to testify. However, the doctor had performed over 400 autopsies, including about 40 that involved gunshot wounds. Clausell did not offer any applicable legal theory that a clinical pathologist with such experience who is not a forensic pathologist is not qualified to testify in a homicide case, and the Supreme Court declined to adopt a rule to that effect. Further, Clausell failed to preserve any other objection at trial to the pathologist's testimony and was precluded from raising other issues regarding the testimony on appeal. St. v. Clausell, 2001 MT 62, 305 M 1, 22 P3d 111 (2001), distinguishing In re K.H. & K.L.E., 1999 MT 128, 294 M 466, 981 P2d 1190 (1999).

Question of Battered Woman Syndrome Not Properly Framed — Not Preserved by Objection: Castle objected at trial to the testimony of a clinical social worker regarding the general nature of battered woman syndrome as speculative. The District Court held that a foundation had been laid for the testimony. The issue of whether Castle's wife exhibited characteristics of the syndrome was never properly framed before the District Court, and the court did not address it. Castle's "speculation" objection was not specific enough to preserve the issue on appeal, nor was specific ground for objection apparent from the objection. Castle waived the right to claim error on appeal, and the Supreme Court declined to address the issue of whether the expert testimony should have been admitted. St. v. Castle, 1999 MT 141, 982 M 1035, 982 P2d 1035, 56 St. Rep. 558 (1999), following Kizer v. Semitool, Inc., 251 M 199, 824 P2d 229, 48 St. Rep. 1115 (1991).

Lack of Objection to Expert Testimony on Hedonic Damages — Testimony Allowed: In order to preserve an objection to the admission of evidence for purposes of appeal, the objecting party must make a timely objection and state specific grounds for the objection. To be timely, an objection must be made as soon as the grounds for the objection become apparent. Here, defendant became aware at least 1 year before trial that plaintiff intended to introduce expert testimony regarding plaintiff's hedonic damages for loss of enjoyment of life, but failed to file a motion in limine at that time seeking to have the evidence excluded. Defendant had another opportunity to object to introduction of the evidence when the District Court issued its pretrial order listing witnesses and exhibits to be used at trial, but defendant failed to object until the second day of trial. Thus, the court did not abuse its discretion in allowing the expert testimony because of the lack of a timely and specific objection or in denying defendant's motion for a new trial on grounds that the admission of the evidence resulted in an unfair trial and excessive damages. Hunt v. K-Mart Corp., 1999 MT 125, 294 M 444, 981 P2d 275, 56 St. Rep. 503 (1999), following Kizer v. Semitool, Inc., 251 M 199, 824 P2d 229, 48 St. Rep. 1115 (1991).

Asking Rape Prosecution Witness if Victim Would Take Claim as Far as Trial Were Claim Not True: In a prosecution for burglary, kidnapping, and sexual intercourse without consent, prosecutor asked a lay witness for defendant if the witness remembered telling the prosecutor that the victim "wouldn't go this far with this if it weren't true". Defendant objected that the question called for speculation. The question was not improper on that ground. An objection raised for the first time on appeal (that the question was improper impeachment that had the effect of bolstering the victim's credibility) was not apparent from the context in which the question was asked. Therefore, it was not error to overrule the objection. A mistrial was not warranted when the witness answered "no" and had previously testified that he was a friend of both parties and when the judge told the jury to disregard the testimony. St. v. Greytak, 262 M 401, 865 P2d 1096, 50 St. Rep. 1610 (1993).

Objection Raised in Trial Brief but Never Ruled Upon Not Preserved for Appeal: Defendant claimed it adequately preserved its objection by raising the issue of speculative damages for plaintiff's lost future profits in its trial briefs. However, at no time did defendant solicit a ruling from the trial court on the issue of speculative future damages. Mere inclusion of the issue in the trial brief did not preserve the objection for appeal. Story v. Bozeman, 259 M 207, 856 P2d 202, 50 St. Rep. 761 (1993).

Insufficiency of General Objection: A general objection made without giving specific grounds for the objection is insufficient to preserve an error for appeal. An objection, to be good, must point out the specific ground of the objection. St. v. Birthmark, 253 M 526, 833 P2d 1103, 49 St. Rep. 583 (1992), citing St. v. Walker, 148 M 216, 419 P2d 300 (1966).

Expert Opinion by Expert Witness Invaded Province of Jury — Objection Preserved by Objection Following Expert's Summary: The Supreme Court held that testimony by an expert witness invaded the province of the jury. The Supreme Court also held that objections to the expert's testimony by defendant's counsel properly preserved the objection. In order to preserve an objection, the objection must be timely, must state specific grounds, and must be made on the

record. The record showed that first, the expert summarized five theories of the defendant's conduct and then examined the theories one at a time. During this more detailed testimony, the expert began to give testimony on the ultimate issue of whether the employer defendant violated its covenant of good faith and fair dealing with its employee, at which time defendant's counsel objected and stated the basis for his objection. The Supreme Court held that the objection was sufficiently preserved under these conditions. Kizer v. Semitool, Inc., 251 M 199, 824 P2d 229, 48 St. Rep. 1115 (1991), followed, but with a different result, in In re Estate of Bayers, 1999 MT 154, 295 M 89, 983 P2d 339, 56 St. Rep. 607 (1999), and Spinler v. Allen, 1999 MT 160, 295 M 139, 983 P2d 348, 56 St. Rep. 632 (1999).

Motion In Limine Properly Preserved When Nature of Evidence Unchanged: Prior to trial, plaintiff objected to certain evidence by motion in limine. At trial, following the original objection, the nature of the evidence was not modified; therefore, the objection at the time of the motion in limine covered the same evidence presented at trial and was sufficiently preserved for purposes of review on appeal. Beil v. Mayer, 242 M 204, 789 P2d 1229, 47 St. Rep. 661 (1990).

Failure of Plaintiff to Appear at Trial or Present Evidence — Judgment for Defendant Proper: Objections by the plaintiff on appeal as to whether evidence was properly admitted at trial were waived because of plaintiff's failure to appear at trial, in person or by counsel, and to make a timely objection. Similarly, plaintiff's contention that the District Court should have found evidence of fraud failed because plaintiff failed to appear or present any evidence at trial to support the claim. Gibson v. Swanson, 239 M 380, 780 P2d 1137, 46 St. Rep. 1764 (1989).

Failure to Object to Closing Argument as Trial Strategy — Consideration Barred on Appeal: Defendant argued that the state's closing argument denied him due process and a fair trial but admitted that he chose not to object as a matter of trial strategy and instead moved for a new trial. Contrary to defendant's contentions, St. v. Harris, 209 M 511, 682 P2d 159, 41 St. Rep. 866 (1984), did not hold that a motion for a new trial preserved objection to a closing argument but relied instead on the plain error doctrine in 46-20-702 (now 46-20-701(2)), which did not apply here. The District Court correctly ruled that failure to object barred consideration of this issue because defendant's substantial rights were not affected. In affirming, the Supreme Court noted that Montana has long held that objections to closing arguments first made on appeal are too late. (Hawkins v. Crist, 178 M 206, 583 P2d 396 (1978), citing St. v. French, 166 M 196, 531 P2d 373 (1975).) St. v. Pease, 222 M 455, 724 P2d 153, 43 St. Rep. 1417 (1986), followed in St. v. Laverdure, 241 M 135, 785 P2d 718, 47 St. Rep. 142 (1990), and in St. v. Rodgers, 257 M 413, 849 P2d 1028, 50 St. Rep. 335 (1993).

Failure to Object as Fruitless — Fear of Alienating Judge — "Trial Tactic" Precluding Application of Plain Error Doctrine: Hearing on increase of child support payments was held in chambers with the judge briefly questioning the parties in the presence of their attorneys, a court clerk, and a court reporter. During the hearing the judge refused to allow expert testimony offered by the father's attorney. Father's attorney did not object to the method of hearing or refusal to hear testimony for fear it would be fruitless, and he did not want to alienate the judge. The Supreme Court refused to apply the plain error doctrine to review the father's allegations of error based on due process and the refusal of evidence because the errors were not brought to the attention of the trial court as a matter of the father's "trial tactics". His voluntary participation in the procedures and intentional choice precluded review of the issue. In re Marriage of Purkett, 222 M 225, 721 P2d 349, 43 St. Rep. 1217 (1986).

Admissibility of Videotape With Cautionary Instruction — No Objection — Waiver: An insurer assigned as error the admission to evidence of a doctor's videotaped deposition, contending the deposition was cumulative, had no probative value, and invoked the sympathy and passion of the jury. The videotape was submitted to the jury without any objection by the insurer and under a cautionary instruction from the court that the video was not to be considered for the insured's damages but only to show whether he was physically able to participate in the fire in the way the insurer claimed he did. The District Court Judge, in his order denying the posttrial motions, properly found the objection to submission of the evidence to have been waived. Britton v. Farmers Ins. Group, 221 M 67, 721 P2d 303, 43 St. Rep. 641 (1986).

Failure to Object to Time Limit on Closing Argument: Rumley appealed his conviction for negligent homicide based on the District Court's limitation on closing arguments to 45 minutes. There is no indication on the record that an objection was made by defense counsel to that limitation, and there is no record of either the state's or the defendant's closing argument. Since there is no record, the Supreme Court cannot determine whether defendant's rights were abridged by the time limitation. The Supreme Court will not consider issues that are not based on a record to which it can look. St. v. Rumley, 194 M 506, 634 P2d 446, 38 St. Rep. 1351A (1981).

See also Scofield v. Estate of Wood, 211 M 59, 683 P2d 1300, 41 St. Rep. 1212 (1984), and Busta v. Columbus Hosp. Corp., 276 M 342, 916 P2d 122, 53 St. Rep. 428 (1996).

Request for Modification of Divorce Agreement — Timeliness: The former wife orally requested the court for additional property over 6 months after entry of the legal separation decree and approval of the written agreement incorporated into the divorce decree; the former husband contended that the request was barred by Rule 60(b), M.R.Civ.P. The Supreme Court said that this may have been a crucial issue at the trial court but that the husband's failure to object makes timeliness a nonjudicable issue on appeal. Without an objection there need be no ruling, and the Supreme Court concluded that without a ruling the wife made her request within the "reasonable time" required by Rule 60(b), M.R.Civ.P. In re Harris v. Harris, 189 M 509, 616 P2d 1099, 37 St. Rep. 1696 (1980).

Written Divorce Settlement Agreement — Simultaneous Oral Agreement Given Effect When No Objection Made: At the conclusion of a hearing on the enforcement of his divorce settlement agreement several months after his divorce, the former husband moved to amend the finding of deficiency of the settlement agreement or, in the alternative, to grant a new trial. Appeal was taken from the denial of the motion. One ground was the assertion that the District Court erred in considering evidence of an oral agreement made simultaneously with the written settlement agreement. The record disclosed no objection during trial to the wife's testimony about the automobile and the insurance to be furnished her. The failure to raise the issue of parol evidence at the trial court forfeited any right to a remedy on appeal. In re Harris v. Harris, 189 M 509, 616 P2d 1099, 37 St. Rep. 1696 (1980).

One Proceeding With Two Hearings — Failure to Object Again — Waiver of Error: In a child abuse and neglect proceeding to terminate parental rights when the father of the youngest child was to have his rights determined a month after a hearing involving the termination of both parents' rights to the two older children, the father of the youngest child waived his right to complain of error on appeal because he failed to object to questions by the judge at the second hearing involving a prior felony conviction, even though objection was made and overruled in the first hearing. In re T.J.D., J.L.D., and R.J.W., 189 M 147, 615 P2d 212, 37 St. Rep. 1385 (1980).

OFFER OF PROOF

Clarification of General Requirement of Substantially Similar Circumstances as Precedent to Admission of Evidence of Prior Accident: Evidence of prior accidents, although inadmissible to prove negligence, may be admitted for other purposes, such as to show: (1) the existence of a particular physical condition or defect; (2) the dangerousness of the condition or defect; (3) the possibility that the condition or defect might cause an accident or injury of the type alleged; (4) cause in fact; and (5) knowledge of the condition or defect. (See Modern Evidence: Doctrine and Practice, Mueller & Kirkpatrick, §4.8 at 281, 282 (1995), and McCormick on Evidence §200 at 844-847, 4th Ed. (1992).) Regarding the degree of identity of circumstances required when offering prior accident evidence for the sole purpose of notice or knowledge, the general requirement of substantially similar circumstances is relaxed or less strict when the evidence is proffered to show notice rather than dangerousness or causation, and a lack of exact similarity of conditions will not preclude admission under these circumstances if the accident was of a kind that should have served to warn defendant. In proving notice, there may be dissimilarities between the accidents; however, the differences affect the weight of the evidence, but not necessarily the admissibility. Here, Kissock slipped and fell in defendant's parking lot. The District Court excluded proffered evidence of a fall by another person in the same parking lot days earlier because it occurred at a different time of day under different physical circumstances. The Supreme Court disagreed and reversed, holding that the minor spatial and temporal differences existing between the two slip-and-fall accidents went to the weight rather than admissibility of the evidence in supporting an inference that defendant had notice or knowledge of the icy conditions. The circumstances surrounding the prior accident were not so remote or dissimilar from Kissock's accident that the probative value was substantially outweighed by unfair prejudice to defendant. Kissock v. Butte Convalescent Center, 1999 MT 322, 297 M 307, 992 P2d 1271, 56 St. Rep. 1288 (1999). See also Runkle v. Burlington N., Inc., 188 M 286, 613 P2d 982, 37 St. Rep. 995 (1980), Bailey v. S. Pac. Transp. Co., 613 F2d 1385 (5th Cir. 1980), and Kalanick v. Burlington N. RR Co., 242 M 45, 788 P2d 901, 47 St. Rep. 532 (1990).

Admissibility of Shingles for Demonstrative Purposes Only: Harwoods sought to introduce as an exhibit shingles retrieved from the Harwood home, which had been destroyed by fire, allegedly by sparking from electrical wiring that might have been damaged by shingles similar to the shingles introduced in evidence. The shingles offered were not the shingles that surrounded the area where the wires entered the home and could not be demonstrated to be in

the same condition as those that the wires may have actually contacted. The District Court properly allowed the shingles as demonstrative evidence only, to provide the jury with an understanding of the shingles' texture and potential for damaging wires, without the risk of suggesting that the shingles at issue were in the identical condition as the shingles surrounding the area where the wires entered the home. Harwood v. Glacier Elec. Co-op, Inc., 285 M 481, 949 P2d 651, 54 St. Rep. 1257 (1997).

Denial of Motion to Call Deleted Witness — Failure to Make Offer of Proof — Objection Not Preserved: In order to preserve a trial date, Rathbun was deleted from plaintiff's list of potential witnesses, and defendant accepted the decision. Midtrial, defendant moved to call Rathbun as a witness, contending that because Rathbun was originally listed in the pretrial order, the right to call her as a witness was reserved. The trial judge denied the motion, but defendant failed to make an offer of proof concerning testimony that would have been elicited, thereby failing to properly preserve the objection to the excluded testimony. The trial judge properly denied the motion because at the point that defendant accepted the decision to delete the witness, defendant no longer retained the right under the catchall provision to call Rathbun from the witness list. Guertin v. Moody's Mkt., Inc., 265 M 61, 874 P2d 710, 51 St. Rep. 407 (1994).

Substance of Evidence Apparent From Context: In a child custody modification case, husband contended that wife should not be allowed to argue on appeal that the trial court erred when it excluded predecree evidence because wife did not preserve an objection by making an offer of proof of the predecree evidence. However, although no offer of proof was made, the substance of the predecree evidence was apparent from the context of the wife's attorney's questions and the information was made a substantive part of the record at the time of the hearing through affidavits of a social worker and a licensed counselor. Therefore, it was proper for wife to assert on appeal that the trial court's exclusion of the predecree evidence was in error. In re Marriage of Johansen, 261 M 451, 863 P2d 407, 50 St. Rep. 1403 (1993).

Disallowance of Cumulative Character Evidence Not Reversible Error — Offer of Proof: Defendant was not allowed to impeach a witness directly through introduction of character evidence. Defendant was allowed to make an offer of proof, but he made no statement as to what facts were to be proved or that an alternative manner would be less objectionable. The evidence defendant attempted to present was cumulative in that it came out in various forms, directly and indirectly, throughout the trial after the witness testified. The exclusion of the character evidence affected no substantial right and was not reversible error. St. v. Miller, 231 M 497, 757 P2d 1275, 45 St. Rep. 790 (1988).

No Offer of Proof Made in Murder Trial: The defendant did not make an offer of proof before attempting to enter evidence demonstrating the witnesses' propensity for violence, use of drugs, and past acts of violent behavior for the purpose of showing the witnesses, not defendant, committed the murders. As no offer of proof of facts pointing directly to the guilt of the witnesses was made, the evidence properly was kept out. St. v. Bell, 225 M 83, 731 P2d 336, 44 St. Rep. 56 (1987).

Mere Allegations of Prejudice Insufficient to Satisfy Cumulative Error Doctrine: Defendant contended that the overall demeanor of the prosecution and the District Court, together with other alleged errors, required a reversal of his conviction; however, he articulated no particular comments or remarks and alleged no prejudice to his substantial rights. The Supreme Court has acknowledged the cumulative error doctrine, which is the accumulation of errors which prejudice a defendant's right to a fair trial, but noted that mere allegations of error without proof of prejudice are insufficient to satisfy the doctrine. The resolution of the alleged errors indicated no error meriting reversal of this case, and the court held that defendant failed to carry his burden of showing prejudice and declined to reverse his conviction on grounds of cumulative error. St. v. Grant, 221 M 122, 717 P2d 562, 43 St. Rep. 685 (1986). See also St. v. Hildreth, 267 M 423, 884 P2d 771, 51 St. Rep. 1086 (1994), St. v. Flowers, 2004 MT 37, 320 M 49, 86 P3d 3 (2004), and St. v. Kearney, 2005 MT 171, 327 M 485, 115 P3d 214 (2005).

Evidence of Prior Accidents — No Offer of Proof — No Error: Evidence of prior accidents, while inadmissible for the purpose of proving negligence, is nevertheless admissible for the purpose of showing the existence of a danger or defect and notice thereof. Such evidence of prior accidents, however, must show situations substantially similar to or not too remote from the accident in question, although absolute identity of circumstances is not necessary. Here, where there was no offer of proof as to what the prior accidents would have shown, the Supreme Court could not determine admissibility, and therefore no reversible error was committed. Runkle v. Burlington N., 188 M 286, 613 P2d 982, 37 St. Rep. 995 (1980). See also Kissock v. Butte Convalescent Center, 1999 MT 322, 297 M 307, 992 P2d 1271, 56 St. Rep. 1288 (1999).

No Offer of Proof — No Record or Other Basis for Review: The defendant sought to introduce evidence he claimed was exculpatory and rehabilitating and that impeached testimony offered by the State. The State's objection to the evidence was sustained. On appeal, the court found nothing in the record to disclose the nature of the alleged impeaching testimony and no offer of proof was made. Absent this, the court had no basis for review. St. v. Hall, 183 M 511, 600 P2d 1180, 36 St. Rep. 1780 (1979).

No Offer of Proof at Trial — Effect on Appeal: The Supreme Court refused to review various documents attached to appellant's brief in an appeal pro se when no offer of proof was made at trial because, as such, they were not a part of the record on appeal. Jerome v. Jerome, 175 M 429, 574 P2d 997 (1978).

PLAIN ERROR

Assertion of Error in Alleged Comment on Post-Miranda Silence — No Doyle Violation: Clausell contended that the state violated his right to due process and privilege against self-incrimination by commenting on his silence after he received a Miranda warning, relying on Doyle v. Ohio, 426 US 610 (1976). The Supreme Court found that the issue was reviewable under the common-law plain error doctrine set out in St. v. Finley, 276 M 126, 915 P2d 208 (1996); however, the court found no Doyle violation in this case. Not only did the record fail to support Clausell's assertion that the prosecution commented on his post-Miranda silence, it also did not support his assertion that he was silent after he received Miranda warnings. In fact, between the time that they arrived at the hospital and the time of being arrested and given the warnings, Clausell gave five different accounts of how his girlfriend was injured. He had not received a Miranda warning prior to making any of the statements that the state referred to in arguments at trial. The Doyle rule is limited to instances in which the prosecution seeks to impeach a defendant's testimony based on silence after Miranda warnings are given, and no construction of Doyle could be read to preclude the state from comparing Clausell's voluntary, inconsistent statements. Clausell failed to establish any improper comment on his post-Miranda silence, and thus his constitutional rights were not violated by the state's comments at trial. St. v. Clausell, 2001 MT 62, 305 M 1, 22 P3d 111 (2001).

Jury Instruction Disallowing Evidence of Intoxication in Determining State of Mind Not Error — Full and Fair Instructions on Law: Following Raugust's criminal trial, the court instructed the jury that it could not consider evidence of intoxication for any purpose, pursuant to 45-2-203. Raugust maintained on appeal that the instruction was in error because depriving him of the ability to admit intoxication evidence lessened the state's burden of proof and confused the jury, in violation of his due process rights. However, the error urged on appeal was not contained in the objection made to the instruction during the final settling of jury instructions, constituting waiver of the argument on appeal. Moreover, the plain error doctrine did not apply because review under that doctrine was requested for the first time on appeal. Here, the jury was instructed regarding: (1) the elements of each offense charged and the state's burden of proving each element beyond a reasonable doubt; (2) the definition of the applicable mental states—purposely and knowingly; (3) the fact that the existence of a mental state may be inferred from the acts of the accused and from the facts and circumstances connected with the offense; (4) the difference between direct and circumstantial evidence; (5) witness credibility; and (6) the need for a unanimous verdict. Read as a whole, these instructions fairly and fully instructed the jury on the law applicable to the case, and giving the instruction disallowing the defense of intoxication was not erroneous. St. v. Raugust, 2000 MT 146, 300 M 54, 3 P3d 115, 57 St. Rep. 570 (2000). See also St. v. Hagen, 283 M 156, 939 P2d 994 (1997).

Impeachment Questioning on Defendant's Silence — Not Error: In a trial for sexual intercourse without consent, the District Court allowed the defendant to be cross-examined on statements that the defendant had voluntarily made to a police officer prior to arrest and on how the defendant's testimony at trial conflicted with those statements. The District Court did not err in allowing the state to use the defendant's silence regarding consensual sexual intercourse during the initial interrogation by police as evidence against the defendant at trial. St. v. Graves, 272 M 451, 901 P2d 549, 52 St. Rep. 755 (1995).

Incorrect Jury Instruction Requested — Plain Error Not Applied: In a civil rights action against a county and hospital, Buhr argued at trial that the deliberate indifference standard was the correct standard of care to apply to the defendants in the case and requested a jury instruction to that effect. During trial, Buhr discovered his error and, on appeal, argued for the first time that the correct standard to be applied in the case was the professional judgment standard. He further argued that the District Court erred in applying the deliberate indifference standard and that the Supreme Court should apply the plain error doctrine in order to reach the

conclusion that the professional judgment standard applies to his civil rights claim. The Supreme Court refused to apply the plain error doctrine, noting that Buhr himself requested the jury instruction on deliberate indifference. Buhr v. Flathead County, 268 M 223, 886 P2d 381, 51 St. Rep. 1258 (1994).

Prosecutorial Comment on Defendant's Silence — Failure to Object — No Plain Error or Doyle Violation: There is no plain error or Doyle violation (Doyle v. Ohio 426 US 610, 49 L Ed 2d 91, 96 S Ct 2240 (1976)) when the defendant first focuses on the issue of his earlier silence in cross-examination of the state's witnesses, fails to object to the state's reference to the same silence for alleged improper purposes, and then for the first time on appeal, alleges that admission of such evidence constitutes plain reversible error. St. v. Sadowski, 247 M 63, 805 P2d 537, 48 St. Rep. 93 (1991).

Use of Expert Testimony to Identify Victim of Sexual Abuse — Not Plain Error: Defendant argued that even though no objection was made at trial, the admission of expert testimony indicating a child had been sexually abused was improper because it was not scientifically reliable and constituted plain error. However, defendant presented no evidence that the testimony was prejudicial as to his guilt or innocence or that the alleged error met any of the criteria of 46-20-701(2). Further, when expert testimony in child abuse cases has not been objected to at trial as improper, the Supreme Court will not entertain the issue on appeal. St. v. Reynolds, 243 M 1, 792 P2d 1111, 47 St. Rep. 1143 (1990), following St. v. Eiler, 234 M 38, 762 P2d 210 (1988).

Anonymous Tip — Hearsay — Plain Error: In the prosecution of defendant for conspiracy to commit arson and attempted criminal mischief, admission of the contents of an anonymous tip was error as the tip was hearsay. However, because defendant did not object to admission of the tip at trial, the inquiry of whether admission constituted reversible error extends only to determining whether the admission was plain error affecting substantial rights of the defendant under Rule 103, M.R.Ev. St. v. Cain, 220 M 509, 717 P2d 15, 43 St. Rep. 568 (1986).

Violation of Order Granting Motion In Limine: The "plain error" rule does not apply when only nonsubstantial rights of appellant are affected by testimony entered in violation of a motion in limine. St. v. Lias, 218 M 124, 706 P2d 500, 42 St. Rep. 1453 (1985).

Prosecution Comments on Witnesses in Opening and Closing — No Objection — No Effect on Substantial Rights: The prosecution in opening and closing made comments on the truthfulness and credibility of witnesses and other matters not related to the defendant's right not to testify. A lack of objection does not preclude consideration in the trial court of error that affects the defendant's substantial rights, but these matters were subject to free comment to the jury under the circumstances of this case and thus did not affect substantial rights of the defendant. St. v. Harris, 209 M 511, 682 P2d 159, 41 St. Rep. 866 (1984).

Plain Error Doctrine — Strictly Construed: Plaintiffs brought suit for personal injuries arising out of an automobile accident. Defendant's attorney obtained a motion in limine to prevent mention of insurance matters during trial. The jury returned a verdict awarding plaintiffs $5,000. Plaintiffs moved for a new trial, alleging inflammatory remarks by defense counsel during closing arguments, allegedly violating the motion in limine. No objections were made, no request for an admonition by the court was made, and no corrective jury instruction was requested. Plaintiffs contended they were entitled to a new trial under the "plain error doctrine". The Supreme Court was not sympathetic to a broad definition of "substantial rights" that must be impaired in order to apply the "plain error doctrine". The court stated that "plain error" generally involves an act or omission of a more serious nature than "reversible error", and only on rare occasion is it invoked in civil cases. The application of the "plain error doctrine" to cases where failure or refusal to raise the issue involved at the trial level was conscious on the part of trial counsel would so liberalize the doctrine as to effectively negate the substance of the remainder of Rule 103. The time and place for objecting to unwarranted references to insurance are during trial. Reno v. Erickstein, 209 M 36, 679 P2d 1204, 41 St. Rep. 537 (1984), followed in Cosner v. Napier, 249 M 253, 813 P2d 989, 48 St. Rep. 652 (1991), Geiger v. Sherrodd, Inc., 262 M 505, 866 P2d 1106, 50 St. Rep. 1661 (1993), and Guertin v. Moody's Mkt., Inc., 265 M 61, 874 P2d 710, 51 St. Rep. 407 (1994).

"Plain Error" — Appealable Though No Objection Made: In adopting the "plain error" doctrine, appellate courts have a duty to determine whether the parties before them have been denied substantial justice by the trial court, and when that has occurred, they can, within sound discretion, consider whether the trial court has deprived a litigant of a fair and impartial trial, even though no objection was made to the conduct during the trial. Such was the case when appellant was denied his day in court by the trial judge's recess and failure to reconvene.

Halldorson v. Halldorson, 175 M 170, 573 P2d 169 (1977). See also Zimmerman v. Bozeman Prod. Credit Ass'n, 233 M 156, 759 P2d 166, 45 St. Rep. 1387 (1988).

GENERAL

Admission of Medical Records to Determine Whether Material Misrepresentation Made on Application — No Prejudice: When applying for credit life insurance, plaintiff's husband, Clarence, indicated that he was in good health. Less than 1 year later, Clarence died, and plaintiff submitted an insurance claim, but the claim was denied and the policy was rescinded, so plaintiff sued. At trial, the District Court admitted Clarence's medical records. Plaintiff argued that the records were allowed without foundation showing that the records existed when Clarence applied for the insurance or that the records were relied on by the parties. The court concluded that it was for the jury to decide whether Clarence made a material misrepresentation that would justify defendant's action in denying the claim and rescinding the policy. The Supreme Court affirmed, holding that the District Court did not act arbitrarily or exceed the bounds of reason in admitting the records for jury inspection and that plaintiff failed to identify any prejudicial information in the records or show how introduction of the records harmed the case. Williams v. Union Fidelity Life Ins. Co., 2005 MT 273, 329 M 158, 123 P3d 213 (2005). See also Lopez v. Josephson, 2001 MT 133, 305 M 446, 30 P3d 326 (2001).

Evidence Related to Plaintiff's Bankruptcy Properly Precluded From Trial Regarding Plaintiff's Purchase of Credit Life Insurance: When Clarence and Barbara purchased a vehicle, the dealer offered credit life insurance as part of the transaction. Clarence died within 1 year of the purchase, but the insurer denied a life insurance claim and rescinded the policy. Barbara sued the insurer for fraud and bad faith. At trial, defendant sought to introduce evidence regarding plaintiff's bankruptcy, but the trial court granted Barbara's motion in limine excluding the bankruptcy evidence, and defendant appealed. The Supreme Court found no evidence that the trial court acted arbitrarily or exceeded the bounds of reason in granting the motion in limine, and the trial court was affirmed. Williams v. Union Fidelity Life Ins. Co., 2005 MT 273, 329 M 158, 123 P3d 213 (2005). See also Lopez v. Josephson, 2001 MT 133, 305 M 446, 30 P3d 326 (2001).

Failure to Notify Defendant of State's Intent to Use Evidence of Alleged Violations at Probation Revocation Hearing Considered Due Process Violation — Harmless Error: At a hearing on the revocation of Pedersen's suspended sentence, the District Court allowed the state to introduce drug test results, even though drug use was not alleged prior to the hearing. Pedersen asserted that the failure to notify him that the drug test results would be used was a due process violation. The Supreme Court agreed. Even though a revocation hearing is not subject to the Montana Rules of Evidence, the hearing must be fundamentally fair, and minimum due process rights, including notice, extend to a revocation hearing. Thus, because Pedersen was not notified in advance, the District Court erred in admitting the drug test results. However, the error was harmless. The District Court's findings did not reference the drug test results, nor did the court rely on the results in revoking the suspended sentence, relying instead on the abundant evidence of Pedersen's violation of four other probation conditions. Therefore, the Supreme Court affirmed the sentence revocation. St. v. Pedersen, 2003 MT 315, 318 M 262, 80 P3d 79 (2003). See also St. v. Nelson, 225 M 215, 731 P2d 1299 (1987).

No Requirement to Bifurcate Revocation Hearing Into Evidentiary and Dispositional Phases: Pedersen contended that he was entitled to a bifurcated sentence revocation hearing, with the evidentiary and dispositional phases separated into two distinct hearings, and that the only proper time for introducing and rebutting evidence was during the evidentiary phase of the hearing. However, Pedersen cited no authority for the bifurcation proposition, and the Supreme Court declined to adopt it. The District Court has wide latitude to control courtroom proceedings, and it was not an abuse of the court's discretion to allow the state to present evidence during the dispositional phase, rather than divide the hearing into distinct proceedings for evidentiary purposes. St. v. Pedersen, 2003 MT 315, 318 M 262, 80 P3d 79 (2003).

Introduction of Evidence of Acts Not Referred to in Pretrial Order — Not Grounds for New Trial: As a result of a dispute, the relationship between neighbors Lopez, Monroe, and Josephson deteriorated until assault charges were filed against Josephson. The operative contentions in the pretrial order were that Josephson assaulted Lopez by pointing a firearm at Lopez's face and assaulted Monroe verbally and fired a weapon toward Monroe's property. The District Court found it impossible to determine from the allegations the dates, times, and places that the alleged assaults took place, but the court concluded that the pretrial order nevertheless placed Josephson on notice that he was being accused of assault on multiple occasions over an unspecified period of time. Josephson moved for a new trial on grounds that plaintiffs were

improperly allowed to introduce evidence of acts not referred to in the pretrial order, evidence of bad character, and evidence of other crimes, wrongs, or acts. However, because Josephson waited until the day of trial to clarify which assaults formed the basis of the case against him, rather than using available pretrial motions and rules of discovery, the District Court was not found to have abused its discretion in giving plaintiffs latitude in their proof of the various assaults at trial, including allowing evidence of bad character to impeach Josephson's testimony. The District Court did properly preclude evidence of assaults by Josephson on nonparty persons. Lopez v. Josephson, 2001 MT 133, 305 M 446, 30 P3d 326 (2001).

Lower Court's Admission of Testimony Regarding Ownership of Cattle Prod as Rebuttal Evidence Proper: Hart argued that the lower court should not have allowed the state to introduce rebuttal evidence concerning his ownership of a cattle prod allegedly used by him during an assault because the issue of ownership was first raised during the state's cross-examination of him and not during his direct testimony. The Supreme Court ruled that although rebuttal testimony may not be used to introduce new matters, Hart had raised the issue of ownership of the cattle prod during his direct testimony when he testified that he had seen the cattle prod previously in the victim's house and believed that she used it to train her dogs. Therefore, the state could present rebuttal evidence showing that the cattle prod belonged to Hart. St. v. Hart, 2000 MT 332, 303 M 71, 15 P3d 917, 57 St. Rep. 1398 (2000).

Improper Argument Concerning Witness Not Called Not Requiring Reversal: Moralli sued Lake County for a back injury that resulted from slipping and falling in the Lake County jail. During the closing argument at trial, Moralli's counsel commented upon the failure of the county to call the jailer as a witness, saying that the jailer's testimony would have hurt the county badly. Upon objection by the county, the District Court gave a curative instruction, admonishing the jury that it could not consider what the jailer might or might not say. The Supreme Court held that the argument was less prejudicial than the argument based upon excluded testimony considered by the Supreme Court in Gunnels v. Hoyt, 194 M 265, 633 P2d 1187 (1981). As in Gunnels, the Supreme Court held that the argument was improper but was not so prejudicial that it could not be cured by the District Court's instruction to the jury. Moralli v. Lake County, 255 M 23, 839 P2d 1287, 49 St. Rep. 872 (1992). However, see Harne v. Deadmond, 1998 MT 22, 287 M 255, 954 P2d 732, 55 St. Rep. 80 (1998).

Defendant's Difficulty With English Not Sufficient to Suppress Statements Made to Arresting Officer: The defendant was arrested at the scene of a burglary. During the trial, he moved to suppress statements made to the arresting officer on the basis that he did not have an adequate understanding of English. The Supreme Court affirmed the lower court's ruling that nothing in the record reflected an inadequate understanding on the defendant's part. St. v. Higareda, 238 M 130, 777 P2d 302, 46 St. Rep. 1146 (1989).

Negligent Suppression of Evidence — Harmless Error: In an appeal involving the negligent suppression of evidence, the court agreed with appellant that the state acted improperly in suppressing four taped witness statements during discovery and a possibly incriminating statement made by appellant during his arrest and in endorsing an additional witness on the first day of trial. However, the court found that the suppressed evidence was either repetitive of other testimony or minimally supportive of a self-defense theory, and that since the defense knew of the additional witness' connection with and importance in the case, it could not convincingly claim surprise at the endorsement. Therefore, all errors were held to be harmless and not grounds for reversal. St. v. Wallace, 223 M 454, 727 P2d 520, 43 St. Rep. 1908 (1986), followed, with regard to application of the harmless error rule to admissibility of hearsay testimony, in St. v. Alexander, 265 M 192, 875 P2d 345, 51 St. Rep. 474 (1994).

Excluded Documents Never Offered and Refused as Exhibits — Refusal to Consider on Appeal — Admonishment for Attaching to Appeal Brief: Medical documents that were excluded as evidence but were never offered as exhibits at trial and thus were not in the record as refused exhibits were included as part of an appendix to the defendant's appeal brief. The Supreme Court held that it was unable to evaluate or rule on the admissibility of documents that were never offered into evidence or described in the record and admonished counsel for attaching extraneous material to briefs as an attempt to introduce evidence through the "back door". Garza v. Peppard, 222 M 244, 722 P2d 610, 43 St. Rep. 1233 (1986), followed in Murphy v. St., 248 M 82, 809 P2d 16, 48 St. Rep. 335 (1991).

Evidence of Nonprosecution for Arson in Applying Valued Policy Statute: An insurer objected to closing arguments on the ground that evidence of nonprosecution for arson in cases for insurance proceeds was not admissible. The issue arose because of the provision in 33-24-102 which provides that the valued policy law applies without criminal fault on the part of the insured. The Supreme Court held that it was pertinent to the insured's case that the jury, in

considering whether 33-24-102 was applicable, should also have known whether the insured was without criminal fault; otherwise, under its terms, the statute would not apply. Britton v. Farmers Ins. Group, 221 M 67, 721 P2d 303, 43 St. Rep. 641 (1986).

Motion In Limine to Exclude Documents and Testimony — General Testimony on Same Subject Allowed — No Effect on Substantial Rights of Defendant: A homicide defendant claimed error because the District Court granted the State a motion in limine refusing the introduction of specific documentary and testimonial evidence relating to an earlier incident involving the defendant and the victim that could have established the defendant's frame of mind relevant to self-defense in the homicide. The Supreme Court held that the refusal to admit such evidence did not affect substantial rights of the defendant because general testimony was admitted establishing that the incident occurred and what its general outcome was. St. v. Daniels, 210 M 1, 682 P2d 173, 41 St. Rep. 880 (1984).

Credibility of Probationer: Defendant's assertion that admission in probation revocation hearing of inadmissible probation violations had a detrimental impact on his credibility was pure fantasy. The record on appeal disclosed that if anything affected his credibility, it was his own testimony and that of his alibi witnesses that he was not present at the time and place of the alleged assault on his mother-in-law (one of the bases for petition for probation revocation) in the face of her positive identification of him as her assailant. St. v. Steffans, 195 M 395, 636 P2d 836, 38 St. Rep. 1976 (1981).

Evidence of Offenses Not Charged — Probation Revocation: Admission in evidence, in probation revocation hearing, of alleged probation violations not contained in the petition to revoke was error, but it did not affect defendant's substantial rights and must be disregarded where two of the alleged violations were not made a basis of revocation of probation and, although the third was, the State introduced no evidence on the matter and all evidence on it was introduced by defendant. Defendant could not predicate reversible error on testimony he himself introduced. St. v. Steffans, 195 M 395, 636 P2d 836, 38 St. Rep. 1976 (1981). See also St. v. Nelson, 225 M 215, 731 P2d 1299, 44 St. Rep. 181 (1987).

Counsel's Remarks Concerning Evidence Not Given: The Supreme Court held that the defense counsel's remarks about the failure of the plaintiff to call his doctor to testify or to provide the doctor's records did not constitute misconduct amounting to reversible error. Gunnels v. Hoyt, 194 M 265, 633 P2d 1187, 38 St. Rep. 1492 (1981). See also Krueger v. Gen. Motors Corp., 240 M 266, 783 P2d 1340, 46 St. Rep. 2114 (1989).

Admission of Irrelevant Evidence — No Effect on Substantial Rights: In a trial for a decree of divorce in which the only issue was the disposition of the family home, the court admitted evidence concerning bank deposits and checks. As the evidence admitted had nothing to do with the issue at trial, it cannot serve as a basis for error; no error exists for appeal unless a substantial right of the objecting party has been affected. In re Schwartz v. Schwartz, 184 M 178, 602 P2d 175, 36 St. Rep. 1980 (1979), followed in Funk v. Robbin, 212 M 437, 689 P2d 1215, 41 St. Rep. 1848 (1984).

Attempted Admission — Not Grounds for Reversal: The fact that State was unable to lay a proper foundation for the admission of items into evidence, which were not irrelevant or otherwise inadmissible in an essential way, did not require reversal of defendant's conviction on the ground their attempted admission was prejudicial. St. v. Larson, 175 M 395, 574 P2d 266 (1978).

Law Review Articles

The Motion In Limine—A Useful Procedural Device, Fetscher, 35 Mont. L. Rev. 362 (1974).

Improper Evidence in Nonjury Trials: Basis for Reversal, 79 Harvard L. Rev. 407 (1965).

Collateral References

Evidence *key* 44 through 49, 73 through 97.

88 C.J.S. Trial §§163 through 176.

5 Am. Jur. 2d Appellate Review §§671, 681, 706, 709, 710, 752, 759, 760; 58 Am. Jur. 2d New Trial §§94 through 96; 75 Am. Jur. 2d Trial §§395 through 484.

Right of accused to be present at suppression hearing or at other hearing or conference between court and attorneys concerning evidentiary questions. 23 ALR 4th 955.

Violation of federal constitutional rule of *Mapp v. Ohio* excluding evidence obtained through unreasonable search and seizure, as constituting reversible or harmless error. 30 ALR 3d 128.

Construction of provision of Rule 43(c) of the Federal Rules of Civil Procedure, and similar state provisions, providing for entry into record of evidence excluded by trial court. 9 ALR 3d 508.

Supreme Court cases determining whether admission of evidence at criminal trial in violation of federal constitutional rule is prejudicial or harmful error. (comment note) 31 L Ed 2d 921.

1 Wigmore §§18, 20, 21; 6 Wigmore §1808.

Rule 104. Preliminary questions of admissibility.

Commission Comments

(a) Questions of admissibility generally. This subdivision is identical to Federal and Uniform Rules (1974) Rule 104(a) except that "subject to the provisions of subdivision (b)" is deleted because of a change in that subdivision. The Commission adopted this provision because of its common-sense approach to the problem of whether the judge or jury should determine such preliminary questions and because it is consistent with the practice in Montana. Section 93-2501-2, R.C.M. 1947 [25-7-102 and 26-1-201, amended 1983], states: "All questions of law, including the admissibility of testimony, the facts preliminary to such admission,...and other rules of evidence, are to be decided by the court...."

Montana cases have followed this statute, and two in particular provide detailed procedure to be followed in using this provision. State v. Newman, 66 Mont. 180, 185, 213 P 805 (1922) on the existence of a privilege; State v. Kacar, 74 Mont. 269, 280, 240 P 365 (1925) on the admissibility of a dying declaration; and Union Interchange, Inc. v. Parker, 138 Mont. 348, 355, 357 P2d 339 (1960) one of the latest cases.

The last sentence of this subdivision, providing for the suspension of the rules except for those with respect to privilege, is adopted for practical reasons: When the judge is determining these preliminary matters he must be able to view potentially inadmissible evidence in order to determine whether it can be admitted. It is not clear whether this part of the rule is consistent with existing Montana law. Section 93-2501-3, R.C.M. 1947 [superseded], states that in the determination of facts in nonjury trials by the the court, the law of evidence is applicable; however, it does not state whether the law of evidence is applicable when the court determines questions of law, such as those under this rule. The final phrase in this sentence, applying rules of privilege in preliminary questions, means that the substance of a privileged communication will be protected, but all other rules of evidence will not apply in the determination of the existence of that privilege. Holding the substance of a privilege inviolate is consistent with Section 93-701-4, R.C.M. 1947 [26-1-801], and Montana Rule 101(b).

(b) Admissibility subject to a condition. This subdivision is original and therefore entirely different from either Federal or Uniform Rules (1974) Rule 104(b). The Commission rejected those rules on relevancy conditioned on fact because they were impractical and inconsistent with Montana law. The Federal and Uniform Rule calls for a determination of the relevancy of an item *by the jury* when its relevance depends upon the existence of a preliminary fact. The impracticality of the rule arises when an attempt is made to apply it to various situations. The originator of the term, Morgan, in Basic Problems in Evidence 45-46 (1962), gives examples of entirely different situations than are given by the Advisory Committee in its Note to Federal Rule 104(b) at 46 F.R.D. 161, 189. As shown by the Commission Notes to Montana Rule 104(a), Montana law clearly has no provision for the jury to determine any preliminary questions. The policy behind Federal and Uniform Rule 104(b) is to allow the jury to decide questions similar to other questions of fact which it is capable of making, especially where none of the exclusionary rules of competence apply. Advisory Committee Note to the Federal Rule, supra at 190. The Commission feels that current Montana law should not be rejected on such policy grounds, particularly where the result is potentially confusing and impractical.

The rule adopted is the common practice in Montana allowing evidence to be introduced subject to the condition that it be connected up. Montana has apparently always allowed this practice. State ex rel. Felker, 27 Mont. 451, 459, 71 P. 668 (1903); Risken v. N. Pac. Ry., 137 Mont. 57, 70, 350 P2d 831 (1960). The phrase "except as otherwise provided by law" is included to prevent a misinterpretation of the rule which could allow evidence to be introduced with a promise to connect but without sufficient foundation; this would be clearly contrary to existing Montana law. Examples of situations which require that foundation evidence be introduced first are: the best evidence rule under Section 93-1101-9, R.C.M. 1947 [superseded]; authentication of writings under Section 93-801-2, R.C.M. 1947 [superseded], (business records), Section 93-901-1, R.C.M. 1947 [superseded], (official reports), Sections 93-1001-17, R.C.M. 1947 [superseded], -18 [superseded], and -30 [superseded], (public writings), and Sections 93-1101-12, R.C.M. 1947 [superseded], and -19 [superseded], (private writings); use of prior inconsistent statements under Section 93-1901-12, R.C.M. 1947 [superseded]; refreshing memory from notes under Section 93-1901-6, R.C.M. 1947 [superseded]; relevancy of material objects under Section

93-1201-1, R.C.M. 1947 [superseded]; and qualification of expert witnesses and of lay witnesses in certain situations under Section 93-401-27(9), R.C.M. 1947 [superseded].

The final sentence is added to insure that the court retains its control over the parties' introduction of evidence under this rule. This is consistent with R.C.M. 1947 Sections 93-1901-1 [superseded], and 95-1910 [46-16-401] and case law. Exchange State Bank v. Occident Elevator Co., 95 Mont. 78, 91, 24 P2d 126 (1933); State v. Jensen, 153 Mont. 233, 237, 455 P2d 63 (1969); Spurgeon v. Imperial Elevator Co., 99 Mont. 432, 438, 43 P2d 891 (1935) and cases cited therein. Especially important is that the evidence is capable of being connected up. State v. Simanton, 100 Mont. 292, 309, 49 P2d 981 (1935). It may also be noted that Montana follows the majority rule and requires that when evidence is not connected up, it is the duty of counsel to object and make a motion to strike as soon as it is apparent. State v. Simanton, supra at 305 and Pfau v. Stokke, 110 Mont. 471, 474, 103 P2d 673 (1940).

(c) Hearing of jury. This subdivision is identical to Federal and Uniform Rules (1974) Rule 104(c). The rule was adopted because it expresses good policy and is generally consistent with Montana law. Having hearings on the admissibility of confessions outside the presence of the jury is consistent with the provisions of Section 95-1805, R.C.M. 1947 [46-13-301]. Hearings on other matters may or may not be conducted within the hearing of the jury, depending upon the nature of the matter; therefore, leaving this to the discretion of the court is the most practical solution to the problem and also current practice. The final part of this subdivision, allowing the accused in a criminal trial to request a hearing outside the presence of the jury when he is a witness, encourages testimony and prevents claims of prejudice.

(d) Testimony by accused. This subdivision is identical to Federal and Uniform Rules (1974) Rule 104(d). The rule was adopted because it expresses good policy, like that of subdivision (c), in encouraging the accused to testify in such preliminary matters, so that the admissibility of evidence is more easily determined. While there is no Montana law specifically dealing with this subdivision, the Commission does not intend to change the rule expressed in State v. Rogers, 31 Mont. 1, 7, 77 P 293 (1904) and State v. Smith, 57 Mont. 349, 359, 188 P 644 (1920) allowing a "wide latitude of cross-examination" when the accused testifies on his own behalf and "denies that he committed the crime for which he is on trial".

(e) Weight and credibility. This subdivision is identical to Federal and Uniform Rules (1974) Rule 104(e). It was adopted because it is consistent with Montana law and clarifies a potential misinterpretation of subdivision (a) of this rule. The misinterpretation could arise because of the similarity between evidence which may be preliminary to admissibility and that related to weight or credibility; the rule simply clarifies this situation. Sections 93-401-4, R.C.M. 1947 [26-1-302], and 93-2001-1, R.C.M. 1947 [26-1-203], respectively, have long provided the rule in Montana that the jury is the sole judge of credibility and weight, and therefore the rule is consistent with Montana law in allowing a party to introduce such evidence.

COMMISSION COMMENT TO JUNE 1990 AMENDMENT

The revision establishes gender neutral format only. No substantive change.

Compiler's Comments

1990 Amendment: Substituted gender neutral language for gender specific language. Amendment effective June 7, 1990.

Case Notes

Admissibility of Evidence 182
Audio or Video Evidence 185
Chain of Custody 186
DNA Evidence 187
Experts 187
Foundation 188
Surprise 189
Miscellaneous 190

ADMISSIBILITY OF EVIDENCE

Child Incest Victim's Testimony Not Tainted by Interview Technique — Directed Verdict Denied: Following Gardner's incest conviction, he moved for a directed verdict, attacking the victim's credibility, criticizing the police investigation, and asserting that no medical evidence existed to support sexual abuse. The motion was denied, and Gardner appealed. A directed verdict of acquittal is appropriate only when there is no evidence to support a guilty verdict. Although not required, the District Court conducted a taint hearing to determine whether the child's testimony was rendered irremediably unreliable by the investigative process and

determined that it was not. The court also heard testimony that no custody issues existed that may have motivated the mother to coax an adverse statement from the child about her father. The motion for a directed verdict was properly denied. On the issue of medical evidence, the Supreme Court noted that a conviction for a sex offense may be based entirely on uncorroborated evidence of the victim, even if the victim is a child, and that the credibility and weight of witness testimony are determined by the trier of fact. In this case, Gardner's allegations in conflict with his daughter's testimony constituted questions for the trier of fact, which the jury resolved against Gardner. Viewed in a light most favorable to the prosecution, a rational jury could have found the essential elements of incest beyond a reasonable doubt. The Supreme Court affirmed. St. v. Gardner, 2003 MT 338, 318 M 436, 80 P3d 1262 (2003).

Rule of Law Regarding Admissibility of Evidence of Subsequent Accident With Nonparty — Defendant's Burden to Show That Damages Divisible and Apportionment Proper: Following Truman's injury in an automobile accident, she was involved in a second automobile accident and in an accident involving an ultralight aircraft. The District Court held that evidence of Truman's injuries in the second automobile accident and the aircraft accident would be admissible in a trial related to the first automobile accident to disprove causation. After accepting supervisory control, the Supreme Court relied on an analogous situation in Azure v. Billings, 182 M 234, 596 P2d 460 (1979), holding that once a plaintiff presents a prima facie case that the defendant's conduct contributed as a cause of injury, the burden shifts to the defendant to prove that the injury is divisible. A defendant is permitted to submit relevant evidence of subsequent accidents to negate allegations that the defendant is the cause or sole cause of the injury, but the defendant may not attempt to apportion fault to the conduct of a nonparty because assignment of liability to a nonparty without affording that party the opportunity to defend against liability risks an unreliable and disproportionate assignment of liability and places the burden of defending the nonparty on the plaintiff. In this case, plaintiff must prove that defendant's conduct contributed as a substantial factor to the damages, but need not prove the extent to which defendant is responsible. If defendant proves by a reasonable medical probability that the injury is divisible and that defendant is responsible for only a portion of the damages, the jury may reduce defendant's obligation by the portion of damages for which it is proved that defendant is not responsible. However, if the injury is indivisible and evidence does not permit an apportionment, then defendant is liable for the entire damage. Truman v. District Court, 2003 MT 91, 315 M 165, 68 P3d 654 (2003).

Admissibility of Preliminary Alcohol Screening Test Results — Administrative Rule Limiting Test Results to Probable Cause Evidence Superseded — Proper Foundation for Use of Training Manual as Model for Screening Test: Harrington raised several objections concerning the use of results from a preliminary alcohol screening test (PAST) at trial, contending first that the PAST results should have been excluded because ARM 23.4.201(7)(b) (before 2002 amendment) allows PAST results to be considered as probable cause evidence only. The Supreme Court noted that the 1997 Legislature amended 61-8-404 to allow admission of a report of a blood or breath test if a breath test or PAST was performed by a person certified by the Forensic Sciences Division of the Department of Justice. The administrative rule was inconsistent with the statute, and the statute prevailed, so the PAST results could not be disallowed pursuant to the rule. Harrington also argued that a proper foundation was not laid for admission of the PAST results. The Supreme Court disagreed. The arresting officer testified that the specific make and model of equipment used for Harrington's PAST was on the approved list in the training manual distributed by the Department and that the equipment was field tested prior to use. It was within the trial court's discretion to consider the training manual pursuant to this rule in determining whether an adequate foundation existed for introduction of the PAST results. Columbus v. Harrington, 2001 MT 258, 307 M 215, 36 P3d 937 (2001).

"Were They Lying" Questions to Defendant Not Categorically Improper: Hart argued that the lower court erred in allowing the prosecutor to ask him if other witnesses had lied when they testified that Hart owned the cattle prod used in an alleged assault after he had testified that the prod belonged to the victim. The Supreme Court held that it was declining to follow the line of cases that held "were they lying" questions were always proper or the line of cases that held that they were always improper. The Supreme Court stated that the admissibility of "were they lying" questions was discretionary with the trial court. In the instant case, the questions were proper because the case came down to whether the jury believed the defendant or the victim and the other eyewitnesses. Therefore, the prosecutor's asking Hart if the other witnesses lied helped focus the jury's attention on the central issue of the case. St. v. Hart, 2000 MT 332, 303 M 71, 15 P3d 917, 57 St. Rep. 1398 (2000).

Error in Exclusion of Evidence of Stress-Provoking Event Other Than Accident in Determining Loss of Established Course of Life: Maurer was injured in a car accident, after which he was depressed. This depression led him to leave the family ranch and contributed to his "course of life" damages. Defendants should have been allowed to introduce evidence of another stress-provoking incident that occurred about the same time and could have contributed to Maurer's depression. The incident involved the injury of Maurer's girlfriend, criminal charges against Maurer, and his subsequent trial and acquittal on felony assault (now assault with a weapon) charges. The link between the incident and Maurer's depression was self-evident, and the jury should have been allowed to consider evidence of the incident from a common sense viewpoint to determine to what degree, if any, the stress from the incident contributed to Maurer's loss of established course of life. The probative value of evidence of the incident was not substantially outweighed by its prejudicial nature. Maurer v. Clausen Distrib. Co., 275 M 229, 912 P2d 195, 53 St. Rep. 78 (1996).

Admissibility of Coconspirator's Statements — Independent Evidence Required: Before statements of a coconspirator may be admitted, the existence of a conspiracy must be shown by a preponderance of the evidence, independent and exclusive of the coconspirator's statement itself. The existence of a conspiracy can be shown by circumstantial evidence. Further, the admissibility determination must be made prior to the introduction of the alleged coconspirator's statement. St. v. Stever, 225 M 336, 732 P2d 853, 44 St. Rep. 283 (1987).

Prima Facie Case Showing No Substantial Change in Evidence — Attack of Chain of Evidence at Trial: Defendant questioned whether evidence was properly admitted without the state's establishing a proper chain of evidence. Extensive testimony chronicled the labeling, storing, securing, transferring of possession, and testing of each exhibit. The state made a prima facie case showing that there had been no substantial change in the evidence, and defendant failed to produce any evidence to show if actual or even potential tampering could have occurred. Additionally, defendant vigorously attacked the chain of evidence at trial; thus, the jury had an opportunity to weigh this evidence. The Supreme Court found no abuse of discretion in admitting the evidence. St. v. Grant, 221 M 122, 717 P2d 562, 43 St. Rep. 685 (1986), followed in St. v. Evans, 247 M 218, 806 P2d 512, 48 St. Rep. 170 (1991).

Consent to Search — Voluntariness — Totality of the Circumstances Test: Defendant voluntarily went to the Billings Police Department in connection with a homicide investigation. It later came out that defendant had serious mental and drug abuse problems. Defendant was interrogated by two police officers. He was kept incommunicado in a small room for several hours, the officers used the "mean cop-nice cop" interrogation technique, and the officers lied to defendant about how much was known of his involvement in the crime (guilt assumption technique). The officers told defendant his problems might be mental or medical rather than criminal. Defendant then gave written consent to search his house and van. The police then brought in a psychiatrist who administered sodium amytal to defendant. The next day defendant was convinced by the psychiatrist to confess. The District Court suppressed evidence found during the search, ruling that the consent was involuntarily given. The question of voluntariness largely depends upon the facts of each case, no single fact being dispositive. The determination of voluntariness, rather, depends upon the "totality of the circumstances". The issue of voluntariness is a factual one addressed to the discretion of the trial court and will not be disturbed if supported by substantial credible evidence. The totality of the circumstances in the present case includes not only the police techniques employed, which were particularly coercive, but also the testimony presented by experts that defendant was a paranoid schizophrenic with severe drug problems. There can be no doubt that substantial evidence exists to support the suppression finding. St. v. Allies, 190 M 475, 621 P2d 1080, 37 St. Rep. 2089 (1980).

Evidence of Inseparably Related Crime Not Inadmissible Evidence of "Other Crimes": A defendant appealed his conviction for theft of a truck. The sole issue on appeal was whether the trial court erred in denying the defendant's motion to prohibit reference at trial to his use of the truckowner's credit cards, which were stored in the truck. Use of "other crimes" evidence requires notice to the defendant. The reviewing court, however, said that the evidence of the defendant's possession and use of the credit cards was not "other crimes" evidence. Because the wallet with the credit cards was in the truck when the truck was stolen, the evidence of the defendant's possession and use of a credit card was inseparably related to the truck theft. The acts of misconduct were simultaneous. The use of the credit card evidence was not unfair surprise or an unrelated issue. So, although the general rule is that when a defendant is tried for one offense he should be convicted, if at all, by evidence which shows that he is guilty of that offense alone, the evidence of the possession of the victim's credit cards was not "wholly independent" or "other crimes" evidence. Accordingly, the evidence was admissible under the

facts of this case, and no error was committed by the trial court. St. v. Trombley, 190 M 218, 620 P2d 367, 37 St. Rep. 1871 (1980).

Photographs Relevant as Demonstrative Evidence: In a wrongful death action in which the decedent's surviving spouse brought suit against the state and its contractor for negligently failing to warn the decedent of an abrupt edge at the shoulder of a highway construction project, the court abused its discretion in refusing to admit into evidence for demonstrative purposes photographs showing the proper use of an "abrupt edge" sign. The photographs were relevant as demonstrative evidence, as they illustrated an issue in the case and would not prejudice the jury. Workman v. McIntyre Constr. Co., 190 M 5, 617 P2d 1281, 37 St. Rep. 1637 (1980). See also Palmer v. Farmers Ins. Exch., 233 M 515, 761 P2d 401, 45 St. Rep. 1694 (1988).

Relevance and Admissibility of Testimony of Previously Acquitted Alleged Principal: The testimony of a previously acquitted alleged principal in a robbery was allowed in the trial of an alleged participant in the same robbery. The denial of any participation in the robbery provided the foundation for the admission of the witness' prior inconsistent statements in which he admitted his participation. There was additional evidence tending to establish that the witness and the defendant had planned the robbery with others. The witness' testimony was therefore relevant and clearly admissible. St. v. Bad Horse, 185 M 507, 605 P2d 1113, 37 St. Rep. 45 (1980).

Statement by Deceased Agent of Defendant — Admissibility: The statement of a corporate agent made to plaintiff within the scope and term of the agency is admissible as testimony by plaintiff when offered against the defendant although the corporate agent died before trial. McNulty v. Bewley Corp., 182 M 260, 596 P2d 474, 36 St. Rep. 1110 (1979).

Admissibility Subject to Condition — Renewal of Objection: If a counsel's foundational objection to evidence is based on subsection (b) of this section, he should state why the proffered evidence should only have been conditionally admitted, and it would then be incumbent upon him, not the court, to renew the objection after the State rested its case by motion to strike. St. v. Sullivan, 182 M 66, 595 P2d 372, 36 St. Rep. 936 (1979).

Admissible Evidence: The test of admissibility of photographic evidence and oral testimony is whether its probative value is substantially outweighed by its prejudicial effect. St. v. Azure, 181 M 47, 591 P2d 1125, 36 St. Rep. 514 (1979).

AUDIO OR VIDEO EVIDENCE

No Error in Denial of Motion to Suppress Evidence Based on Failure to Record 9-1-1 Emergency Call and Promptly Provide Officer's Belt Recording: Saxton made a 9-1-1 emergency domestic violence call that ultimately resulted in officers entering Saxton's home and arresting her on drug charges. Saxton maintained that the evidence should be suppressed because the police improperly entered the home but failed to record the emergency call and promptly provide the audio recording from the belt recorder of the investigating officer, which might have provided exculpatory evidence. The Supreme Court found that entry into the home was not unlawful and affirmed. Although the state may not interfere with a defendant's right to gather exculpatory evidence, the state is not required to collect it. Here, there was no deliberate suppression of evidence by failing to record the 9-1-1 call, and Saxton was eventually allowed to review and enhance the belt recording, but it yielded no evidence that was material to Saxton's defense. Thus, the District Court did not abuse its discretion by failing to suppress the evidence under these circumstances. St. v. Saxton, 2003 MT 105, 315 M 315, 68 P3d 721 (2003), following St. v. Heth, 230 M 268, 750 P2d 103 (1988).

Involuntary Written Consent to Search — Suppression of Illegally Seized Evidence Under Exclusionary Rule: Olson was arrested when officers entered her home pursuant to a warrant for Olson's failure to appear at a Justice's Court hearing. While the arrest was taking place in the kitchen, an officer looked into the living room and observed drug paraphernalia. Officers then searched other rooms of the house and found drugs and paraphernalia in each room. An officer requested that Olson sign a form consenting to a further search of the residence, and Olson agreed. A further search revealed more drugs and paraphernalia. Olson later made a taped statement in jail. The District Court denied Olson's motion to suppress on grounds that the written consent was voluntary. The Supreme Court disagreed and reversed. Although the knowing and voluntary consent by a citizen to a search is a recognized exception to warrant requirements, consent is not voluntary when it is given only after law enforcement officers have already conducted an illegal search because the consent flows directly from the unlawful intrusion. Further, the taped statement should have also been suppressed under the exclusionary rule, because the incriminating statement was gathered as a result of the unlawful search. St. v. Olson, 2002 MT 211, 311 M 270, 55 P3d 935 (2002).

Demonstrative Videotape: In a criminal trial resulting from a car accident, the District Court excluded from evidence a videotape prepared by a defense expert to illustrate the defendant's theory as to how the accident occurred. On appeal, the Supreme Court remanded the case for trial on other grounds and advised the court to specifically address factors discussed in Workman, Palmer, and Brown and to reconsider the question of whether the videotape may be admissible as demonstrative evidence. St. v. Ingraham, 1998 MT 156, 290 M 18, 966 P2d 103, 55 St. Rep. 611 (1998).

Questional Videotapes of Defendant Inadmissible to Show Poor Mental State: Santos appealed his murder convictions on the basis that the trial court should have admitted videotapes of him made by defense counsel shortly after his arrest because they were proof of his poor mental state. The Supreme Court held that the District Court properly excluded the tapes due to their questionable probative value because the defendant was not under oath at the time, there were no safeguards to ensure the tapes' integrity, and at best the tapes demonstrated the defendant's mental state several days after the crimes were committed. St. v. Santos, 273 M 125, 902 P2d 510, 52 St. Rep. 865 (1995).

Videotape With Blank Segment and Other Booking — Admissible: During the course of booking for a DUI arrest, the video camera was turned off for a short time to allow an independent investigator to obtain information from the defendant. Because of the interruption, the videotape contained a blank segment followed by a brief segment of a prior unrelated DUI booking. The defendant contended that the videotape was inadmissible because the interruption and the segment on the other booking constituted improper editing of the video. The Supreme Court held that proper foundation was made for the recording and that it was not abuse of discretion for the trial court judge to determine that the appropriate portions of the videotape were admissible. Missoula v. Forest, 236 M 129, 769 P2d 699, 46 St. Rep. 237 (1989).

Admissibility of Recording of Warrantless Face-to-Face Conversation by Police Use of Body Wire Transmitting Device: Warrantless consensual electronic monitoring of face-to-face conversations by the use of a body wire transmitting device, when performed by law enforcement officers while pursuing their official duties, does not violate the constitutional right to be free of unreasonable search and seizure or the right of privacy. Consent must be clearly obtained from at least one party to the conversation and must be freely made and without compulsion. As in telephone conversations, the consenting party may be an informant or police officer. Evidence obtained from such monitoring is admissible in a subsequent criminal trial. St. v. Brown, 232 M 1, 755 P2d 1364, 45 St. Rep. 818 (1988), overruling St. v. Brackman, 178 M 105, 582 P2d 1216 (1978).

Disclaimer in Videotape Made in Anticipation of Trial Inadmissible: A videotape that explained a fertilization program included a statement that the fertilizer was only a starter system, not a complete program. Plaintiffs contended the system was presented to them a year earlier as a complete program and that their reliance on it caused a partial crop failure. The Supreme Court affirmed a lower court ruling that because the tape was cumulative and was too likely made in anticipation of trial, it was inadmissible. Gurnsey v. Conklin Co., Inc., 230 M 42, 751 P2d 151, 45 St. Rep. 1 (1988).

Movie Admitted as Demonstrative Evidence: The court did not err in admitting a movie, offered as demonstrative evidence intended to illustrate plaintiff's testimony as to the cause of injury in a strict liability action, because the jury was cautioned the film was intended as demonstrative evidence only and was instructed in detail as to changes in conditions between the actual occurrence and demonstration. Brown v. N. Am. Mfg. Co., 176 M 98, 576 P2d 711 (1978), followed in Palmer v. Farmers Ins. Exch., 233 M 515, 761 P2d 401, 45 St. Rep. 1694 (1988).

Audio-Video Taping: The procedure of audio-video taping defendant arrested for driving while intoxicated was not violative of due process requirements, did not constitute an unreasonable search and seizure, and was held to be objective evidence outside the privilege against self-incrimination. St. v. Finley, 173 M 162, 566 P2d 1119 (1977).

CHAIN OF CUSTODY

Chain of Custody — Sufficiency of Evidence Demonstrating Chain — Faulty Laboratory Procedure: Weeks was convicted of sexual intercourse without consent with his stepdaughter. The conviction was based in part upon serological DNA evidence gained from blood samples taken from Weeks, the stepdaughter, and a child of the stepdaughter. Weeks challenged the admissibility of the samples because one of the samples was mistakenly sent to another laboratory before being forwarded to the correct laboratory and because when a sample of blood was taken from him, the person marking the sample did not follow the requirements of the

laboratory manual. Citing St. v. Bradley, 262 M 194, 864 P2d 787 (1993), the Supreme Court held that the state's evidence as to the chain of custody was sufficient even though the blood sample was inadvertently sent to the wrong laboratory. The Supreme Court also held that although the laboratory manual was not complied with, there was sufficient evidence to prove that the sample of blood tested by the laboratory was the blood that was taken from Weeks. St. v. Weeks, 270 M 63, 891 P2d 477, 52 St. Rep. 78 (1995), followed in St. v. Bowser, 2005 MT 279, 329 M 218, 123 P3d 230 (2005).

Prima Facie Case Showing No Substantial Change in Evidence — Attack of Chain of Evidence at Trial: Defendant questioned whether evidence was properly admitted without the state's establishing a proper chain of evidence. Extensive testimony chronicled the labeling, storing, securing, transferring of possession, and testing of each exhibit. The state made a prima facie case showing that there had been no substantial change in the evidence, and defendant failed to produce any evidence to show if actual or even potential tampering could have occurred. Additionally, defendant vigorously attacked the chain of evidence at trial; thus, the jury had an opportunity to weigh this evidence. The Supreme Court found no abuse of discretion in admitting the evidence. St. v. Grant, 221 M 122, 717 P2d 562, 43 St. Rep. 685 (1986), followed in St. v. Evans, 247 M 218, 806 P2d 512, 48 St. Rep. 170 (1991).

Chain of Custody of Evidence: Rumley appealed his conviction for negligent homicide. He argued that the court erred in admitting the results of a blood alcohol test because of a break in the chain of possession of the blood sample. He argued that because the police officer did not see the blood sample being drawn, the chain of possession was broken. There was testimony that the police officer gave a vial to a nurse who testified that she drew the blood sample, placed it in the vial, and returned it to the police officer. In light of that testimony, Rumley's claim lacks merit. The State's burden in establishing the chain of custody requires only that the evidence be identified and to make a prima facie showing that there has been no substantial change. In this case, the State satisfied its burden. St. v. Rumley, 194 M 506, 634 P2d 446, 38 St. Rep. 1351A (1981).

Chain of Custody — Adequacy of Foundation Left to Discretion of District Court: Armstrong contends that the State must show a complete chain of custody from the time of the homicide until the introduction into evidence and that if a link in the chain is missing, the exhibit may not be admitted. On appeal, the Supreme Court said that the adequacy of the foundation for admission of such evidence is within the District Court's discretion, and the District Court's determination will not be reversed absent a clear abuse of discretion. The State established a complete chain of custody from the time the evidence was found until it was introduced, and that is sufficient. St. v. Armstrong, 189 M 407, 616 P2d 341, 37 St. Rep. 1563 (1980).

DNA EVIDENCE

DNA Evidence — Conflicting Expert Testimony on Statistical Foundation for Test — Weight and Admissibility: Weeks was convicted of sexual intercourse without consent with his stepdaughter. The conviction was based in part upon DNA evidence gained from blood samples taken from Weeks, the stepdaughter, and a child of the stepdaughter. Weeks contended that because of conflicting expert testimony as to the size of the statistical basis necessary to apply the results to a population of 100 million, the DNA results should not be admitted. Citing Barmeyer v. Mont. Power Co., 202 M 185, 657 P2d 594 (1983), the Supreme Court held that the conflicting evidence was a matter for the jury to consider in deciding the weight of the evidence. St. v. Weeks, 270 M 63, 891 P2d 477, 52 St. Rep. 78 (1995).

DNA Evidence — Lack of Industry Standard No Preclusion of Admissibility: Weeks was convicted of sexual intercourse without consent with his stepdaughter. The conviction was based in part upon DNA evidence gained from blood samples taken from Weeks, the stepdaughter, and a child of the stepdaughter. Weeks contended that lack of one industrywide standard for DNA testing laboratory procedures precluded admissibility of the DNA evidence. An expert witness testified that membership in the American Association of Blood Banks (AABB) resulted in the application of a de facto standard for all testing. Citing St. v. Moore, 268 M 20, 885 P2d 457 (1994), the Supreme Court held that the methodology of DNA testing could not be seriously questioned and that because the laboratory was a member of the AABB and because Weeks failed to point out any errors in the laboratory procedures, the DNA evidence was properly admitted. St. v. Weeks, 270 M 63, 891 P2d 477, 52 St. Rep. 78 (1995).

EXPERTS

Expert Testimony on Evidence of Microscopic Hair Comparison Admissible: When considering whether expert evidence from microscopic hair comparison is admissible, the

Supreme Court found that microscopic hair comparison is not novel scientific evidence; therefore, it was not error for the District Court to fail to consider the factors in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786 (1993), in determining if the expert's testimony was admissible. Nevertheless, when considering admissibility of microscopic hair comparison evidence, the District Court must conduct a conventional Rule 702, M.R.Ev., analysis. Applying Hulse v. Dept. of Justice, 1998 MT 108, 289 M 1, 961 P2d 75 (1998), the court held that microscopic hair comparison, like the horizontal gaze nystagmus test in Hulse, is beyond the range of ordinary training or intelligence and is thus a subject on which an expert may testify. Here the state established an adequate foundation for the expert's testimony, including education, training, and knowledge, and the District Court did not err in allowing it. St. v. Southern, 1999 MT 94, 294 M 225, 980 P2d 3, 56 St. Rep. 395 (1999), in accord with U.S. v. Matta-Ballesteros, 71 F3d 754 (9th Cir. 1995).

DNA Evidence — Conflicting Expert Testimony on Statistical Foundation for Test — Weight and Admissibility: Weeks was convicted of sexual intercourse without consent with his stepdaughter. The conviction was based in part upon DNA evidence gained from blood samples taken from Weeks, the stepdaughter, and a child of the stepdaughter. Weeks contended that because of conflicting expert testimony as to the size of the statistical basis necessary to apply the results to a population of 100 million, the DNA results should not be admitted. Citing Barmeyer v. Mont. Power Co., 202 M 185, 657 P2d 594 (1983), the Supreme Court held that the conflicting evidence was a matter for the jury to consider in deciding the weight of the evidence. St. v. Weeks, 270 M 63, 891 P2d 477, 52 St. Rep. 78 (1995).

Opinion Testimony Beyond Scope of Expert's Employment: The defendant argued that the trial court erred in allowing testimony by the plaintiff's expert on subject matter that was beyond the scope of the expert's employment. The Supreme Court ruled that the testimony could not have come as a surprise to the defendant because the expert's deposition indicated that he was going to testify on the subject matter in question. Davis v. Church of Jesus Christ of Latter Day Saints, 244 M 61, 796 P2d 181, 47 St. Rep. 1302 (1990).

FOUNDATION

What Form of Compliance of Instrument Used in Breath Test Required as Foundation for Breath Test Results: ARM 23.4.214 requires that all breath analysis equipment be sent to the state Forensic Sciences Division annually for laboratory certification. A person charged with an alcohol-related offense is entitled to the procedural safeguards contained in the administrative rule, so in order for the results of a defendant's breath test to be admissible, the state must lay a proper foundation by establishing that the instrument complied with ARM 23.4.214. During pretrial discovery, Delaney requested documentation that the instrument used to test his breath had been certified, and the state provided a copy of the laboratory certification form. At trial, Delany moved to dismiss the results of the breath test, contending that the form was inadmissible hearsay that could not be used to lay the requisite foundation, and also maintained that failure to call the custodian of the annual certification records violated Delaney's right to confront witnesses. The state contended that it was not required to have the form admitted in order to lay a foundation for admissibility and that, consequently, it did not matter that the document was hearsay, but rather that all that was necessary was to establish to the satisfaction of the court that the certification had been performed. The District Court sided with the state and admitted the breath test results. On appeal, the Supreme Court affirmed, noting that the determination of whether adequate foundation exists is within the discretion of the District Court and that that determination is made pursuant to subsection (a) of this rule, which authorizes the examination of any proffered evidence, regardless of its admissibility, in determining the admissibility of challenged evidence. Under the identical federal Rule of Evidence, federal courts have found that the plain language of the rule extends to consideration of hearsay and other evidence normally inadmissible at trial. (See Bourjaily v. U.S., 483 US 171, 97 L Ed 2d 144, 107 S Ct 1775 (1987), and its progeny.) Thus, the District Court was allowed to consider the certification form in determining whether an adequate foundation existed without regard to whether the form itself was hearsay, and consequently, the state was not required to call the records custodian to testify. St. v. Delaney, 1999 MT 317, 297 M 263, 991 P2d 461, 56 St. Rep. 1267 (1999), distinguishing St. v. Woods, 272 M 220, 900 P2d 320, 52 St. Rep. 762 (1995), and St. v. Clark, 1998 MT 221, 290 M 479, 964 P2d 766, 55 St. Rep. 919 (1998).

Introduction of Photograph of Exemplar Exhibit Proper as Necessary Foundational Requirement: At trial, plaintiff sought to introduce a photograph of an exemplar vehicle kingpin through an expert, asserting that the purpose for introducing the photograph was to show what the subject kingpin looked like before the accident and to show a kingpin with a properly

designed radius. The only foundation laid for admitting the photograph was the expert's testimony that the exemplar kingpin was fundamentally the same design as the subject kingpin, except in terms of radius; however, the expert could not identify the date and source of manufacture of the exemplar kingpin and, without this information, there was no way to know whether the kingpins were in fact substantially the same. The District Court did not err in refusing admission of the photograph and allowing the expert to refer to previously admitted exhibits to illustrate his opinion concerning adequate radiusing. Baldauf v. Arrow Tank & Eng'r Co., Inc., 1999 MT 81, 294 M 107, 979 P2d 166, 56 St. Rep. 337 (1999), distinguishing Simonson v. White, 220 M 14, 713 P2d 983, 43 St. Rep. 133 (1986).

Photographs of Re-Creation of Accident — Substantial Similarity Required: If pictures taken of the re-creation of an accident are "substantially similar" to those at the time of the accident and the re-creation has been properly "foundationed" [sic], there is no abuse of discretion by the trial judge in admitting the evidence where, as here, the party assisting with the re-creation explained to the jury the dissimilarities between the re-creation and the actual incident. Simonson v. White, 220 M 14, 713 P2d 983, 43 St. Rep. 133 (1986), distinguished in Baldauf v. Arrow Tank & Eng'r Co., Inc., 1999 MT 81, 294 M 107, 979 P2d 166, 56 St. Rep. 337 (1999).

Tort Action — Admitted Use of Drugs Before Traffic Accident — Motion In Limine to Exclude Unless Foundation Established: Plaintiff admitted certain use of illegal drugs before the traffic accident, but it was not error for the District Court to grant a motion in limine excluding such evidence from the trial unless a foundation could be established showing that at the time of the accident he was under the influence and that his negligence was the proximate or controlling cause of injuries. Because evidence of drugs is very prejudicial, such conditional exclusion requires some link between it and the accident and a weighing of its probative value against its prejudicial effect. Simonson v. White, 220 M 14, 713 P2d 983, 43 St. Rep. 133 (1986).

Foundation Required for Admissibility of Blood Test Results: Defendant on a charge of driving under the influence of alcohol or drugs in violation of 61-8-401 is entitled to the procedural safeguards of the Administrative Rules of Montana. To admit evidence of blood alcohol content and a test report, the State must lay a foundation pursuant to 61-8-404 which incorporates ARM 23.3.931 (now repealed). The laboratory analysis must be done in a laboratory qualified under the rules of the Department of Justice. The report must be prepared in accordance with the rules of the Department. If a blood sample is taken, the person withdrawing the blood must be demonstrably qualified to do so. St. v. McDonald, 215 M 340, 697 P2d 1328, 42 St. Rep. 414 (1985).

Vague Testimony of Driver and Vehicle Remote From Scene of Accident — Prejudicial — Foundation Lacking: In a trial arising from an intersection collision between plaintiff's motorcycle and defendant's auto, testimony of defendant's proposed witness was properly excluded as having prejudicial effect outweighing any probative value. He would have testified regarding a motorcyclist he saw while closing his shop. He could not positively identify plaintiff as the motorcyclist, and his description of the cycle and its driver varied from that of other witnesses and from the actual cycle and driver. His view occurred 300 yards from the accident. He was vague as to the time. Other cycles could have passed him by unobserved. His testimony characterized the driver as a stereotypical biker driving fast. The testimony also lacked a sufficient foundation, because there was insufficient connection between the driver witness saw and plaintiff. Welnel v. Hall, 215 M 78, 694 P2d 1346, 42 St. Rep. 195 (1985).

Admissibility Subject to Condition — Renewal of Objection: If a counsel's foundational objection to evidence is based on subsection (b) of this section, he should state why the proffered evidence should only have been conditionally admitted, and it would then be incumbent upon him, not the court, to renew the objection after the State rested its case by motion to strike. St. v. Sullivan, 182 M 66, 595 P2d 372, 36 St. Rep. 936 (1979).

Attempted Admission — Insufficient Foundation: The fact that State was unable to lay a proper foundation for the admission of items into evidence, which were not irrelevant or otherwise inadmissible in an essential way, did not require reversal of defendant's conviction on the ground their attempted admission was prejudicial. St. v. Larson, 175 M 395, 574 P2d 266 (1978).

SURPRISE

Exclusion of Evidence on Suretyship Defense on Grounds of Surprise — Adequate Opportunity to Raise Defense, yet No Notice Given: Challinors sought to introduce evidence concerning a "suretyship defense" for the first time at trial. Glacier National Bank (Glacier) repeatedly objected on the basis of surprise. The trial court gave Challinors ample opportunity to demonstrate that notice concerning this legal theory had been given to Glacier during discovery

or at any other time. Upon finding that notice had not been given, the court considered possible prejudice to Glacier. The issue Challinors sought to raise would have changed the entire complexion of the lawsuit. In light of the lack of notice prior to trial of the intent to raise the issue and in light of Glacier's timely objections, it was not an abuse of the court's discretion in not allowing Challinors to present the evidence. Glacier Nat'l Bank v. Challinor, 253 M 412, 833 P2d 1046, 49 St. Rep. 503 (1992).

Allowing Witness Not Listed in Pretrial Order to Testify — Abuse of Discretion: Neither a scheduling order nor a pretrial order listed Goacher as a witness; rather, Stokes was listed as the witness who would provide foundation for the survey of an accident scene. One week before trial, defendant learned it was Goacher who had prepared the survey and would testify, but there was not time to depose Goacher prior to trial. At trial, defendant objected to Goacher's testimony on the grounds of surprise and prejudice. The objection was overruled, and defendant did not request a continuance. Failure to reveal the information regarding witness testimony in a timely fashion resulted in surprise and prejudice to defendant and constituted reversible error, notwithstanding defendant's failure to request a continuance. Bache v. Gilden, 252 M 178, 827 P2d 817, 49 St. Rep. 203 (1992), overruling Barrett v. ASARCO Inc., 234 M 229, 763 P2d 27 (1988), and Sikorski v. Olin & Rolin Mfg., 174 M 107, 568 P2d 571 (1977), to the extent that they held that failure to request a continuance at trial constituted a waiver of the right to claim error on appeal, and followed in Glacier Nat'l Bank v. Challinor, 253 M 412, 833 P2d 1046, 49 St. Rep. 503 (1992).

No Unfair Surprise — Testimony Admissible: The District Court did not abuse its discretion in allowing an expert witness's testimony when there was disclosure of the testimony a month prior to the trial, the witness's depositions were available, there was actual opportunity to examine the witness prior to his testimony, and appellant had its own expert available at the trial to testify in rebuttal. Morning Star Enterprises, Inc. v. R.H. Grover, Inc., 247 M 105, 805 P2d 553, 48 St. Rep. 112 (1991).

Late Disclosure — Evidence Improperly Excluded: The District Court abused its discretion by excluding evidence on the basis of late disclosure of new witnesses by defendant, given the fact that defendant supplemented its interrogatory answers 24 days before trial, plaintiff refused to depose the new witnesses at defendant's expense, and plaintiff failed to request a continuance. Defendant's alleged knowledge of the witnesses before the discovery deadline also did not warrant exclusion, and plaintiff's claim of prejudice by the late discovery did not justify an exclusion that substantially affected defendant's rights. Barrett v. ASARCO Inc., 234 M 229, 763 P2d 27, 45 St. Rep. 1865 (1988), overruled in Bache v. Gilden, 252 M 178, 827 P2d 817, 49 St. Rep. 203 (1992), to the extent that Barrett held that failure to request a continuance at trial constituted a waiver of the right to claim error on appeal. Bache followed in Glacier Nat'l Bank v. Challinor, 253 M 412, 833 P2d 1046, 49 St. Rep. 503 (1992). Plaintiff's claim that defense attorneys defrauded the court by obtaining a reversal of this decision by representing that six named witnesses would testify to specific acts of misconduct was properly dismissed through summary judgment because plaintiff chose not to use the means available to him to investigate the truth of the representations made to him. Barrett v. Holland & Hart, 256 M 101, 845 P2d 714, 49 St. Rep. 1156 (1992), and 50 St. Rep. 63 (1993).

MISCELLANEOUS

Admissibility of Proof of Refusal to Take Sobriety Test Not Violative of Separation of Powers Doctrine: Robertson claimed that by enacting 61-8-404, regarding admission of evidence of a person's refusal to take a sobriety test, the Legislature unconstitutionally infringed on the function of courts to determine the admissibility of evidence, in violation of the separation of powers doctrine. The Supreme Court disagreed, noting that ultimately, the admissibility of evidence lies with the court pursuant to this rule. The Legislature routinely passes laws that determine whether certain kinds of evidence are admissible, without violating the separation of powers doctrine in the process. Further, "admissible" means that evidence may, but is not required, to be admitted. Missoula v. Robertson, 2000 MT 52, 298 M 419, 998 P2d 144, 57 St. Rep. 250 (2000). See also St. v. Long, 778 P2d 1027 (Wash. 1989).

No Burden-Shifting in Statute Allowing Evidence of Refusal to Take DUI Test: Relying on St. v. Long, 778 P2d 1027 (Wash. 1989), Robertson argued that 61-8-404(2) allows the prosecution to argue that an inference of guilt could be drawn from the evidence of his refusal to take a Breathalyzer test, impermissibly shifting the burden of proof to him to establish that the refusal was not a reflection of guilt, in violation of 46-16-204. Although the Washington and Montana versions of 61-8-404(2) are virtually identical, the Montana Supreme Court distinguished Long, finding nothing in the statute that inferred a consciousness of guilt arising from the introduction

of evidence of the proof of refusal to take the test. The state still must prove the offense of DUI beyond a reasonable doubt. Missoula v. Robertson, 2000 MT 52, 298 M 419, 998 P2d 144, 57 St. Rep. 250 (2000).

Exclusionary Rule Inapplicable to Civil Involuntary Commitment Hearing: L.B. was examined by a professional person and determined to suffer from a serious mental disorder that required treatment. Following presentation of the professional's testimony at a hearing for involuntary commitment, the District Court held that the testimony was too speculative and ordered L.B. released. After the hearing, L.B. was detained by the Sheriff's office for a short time in an attempt to find a place for him, rather than just sending him out onto the streets. During his detention, L.B. was examined by a second professional person who determined that L.B. should be involuntarily committed to the state hospital for immediate treatment, and a second petition for commitment was filed that same day. The District Court subsequently determined that L.B.'s mental illness deprived him of the ability to protect his life or health and transferred him to the state hospital for treatment. L.B. argued that all evidence obtained after the order for release should be suppressed under the exclusionary rule because such proceedings may result in a massive curtailment of liberty for the person committed. However, noting the civil nature of commitment proceedings, the Supreme Court declined to apply the criminal law exclusionary rule because to suppress relevant evidence would defeat the purpose of the proceeding, which is to secure the appropriate treatment for those who need it and are unable to obtain it because of their mental condition. In re Mental Health of L.C.B., 253 M 1, 830 P2d 1299, 49 St. Rep. 290 (1992).

Reference to List Given Witness and Referring to Inadmissible Evidence — No Mistrial: At the close of the state's direct examination of a forensic scientist, the prosecutor handed him a list of items the scientist had analyzed. The list included items as to which evidence was not admissible. The prosecutor told the judge that he was not going to offer the list and that the defense could ask questions regarding the list and could offer the list if the defense wished to. This was not an impermissible reference to inadmissible evidence. There was no indication that the jury saw the list, that the analysis of the inadmissible evidence was revealed to the jury, or that the jury was otherwise informed of the inadmissible evidence. St. v. Scheffelman, 225 M 408, 733 P2d 348, 44 St. Rep. 357 (1987).

Standard of Lawful Basis for Refusal to Decline Payment of Claim — Standard Not Met by Reliance on Inadmissible Evidence: An insurer must meet the standard of a lawful basis for refusal to decline payment of an insured's claim for an insured's loss. Reliance by the insurer on inadmissible evidence of arson by the insured in declining payment of an insured's loss does not meet the standard of a lawful basis for refusal of the insured's claim. Britton v. Farmers Ins. Group, 221 M 67, 721 P2d 303, 43 St. Rep. 641 (1986).

Demonstration of Stolen Item's Operability — No Objection — No Instruction: Defendant was convicted of felony theft of a jackhammer. At trial, the operability of the jackhammer was demonstrated in response to testimony that the jackhammer would have greater value if it worked. Defendant failed to object at trial that it was not operated "under a load". The court rejected defendant's attack on the validity of the demonstrative evidence and his complaint that there was no precautionary instruction to the jury about the demonstration. Defendant proposed no such instruction to the court as required by 46-16-401. St. v. Field, 215 M 361, 697 P2d 1339, 42 St. Rep. 431 (1985).

Admission of Drug Paraphernalia Found in Accident Victim's Car — Prejudicial Effect Outweighed by Probative Value: In a case involving negligence in an automobile accident, the prejudicial effect of allowing the introduction of drug paraphernalia found in the car in which the accident victim had been riding was outweighed by its probative value. Testimony of the driver and victim was that they had not smoked marijuana on the day of the accident, but because the vehicle had been owned only a short time, the existence of the paraphernalia would tend to show that the driver actively consumed marijuana within a few days of the accident, thus tending to impeach the testimony. Foreman v. Minnie, 211 M 441, 689 P2d 1210, 41 St. Rep. 1478 (1984).

Testimony of Psychologist on Suicide Victim's State of Mind — When Psychologist Never Interviewed Decedent: When a psychologist had performed a psychological autopsy on the decedent after his suicide, the Workers' Compensation Court admitted, over the employer's objection, the psychologist's testimony on the causal connection between decedent's injury and his suicide. On appeal, the Supreme Court affirmed, ruling that the fact that decedent had never been interviewed by the psychologist did not render the psychologist's testimony inadmissible. Campbell v. Federated Mut. Ins., 211 M 68, 684 P2d 1101, 41 St. Rep. 1218 (1984).

Admissibility of Confession to Civilian: The court did not err by not holding an evidentiary hearing to determine whether an admission by the defendant met constitutional requirements

because the voluntariness of the statement was not an issue and Miranda warnings were not required for a noncustodial confession to a civilian. St. v. Hallam, 175 M 492, 575 P2d 55 (1978).

Law Review Articles

The Exclusionary Rule—The Illusion vs. The Reality, Ranney, 46 Mont. L. Rev. 289 (1985).

Chain of Custody Requirements in Admissibility of Evidence, Anderson, 37 Mont. L. Rev. 144 (1976).

Juror Understanding of DNA Evidence: An Empirical Assessment of Presentation Formats for Trace Evidence With a Relatively Small Random-Match Probability, Nance & Morris, 34 J. Legal Stud. 395 (2005).

Motions In Limine, Objections and Offers of Proof, McCarter, 45 J. Mo. B. 411 (1989).

Collateral References

Trial *key* 48.

88 C.J.S. Trial §§177 through 180.

4 Am. Jur 2d Appellate Review §§77, 78; 75 Am. Jur. 2d Trial §§741, 742.

Admissibility of tape recording or transcript of "911" emergency telephone call. 3 ALR 5th 784, §9 superseded by 125 ALR 5th 357.

Admissibility, in prosecution in another state's jurisdiction, of confession or admission made pursuant to plea bargain with state authorities. 90 ALR 4th 1133.

Propriety of telephone testimony or hearings in unemployment compensation proceedings. 90 ALR 4th 532.

Challenges to use of breath tests for drunk drivers based on claim that partition or conversion ratio between measured breath alcohol and actual blood alcohol is inaccurate. 90 ALR 4th 155.

Propriety of telephone testimony or hearings in public welfare proceedings. 88 ALR 4th 1094.

Admissibility or compellability of blood test to establish testee's nonpaternity for purpose of challenging testee's parental rights. 87 ALR 4th 572.

Admissibility of evidence, in action for personal injury or death, of injured party's use of intoxicants or illegal drugs on issue of life expectancy. 86 ALR 4th 1135.

Permissibility of testimony by telephone in state trial. 85 ALR 4th 476.

Admissibility of DNA identification evidence. 84 ALR 4th 313.

Admissibility of evidence that juvenile prosecuting witness in sex offense case had prior sexual experience for purposes of showing alternative source of child's ability to describe sex acts. 83 ALR 4th 685.

Permissibility of in-court demonstration to show effect of injury in action for bodily injury. 82 ALR 4th 980.

Admissibility in prosecution for sex offense of evidence of victim's sexual activity after the offense. 81 ALR 4th 1076.

Admissibility of evidence of reputation as to land boundaries or customs affecting land, under Rule 803(20) of Uniform Rules of Evidence and similar formulations. 79 ALR 4th 1044.

Admissibility of lie detector test results, or of offer or refusal to take test, in attorney disciplinary proceeding. 79 ALR 4th 576.

Admissibility, in prosecution for sex-related offense, of results of tests on semen or seminal fluids. 75 ALR 4th 897.

Sufficiency of showing that voluntariness of confession or admission was affected by alcohol or other drugs. 25 ALR 4th 419, §§3 through 6 superseded by 96 ALR 5th 523.

Admissibility of hearsay evidence in probation revocation hearings. 11 ALR 4th 999.

Mental subnormality of accused as affecting voluntariness or admissibility of confession. 8 ALR 4th 16.

Admissibility and effect, on issue of party's credibility or merits of his case, of evidence of attempts to intimidate or influence witness in civil action. 4 ALR 4th 829.

Admissibility of videotape in evidence in criminal trial. 60 ALR 3d 333, §§10 through 14 superseded by 41 ALR 4th 812, 41 ALR 4th 877.

Omission or inaudibility of portions of sound recording as affecting its admissibility in evidence. 57 ALR 3d 746.

Admissibility in criminal prosecution, of evidence obtained by electronic surveillance of prisoner. 57 ALR 3d 172.

Admissibility of evidence of photographic identification as affected by allegedly suggestive identification procedure. 39 ALR 3d 1000.

Admissibility of evidence of showup identification as affected by allegedly suggestive showup procedures. 39 ALR 3d 791.

Admissibility of evidence of lineup identification as affected by allegedly suggestive lineup procedures. 39 ALR 3d 487.

Admissibility of confession of one accused of felonious homicide, as affected by its inducement through compelling, or threatening to compel, accused to view victim's corpse. 27 ALR 3d 1185.

Admissibility, in civil case, of evidence obtained by unlawful search and seizure. 5 ALR 3d 670, superseded by 105 ALR 5th 1.

Preliminary proof, verification, or authentication of X-rays requisite to their introduction in evidence in civil cases. 5 ALR 3d 303.

Constitutional aspects of procedure for determining voluntariness of pretrial confessions. (comment note) 1 ALR 3d 1251.

Admissibility of hearsay evidence for court's determination, under Rule 104(a) of the Federal Rules of Evidence, of preliminary questions of fact. 39 ALR Fed. 720.

Propriety and prejudicial effect of presence of jury during court's inquiry into voluntariness of accused's confession — federal cases. 19 L Ed 2d 1313.

Admissibility of evidence obtained by illegal search and seizure. 6 L Ed 2d 1544.

1 Wigmore §§4, 14; 2 Wigmore §487; 3 Wigmore §861; 6 Wigmore §§1835, 1871; 8 Wigmore §2276; 9 Wigmore §2550.

Rule 105. Limited admissibility.

Commission Comments

This rule is identical to Federal and Uniform Rules (1974) Rule 105. The Commission adopted the rule because [it] expresses longstanding practice and existing Montana law. The effect of the rule is to allow evidence to be admissible for a particular purpose even though that evidence may be inadmissible for another purpose. There is a danger that this evidence could be confusing or misleading to the jury or could prejudice a party. Therefore the court should exercise caution in admitting such evidence in light of the effectiveness of a limiting instruction. See Bruton v. United States, 391 U.S. 126, 137 (1968) holding that when a codefendant's confession inculpating Bruton was admitted, a limiting instruction was inadequate.

Montana cases have recognized this practice in situations unlike the one in Bruton, *supra*: Hester v. Western Life & Accident Co., 67 Mont. 286, 290, 215 P 508 (1923) allowing hearsay; Outlook Farmer's Elevator Co. v. American Surety Co., 70 Mont. 8, 25, 223 P 905 (1924) allowing declarations against interest against a surety; DeAtley v. Streit, 81 Mont. 382, 390, 263 P 967 (1928) allowing parol evidence; Edquest v. Tripp & Dragstedt Co., 93 Mont. 446, 454, 19 P2d 637 (1933) allowing exhibits that were potentially prejudicial; and Teesdale v. Anschutz Drilling Co., 138 Mont. 427, 439, 357 P2d 4 (1960) allowing evidence showing remedial measures.

Case Notes

Use of Redacted Pretort Release to Establish Statutory Liability Shield Allowed: A pretort form indicating a prospective release from liability for negligence is illegal. However, it was not improper for a trial court to allow introduction of a redacted version of an illegal exculpatory agreement to show that an equine activity sponsor was statutorily protected from liability from unavoidable risks or from the inherent risks of equine activities of which the participant was or should have been aware. In the present case, plaintiff failed to cite authority or establish error by the trial court in admitting the redacted agreement, and the Supreme Court affirmed the trial court's denial of plaintiff's motion for a new trial on grounds that the redacted agreement was improperly admitted in evidence. McDermott v. Carie, LLC, 2005 MT 293, 329 M 295, 124 P3d 168 (2005).

Defendant Acquitted of Murder — Evidence of Motive for Murder Admissible on Arson Charge — Evidence Admissible as to One Defendant Properly Introduced in Consolidated Trial: Link was acquitted by a jury of purposefully or knowingly causing Leonard's death. In a later trial on charges of arson and deliberate homicide under the felony-murder rule, Link argued that evidence of his financial motive for wanting Leonard's death was inadmissible on the arson charge because he had already been acquitted of accountability for Leonard's death. The Supreme Court held that the evidence was properly admitted because it was not made irrelevant by the fact that Link could collect only if Leonard actually died as a result of the fire. Link also argued that evidence that Enright, a codefendant with whom Link's trial had been consolidated, also committed similar crimes against Leonard was not admissible because it did not pertain to him. The Supreme Court held that the evidence against Enright was admissible because the jury was capable of considering the evidence only as it pertained to Enright and had been instructed by the District Court to do so. St. v. Enright, 2000 MT 372, 303 M 457, 16 P3d 366, 57 St. Rep. 1590 (2000).

Inadmissibility of Evidence of Receipt of Workers' Compensation Benefits — Reversible Error: Mickelson was injured when the fire truck that he was driving was struck by a Montana Rail Link (MRL) train and sought damages. Prior to trial, Mickelson filed a motion in limine to preclude MRL from mentioning or arguing at trial that Mickelson was receiving workers' compensation benefits as a result of the injuries. The District Court denied the motion, concluding that MRL should be allowed to show that Mickelson did not take reasonable steps to mitigate the damages by accepting a retraining employment position because of fear of losing the workers' compensation benefits. At trial, evidence of Mickelson's workers' compensation benefits was allowed throughout the proceedings, and the jury decided for MRL. On appeal, MRL argued that the evidence had significant probative value as to why Mickelson had not returned to work, perhaps even indicating that Mickelson was malingering by not accepting a supported employment position. The Supreme Court noted the District Court's broad discretion in determining the relevance and admissibility of evidence, but recited several prior holdings that evidence of receipt of workers' compensation benefits or other collateral source benefits constitutes prejudicial and reversible error requiring a new trial. Despite MRL's argument to the contrary, introduction of the evidence could not be considered harmless because the evidence could have an impact on the jury's verdict on the issue of liability as well as damages. The Supreme Court reversed and remanded for a new trial. Mickelson v. Mont. Rail Link, Inc., 2000 MT 111, 299 M 348, 999 P2d 985, 57 St. Rep. 446 (2000), following Mydlarz v. Palmer/Duncan Constr. Co., 209 M 325, 682 P2d 695, 41 St. Rep. 738 (1984). See also Goggans v. Winkley, 159 M 85, 495 P2d 594 (1972), Allers v. Willis, 197 M 499, 643 P2d 592, 39 St. Rep. 745 (1982), and Thomsen v. St., 253 M 460, 833 P2d 1076, 49 St. Rep. 533 (1992).

Collateral Source Evidence Inadmissible — Possible Impact on Issue of Liability as Well as on Damages: The state contended that the introduction of collateral source evidence was harmless because the jury found that the state's negligence was not the proximate cause of plaintiff's injuries. The Supreme Court reversed and remanded the case on the basis that collateral source evidence can have an impact on the jury's verdict on the issue of liability as well as on damages. Thomsen v. St., 253 M 460, 833 P2d 1076, 49 St. Rep. 533 (1992).

Introduction of Insurance for Issue Other Than Showing Negligence or Liability — Joint Prosecution With Tort for Failure of Duty to Settle: This rule is not violated when an action against defendant is jointly prosecuted with an action against defendant's insurance company for failure of duty to settle under 33-18-201 because the issues of the actions are separate and because in prosecuting failure of duty to settle, insurance is introduced for purposes other than to show negligence or liability. Klaudt v. Flink, 202 M 247, 658 P2d 1065, 40 St. Rep. 64 (1983).

Instruction — Request Required: The plaintiff allegedly assaulted and threatened a witness with death if he did not testify favorably to the plaintiff's case. Testimony concerning the assault was admitted to show that the witness had a motive to testify falsely. The plaintiff was entitled to an instruction limiting the scope of the jury's consideration of the evidence to the specific purpose for which it was relevant. However, the trial judge has no duty to give a limiting instruction absent a request at trial from a party wishing to limit the scope of the consideration of the testimony. Cissel v. W. Plumbing & Heating, 188 M 149, 612 P2d 206, 37 St. Rep. 966 (1980).

Other Crime — Prejudice — Limited Use of Evidence: Testimony concerning another crime in the chain of events with the crime of which the defendant is accused, when used for impeachment purposes, may be admissible in a proper case. Since a stipulation stating the nature of the crime committed and the disposition of other prosecutions stemming from the crime had been read to the jury and since the defendant did not carry his burden of affirmatively showing prejudice, this was such a case. St. v. Holliday, 183 M 251, 598 P2d 1132, 36 St. Rep. 1535 (1979).

Law Review Articles

The Modified Just Rule: A New Standard for the Admissibility of Evidence of Other Crimes, Wrongs or Acts Under Rules 403 and 404(b) of the Montana Rules of Evidence, Cameron, 53 Mont. L. Rev. 133 (1992).

Collateral References

Trial *key* 48, 86, 87.

88 C.J.S. Trial §§179, 180.

75 Am. Jur. 2d Trial §§321 through 342, 433 through 435, 407 through 426.

1 Wigmore §13.

Rule 106. Remainder of or related acts, writings, or statements.

Commission Comments

Subdivision (a). This subdivision incorporates Federal Rule 106 with Section 93-401-11, R.C.M. 1947 [superseded], and case law developed under it. The Commission intends that this combination will preserve Montana's completeness rule; adopt the Federal Rule allowing the whole of a writing or recorded statement to be admitted, if fairness requires it, when part of the writing or recorded statement is introduced; and, result in a rule of completeness that codifies all of Montana case law so that scattered fragments of the rule of completeness do not have to be searched for when the rule is to be applied. Therefore the Commission believes that this incorporation of the Federal Rule and Montana law is a more accurate statement of the rule of completeness.

The subdivision is identical to Federal and Uniform Rules (1974) Rule 106 with these exceptions: "When part of an act, declaration, conversation, writing or recorded statement or series thereof" is substituted for "When a writing or recorded statement or part thereof" in the first clause; "(1)" is added and "of such item or series thereof" is substituted for "any other writing or recorded statement" and "at that time" is substituted for "contemporaneously with it" in paragraph (1); and paragraph (2) is added.

The subdivision begins with an expanded list of matters to be covered by the rule. Section 93-401-11, R.C.M. 1947 [superseded], covers acts, declarations, conversations, and writings; Federal Rule 106 covers only writings and recorded statements. Therefore the rule adds the items from Montana law to the Federal Rule and the rule adds recorded statements to Montana law. This addition is consistent with the policy of Section 93-401-11, R.C.M. 1947 [superseded], whose title reads: "When part of the transaction proved, the whole is admissible", and with the items listed in that section; the addition is intended to be a modernization of that section. The list includes not only part of such items, but also a series of such items which is a codification of the Montana practice. Northwestern Electric Equipment Co. v. Leighton, 66 Mont. 529, 536, 213 P 1094 (1923).

Paragraph (1) is a statement of the operational part of Federal Rule 106 which allows the adverse party the right to require the immediate introduction of all items of evidence which ought to be considered with part of the item of evidence being offered by the proponent of such evidence. The reason for this rule is that a mistaken impression gained by out of context evidence is hard to correct when the whole of the matter is not presented until later. Advisory Committee Note to Federal Rule 106, 46 F.R.D. 161, 194. A similar provision has already been adopted in Montana in Rules 26(d)(4), M.R.Civ.P., allowing immediate introduction of all relevant parts of a deposition when a part is introduced; the same provision applies to interrogatories under Rule 33, M.R.Civ.P. and use of depositions in criminal trials under Section 95-1802(c), R.C.M. 1947 [46-15-202].

Paragraph (2) is a statement of the operation of Montana law under Section 93-401-11, R.C.M. 1947 [superseded], and case law construing it which allows the adverse party the right to inquire into other evidence necessary to make the proponent's evidence understood at any time. The evidence needed to make the part introduced understood is not normally admitted until the adverse party presents his case. McGonigle v. Prudential Life Ins. Co., 100 Mont. 203, 223, 46 P2d 687 (1935) and Rasmussen v. Lee, 104 Mont. 278, 282, 66 P2d 119 (1937). The Montana completeness rule allows evidence which would ordinarily be inadmissible on its own to be admitted. McConnell v. Combination M & M Co., 30 Mont. 239, 263, 76 P 14 (1904) and Hulse v. N. Pac. Ry., 47 Mont. 59, 63, 130 P 415 (1913).

The two paragraphs follow the normal sequence of trial in that paragraph (1) allows the adverse party to immediately require that the remainder of evidence be admitted at the same time that the proponent's evidence is admitted when fairness requires. Paragraph (2) allows an inquiry by the adverse party at any time, but also gives him the right to introduce such evidence as part of his own case if paragraph (1) was not used. Failure to demand introduction under paragraph (1) would not waive the right to introduce this evidence later.

Therefore, this proposed rule expresses existing Montana law as well as expanding the completeness rule to include recorded statements and allows immediate introduction of the remainder of evidence to gain a complete impression, which is an expansion of Rules 26(d)(4) and 33, M.R.Civ.P. and Section 95-1802(c), R.C.M. 1947 [46-15-202].

It should be noted that the trial court makes the final determination of how much evidence is needed to make a fair impression under this rule and to prevent abuses of the rule. The authority of the court to make such rulings is Rule 403, allowing exclusion of relevant evidence on the grounds of prejudice, confusion of issues, or misleading the jury and waste of time or undue delay; and Rule 611 allowing the court the authority to conduct trial.

Subdivision (b). This subdivision is original and therefore entirely different than Federal and Uniform Rules (1974) Rule 106. The Advisory Committee Note to Federal Rule 106, 46 F.R.D. 161, 194 states the same principle as this subdivision. The commission feels that the guarantee of the right of any party to cross-examine or further develop as part of his case matters covered by this rule is important enough to be stated in the rule. Rule 26(d)(4) and Rule 33 (by reference) M.R.Civ.P. and Section 95-1802(c), R.C.M. 1947 [46-15-202], state the same principle contained in Federal Rule 106 and proposed rule 106(a)(1) as applied to depositions and interrogatories and then conclude by giving any party the right to introduce any other part. There is no other Montana law specifically on this point, and therefore this would be new Montana law.

COMMISSION COMMENT TO JUNE 1990 AMENDMENT

The revision establishes gender neutral format only. No substantive change.

Compiler's Comments

1990 Amendment: Substituted gender neutral language for gender specific language. Amendment effective June 7, 1990.

Case Notes

Applicability of Completeness Doctrine to Supplementary Evidence: The prosecution conducted a 125-page interview with an expert witness. At trial, the state asked the expert about certain statements made during the interview. Defendant sought to have the entire transcript given to the jury because the state was taking the statements out of context. The trial court declined to admit the entire pretrial interview, holding that defendant could bring other relevant portions of the interview to the jury's attention, which defendant did not do. Pursuant to this rule, the doctrine of completeness permits examination of the balance or portions of the same document, correspondence, or conversation only when the portions, on balance, are relevant and throw light on the parts already admitted or that bear on the same subject. However, the rationale behind the inclusion of supplementary evidence is that it is allowed if it is needed to make the primary evidence understandable. Defendant failed to show which specific portions of the interview were relevant, so failure to allow admission of the entire interview transcript was not an abuse of discretion. St. v. Whitlow, 285 M 430, 949 P2d 239, 54 St. Rep. 1227 (1997).

Nonself Inculpatory Statements Not Admissible: Portions of a statement that tend to subject the declarant to criminal liability are properly admitted under Rule 804(b)(3), M.R.Ev., as an exception to the hearsay rule. The District Court erred in admitting those portions of the statement that tended to implicate the defendant. This rule is separate and distinct from the hearsay rule and does not make admissible statements that would otherwise be inadmissible. St. v. Castle, 285 M 363, 948 P2d 688, 54 St. Rep. 1194 (1997).

Parol Evidence: Buechler entered into a contract with Payne, granting him the right to sell Buechler's property. Payne's copy of the contract stated that the listing was exclusive. Buechler offered parol evidence that Payne had written "nonexclusive" on her copy of the contract. Her copy was destroyed and therefore was not introduced. The court held that the parol evidence was inadmissible under the parol evidence rule and that Rule 106, M.R.Ev. and Rule 32(a)(4), M.R.Civ.P., cannot render this otherwise inadmissible parol evidence admissible. Payne v. Buechler, 192 M 311, 628 P2d 646, 38 St. Rep. 799 (1981).

Variation of Terms of Written Contract Held Improper — Evidentiary Rule as Procedural Rule Only: In an action to collect the amount due under a promissory note, the District Court erred in allowing the plaintiff to prove that the terms of a written contract concerning only the terms of sale of a bar also applied to a previous sale of another business. Rule 106, M.R.Ev., relied on by the District Court to vary the clear terms of the parties' written agreement, is a procedural rule concerning the introduction of only a portion of a whole agreement and cannot be used to affect the substance of the existing law of parol evidence. Spraggins v. Elvidge, 192 M 8, 625 P2d 1151, 38 St. Rep. 493 (1981).

No Error in Limiting Right of Cross-Examination — Ancillary Portions of Statements to Police: The omission of ancillary portions of defendant's statement to the police concerning defendant's willingness to cooperate with police did not constitute reversible error under Rule 106, M.R.Ev., which imposes an obligation to enter sufficient portions of testimony so as to not create a misleading impression. St. v. Sheriff, 190 M 131, 619 P2d 181, 37 St. Rep. 1793 (1980), followed in Cline v. Durden, 246 M 154, 803 P2d 1077, 47 St. Rep. 2306 (1990).

Withholding Statement Irrelevant: In a prosecution for failure to file proper tax returns, it was proper for the court to refuse to admit into evidence a tax withholding statement, although evidence of defendant's income was admitted. The payment of taxes by withholding was

irrelevant to the issue of whether proper returns were filed and could have confused the jury. St. v. Poncelet, 187 M 528, 610 P2d 698, 37 St. Rep. 760 (1980).

"Completeness Doctrine" Distinct From Hearsay Rules: The Supreme Court rejected the State's argument that by questioning police officers as to an informant's name and involvement in burglaries, defense counsel "opened the door" to hearsay testimony regarding communications between police and the informant about defendant's participation in the burglaries. The issues were separate. The so-called "completeness doctrine" relied on by the State in this regard is a rule of evidence distinct from hearsay rules. St. v. Campbell, 178 M 15, 582 P2d 783, 35 St. Rep. 1080 (1978), followed in Simmons Oil Corp. v. Wells Fargo Bank, N.A., 1998 MT 129, 289 M 119, 960 P2d 291, 55 St. Rep. 508 (1998).

Law Review Articles

Montana Supreme Court Survey—Evidence, Jones, 43 Mont. L. Rev. 301 (1982).

Montana Supreme Court Survey—Civil Procedure and Evidence, Dyrud, 42 Mont. L. Rev. 343 (1981).

Collateral References

Evidence *key* 155(8), (10).

31A C.J.S. Evidence §190; 32A C.J.S. Evidence §774.

29 Am. Jur. 2d Evidence §358; 29A Am. Jur. 2d Evidence §1028.

7 Wigmore §§2094 through 2125.

Article II
Judicial Notice

Rule 201. Judicial notice of facts.

Commission Comments

This rule governs judicial notice of facts. See Rule 202 for judicial notice of law.

(a) Scope of rule. This subdivision is identical to Federal and Uniform Rules (1974) Rule 201(a) except that it does not use the term "adjudicative facts". The Commission believes that use of the terms "adjudicative" and "legislative" facts as is done with Federal Rule 201 is confusing and that they cannot be readily or easily applied to all factual situations. The Commission rejects the approach under the Federal Rule 201 of limiting judicial notice to adjudicative facts because this is a basis which is totally new, not clearly defined, and contrary to existing Montana practice. The confusion and litigation bound to result are clearly contrary to a rule which is meant to save time and expense.

Section 93-501-1, R.C.M. 1947 [superseded], is the primary statute on judicial notice in Montana. It lists eight categories of fact, most of which relate to judicial notice of law, covered in Rule 202. However, the last of these categories gives the impression that this subdivision of the rule is consistent with existing Montana law: "the laws of nature, the measure of time, and the geographical divisions and political history of the world". In addition, Section 93-1101-8, R.C.M. 1947 [superseded], has been construed as a judicial notice statute, Lynes v. N. Pac. Ry., 43 Mont. 317, 327, 117 P 81 (1911), and is consistent with this subdivision in allowing "historical works, books of science or art, and published maps or charts" to be judicially noticed as items of "general notoriety and interest".

Therefore, the Commission intends to preserve existing law in Montana and hopefully encourage the expansion of the use of judicial notice to expedite the trial process.

(b) Kinds of facts. This subdivision is identical to Federal and Uniform Rules (1974) Rule 201(b) with the exception of the phrase "a fact to be judicially noticed" which is substituted for "a judicially noticed fact". This change is only to clarify the language of the section, as the Commission prefers the present tense of the proposed rule rather than the past tense of the Federal and Uniform Rule.

The Commission feels that the courts should take notice of facts only if they are not subject to reasonable dispute. If a fact is disputable, evidence should be introduced to support or deny it, and the trier of fact should then decide its existence. If a fact is not subject to a reasonable dispute, the court can save time and expense for all by judicially noticing it.

Existing Montana statute and case law on judicial notice is consistent with this subdivision. Facts to be judicially noticed under subdivision (b)(1) which are "generally known" have been judicially noticed in many cases in Montana using slightly different terminology that [than?] these facts are "common knowledge". See State ex rel. Schultz-Lindsay v. Board of Equalization, 145 Mont. 380, 401, 403 P2d 635 (1965) and Clark v. Worrall, 146 Mont. 374, 380, 406 P2d 822 (1965) for recent examples. Facts to be judicially noticed under subdivision (b)(2) which are "capable of accurate and ready determination by resort to sources whose accuracy cannot be

reasonably questioned" are not judicially noticed under Sections 93-501-1, R.C.M. 1947 [superseded], and 93-1101-8, R.C.M. 1947 [superseded], discussed in the Commission Notes to Rule 201(a). See Holtz v. Babcock, 143 Mont. 341, 370, 372, 389 P2d 869 (1964) for a strict statement by the Montana Supreme Court as to what matters should be judicially noticed.

(c) and (d) When discretionary and when mandatory. These subdivisions are identical to Federal and Uniform Rules (1974) Rule 201(c) and (d). As stated in the Advisory Committee's Note to the Federal Rules, 46 F.R.D. 161, 203, these rules are believed to reflect existing practice and are simple and workable.

The Montana statute on judicial notice (Section 93-501-1, R.C.M. 1947 [superseded]), does not indicate when a court may or when it must take judicial notice. Cases in Montana do not address themselves to the question; therefore the rule is apparently consistent with existing Montana law and practice. These subdivisions allow the court full discretion, within the limitations of Rule 201(b), to take judicial notice except when a party requests notice be taken and supplies the necessary information; that is, the information needed to satisfy the court that the fact fits within the limitations of Rule 201(b).

(e) Opportunity to be heard. This subdivision is identical to Federal and Uniform Rules (1974) Rule 201(e). No elaborate procedural safeguards are provided because it is contemplated that usual practices of notifying parties that judicial notice has been requested or taken will be followed. The rule provides the right to be heard as to the propriety of taking judicial notice, whether advance notification is given or not. Often notification is not given because of nonrecognition that judicial notice has been taken. This rule was adopted on the assumption that the discretion of the judge and parties will dictate how elaborate a hearing will be held. The issue at the hearing will be whether the fact to be judicially noticed falls within the limitations of subdivisions (a) and (b) of the rule. It should be noted that judicial notice by a trial court is reviewable by appellate courts, and for the sake of clarity and convenience the fact that judicial notice has been taken and the source of information should be a part of the record.

Existing Montana statutes and case law on judicial notice do not provide for any notification or opportunity to be heard. Therefore this section is new Montana law.

(f) Time of taking notice. This section is identical to Federal and Uniform Rules (1974) Rule 201(f). It is in accord with the usual view, accepted in Montana case law but not provided for by statute, that either a trial or appellate court can take judicial notice. Therefore there is no change in Montana law.

(g) Instructing the jury. This subdivision is identical to Federal Rule 201(g). The first part of this subdivision, dealing with civil cases, is consistent with Section 93-2501-2, R.C.M. 1947 [25-7-102 and 26-1-201], providing that the jury is bound to accept facts judicially noticed. The second part of the subdivision, dealing with criminal cases, is inconsistent with Montana case law. Criminal cases in Montana which have dealt with judicial notice have not mentioned any different means of instructing the jury than in civil cases and so instructed the jury to accept facts judicially noticed: State v. Slothower, 56 Mont. 230, 236, 182 P 270 (1919) that the moon was out on a certain night; State v. Williams, 122 Mont. 279, 282, 202 P2d 245 (1949) that venue was established; State v. Wild, 130 Mont. 476, 491, 305 P2d 325 (1956) that vodka is an intoxicating liquor; and State v. Peters, 146 Mont. 188, 198, 405 P2d 642 (1965) that venue was established. It is highly unlikely that any different result will be obtained under the Rule 201(g) since 201(b) allows judicial notice of indisputable facts such as those judicially noticed in the above cited cases [and] the jury would very probably find in accordance such indisputable facts. The Commission feels that there is no strong reason to ignore the civil-criminal distinction of the Federal Rule while there are these reasons to adopt it: first, it will be uniform with the Federal Rule, and second, it insures that all facts necessary to prove each element of a crime will be proven beyond a reasonable doubt, not dictated to be found through judicial notice in instructing the jury. This view is consistent with the reason for Congressional changes in this subdivision to its present form because mandatory instructions in criminal cases are "contrary to the spirit of the Sixth Amendment right to a jury trial".

Case Notes

Judicial Notice of Mother's Prior Termination Proceeding in Action to Terminate Father's Parental Rights — No Error: The District Court terminated a father's parental rights after taking judicial notice of the sealed record of the mother's prior termination proceeding. The father asserted error because the court took notice of facts that were not known and could not be discovered by the father. The Supreme Court disagreed. Rule 202, M.R.Ev., and this rule allow the District Court to take judicial notice of certain facts of record. Although sealed, the record was not entirely inaccessible because the father could have petitioned for disclosure of the

records under 41-3-205, but he did not, even though he was aware of the prior proceeding. In re K.C.H., 2003 MT 125, 316 M 13, 68 P3d 788 (2003).

Examination on Motion to Dismiss Limited to Contents of Complaint — Notice Required for Consideration of Materials Outside Pleading: Plouffe sued the state for tortious conduct, malicious prosecution, and defamation. The state moved for dismissal based on res judicata, and the District Court granted the state's motion, so Plouffe appealed. In considering the dismissal motion, the District Court relied on exhibits and materials related to other issues than those cited in the complaint. Plouffe noted that the exhibits could have been examined by converting the motion to one for summary judgment but that Plouffe would have been entitled to proper notice of the court's intention to do so. The state contended that the District Court was allowed to take judicial notice of the extraneous materials under this rule without converting the motion to one for summary judgment. The Supreme Court decided for Plouffe. On a motion to dismiss, the District Court may examine only whether a claim has been adequately stated in the complaint, and the court's examination is limited to the content of the complaint. Whether Plouffe's complaint was barred by res judicata could not be determined from the allegations of the complaint. The District Court could have ignored the exhibits and decided the motion based on the rules pertaining to a motion to dismiss, or the court could have converted the motion to one for summary judgment, which would have allowed Plouffe to present all material pertinent to the motion and to avoid surprise. However, judicial notice cannot circumvent the notice requirement in Rule 12(b), M.R.Civ.P. (Title 25, ch. 20). Plouffe's complaint did not challenge or present a collateral attack on a prior judgment, so the complaint could not be dismissed without converting the motion to dismiss to one for summary judgment. The District Court's failure to do so, and to notify Plouffe of its intent to do so, was reversible error. Plouffe v. St., 2003 MT 62, 314 M 413, 66 P3d 316 (2003). See also Glickman v. Whitefish Credit Union Ass'n, 1998 MT 8, 287 M 161, 951 P2d 1388 (1998).

Evidence of Market Value Not Presented — Replacement Value Insufficient to Prove Elements of Felony Theft: When fleeing from a pursuing police officer, Martin shot the officer and stole his service revolver. He was convicted of felony theft for exerting unauthorized control over the weapon. At trial, the only evidence presented as to the value of the revolver was an estimate of the replacement value, but no evidence was given regarding the market value. To prove felony theft, the value of the stolen property must be shown to exceed $500. By definition, value means the market value of the property at the time and place of the crime. Replacement value is to be used only if market value cannot be satisfactorily ascertained. Here, the state relied solely on replacement value and presented no evidence of market value or evidence that market value could not be ascertained. Having failed to meet the burden of proof regarding value, the essential elements of felony theft were not shown and the conviction was reversed. St. v. Martin, 2001 MT 83, 305 M 123, 23 P3d 216 (2001).

Sale of Automobile Franchise — Error in Failure to Resolve Mootness as Threshold Issue Before Underlying Dispute Addressed: Ford Motor Company (Ford) notified franchisee Shamrock Motors (Shamrock) that it intended to terminate Shamrock's automobile dealer franchise because Shamrock had sold 80% of its stock without Ford's knowledge or consent, which violated their franchise agreement. The Motor Vehicle Division of the Department of Justice issued a ruling that Ford had good cause, so Shamrock filed for judicial review in the District Court. Ford then removed to federal court, where the ruling was reversed, so Ford appealed to the Ninth Circuit Court. Shamrock then sold the dealership, and the decision was vacated because of lack of jurisdiction. The case was remanded to state court, where Ford moved to dismiss for mootness. The District Court denied the motion without discussion and ruled for Shamrock, concluding that the franchise could not be terminated as a result of the sale of 80% of the franchise stock. Reversing on appeal, the Supreme Court cited Adkins v. Livingston, 121 M 528, 194 P2d 238 (1948), in holding that mootness is a threshold issue that must be dealt with before the underlying dispute may be addressed. A matter is moot when, because of an event or happening, the issue has ceased to exist and no longer presents an actual controversy. A question is moot when a court cannot grant effective relief. If the parties cannot be restored to their original position, an appeal becomes moot. When Shamrock chose to sell the franchise during the appellate process, the question of whether Ford had good cause to terminate the franchise in the first instance became academic and thus moot. The District Court erred when it did not resolve the issue of mootness before addressing the merits of the claim, not recognizing that once Shamrock sold the dealership and was no longer the franchisee, there was no effective relief that the court could fashion under Title 61, ch. 4, part 2, so the appeal from the Motor Vehicle Division's ruling should have been dismissed as moot. Shamrock Motors, Inc. v. Ford Motor Co.,

1999 MT 21, 293 M 188, 974 P2d 1150, 56 St. Rep. 99 (1999), followed in Shamrock Motors, Inc. v. Chrysler Corp., 1999 MT 39, 293 M 317, 974 P2d 1154, 56 St. Rep. 164 (1999).

Newspaper Articles Improperly Attached to Opening Brief Set Aside: Counsel for the Franks attached several irrelevant newspaper articles to an opening brief, contending that it was permissible to supplement the record on appeal with judicially recognizable material. The Supreme Court found that the articles were not judicially recognizable under this rule and were improperly attached to the brief. Affirming the District Court decision to set aside a default judgment, the Supreme Court cited Downs v. Smyk, 185 M 16, 604 P2d 307 (1979), in cautioning counsel against attempting to introduce extraneous evidence by the back door via attachment to briefs, a practice that is not tolerated. Frank v. Harding, 1998 MT 215, 290 M 448, 965 P2d 254, 55 St. Rep. 903 (1998), distinguishing In re Establishment & Organization of Ward Irrigation District, 216 M 315, 701 P2d 721, 42 St. Rep. 824 (1985).

General Objection to Judicial Notice Insufficient to Preserve Issue on Appeal: Loh was charged with criminal possession of a controlled substance and sought to have her confession suppressed. The District Court denied the motion to suppress, and Loh was tried on the charge. At the trial, the prosecution requested the District Court to take judicial notice of the testimony of several firefighters given at the suppression hearing. The District Court agreed, over Loh's objection, saying that judicial notice of that former testimony was the very purpose contemplated by this rule. The Supreme Court held that the general objection made by Loh's counsel at the suppression hearing was an insufficient objection. The Supreme Court also noted that if there was error, it was harmless error and that Loh failed to make a further objection as to the sufficiency of any evidence offered at trial. St. v. Loh, 275 M 460, 914 P2d 592, 53 St. Rep. 226 (1996).

Admissibility of Unsworn Medical Reports: Under the rationale of ARM 24.5.317, adopted in 1990, medical records based on an examination of the claimant and exchanged between the parties are admissible without the necessity of foundation testimony. Miller v. Frasure, 264 M 354, 871 P2d 1302, 51 St. Rep. 233 (1994), overruling Hert v. Lumberman Mut. Cas. Co., 178 M 355, 584 P2d 656 (1978).

Court Observations Beyond Scope of Judicial Notice in STAB Case: The District Court erred in reviewing a contested State Tax Appeal Board case when its observations of the business-generating capability of a motel could only be verified by income statements of other area motels, data which was not generally known or capable of accurate and ready determination. Such empirical observations passed beyond the scope of judicial notice and bordered on judicial impression. O'Neill v. Dept. of Revenue, 227 M 226, 739 P2d 456, 44 St. Rep. 1037 (1987), followed in Leahy v. Dept. of Revenue, 266 M 94, 879 P2d 653, 51 St. Rep. 665 (1994).

Medical Community "Conspiracy of Silence": The so-called conspiracy of silence in the medical community does not fall within the category of the type of facts that can be judicially noticed. Clark v. Norris, 226 M 43, 734 P2d 182, 44 St. Rep. 444 (1987).

Incorrect Calculations Inappropriate for Judicial Notice — Harmless Error: The trial court took judicial notice of two calculations that proved incorrect. The inferences drawn from these figures were used to support the court's decision. The Supreme Court stated that the trial court erred by taking judicial notice of facts not appropriate for judicial notice, but the error was harmless since other evidence supported the court's decision. Rose v. Myers, 223 M 13, 724 P2d 176, 43 St. Rep. 1493 (1986).

Prejudice in Failure to Admit Documents Negated by Judicial Notice: The District Court refused to admit into evidence documents which might have suggested that the transfer of a ranch was invalid, holding that the documents were irrelevant. However, the court agreed to take judicial notice of a file containing the documents in a separate action brought against the copersonal representatives. The Supreme Court held that any prejudice caused by the District Court's failure to admit the documents into evidence was therefore negated. In re Estate of Mattila, 221 M 262, 718 P2d 343, 43 St. Rep. 797 (1986).

Judicial Notice of Maps and Descriptions on Appeal: In a dispute over control of an irrigation district's headgate, the Supreme Court permitted submission on appeal of government survey descriptions and maps that had not been introduced as evidence at trial. The court reasoned: first, that the commission comments to Rule 201, M.R.Ev., indicate that published maps or charts are included within the Rule's scope; and second, that maps and descriptions are acceptable articles of evidence by which to show a water right in the adjudication process. In re Establishment & Organization of Ward Irrigation District, 216 M 315, 701 P2d 721, 42 St. Rep. 824 (1985), distinguished in Frank v. Harding, 1998 MT 215, 290 M 448, 965 P2d 254, 55 St. Rep. 903 (1998).

Inflation Factor: In a petition to increase child support payments, the District Court used inflation as a factor to find an increased need for support. On appeal, the husband contended that this was error and that no evidence of inflation's effects on him had been presented. On appeal, the Supreme Court found no merit in the argument, saying, "Today inflation is not open to reasonable dispute." Reynolds v. Reynolds, 203 M 97, 660 P2d 90, 40 St. Rep. 321 (1983).

Judicial Notice of Aliases Properly Taken: In a prosecution for theft by accountability, there was sufficient evidence of the defendant's presence at the scene of the offense, as proved by her fingerprints on certain glassware, to uphold the conviction. The fact that the fingerprint card showed that the prints belonged to the defendant as identified by her maiden name rather than her married name is unimportant. The trial court may take judicial notice of the defendant's aliases to prove that the fingerprints were hers. St. v. Hart, 191 M 375, 625 P2d 21, 38 St. Rep. 133 (1981).

Theft by Accountability — Judicial Notice of Principals' Guilt Properly Taken: In a prosecution for theft by accountability the trial court did not err in taking judicial notice of the State's charges that two associates of the defendant actually committed the theft. There was ample direct evidence to show that the two women charged with the theft directly were associates of the defendant. The charges against the women qualified for judicial notice, and any taint resulting from the taking of judicial notice by the court was removed by the court's cautionary instruction to the jury that it was not bound by the decision of the court. St. v. Hart, 191 M 375, 625 P2d 21, 38 St. Rep. 133 (1981), followed in St. v. Oatman, 275 M 139, 911 P2d 213, 53 St. Rep. 74 (1996).

No Notice of Value — Essential Element of Felony Theft: Where the State failed to present any evidence that the value of the personalty allegedly taken by the defendant was greater than the $150 minimum required by statute, defendant was not required to object prior to the entry of judgment, because value is an essential element of the crime of felony theft and such an error may be raised at any time. The Supreme Court refused to take judicial notice of the value of the property because it was an essential element of the crime charged and the jury was not properly instructed as to value. St. v. Sunday, 187 M 292, 609 P2d 1188, 37 St. Rep. 561 (1980).

Workers' Compensation Court: The rules of evidence are more relaxed in an administrative proceeding than in a court of law, but due process will not be disregarded. The right to cross-examination is a constitutionally protected fundamental right and not an evidentiary rule. Section 2-4-612(5) makes this right absolute. The Workers' Compensation Judge may only consider evidence which is offered at the hearing or of which he may take judicial notice. A judicially noticed fact must be one not subject to reasonable dispute. Disputed medical conclusions by doctors contained in medical reports cannot be judicially noticed. Hert v. Lumberman Mut. Cas. Co., 178 M 355, 584 P2d 656, 35 St. Rep. 1345 (1978), distinguishing Stevens v. Glacier Gen. Assurance Co., 176 M 61, 575 P2d 1326 (1978), and clarified and rehearing denied in Hert v. Lumberman Mut. Cas. Co., 179 M 160, 587 P2d 11 (1978). Hert was held to no longer be authority for admissibility of medical records, in light of the 1990 adoption of ARM 24.5.317, in Miller v. Frasure, 264 M 354, 871 P2d 1302, 51 St. Rep. 233 (1994).

Collateral References

Evidence *key* 1, et seq., 20.

31 C.J.S. Evidence §§6 through 13, 28 through 57; 31A C.J.S. Evidence §§58 through 102.

29 Am. Jur. 2d Evidence §24, et seq.

Judicial notice of attorney customs and practices. 61 ALR 5th 707.

Effect of anticipated inflation on damages for future losses—modern cases. 21 ALR 4th 21.

Judicial notice as to location of street address within particular political subdivision. 86 ALR 3d 484.

Judicial notice as to assessed valuations. 42 ALR 3d 1439.

Judicial notice of driver's reaction time and of stopping distance of motor vehicles traveling at various speeds. 84 ALR 2d 979.

Judicial notice of diseases and similar conditions adversely affecting human beings. 72 ALR 2d 554.

Judicial notice of intoxicating quality, and the like, of liquor or particular liquid, from its name. 49 ALR 2d 764.

Judicial notice of matters relating to public thoroughfares and parks. 48 ALR 2d 1102, §7(c) superseded by 86 ALR 3d 484.

Reception of evidence to contradict or rebut matters judicially noticed. 45 ALR 2d 1169.

Effect of Rule 201(g) of the Federal Rules of Evidence, providing for instruction in criminal case that jury need not accept as conclusive fact judicially noticed, on propriety of taking judicial notice on appeal under Rule 201(f). 49 ALR Fed. 911.

What constitutes "adjudicative facts" within meaning of Rule 201 of Federal Rules of Evidence, concerning judicial notice of adjudicative facts. 35 ALR Fed. 440, superseded by 150 ALR Fed. 543.

9 Wigmore §§2571 through 2583.

Rule 202. Judicial notice of law.

Commission Comments

(a) Scope of rule. This section is identical to Federal and Uniform Rules (1974) Rule 201(a) except that changes are made to indicate that the rule governs judicial notice of law rather than fact. There is no Federal rule equivalent to this rule. The Advisory Committee Note to Federal Rule 201, 46 F.R.D. 161, 196, states that this area is a proper concern for rules of procedure; however, the Commission feels that rules facilitating proof of law are the proper concern of rules of evidence. Under Rule 9(d) M.R.Civ.P. ordinances and statutes must be pled as special matters: the Commission Note to that rule states that it is "consistent with and complementary to" sections 93-501-2 to 93-501-8, R.C.M. 1947 [all superseded], the Uniform Judicial Notice of Foreign Law Act, which is what much of this rule is based upon. The same comment is applicable here. This rule is intended to expedite proving foreign law. For instance, procedures under Section 93-1001-1, et seq., R.C.M. 1947 [2-6-101, 2-6-102, 1-1-102 through 105], on public writings could be facilitated under this rule.

The existing Montana law on judicial notice of law is covered by R.C.M. 1947, Sections 82-4208 [2-4-505], judicial notice in the Administrative Procedure Act; 93-501-1(2) through (7) [superseded], the general judicial notice statute; 93-501-2 through 93-501-8 [all superseded], the Uniform Judicial Notice of Foreign Law Act; and M.R.Civ.P. Rule 44.1, judicial notice of the law of foreign nations. These provisions do not adequately cover all law of all jurisdictions, nor do they cover all law in criminal cases. Rather than attempt to amend these provisions, the Commission adopts this rule in order to clarify and codify what it feels should be the rule on judicial notice of law. The rule serves to replace and is consistent with some of these provisions, but is inconsistent with some Montana case law detailed in the Commission Comments to Rule 202(b). (For a similar provision, see Nevada Revised Statutes, Section 47.140 and Wisconsin Rules of Evidence Sections 902.02 and 902.03.)

(b) Kinds of law. This subdivision is original and therefore entirely different than either the Federal or Uniform Rules of Evidence (1974) Rule 201(b). It was adopted because a series of Montana cases have limited judicial notice of law to a few areas. The Commission feels a broader approach is more in keeping with the goals of judicial notice: promoting convenience and expediting the administration of justice. To achieve these purposes, a broad list has been made, but it is not intended to be exclusive.

Paragraph (1) is taken from Section 93-501-2, R.C.M. 1947 [superseded], and therefore no change occurs as a result of its adoption.

Paragraph (2) is taken from the A.L.I. Model Code (1942) and is a change in Montana law. Although the Montana Supreme Court has judicially noticed city charters (Drew v. City of Butte, 44 Mont. 124, 125, 119 P 279 (1911)), it has refused to allow judicial notice of their ordinances. Carey v. Guest, 78 Mont. 415, 430, 258 P 236 (1927); Dineen v. City of Butte, 83 Mont. 370, 374, 272 P 243 (1928). Therefore this would be a change in the law but, the Commission feels, a sensible and convenient one.

Paragraph (3) is from the California Evidence Code covering judicial notice of acts of administrative agencies and is apparently not a change in Montana law. The court's first case on this subject allowed judicial notice of rules and regulations as acts of the executive department of the United States (U.S. v. Williams, 6 Mont. 379, 387, 12 P 851 (1887)) and as having the force and effect of Federal statutes (Johnson v. County of Lincoln, 50 Mont. 253, 256, 146 P 471 (1915)) and of the public and private official acts of the legislative and executive departments of the United States. Grosfield v. First National Bank of Miles City, 73 Mont. 219, 232, 236 P 250 (1925). However, the court refused to recognize administrative rules of Montana's Industrial Accident Board on the grounds that the board was quasi-judicial and judicial notice of rules of court was not allowed. Williams v. Anaconda Copper Mining Co., 96 Mont. 204, 211, 29 P2d 785 (1934). This decision was followed in other cases: State v. Andre, 101 Mont. 366, 368, 54 P2d 566 (1936); State ex rel. Magelo v. Industrial Accident Board, 102 Mont. 455, 461, 59 P2d 785 (1936). The court did, however, take judicial notice of the Montana Agriculture Commissioner's rules and regulations. Northern Montana Mustard Growers Co-op v. Britton, 128 Mont. 553, 567, 280 P2d 1078 (1955). Under Section 82-4208, R.C.M. 1947 [2-4-505], the Administrative Procedure Act, courts are to take judicial notice of rules and regulations.

Paragraph (4) is from the California Evidence Code. Montana law has a similar provision, Section 93-501-1(3) [superseded], and the Montana Supreme Court has taken notice of these acts in several cases. Therefore there is no change from present Montana law.

Paragraph (5) is taken from the Model Code and is recognized in Montana by case law. State ex rel. Goodman v. Stewart, 57 Mont. 144, 169, 187 P 641 (1920); Vaughn & Ragsdale v. State Board of Equalization, 109 Mont. 52, 56, 96 P2d 420 (1939). It represents no change from Montana law.

Paragraph (6) is from the California Evidence Code and in part may represent a change from Montana law. A long line of cases, the most recent being Sikora v. Sikora, 160 Mont. 27, 34, 499 P2d 808, 812 (1972), has held that courts may take judicial notice of records of the same case and any other cases; however, proceedings in courts of another state have not been allowed to be judicially noticed. In re Estate of Bruhns, 58 Mont. 526, 529, 193 P 1114 (1920). The Bruhns case is the only one that has followed this rule, and since the passage of the Uniform Judicial Notice of Foreign Law Act, it would seem proper to change it. Therefore, to the extent that records of any court of record of any state or the United States can be judicially noticed, this is a change in law.

Paragraph (7) is taken from the California Evidence Code and represents a change in existing Montana law. A line of cases, the most recent being Coleman v. District Court, 120 Mont. 372, 377, 186 P2d 91 (1947), has held that the local court rules will not be judicially noticed. However, the Commission feels that to adequately cover a rule on judicial notice of law, this area should be included, there being little reason for not changing the rule as the Supreme Court is promulgating rules of court and local court rules are available in any county courthouse.

Paragraph (8) is taken from the California Evidence Code, is in compliance with Rule 44.1, M.R.Civ.P., and represents no change in existing Montana law.

Paragraphs (9) and (10) are original and would be new Montana law.

Paragraph (11) is taken from Section 93-501-1(4), (5), (6) and (7), R.C.M. 1947 [superseded]. It retains existing Montana law allowing the court to take judicial notice of a wide variety of seals of officials of government and seals of notaries public. This paragraph is intended to allow more expeditious use of Rules 902(1), (2), (3) and (4) dealing with authentication of documents and seals.

(c) and (d) When discretionary and when mandatory. These subdivisions are based on Federal and Uniform Rules (1974) Rule 201(c) and (d) with changes and additions from existing Montana R.C.M. 1947 Sections 93-501-2 and 93-501-3 [both superseded] to make the rule compatible with this rule on judicial notice of law.

The first sentence of subdivision (c) allows the court complete discretion in taking judicial notice of all law such as those laws listed in paragraphs (2) through (10) of Rule 202(b). Subdivision (d) requires judicial notice to be taken of the law listed in Rule 202(b)(1), as also required by Section 93-501-2, R.C.M. 1947 [superseded], and other law, when requested. Allowing the court to take judicial notice, whether requested or not, in subdivision (c) and making judicial notice mandatory when requested in subdivision (d) follows the Federal and Uniform Rules approach and is believed to be simple and workable, as well as current Montana practice.

Slight changes in language have been made from the present Section 93-501-2, R.C.M. 1947 [superseded], which are only intended to make these statutes clearer, not to change their meaning. Therefore, there is no change from existing Montana law.

(e) Opportunity to be heard. This subdivision is identical to Federal Rule 201(e) except for the substitution of the word "law" for "matter" in the phrase "tenor of the law noticed". As stated in the Commission Comments to Rule 201(e) no elaborate procedure is outlined, for it is felt that none is needed. The issue to be presented at the hearing would be whether the proper law was judicially noticed. This section is new and represents no change in existing Montana law.

(f) Time of taking notice. Paragraph (1) of this subdivision is based upon Federal Rule 201(f) in that it allows judicial notice to be taken at any stage of the proceeding but only judicial notice of the law of this state and the United States. Paragraph (2) is based upon Section 93-501-5, R.C.M. 1947 [superseded], and requires that notice be given for judicial notice of other law. This notice requirement is also contained in Rule 44.1 M.R.Civ.P. H & J Gross, Inc. v. Fraser, 140 Mont. 95, 97, 368 P2d 163 (1962) construed the statutory provision as putting the duty on the court to make an independent determination of the correct foreign law. In order that this may be done, paragraph (2) requires notification to be given: a reasonable amount of time can be allowed the court to properly examine and determine the foreign law. Both paragraphs are consistent with existing Montana law.

(g) Question for the court. This section is taken from Section 93-501-4, R.C.M. 1947 [superseded], and is not similar to any of the Federal Rules of Evidence. The phrase "except as

otherwise provided by law" refers to unusual situations where the jury is directed by law to determine the law, as in The 1972 Constitution of the State of Montana, Article II, Section 7: "...In all suits and prosecutions for libel and slander the truth thereof may be given in evidence; and the jury, under the direction of the court, shall determine the law and facts". In all other situations it is anticipated that taking judicial notice of the law will be a question for the court and not for the jury. This section is therefore consistent with existing Montana law.

Case Notes

No Improper Bifurcation of Adjudicatory and Dispositional Hearings Based on Noticed Testimony From Earlier Show Cause Hearing: A parent argued that adjudicatory and dispositional hearings were improperly bifurcated because the District Court took notice of and improperly relied upon expert testimony offered at an earlier show cause hearing. The state argued that a court may take notice of the records of any court in the state. The Supreme Court noted that the District Court allowed the parent to move for reconsideration at the hearing of its judicial notice of testimony from the previous hearing, but the parent did not move for reconsideration. Because the District Court also determined that there was sufficient evidence at the later hearing, without reliance on the noticed testimony, to sustain a finding of abuse and neglect and because the parent did not establish that use of the noticed testimony was a disadvantage, no error was demonstrated. In re S.C. & L.Z., 2005 MT 241, 328 M 476, 121 P3d 552 (2005).

Judicial Notice of Mother's Prior Termination Proceeding in Action to Terminate Father's Parental Rights — No Error: The District Court terminated a father's parental rights after taking judicial notice of the sealed record of the mother's prior termination proceeding. The father asserted error because the court took notice of facts that were not known and could not be discovered by the father. The Supreme Court disagreed. Rule 201, M.R.Ev. and this rule allow the District Court to take judicial notice of certain facts of record. Although sealed, the record was not entirely inaccessible because the father could have petitioned for disclosure of the records under 41-3-205, but he did not, even though he was aware of the prior proceeding. In re K.C.H., 2003 MT 125, 316 M 13, 68 P3d 788 (2003).

Judicial Notice of Prior Court Orders in Fraudulent Conveyance Case: Defendant contended that the District Court erred in basing a finding regarding a fraudulent conveyance action on the record submitted by plaintiffs referring to a default judgment in an earlier intentional interference and assault action, contending that judicial notice of the prior case amounted to impermissible hearsay and did not comport with the purpose for which judicial notice exists. The Supreme Court noted that this rule provides that a court may take judicial notice of records of any court of this state or any other U.S. or state court of record. The finding in question was supported by substantial credible evidence, was not clearly erroneous, and was thus affirmed. Farmers Plant Aid, Inc. v. Fedder, 2000 MT 87, 299 M 206, 999 P2d 315, 57 St. Rep. 375 (2000).

Sale of Automobile Franchise — Error in Failure to Resolve Mootness as Threshold Issue Before Underlying Dispute Addressed: Ford Motor Company (Ford) notified franchisee Shamrock Motors (Shamrock) that it intended to terminate Shamrock's automobile dealer franchise because Shamrock had sold 80% of its stock without Ford's knowledge or consent, which violated their franchise agreement. The Motor Vehicle Division of the Department of Justice issued a ruling that Ford had good cause, so Shamrock filed for judicial review in the District Court. Ford then removed to federal court, where the ruling was reversed, so Ford appealed to the Ninth Circuit Court. Shamrock then sold the dealership, and the decision was vacated because of lack of jurisdiction. The case was remanded to state court, where Ford moved to dismiss for mootness. The District Court denied the motion without discussion and ruled for Shamrock, concluding that the franchise could not be terminated as a result of the sale of 80% of the franchise stock. Reversing on appeal, the Supreme Court cited Adkins v. Livingston, 121 M 528, 194 P2d 238 (1948), in holding that mootness is a threshold issue that must be dealt with before the underlying dispute may be addressed. A matter is moot when, because of an event or happening, the issue has ceased to exist and no longer presents an actual controversy. A question is moot when a court cannot grant effective relief. If the parties cannot be restored to their original position, an appeal becomes moot. When Shamrock chose to sell the franchise during the appellate process, the question of whether Ford had good cause to terminate the franchise in the first instance became academic and thus moot. The District Court erred when it did not resolve the issue of mootness before addressing the merits of the claim, not recognizing that once Shamrock sold the dealership and was no longer the franchisee, there was no effective relief that the court could fashion under Title 61, ch. 4, part 2, so the appeal from the Motor Vehicle Division's ruling should have been dismissed as moot. Shamrock Motors, Inc. v. Ford Motor Co.,

1999 MT 21, 293 M 188, 974 P2d 1150, 56 St. Rep. 99 (1999), followed in Shamrock Motors, Inc. v. Chrysler Corp., 1999 MT 39, 293 M 317, 974 P2d 1154, 56 St. Rep. 164 (1999).

Attempted Assignment of Void Option Agreement — Judicial Notice: The District Court did not err in finding appellant was not entitled to exercise an option, which had been assigned to appellant, because the original option agreement between the respondent and the assignor was void. The District Court could take judicial notice of a separate action that had determined the invalidity of the option agreement at the time of the attempted assignment, and there was sufficient independent evidence that the option agreement was void. Berry v. Mann, 188 M 71, 610 P2d 1180, 37 St. Rep. 911 (1980).

Law Review Articles

Judicial Notice of Foreign Law in Federal Courts, Beale, 38 Wash. L. Rev. 802 (1963).

Collateral References

Evidence *key* 28, et seq.

31 C.J.S. Evidence §§14 through 27.

29 Am. Jur. 2d Evidence §§104 through 128.

21 Am. Jur. POF2d Law of Foreign Jurisdiction, pp. 1 through 71.

Federal or state law as governing federal court's authority, in diversity action after Erie R. Co. v. Tompkins, to take judicial notice of law of sister state or foreign country. 7 ALR Fed. 921.

9 Wigmore §§2572, 2573.

Article III
Presumptions

Rule 301. Presumptions in general.

Commission Comments

This rule governs all presumptions generally. See Rule 302 for presumptions controlled by Federal law.

(a) Definition of presumption. This subdivision is entirely different from both the Federal and Uniform Rules (1974) Rule 301. The rule is a complete departure from both of these rules which have the narrow objective of stating the effect of presumptions; therefore the rule is not comparable or equivalent to either of these rules. The Commission feels that all the law of evidence should be put in one place as much as possible; therefore a definition is placed in this subdivision and other basic concepts are contained in following subdivisions of the rule.

This definition in the rule is taken from West's Ann. Cal. Ev. Code, Section 600(a). Previously California defined presumptions in the exact language of the existing statutory definition, Section 93-1301-3, R.C.M. 1947 [superseded], which provides: "A presumption is a deduction which the law expressly directs to be made from particular facts". The Comment to California Section 600(a) states that the new California definition is substantially the same as the old definition: the change apparently is made to clarify the wording. The Commission also intends the definition in the rule to be substantially the same as the existing statutory definition in Section 93-1301-3, R.C.M. 1947 [superseded], and that the changes are only for clarification.

The existing statutory definition, Section 93-1301-3, R.C.M. 1947 [superseded], points out one distinguishing feature of a presumption: that the law directs it to be made. That is, once the facts giving rise to the presumption are established, the presumption must be found. However, the statute used the term "deduction" which implies that all presumptions result from some logical process. This is not true of all presumptions — some are based on public policy rather than logical deduction.

To incorporate both distinguishing features, the rule uses the terms "assumption of fact" rather than "deduction" and "that the law requires to be made" rather than "the law expressly directs to be made".

The present Montana rule that a presumption must be based on particular established facts and not on another presumption or inference is followed in this definition by the use of the phrase "from another fact or group of facts". See First National Bank of Glendive v. Sorenson, 65 Mont. 1, 13, 210 P 900 (1922); Kern v. Payne, 65 Mont. 325, 337, 211 P 767 (1922); Doran v. U.S. Bldg. and Loan Assoc. 94 Mont. 73, 76, 20 P2d 835 (1933); and Cavitt v. Seirson, 119 Mont. 437, 440, 175 P2d 67 (1946).

Finally, the phrase "found or otherwise established in the action or proceeding" makes clear that the facts giving rise to the presumption may be established by the pleadings, stipulation of the parties, or judicial notice, as well as by evidence.

(b) Classification and effect of presumptions. This subdivision is original and therefore entirely different from both Federal and Uniform Rules (1974) Rule 301; both state the effect, but

neither contains a classification of presumptions. The effect given presumptions under the rule differs from either approach followed by the Federal or Uniform rule. The Federal rule gives presumptions the sole effect of shifting the burden of producing evidence to rebut or meet the presumption and does not shift the burden of persuasion. The Uniform rule gives presumptions the effect of shifting the burden of persuasion to rebut or meet the presumption.

The Commission rejects both of these rules because Montana has expressly rejected the approach contained in Federal Rule 301 (Lewis v. New York Life Ins. Co., 113 Mont. 151, 162, 124 P2d 579 (1942)) and goes further than the approach contained in Uniform Rule (1974) 301. The Commission adopts this subdivision to retain, codify, and clarify existing Montana law on the effect of presumptions.

Paragraph (1) contains the rule found in R.C.M. 1947, Sections 93-1301-5 [superseded], and 93-1301-6 [26-1-601] that conclusive presumptions are set out by statute and may not be controverted; it is therefore consistent with Montana law. The Commission does not intend to alter in any way the enumeration or effect of conclusive presumptions as declared by statute. (See Appendix, Table D for these presumptions [found at part compiler's comment, Title 26, ch. 1, part 6].)

Paragraph (2) contains the rules found in Section 93-1301-5, R.C.M. 1947 [superseded], that all presumptions not declared conclusive are disputable and may be controverted; and that unless a presumption is overcome, the trier of fact is bound to find in accordance with it. The Montana Supreme Court has interpreted this section as well as R.C.M. 1947, Sections 93-1301-1 [superseded] (classifying presumptions as indirect evidence) and 93-2001-1(2) [26-1-303] (inferring that presumptions are to be weighed as evidence) to mean that presumptions have the effect of evidence.

The Commission believes the procedure and rule followed in Montana concerning presumptions is as follows: If evidence is introduced which gives rise to a presumption, and the presumption is not controverted or disputed, the trier of fact must find in accordance with the presumption. In order to avoid this and overcome a presumption, the rule necessarily requires that the burden of persuasion shift to the party against whom the presumption operates. See Holen v. Phelps, 131 Mont. 146, 152, 308 P2d 624 (1957) and cases cited therein. If evidence contrary to the presumption is introduced, the presumption is given the weight and effect of evidence and a question is raised for the trier of fact who may give the presumption such weight in the face of the contrary evidence as it thinks the presumption should have. See Lewis v. New York Life Ins. Co., *supra;* Williams v. Swords, 129 Mont. 165, 173, 284 P2d 674 (1955); Roseneau Foods Inc. v. Kohlman, 140 Mont. 572, 577, 374 P2d 87 (1962); Crissey v. State Highway Comm'n., 147 Mont. 374, 379, 413 P2d 308 (1966). An exception occurs when the contrary evidence is so overwhelmingly against the presumption as to lead to only one reasonable conclusion; then the matter becomes a question of law for the judge, not a question for the trier of fact. Welch v. All Persons, 85 Mont. 114, 134, 278 P 110 (1929); Nichols v. New York Life Ins. Co., 88 Mont. 132, 139, 292 P 203 (1930); Renland v. First Nat'l Bank, 90 Mont. 424, 4 P2d 488 (1931).

This subdivision may change existing Montana law by providing that a preponderance of evidence is required to overcome all disputable presumptions. Previously different amounts of evidence were apparently required to overcome different presumptions. For example: "slight proof", Sommers v. Gould, 53 Mont. 538, 545, 165 P 599 (1917); "substantial evidence", State ex rel. Rankin v. Martin, 68 Mont. 392, 404, 219 P 632 (1923); "preponderance of evidence", In re Wray's Estate, 93 Mont. 525, 535, 19 P2d 1051 (1933); "proof must be clear, satisfactory and convincing", In re Colbert's Estate, 31 Mont. 461, 468, 78 P 971 (1904); "conclusive evidence", Gardiner v. Eclipse Grocery, 72 Mont. 540, 550, 234 P 490 (1925); and "beyond a reasonable doubt", Spratt v. Helena Power Transmission Co., 37 Mont. 60, 79, 94 P 631 (1908). However, the Commission feels that in the interest of obtaining a simple, practical rule, one amount of evidence should be required and that amount should be a preponderance of the evidence.

With one exception the Commission does not intend to alter the enumeration or effect of the disputable presumptions declared by statute or common law. (See Appendix, Table D for these presumptions [found at part compiler's comments, Title 26, ch. 1, part 6].) The exception arises with Section 93-1301-7(34), R.C.M. 1947 [26-1-602(34), deleted from section by 1983 amendment], which deals with ancient documents. This presumption is changed slightly by two proposed rules: Rule 803(16), dealing with the hearsay aspect of ancient documents, and Rule 901(b)(8), dealing with the authentication aspects of these documents. (See the Commission Comments to those rules for further explanation.)

(c) Inconsistent presumptions. This subdivision is not included in the Federal Rules of Evidence, but was adopted by the Uniform Rules of Evidence (1974) Rule 301(b). The simplest solution to the problem arising when two or more presumptions conflict or arise from the same

group of facts is to have the judge decide whether one of the presumptions is based on weightier considerations of public policy, but if none of the presumptions is weightier, to disregard all of the inconsistent presumptions. The rule that presumptions of weightier public policy overcome those of lesser weight is recognized in Montana. Burgess v. Lasby, 91 Mont. 481, 491, 9 P2d 164 (1932); McMahon v. Cooney, 95 Mont. 138, 144, 205 P2d 131 (1933); Platts v. Platts, 134 Mont. 474, 479, 344 P2d 722 (1959). The rule that if no presumption is of greater weight then all will be disregarded is not recognized and is therefore new to Montana law.

Case Notes

Determination That Marriage Irretrievably Broken Judicial Function, Not Conclusive Presumption: Before a court can enter a decree of dissolution, it must find that the marriage is irretrievably broken. The determination that a marriage is irretrievably broken is a judicial function, rather than a conclusive presumption arising from the parties' testimony or from the petition for dissolution. The finding of irretrievable breakdown must be supported by evidence that the parties have lived apart for more than 180 days prior to the filing of the petition for dissolution or that there is serious marital discord that adversely affects the attitude of one or both of the parties toward the marriage. If the court finds that the marriage is irretrievably broken and satisfies the other requirements of 40-4-104, the court shall enter a decree of dissolution. In re Marriage of Geror, 2000 MT 60, 299 M 33, 996 P2d 381, 57 St. Rep. 285 (2000), following In re Marriage of Kraut, 215 M 170, 696 P2d 981, 42 St. Rep. 268 (1985).

Sale of Lot Presumptively Including Access: It is a presumption, albeit disputable, that the complete use and enjoyment of a parcel of land includes access to that parcel. To overcome the presumption, the seller must offer evidence or some legal basis that would controvert the buyer's reliance on the presumption. Here, the Kester's sold the Erkers a house in Big Sky for approximately $310,000. The Kesters' attorney later discovered through the title company that a portion of the driveway, which provided sole access to the house, had not been conveyed by the deed to the lot and requested additional money for the deed to the driveway. There was no indication at the time of sale that any parcel was separate and distinct from the lot, nor did the Kesters reveal any intention to reserve the driveway from the purchase of the lot. Although the Erkers were charged with constructive notice of the contents of properly recorded instruments describing prior conveyances of the property, under Montana subdivision laws, the driveway was not an individual parcel of land at the time of purchase, so the Erkers could be charged only with knowledge that the purchase of the lot described in the common metes and bounds description included the driveway. Absent evidence to the contrary, the Erkers were entitled to the presumption that purchase of the lot included access to it and to summary judgment as a matter of law. Erker v. Kester, 1999 MT 231, 296 M 123, 988 P2d 1221, 56 St. Rep. 912 (1999), following Yellowstone Valley Co. v. Assoc. Mtg. Investors, Inc., 88 M 73, 290 P 255, 70 ALR 1002 (1930).

Existence of Promissory Notes Creating Rebuttable Presumption of Sufficient Consideration — Speculative Statements Insufficient to Demonstrate Genuine Issue of Material Fact: Defendant Moon contended that the District Court erred in granting summary judgment to plaintiff on promissory notes because there was a genuine issue of material fact regarding whether the notes were unenforceable for lack of consideration. However, 26-1-602 creates a rebuttable presumption arising from the fact of the promissory note itself that the note was given for sufficient consideration. Under subsection (b)(2) of this rule, Moon was required to show a preponderance of evidence contrary to the presumption in order to overcome it, otherwise the court was bound to find the assumed fact in accordance with the presumption. Moon's conclusory and speculative statements in the pleadings, briefs, and affidavits did not constitute sufficient factual evidence to demonstrate that a genuine issue of material fact existed contrary to the presumption of valid consideration, so the grant of summary judgment was proper. Envtl. Contractors, LLC v. Moon, 1999 MT 178, 295 M 268, 983 P2d 390, 56 St. Rep. 696 (1999).

Disputable Presumption Created of Employee Status — List of Presumptions Held Not Exclusive: Berg was sued by the State Fund in a civil action for the recovery of workers' compensation premium payments. Earlier, at the time of an audit, Berg was asked by a State Fund auditor to submit evidence that 23 persons working for him were independent contractors as Berg claimed and was told that if he did not submit any evidence, the State Fund would presume that the 23 people were employees and that premiums must be paid for those people. Berg submitted no evidence. The Supreme Court contrasted the language of 26-1-601 with the language of 26-1-602 regarding the exclusive or nonexclusive nature of the lists of presumptions in the two sections and, citing Werre v. David, 275 M 376, 913 P2d 625 (1996), stated that the language of 39-71-120 (now repealed) should be interpreted in its usual and ordinary meaning. The Supreme Court held that 39-71-120 (now repealed) creates a disputable presumption that a person is an employee and held that the fact that the presumption created by 39-71-120 (now

repealed) is not contained in the list of disputable presumptions in 26-1-602 is not controlling. The Supreme Court noted that the compiler's comment to Title 26, ch. 1, part 6, makes clear that the listing of disputable presumptions is not intended to be exclusive. State ex rel. St. Comp. Mut. Ins. Fund v. Berg, 279 M 161, 927 P2d 975, 53 St. Rep. 1098 (1996).

Proper Standard to Rebut Presumption — Preponderance of Evidence: Vanderburg argued that the trial court had erred in stating that the presumption created for forfeiture had to be rebutted by a preponderance of the evidence and also argued that regardless of the standard, he had rebutted the presumption favoring forfeiture. The Supreme Court held that this rule stands for the proposition that a disputable presumption must be overcome by a preponderance of the evidence and that in the present case, the trial court had correctly concluded that the presumption had not been rebutted. In re Seizure of $23,691.00, 273 M 474, 905 P2d 148, 52 St. Rep. 1063 (1995), following St. v. Flack, 260 M 181, 860 P2d 89 (1993), and distinguishing, as to overcoming a presumption, Magone v. Aul, 269 M 281, 887 P2d 1235 (1994).

Presumption of Adverse Use: Adverse use need not be proved independent and apart from the presumption of adverse use. Unless properly rebutted, the presumption stands. Parker v. Elder, 233 M 75, 758 P2d 292, 45 St. Rep. 1305 (1988), followed in Rappold v. Durocher, 257 M 329, 849 P2d 1017, 50 St. Rep. 293 (1993).

Jury Instructions — Oral Agreement for Lease: In trial involving oral agreement for lease of land for grazing purposes, when term of lease was in dispute and when there was no preponderance of evidence contrary to the presumption of a yearly lease, it was not error to refuse to instruct on a presumption of a month-to-month tenancy. Hill v. Turley, 218 M 511, 710 P2d 50, 42 St. Rep. 1783 (1985).

Parking Ordinance — Presumption That Owner Parked Vehicle — Unconstitutional Shifting of Burden: In striking down a parking ordinance, the Supreme Court held that to make the owner of a vehicle prima facie liable upon proof that his vehicle has been parked illegally is equivalent to a presumption that the owner parked the vehicle. The effect of the presumption is to violate constitutional due process requirements by shifting the burden of persuasion to defendant and contradicting the presumption of innocence. Missoula v. Shea, 202 M 286, 661 P2d 410, 40 St. Rep. 91 (1983).

Sandstrom Instruction — Not Harmless Error if Intent Disputed Issue at Trial: Hamilton appealed federal District Court's dismissal of his habeas corpus petition on grounds that Sandstrom instruction given in his homicide trial was not harmless error. The court of appeals held that the giving of a Sandstrom instruction cannot be held harmless error if intent is a disputed issue at trial. If a criminal defendant's intent is a disputed issue at trial, the reviewing court cannot rationally conclude beyond a reasonable doubt that an unconstitutional Sandstrom instruction given to a jury did not taint its verdict even if substantial evidence of intent exists. Petition of Hamilton, 721 F2d 1189 (9th Cir. 1983).

Theft — Burden on Defendant to Disprove Unlawful Possession or Prove Lawful Possession — Unconstitutional: Defendant was convicted of felony theft of an air compressor, which he contended he had rented from an unidentified party. On appeal, defendant contended that an instruction couched in the exact language of 45-6-304 (now repealed) was unconstitutional in that it created a rebuttable presumption which placed the burden of persuasion on the defendant as to the effect of possession and that it undermined the "beyond a reasonable doubt" standard of proof in that it contained no time constraints, nor was it limited to "exclusive possessions". The Supreme Court held 45-6-304 (now repealed) unconstitutional and held any instruction using the language of the statute to be prejudicial to a defendant. The court stated that the burden of proving every essential element of theft must always be on the state. Section 45-6-304 (now repealed) takes away the presumption of innocence and forces a defendant to testify by placing a burden on him to either disprove unlawful possession or prove lawful possession. The court set forth what it considered a proper instruction on the effect a jury may give to the unauthorized possession of stolen property. St. v. Kramp, 200 M 383, 651 P2d 614, 39 St. Rep. 1819 (1982).

Sandstrom Instruction — Harmless Error — Not Related to Disputed Issue: Because the victim was shot four times in the head at close range and the only disputed issue in the case was the identity of the perpetrator, error by the trial court in using the Sandstrom instruction was harmless. McGuinn v. Crist, 657 F2d 1107 (9th Cir. 1981).

Sandstrom Instruction — Harmless Error Doctrine Correct Test — Plain Error Rule Not Applicable — Federal Habeas Corpus: In rejecting the state's contention that the giving of the Sandstrom instruction (Sandstrom v. Mont., 442 US 510, 61 L Ed 2d 39, 99 S Ct 2450 (1979)) constituted harmless error, the court stated that in applying the "harmless constitutional error" doctrine as set out in Chapman v. Calif., 386 US 18, 17 L Ed 2d 705, 87 S Ct 824 (1967), it must be shown that the constitutional right affected is not a right basic to a fair trial and it must be found

harmless beyond a reasonable doubt. For conviction the Due Process Clause requires that each element of a crime be proven beyond a reasonable doubt, this being basic to a fair trial. The Sandstrom instruction by shifting the burden of proof of intent, an element of the crime of homicide, to the defendant denies him due process, and thus the court cannot consider the instruction as harmless error. The "plain error" doctrine is not applicable because it only sets a standard of "highly probable" that the instruction error "materially affected the verdict", the wrong standard by which to measure the effect of constitutional error. McGuinn v. Crist, 492 F. Supp. 478, 37 St. Rep. 1159 (D.C. Mont. 1980), reversed 657 F2d 1107 (9th Cir. 1981).

Sandstrom Instruction — Viewing Instructions as a Whole — Assurance of Effect on Jury: Petition for Writ of Habeas Corpus was filed in U.S. District Court. When the Sandstrom instruction (Sandstrom v. Mont., 442 US 510, 61 L Ed 2d 39, 99 S Ct 2450 (1979)) was given at a homicide trial, it may be that the defect can be cured by viewing all of the instructions as a whole; other instructions may be so "rhetorically inconsistent" (ibid. 518-519, n. 7) with the Sandstrom instruction that they overcome its presumptive effect. The court may not speculate on the curative effects of the other instructions on the jury; it must be assured that the jury did not find the defendant guilty on the grounds that he merely acted voluntarily, rather than finding the necessary criminal intent. In examining the instructions given, the court was not so assured and the petition for a Writ of Habeas Corpus was granted. McGuinn v. Crist, 492 F. Supp. 478, 37 St. Rep. 1159 (D.C. Mont. 1980), reversed 657 F2d 1107 (9th Cir. 1981).

Sandstrom Instructions — Harmless Constitutional Error — "Overwhelming Weight of the Evidence" Test Adopted: In the Sandstrom case, the jury was instructed, "The law presumes that a person intends the ordinary consequences of his voluntary acts." This instruction was held unconstitutional because the jury might have interpreted it in one of two ways: (1) as a conclusive presumption; or (2) as shifting the burden of persuasion to the defendant to disprove an element of the crime, viz., that defendant "knowingly or purposely" killed the victim. Either interpretation would have rendered the instruction unconstitutional. Here, the instructions included various clarification statements, including one that, unless otherwise instructed, all presumptions are rebuttable. The first Sandstrom objection was thus met. The second objection raises the question of whether the federal constitutional error was harmless beyond a reasonable doubt. The Montana Supreme Court adopted the test that measures the evidence as a whole and excludes the constitutional infirmity where overwhelming evidence supports the conviction. Here the evidence was undisputed, overwhelming, and uncontradicted and permitted only one rational conclusion, that the defendant had the requisite intent when he kidnapped and killed the victim. A reasonable juror could not have found otherwise. Therefore, the unconstitutional jury instructions were harmless beyond a reasonable doubt in the context of the undisputed evidence in the case, and the assigned error could not have contributed to the verdict. St. v. McKenzie, 186 M 481, 608 P2d 428, 37 St. Rep. 325 (1980).

Sandstrom Jury Instruction — Presumption of Intentional Consequences of Acts — Harmless Error: Defendant, charged with mitigated deliberate homicide alleged as error the giving of the jury instruction, "The law presumes that a person intends the ordinary consequences of his voluntary acts." Under Montana law, causing the death of another becomes deliberate homicide only when it is committed purposely or knowingly. These elements are necessary to the proof of this particular crime and must be proved beyond a reasonable doubt by the prosecution. Intent is a difficult element to prove. The evidence normally must be in the nature of outward manifestations of the defendant's state of mind, but when a telephone line to the police station from the scene of the murder happens to be open and the defendant was overheard at length, the court knew what he was thinking from his own words; it is difficult to conceive of a better indication as to defendant's intent. Also, the officer heard the fight at the time these words were spoken and another officer found the defendant and the victim's body minutes later. The only contested element here was intent, and the evidence on it was overwhelming. Basing its holding on the probable impact of the instructions upon the minds of the average jury, in the light of the evidence, the impact of the instruction upon the jury could not reasonably have contributed to the verdict. The error in giving the contested instruction was harmless. St. v. Hamilton, 185 M 522, 605 P2d 1121, 37 St. Rep. 70 (1980), certiorari denied, 447 US 924, 65 L Ed 2d 117, 100 S Ct 3017 (1980); dismissal of federal District Court habeas corpus petition reversed on Sandstrom grounds, sub nom. Petition of Hamilton, 721 F2d 1189 (1983).

Jury Instructions — Intention of Consequences of Acts — Sandstrom Distinguished: Distinguishing Sandstrom, the court noted that the jury was not given a mandatory presumption, but it was told it could reasonably infer the defendant's intent for all the consequences which one acting in a like position would reasonably have expected. Nothing in the instruction lessened the duty of the State to prove every element of the crime charged beyond a

reasonable doubt, nor did it affect the presumption of defendant's innocence. St. v. Bad Horse, 185 M 507, 605 P2d 1113, 37 St. Rep. 45 (1980), distinguishing Sandstrom v. Mont., 442 US 510, 61 L Ed 2d 39, 99 S Ct 2450 (1979).

Presumption in Jury Instruction — Interpretation: The effect of a presumption in a jury instruction is determined by the way in which a reasonable juror would have interpreted it, not by a state court's interpretation of its legal import. Sandstrom v. Mont., 442 US 510, 61 L Ed 2d 39, 99 S Ct 2450 (1979).

Supreme Court as Final Authority: The Supreme Court of Montana is the final authority on the legal weight to be given a presumption instruction under Montana law, but it is not the final authority on the interpretation which a jury could have given to the instruction. Sandstrom v. Mont., 442 US 510, 61 L Ed 2d 39, 99 S Ct 2450 (1979).

Unconstitutional Presumption of Intent — Sandstrom Decision: Upon finding proof of one element of the crime of deliberate homicide and of facts insufficient to establish the second, the voluntariness and ordinary consequences of the defendant's action, the jurors could reasonably have concluded, in light of the instruction that a person intends the ordinary consequences of his voluntary acts, that they were directed to find against defendant on element of intent; the State was thus not forced to prove beyond a reasonable doubt every fact necessary to constitute the crime charged, and defendant was deprived of his constitutional rights. Sandstrom v. Mont., 442 US 510, 61 L Ed 2d 39, 99 S Ct 2450 (1979).

Rebuttable Presumption — Res Ipsa: Based on language in Sweeney v. Erving, 228 US 233, 240, (1913), the Montana Supreme Court held that a res ipsa case does not put the defendant in a position of having to prove an affirmative defense to escape liability. Helmke v. Goff, 182 M 494, 597 P2d 1131, 36 St. Rep. 1104 (1979).

Presumption — Effect on Due Process: In answer to defendant's contention that the presumption in former section 94-8-225, R.C.M. 1947 (since repealed), shifted the burden of proof of lack of intent to the defendant, the Supreme Court stated that if the existence of the proven fact would convince a rational juror of the existence of the inferred fact beyond a reasonable doubt, the statute comports with due process. St. v. McBenge, 175 M 362, 574 P2d 260 (1978).

Law Review Articles

Presumptions in Criminal Cases: A New Look at an Old Problem, Ranney, 41 Mont. L. Rev. 21 (1980).

Statutory and Common Law Presumptions in Montana, Clarke, 37 Mont. L. Rev. 91 (1976).

The Effect of Rebuttable Presumptions in Montana, Hanson, 31 Mont. L. Rev. 97 (1969).

Collateral References

Evidence *key* 53, et seq.

31A C.J.S. Evidence §§111, 114, et seq.

Presumption or inference that accidental death of employee engaged in occupation of manufacturing or processing arose out of and in course of employment. 47 ALR 5th 801.

Presumption or inference, in products liability action based failure to warn, that user of product would have heeded an adequate warning had one been given. 38 ALR 5th 683.

Deeds: effect of Uniform Probate Code §6-201, providing that certain instruments attempting to pass property at death shall be deemed nontestamentary. 81 ALR 4th 1122.

9 Wigmore §§2490 through 2493.

Rule 302. Applicability of federal law in civil cases.

Commission Comments

This rule is identical to the Uniform Rules of Evidence (1974) Rule 302 which in turn is identical to Federal Rule 302 with the exception of the word "federal" being substituted for "state". The comment to the Uniform Rule states the reasons this Commission adopted the rule:

Parallel jurisdiction in state and federal courts exists in many instances. The modification of Rule 302 is made in recognition of this situation. The rule prescribes that when a federally created right is litigated in a state court, any prescribed federal presumption shall be applied.

To this the Commission would add that not only should the prescribed federal presumption be applied but also given effect according to the Federal Rules.

Therefore it must first be determined whether there is a prescribed "federal" presumption. If it has been determined that a "federal" presumption should be applied, the effect it is given is determined by the Federal Rule 301. If a presumption does not deal with a substantive element of a claim or defense, it is not a "federal" presumption and the effect it is given is determined by

proposed Montana Rule 301. This allows federal and state procedural effects to be applied to their respective substantive presumptions.

The current law in this area is generally uncertain. In Federal Employer's Liability Act cases, it seems clear that state courts may not apply their own procedural rules. Brown v. Western Ry. of Alabama, 338 U.S. 294 (1949). Whether other types of federal litigation in state courts must follow the same rule is not certain; however, it is clear that Congress has the constitutional power to control the incidents of a state trial of a federal claim. Write, The Law of Federal Courts, Section 45, 174 (2d ed. 1970).

Collateral References

Conflict of laws as to presumptions and burden of proof concerning facts of civil case. 35 ALR 3d 289.

Comment note.—Extent to which state law is applicable in actions under Federal Tort Claims Act—federal cases. 7 L. Ed. 2d 994.

Comment note.—Extent to which state law is applicable in actions under Federal Tort Claims Act. 1 L. Ed. 2d 1647.

1 Wigmore §§6 through 6(e).

Article IV
Relevancy and Its Limits

Article Compiler's Comments

Rape Cases — Relevance of Victim's Past Behavior: Effective Nov. 28, 1978, Rule 412, Federal Rules of Evidence, was adopted for federal practice. Montana has not adopted this rule; similar provisions are located at 45-5-503 limiting the admissibility of the sexual conduct of a victim of sexual intercourse without consent.

Article Case Notes

Broad Discretion of Court to Prevent Irrelevant Testimony: Hage was tried for deliberate homicide. During his trial, the prosecution inquired about the previous criminal records of two witnesses. When defense counsel attempted to elicit further testimony from the witnesses on that subject, the prosecution objected, claiming that the testimony was barred by Rule 608, M.R.Ev., and the District Court sustained the objection. Citing St. v. Sadowski, 247 M 63, 805 P2d 537 (1991), the Supreme Court held that the trial court has broad discretion to prohibit the introduction of irrelevant evidence and that absent a showing that the District Court abused its discretion, the Supreme Court would not overturn the District Court's determination of relevancy. St. v. Hage, 258 M 498, 853 P2d 1251, 50 St. Rep. 631 (1993).

Evidence of Lifestyle and Criminal History of Nonwitness Properly Excluded as Irrelevant: Hage was tried for deliberate homicide. During his trial, the prosecution sought to introduce testimony about the lifestyle and criminal history of Spindler, an associate of Hage, who had died prior to trial. The District Court excluded the testimony as irrelevant. The Supreme Court held that the District Court did not abuse its discretion in excluding the testimony of the nonwitness. St. v. Hage, 258 M 498, 853 P2d 1251, 50 St. Rep. 631 (1993).

Court Discretion in Determining Admissibility and Relevance of Evidence — General Rule: It is well-established that the District Court has latitude of discretion in passing on the admissibility and relevance of evidence, and the determination of admissibility and relevance is subject to review only for abuse of discretion. St. v. Hall, 244 M 161, 797 P2d 183, 47 St. Rep. 1501 (1990), citing numerous cases.

Relevancy of Evidence — Test: In determining relevancy of evidence, the test, as set out in Derenberger v. Lutey, 207 M 1, 674 P2d 485 (1983), is whether an item of evidence will have any value, as determined by logic and experience, in proving the proposition for which it is offered. The standard used to measure this acceptable probative value is "any tendency to make the existence of any fact . . . more probable or less probable than it would be without the evidence". The standard is meant to allow wide admissibility of circumstantial evidence limited only by Rule 403 or other special relevancy rules in Article IV. St. v. Buckingham, 240 M 252, 783 P2d 1331, 46 St. Rep. 2102 (1989), followed in St. v. Lancione, 1998 MT 84, 288 M 228, 956 P2d 1358, 55 St. Rep. 344 (1998).

Demonstrative Evidence — Admission Upheld: In a prosecution for deliberate homicide caused by blows struck with a pick handle inside an automobile, the court did not err in overruling the defendant's objection to demonstrative evidence consisting of two pieces of a wooden handle and parts of an automobile. Allowing demonstrative evidence is within the discretion of the trial court and will not be reversed except upon a showing of manifest abuse of discretion. The record of the case shows no such abuse but shows that the witnesses, attorneys,

and trial judge made it clear that the evidence admitted was demonstrative only and was not the actual items used in commission of the crime. Defendant offered no cautionary instruction on this issue and therefore cannot claim error on appeal because none was given. St. v. Close, 191 M 229, 623 P2d 940, 38 St. Rep. 177 (1981).

Relevance and Admissibility of Testimony of Previously Acquitted Alleged Principal: The testimony of a previously acquitted alleged principal in a robbery was allowed in the trial of an alleged participant in the same robbery. The denial of any participation in the robbery provided the foundation for the admission of the witness's prior inconsistent statements in which he admitted his participation. There was additional evidence tending to establish that the witness and the defendant had planned the robbery with others. The witness's testimony was therefore relevant and clearly admissible. St. v. Bad Horse, 185 M 507, 605 P2d 1113, 37 St. Rep. 45 (1980).

Article Law Review Articles

Admitting the Accused's Criminal History: The Trouble With Rule 404(b), Reed, 78 Temp. L. Rev. 201 (2005).

Testimony on Credibility: A Case Analysis, Slovenko, 32 J. Psychiatry & L. 243 (2004).

Determining Relevancy: Article IV of the Federal Rules of Evidence, Conly, 36 La. L. Rev. 70 (1975).

Rule 401. Definition of relevant evidence.

Commission Comments

The first sentence of this rule is identical to Federal and Uniform Rules (1974) Rule 401. The second sentence is based on a phrase from West's Ann Cal. Ev. Code, Section 210, defining relevant evidence as "including evidence relevant to the credibility of a witness or hearsay declarant".

The definition of relevant evidence given in the first sentence keeps the Federal definition intact. It has the effect of combining what has been labeled "materiality" with relevance. The ambiguous use of materiality in the past and the current trend in Montana to define relevance as including the concept associated with materiality (what is properly provable in the case as determined by pleadings, procedural rules and substantive law) makes abandoning the term simpler than having two distinct concepts. The inclusion of the phrase "fact that is of consequence to the determination of the action" makes materiality a part of relevance.

The test of relevance is whether an item of evidence will have any value, as determined by logic and experience, in proving the proposition for which it is offered. The standard used to measure this acceptable probative value is "any tendency to make the existence of any fact...more probable or less probable than it would be without the evidence". This standard rejects more stringent ones which call for evidence to make the fact or proposition for which it is offered more probable than any other. It is meant to allow wide admissibility of circumstantial evidence limited only by Rule 403 or other special relevancy rules in Article IV.

Existing Montana law is consistent with this definition of relevant evidence. One of the latest statements by the Montana Supreme Court in the area of relevance is: "any fact which makes probable the existence of another fact in controversy is relevant to prove the disputed fact". Rhodes v. Weigand, 145 Mont. 542, 546, 404 P2d 588 (1965). See also Brion v. Brown, 135 Mont. 356, 363, 340 P2d 539, (1959) and State v. Sanders, 158 Mont. 113, 117, 489 P2d 371 (1971). Section 93-401-25, R.C.M. 1947 [superseded], requires that "evidence must correspond with the substance of the material allegations, and be relevant to the questions in dispute".

The second sentence of the rule is included to insure that Montana law on credibility of witnesses is retained. The Commission feels that it is possible to interpret the Federal and rule definition and that part of Federal Rule 402 providing "evidence which is not relevant is not admissible" to mean evidence used to attack or support credibility of witnesses may not be within the definition of relevant evidence and so would not be admissible. To avoid this problem the rule therefore includes as its definition of relevant evidence all evidence properly admitted as it relates to matters of credibility under other rules of evidence and does not leave to implication the admissibility of such evidence.

The definition of relevant evidence is also meant to include real and demonstrative evidence admitted as an aid to understanding, but which could not always be considered to directly relate to, facts of consequence to the action. Montana has always allowed such evidence under Sections 93-5102, R.C.M. 1947 [25-7-401], on jury views of property or premises and 93-1201-1, R.C.M. 1947 [superseded], on material objects. These sections have been construed in Wolfe v. N. Pac. Ry., 147 Mont. 29, 44, 409 P2d 528 (1966) to allow the discretion of the trial court to admit such procedures and evidence if it is felt they are needed for the evidence as a whole "to be properly understood or that the jury would be aided thereby". There is substantial case law in this area.

Two leading cases express what is pertinent; Ferris v. McNally, 45 Mont. 20, 31, 121 P 889 (1912) held that Section 93-5102, R.C.M. 1947 [25-7-401], "is to enable the jury to apply the testimony of the witnesses to the observed conditions about which they have spoken and also to determine the truth of the statements...". Fulton v. Chouteau County Farmer's Co., 98 Mont. 48, 61, 37 P2d 1025 (1934) held that posed photographs were admissible "for the purpose of explaining and applying the evidence and assisting the court and jury in understanding the case".

Case Notes

General 213
Other Crimes or Acts 218
Wrongful Death 223
Tampering With Witness or Evidence 224
Miscellaneous 224

GENERAL

Admission of Evidence Regarding Language on Defendant's Vehicle and Clothing — Relationship to Crime of Assault With Weapon: Cesnik was charged with assaulting a fellow gun club member with a weapon. The trial court admitted evidence regarding phrases on Cesnik's vehicle and clothing. Cesnik contended that the evidence was unrelated to the assault charge and should not have been admitted. The Supreme Court held that the evidence provided further context regarding the animosity between the men and explained why the club member wanted Cesnik removed from the gun club—an issue that Cesnik's counsel broached on direct examination. The evidence was relevant and admissible. St. v. Cesnik, 2005 MT 257, 329 M 63, 122 P3d 456 (2005).

Admissibility of DUI Suspect's Spontaneous Statements: An officer stopped Damon for investigatory purposes, but the officer failed to recite the advisories for investigative stops. Damon answered several questions and then spontaneously said "Just give me a DUI" and "I'm already drunk." Damon contended that all of his statements should be disallowed because the officer failed to give the advisories. The District Court disallowed all of Damon's statements that were given in response to the officer's questions, but allowed Damon's spontaneous statements. The Supreme Court noted that under St. v. Nelson, 2004 MT 310, 323 M 510, 101 P3d 261 (2004), it is an officer's questioning that triggers the advisories. Damon's spontaneous utterances were not in response to specific questioning and were therefore admissible. St. v. Damon, 2005 MT 218, 328 M 276, 119 P3d 1194 (2005).

Photographs of Nonvictim Children Not Considered Prejudicial or Character Evidence — Probative Value Warranting Admissibility: In Bar-Jonah's aggravated kidnapping, sexual assault, and assault with a weapon trial, the trial court allowed the admission of hundreds of photographs of children seized during a search of Bar-Jonah's residence. Bar-Jonah contended that the photographs were: (1) improperly admitted because only a few were images of the victims; and (2) unfairly prejudicial and tended to erroneously reflect on Bar-Jonah's character. The Supreme Court disagreed. The photographs were relevant by linking them to Bar-Jonah's motive for befriending the victims, for enhancing the credibility of the victims, and to rebut Bar-Jonah's asserted defenses. Even if the photographs could be construed to reflect on Bar-Jonah's character, they were not introduced for that purpose, but rather to prove motive. Any prejudice to Bar-Jonah through introduction of the photographs was outweighed by their probative value, which did not present evidence of other crimes or acts. St. v. Bar-Jonah, 2004 MT 344, 324 M 278, 102 P3d 1229 (2004).

Generalized Expert Testimony Regarding Sexual Abuse and Religious Manipulation and Control Properly Admitted in Sexual Intercourse Without Consent, Incest, and Witness Tampering Case: In Sandrock's trial for sexual intercourse without consent, incest, and witness tampering, an expert testified regarding sexual abuse and religious manipulation and control based on experiences in a Christian sect. Sandrock moved for mistrial on grounds that the testimony was irrelevant and tended to supplant the state's need to prove Sandrock's mental state. The motion was denied, and on appeal, the Supreme Court affirmed. The expert did not provide any testimony specific to Sandrock, but rather provided the jury a context within which to understand the intricacies of religious groups in general, so the court concluded that the testimony was relevant. Further, the testimony did not prejudice Sandrock because Sandrock himself admitted to controlling his wife and daughters, and the expert never stated that Sandrock exhibited or performed the beliefs that were typical of the religious groups about which the expert testified in general. The mistrial motion was properly denied. St. v. Sandrock, 2004 MT 195, 322 M 231, 95 P3d 153 (2004).

Standard of Review of Evidentiary Rulings: The Supreme Court reviews a District Court's evidentiary rulings for an abuse of the lower court's broad discretion, and absent a showing of an abuse of discretion, the lower court will not be overruled. Sufficiency of evidence to support a jury verdict is reviewed to determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. St. v. Runs Above, 2003 MT 181, 316 M 421, 73 P3d 161 (2003). See also St. v. Stevens, 2002 MT 181, 311 M 52, 53 P3d 356 (2002), St. v. Bingman, 2002 MT 350, 313 M 376, 61 P3d 153 (2002), and St. v. Shields, 2005 MT 249, 328 M 509, 122 P3d 421 (2005).

Supreme Court Reduction of Offense of Sexual Intercourse Without Consent to Sexual Assault — Relevance of Testimony of Victims Regarding Belief That Massage Therapist's Actions Were Criminal: Stevens was convicted of two counts of sexual intercourse without consent after having sexual contact with two female patients at his massage clinic. The Supreme Court determined that there was insufficient proof that the offenses were committed without consent and, without addressing whether sexual assault was a lesser included offense of sexual intercourse without consent, reduced the offenses to sexual assault. Even though Stevens was not specifically charged with sexual assault, there was no question that he was reasonably apprised of the sexual assault charges against him. Stevens offered a jury instruction, which was given without objection, stating that sexual intercourse without consent necessarily included the offense of sexual assault. Evidence clearly showed that Stevens had sexual contact with the victims, and testimony from the victims regarding whether they considered sexual contact by a massage professional to be criminal was relevant and admissible, tending to make the existence of a material element of the crime, namely whether the crime was committed without consent, more likely than without the evidence. St. v. Stevens, 2002 MT 181, 311 M 52, 53 P3d 356 (2002), distinguishing St. v. Black, 270 M 329, 891 P2d 1162 (1995).

Use of Evidence to Rebut Claim of Justifiable Use of Force: Pursuant to 45-3-102, a person is justified in the use of force or threat to use force against another when and to the extent that the person reasonably believes that such conduct is necessary to defend against the imminent use of unlawful force. Under St. v. Daniels, 210 M 1, 682 P2d 173, 41 St. Rep. 880 (1984), that person alleging that force was justified has the burden of producing sufficient evidence on the issue to raise a reasonable doubt of guilt. Ultimately, whether the use of force was justified will be determined by the jury based on evidence of what the person reasonably believed when confronted with the imminent use of unlawful force. Thus, evidence of the person's postincident actions is immaterial in determining whether the use of force was justified and would in no sense tend to make the person's reasonable belief at the time of the attack more or less probable under this rule. State ex rel. Kuntz v. District Court, 2000 MT 22, 298 M 146, 995 P2d 951, 57 St. Rep. 111 (2000). See also People v. Fowler, 174 P 892 (Calif. 1918), and St. v. Barrack, 267 M 154, 882 P2d 1028, 51 St. Rep. 983 (1994).

Stipulation Precluding Need to Bring Evidence of Insurance Settlement Before Jury: Dill suffered damages after being hit as a pedestrian by a vehicle operated by Jardine. State Farm Mutual Automobile Insurance Company (State Farm) provided both liability insurance for Jardine and underinsured motorist coverage for Dill. Dill maintained that State Farm's settlement of the underlying liability claim against Jardine was admissible as relevant under Rule 402, M.R.Ev., and this rule and as impeachment evidence pursuant to Rules 607 and 801(d)(2), M.R.Ev. However, it was not necessary to bring evidence of the settlement before the jury in light of the fact that State Farm stipulated that it had paid Dill the liability policy limit on behalf of Jardine and would pay any jury verdict that exceeded that amount up to the policy limit under the underinsured motorist policy. Simple knowledge that the policy limits were paid was sufficient. Dill v. District Court, 1999 MT 85, 294 M 134, 979 P2d 188, 56 St. Rep. 350 (1999).

Measure of Loss as Jury Question: Alternative approaches to measure loss are within the meaning of this rule, and it is up to the jury to decide which approach is more or less probable as a measure of loss. It was not error for the trial court to deny plaintiff's motion in limine to preclude a defense expert witness from testifying as to an alternate measure of loss. Simmons Oil Corp. v. Wells Fargo Bank, N.A., 1998 MT 129, 289 M 119, 960 P2d 291, 55 St. Rep. 508 (1998).

Lawyer's Letter to Veterans Administration Claiming Plaintiff's Death Caused by Preexisting Condition Not Admissible to Show Hospital Not Liable for Plaintiff's Death: Columbus Hospital argued that the lower court had erred in refusing to admit a letter written by the plaintiff's lawyer to the Veterans Benefits Administration stating that Busta's death was due to a preexisting condition incurred when he was in the service. The hospital alleged that the letter should have been admitted because it had a tendency to make more probable the hospital's claim that Busta had died due to a preexisting condition. The Supreme Court held that an attorney is not qualified to express a medical opinion that is admissible in court and that even if relevant,

the letter presented substantial potential for confusing or misleading the jury and therefore had been properly excluded. Busta v. Columbus Hosp. Corp., 276 M 342, 916 P2d 122, 53 St. Rep. 428 (1996).

Judicial Notice of Facts Against Codefendants — Admissibility of Codefendants' Guilty Pleas Offered to Assess Credibility of Witnesses at Trial: Evidence of a codefendant's guilty plea is generally inadmissible. An exception is when evidence of a codefendant's guilty plea is offered to aid the jury in assessing the credibility of a codefendant who testifies at the defendant's trial. In this case, Oatman's defense to robbery charges was that the employees at the restaurant that was robbed had misidentified him as one of the robbers. The employees' credibility was thus placed at issue, and the correct identification of the codefendants as two of the robbers bolstered the employees' credibility. The trial court did not abuse its discretion in deciding that the probative value of informing the jury that the court had taken judicial notice of the codefendants' guilty pleas outweighed the prejudicial potential of that information. Taking judicial notice of proceedings against a codefendant does not taint the fairness of a defendant's trial if the court instructs the jury that it has the prerogative to accept or reject the judicially noticed facts as evidence. St. v. Oatman, 275 M 139, 911 P2d 213, 53 St. Rep. 74 (1996). See also U.S. v. Halbert, 640 F2d 1000 (9th Cir. 1981).

Evidence of Monetary Settlement in Later Accident Inadmissible in Trial of Earlier Accident: Plaintiff was injured in an automobile accident in 1983 and filed a lawsuit that was contested. He was involved in another automobile accident in 1986 and filed a lawsuit that was settled. The District Court erred in allowing evidence of the monetary value of the 1986 settlement when considering damages for the 1983 accident because the evidence had no bearing on the injuries sustained in 1983. Those damages could be established through medical and testimonial evidence, and evidence related to the 1986 accident served only to interject immaterial, prejudicial information into the trial. The nature and extent of injury sustained in a subsequent accident is often relevant to a determination of damages; however, evidence of the value of a previous settlement generally is not. Beil v. Mayer, 242 M 204, 789 P2d 1229, 47 St. Rep. 661 (1990).

Relevancy of Evidence — Test: In determining relevancy of evidence, the test, as set out in Derenberger v. Lutey, 207 M 1, 674 P2d 485 (1983), is whether an item of evidence will have any value, as determined by logic and experience, in proving the proposition for which it is offered. The standard used to measure this acceptable probative value is "any tendency to make the existence of any fact . . . more probable or less probable than it would be without the evidence". The standard is meant to allow wide admissibility of circumstantial evidence limited only by Rule 403 or other special relevancy rules in Article IV. St. v. Buckingham, 240 M 252, 783 P2d 1331, 46 St. Rep. 2102 (1989), followed in St. v. Lancione, 1998 MT 84, 288 M 228, 956 P2d 1358, 55 St. Rep. 344 (1998).

Circumstantial Evidence Sufficient to Sustain Conviction — Test: Circumstantial evidence is sufficient to sustain a conviction if it is of such quality and quantity to legally justify a jury in determining guilt beyond a reasonable doubt. St. v. Pambrun, 240 M 62, 783 P2d 374, 46 St. Rep. 1944 (1989).

Exclusion of Witness's Statement That He Heard Nondefendants Discussing Committing Crime Similar to Crime Charged to Defendants: The defendant sought to introduce evidence that a witness had overheard two men discussing a crime they had committed so similar in time and circumstance that it could have been the crime attributed to the defendant. The evidence was excluded as irrelevant on the basis that unknown factors of the proposed evidence, including what crime was committed, when and by whom, and upon whom, far outweighed the alleged similarity of the two occurrences. St. v. Rudolph, 238 M 135, 777 P2d 296, 46 St. Rep. 1150 (1989).

Communications to Parole Officer Not Privileged: After his arrest for burglary, the defendant called his parole officer and told him of the crime. The defendant's motion to suppress the parole officer's testimony was denied on the basis that the parole officer was not an elected officer or director and therefore communications made to him were not subject to a statutory privilege. The Supreme Court also held that the probative value of the evidence outweighed the relatively slight prejudicial impact the evidence carried in showing the jury that the defendant had been convicted of a prior crime. St. v. Higareda, 238 M 130, 777 P2d 302, 46 St. Rep. 1146 (1989).

Admissibility of Testimony of Nontreating Physician: The lower court denied the plaintiff's motion in limine to exclude the testimony of a physician who did not treat the plaintiff and who examined the patient only one time, for approximately 15 minutes. The ruling was affirmed on appeal on the grounds that the testimony went to the credibility of the plaintiff and her

witnesses and that the testimony was not so unfairly prejudicial that it substantially outweighed its probative value. Feller v. Fox, 237 M 150, 772 P2d 842, 46 St. Rep. 694 (1989).

Offer to Drop Charges for Money — Not Relevant to Assault Incident: It was within the District Court's discretion to exclude testimony on the victim's offer to drop charges in return for money because such testimony was not relevant to the assault incident and had limited probative value regarding the victim's credibility. Sloan v. St., 236 M 100, 768 P2d 1365, 46 St. Rep. 214 (1989).

Exclusion of Evidence of Victim's Later Crimes Proper — Balance of Prejudice and Probative Value: The District Court properly excluded evidence, under Rules 608 and 609, M.R.Ev., of pending or resolved criminal charges against the victim of an assault unless the state alluded to the victim's good character, truthfulness, or veracity. As noted in Cooper v. Rosston, 232 M 186, 756 P2d 1125, 45 St. Rep. 978 (1988), evidence bearing on the issue of the credibility of a witness, in order to be admissible, must be more probative than prejudicial, and the District Court must balance prejudice and probative value pursuant to Rules 401 and 403, M.R.Ev. St. v. Hammer, 233 M 101, 759 P2d 979, 45 St. Rep. 1326 (1988).

Evidence of Witness' Misrepresentations and Omissions Improperly Excluded — "Collateral Matters" Rule Incorrectly Applied: The District Court excluded evidence of a witness' misrepresentations and omissions after holding that the evidence constituted impeachment on collateral matters. The Supreme Court found the exclusion of evidence improper on two issues: the issue of the credibility of the witness and the issue of punitive damages. Further, the Supreme Court noted that the rule on collateral matters was abolished in favor of the relevancy approach contained in Rule 607, M.R.Ev. Cooper v. Rosston, 232 M 186, 756 P2d 1125, 45 St. Rep. 978 (1988), followed in St. v. Kowalski, 252 M 166, 827 P2d 1253, 49 St. Rep. 197 (1992).

Additional Circumstantial Evidence of Burglary Properly Admitted: State's evidence that on the day following the theft of guns a person matching defendant's description and driving an automobile matching the description of defendant's vehicle attempted to pawn guns of the same general description as those stolen, although circumstantial, naturally or logically established an additional fact implicating defendant's guilt of burglary and was properly admitted. St. v. Oliver, 228 M 322, 742 P2d 999, 44 St. Rep. 1567 (1987).

Expert Testimony — Best Available Evidence in Absence of Actual Figures: A herbicide manufacturer argued that expert testimony should not have been admitted because the expert who testified as to the potential crop yield of a 495-acre field based his estimate on a small area of the field. Rule 401 provides that evidence is relevant if it has a tendency to make the existence of any fact more probable or less probable than it would be without the evidence, and the Supreme Court found the expert's testimony had the tendency to cause the amount of crop loss claimed by plaintiff to be more probable. Given the absence of actual crop yield figures on the 495 acres, the expert testimony appeared to be the best available evidence and was properly admitted. Vandalia Ranch, Inc. v. Farmers Union Oil & Supply Co., 221 M 253, 718 P2d 647, 43 St. Rep. 790 (1986).

Standard of Lawful Basis for Refusal to Decline Payment of Claim — Standard Not Met by Reliance on Inadmissible Evidence: An insurer must meet the standard of a lawful basis for refusal to decline payment of an insured's claim for an insured's loss. Reliance by the insurer on inadmissible evidence of arson by the insured in declining payment of an insured's loss does not meet the standard of a lawful basis for refusal of the insured's claim. Britton v. Farmers Ins. Group, 221 M 67, 721 P2d 303, 43 St. Rep. 641 (1986).

Imprecision of Expert Opinion — Relates to Weight of Evidence, Not Admissibility: An expert witness testified that shoe prints found at the scene of a crime were exactly like the defendant's shoes, but that he could not positively identify the defendant's shoes as making the shoe prints. The Supreme Court dismissed the defendant's contention that unless the expert could positively identify the prints to a degree of scientific certainty, the testimony should be inadmissible. The Supreme Court said that relevance means having a tendency to make a fact more or less probable than it would have been without the testimony, and this testimony linked the defendant to the scene of the crime. Any imprecision of expert opinion goes to the weight of evidence, not admissibility. St. v. Smith, 220 M 364, 715 P2d 1301, 43 St. Rep. 449 (1986).

Other Accident Evidence — Identical Circumstances Not Required: Plaintiff lost a foot in compression feed rollers during the operation of a large round hay baler. Part of the plaintiff's presentation of the case was to show that the design of feed rollers was defective and dangerous. The manufacturer in interrogatories mentioned 72 accidents involving operators and the rollers. The court admitted evidence relating to 30 of them, setting specific admission requirements relating to the fact that tractor's power takeoff was running and the injured person engaged in an intentional act at the time of the accident. The Supreme Court held that all such accidents

were admissible because the issues involved not specific conduct of the operators but the injuries to operators in area of the compression feed rollers which was relevant to their design and relevant to the defendant's foreseeability of operator conduct. Tacke v. Vermeer Mfg. Co., 220 M 1, 713 P2d 527, 43 St. Rep. 123 (1986).

Admissibility of Evidence From Earlier Related Lawsuit in Mandamus Proceeding: In a proceeding for a Writ of Mandamus compelling county officers to accept for recording a deed and certificate of survey, it was proper for the trial court to admit into evidence exhibits and testimony from an earlier lawsuit concerning similar issues and the same property. The applicant's conduct is a proper consideration in a mandamus action. Further, the evidence is relevant under Rule 401, M.R.Ev. Withers v. Beaverhead County, 218 M 447, 710 P2d 1339, 42 St. Rep. 1730 (1985).

Evidence Relevant — Inadmissible as Unfair Prejudice: In a tort action, on the issue of the causation of damages, the trial court abused its discretion in allowing testimony concerning the plaintiff's home environment and whether her father's alleged drinking and fighting caused her symptoms rather than an earlier vehicular accident. The questioned testimony had a tendency to make the alleged cause of the symptoms more or less probable than it would have been without the testimony. The testimony therefore was relevant but not admissible as its probative value was substantially outweighed by the danger of unfair prejudice. Kimes v. Herrin, 217 M 330, 705 P2d 108, 42 St. Rep. 1231 (1985), followed in Newville v. St., 267 M 237, 883 P2d 793, 51 St. Rep. 758 (1994), Werre v. David, 275 M 376, 913 P2d 625, 53 St. Rep. 187 (1996), and Henricksen v. St., 2004 MT 20, 319 M 307, 84 P3d 38 (2004).

Vague Testimony of Driver and Vehicle Remote From Scene of Accident — Prejudicial — Foundation Lacking: In a trial arising from an intersection collision between plaintiff's motorcycle and defendant's auto, testimony of defendant's proposed witness was properly excluded as having prejudicial effect outweighing any probative value. He would have testified regarding a motorcyclist he saw while closing his shop. He could not positively identify plaintiff as the motorcyclist, and his description of the cycle and its driver varied from that of other witnesses and from the actual cycle and driver. His view occurred 300 yards from the accident. He was vague as to the time. Other cycles could have passed him by unobserved. His testimony characterized the driver as a stereotypical biker driving fast. The testimony also lacked a sufficient foundation, because there was insufficient connection between the driver witness saw and plaintiff. Welnel v. Hall, 215 M 78, 694 P2d 1346, 42 St. Rep. 195 (1985).

Prejudice Stemming From Evidence Held Inadmissible as Irrelevant: In a tort action relating to the explosive failure of a Goodyear K-type split tire rim where the Supreme Court held inadmissible as irrelevant testimony regarding political bribery during Watergate by the defendant Goodyear Tire and Rubber Company, the failure of the trial court to exclude such evidence was prejudicial to the defendant and permitted the jury to indulge in improper speculation and guesswork. Kuiper v. Goodyear Tire & Rubber Co., 207 M 37, 673 P2d 1208, 40 St. Rep. 1861 (1983).

Relevancy of "Other Accidents" Evidence — Substantial Similarity Required: In order to prevent the jury from being misled, the party offering "other accidents" evidence bears the burden of showing that the circumstances surrounding the product involved in the other accidents were substantially the same or similar to the accident at issue. Kuiper v. Goodyear Tire & Rubber Co., 207 M 37, 673 P2d 1208, 40 St. Rep. 1861 (1983), followed in Krueger v. Gen. Motors Corp., 240 M 266, 783 P2d 1340, 46 St. Rep. 2114 (1989), and Preston v. District Court, 282 M 200, 936 P2d 814, 54 St. Rep. 312 (1997).

Circumstances of Case and Discretion of Judge: A trial court is not guided by fixed rules in determining whether evidence is too remote in time to be relevant. The nature of the evidence and the circumstances of the case control. For this reason the determination is left in great part to the discretion of the judge and is subject to review only in the event of manifest abuse. Preston v. McDonnell, 203 M 64, 659 P2d 276, 40 St. Rep. 297 (1983), followed in Safeco Ins. Co. v. Ellinghouse, 223 M 239, 725 P2d 217, 43 St. Rep. 1689 (1986), In re Marriage of Cole, 224 M 207, 729 P2d 1276, 43 St. Rep. 2136 (1986), and in In re Marriage of Starks, 259 M 138, 855 P2d 527, 50 St. Rep. 719 (1993). See also Story v. Bozeman, 259 M 207, 856 P2d 202, 50 St. Rep. 761 (1993).

Illustrative Exhibits: In reviewing the trial court's ruling on admission of illustrative exhibits, the Supreme Court must give great deference to the trial court's discretion. Barmeyer v. Mont. Power Co., 202 M 185, 657 P2d 594, 40 St. Rep. 23 (1983).

Speed of Vehicle — Relevancy of Prior Behavior: While making a left turn, the plaintiff's car was struck by a passing vehicle. The plaintiff testified that several miles before the accident he had seen the passing vehicle parked alongside the road with its occupants relieving themselves.

Such evidence was relevant as it showed the speed of the passing vehicle in that it caught up with the plaintiff's car. Goodnough v. St., 199 M 9, 647 P2d 364, 39 St. Rep. 1170 (1982).

Admission of Bullets and Ski Mask That Appear to Have Been Used in Commission of Crime: A spent .45 caliber shell casing and a ski mask discovered in a search of a coconspirator's automobile 2 months after the crime was committed were relevant when prior to the admission of these articles the State had produced evidence: (1) placing the defendant in the car on the night of the crime; (2) that the defendant had a .45 caliber handgun and a ski mask while sitting in the car at the scene of the crime; and (3) that the defendant had shot a hole in the automobile's windshield with the gun. The articles had been linked to the defendant and to the commission of the crime and had the tendency to make the existence of those facts more probable. St. v. Fitzpatrick, 186 M 187, 606 P2d 1343, 37 St. Rep. 194 (1980).

Test of Relevance: The test of relevance is whether an item of evidence will have any value, as determined by logic and experience, in proving the proposition for which it is offered. The standard used to measure this acceptable probative value is "any tendency to make the existence of any fact . . . more probable or less probable than it would be without the evidence". This standard rejects more stringent ones which call for evidence to make the fact or proposition for which it is offered more probable than any other. It is meant to allow wide admissibility of circumstantial evidence limited only by Rule 403 or other special relevancy rules in Art. IV, M.R.Ev. St. v. Fitzpatrick, 186 M 187, 606 P2d 1343, 37 St. Rep. 194 (1980).

OTHER CRIMES OR ACTS

Violation of Motion In Limine in First Trial Not Grounds for Double Jeopardy Dismissal in Second Trial: Mallak contended that the state goaded him into moving for a mistrial by purposely violating a motion in limine prohibiting testimony of Mallak's prior violent conduct and that under Oreg. v. Kennedy, 456 US 667 (1982), and St. v. Laster, 223 M 152, 724 P2d 721 (1986), a second trial was a violation of double jeopardy. The Supreme Court disagreed. The part of the testimony that Mallak objected to was a product of the prosecutor's inadvertence, not intention, and did not inevitably lead to a violation of the motion in limine, unlike the inherently violative questioning in Laster. Thus, double jeopardy did not apply, and the trial court did not err in denying Mallak's motion to dismiss the charges. St. v. Mallak, 2005 MT 49, 326 M 165, 109 P3d 209 (2005).

Objectionable Testimony Elicited by Defendant's Own Actions — Right to Allege Error on Appeal Waived: Smith was charged with stealing his mother's credit card and using the card to withdraw money from her bank account and charge items for his personal use. Pretrial, Smith moved in limine to preclude witnesses at trial from testifying regarding Smith's prior criminal convictions, and the motion was granted. When his mother testified, Smith's counsel asked what efforts she made to locate Smith after discovering that her credit card was gone, and the mother responded that she had checked with Smith's parole officer to see if the officer knew where Smith was. Smith immediately moved for a mistrial, asserting that the comment violated the motion in limine, but the motion was denied. On appeal, the Supreme Court affirmed. Because the objectionable testimony was elicited by Smith's own actions, he waived the right to allege error on appeal because he actively participated in creating the error. St. v. Smith, 2005 MT 18, 325 M 374, 106 P3d 553 (2005), following St. v. Gafford, 172 M 380, 563 P2d 1129 (1977).

Defendant's Testimony Regarding Law-Abiding Nature Opening Door to Cross-Examination Regarding Belligerent Conduct When Arrested: Dobson testified at trial that he would have cooperated with law enforcement officers if they would have had a warrant, implying that he was peaceful and law-abiding by nature, so the state attempted to elicit testimony regarding the fact that during his arrest, Dobson was belligerent and hostile. Dobson objected on grounds that the testimony was irrelevant to the charge of sexual intercourse without consent. On a stand-alone basis, Dobson's cross-examination testimony about the details of his arrest did not tend to make the existence of any fact that he committed sexual intercourse without consent more or less probable; however, Dobson did not have a right to offer an unnecessary, self-serving statement, intended to place him in a better light with the jury, without laying the statement open to cross-examination. The state created a sufficient nexus between Dobson's direct testimony and his behavior during arrest, and Dobson opened the door through which the state was entitled to walk. Dobson had an adequate opportunity to rehabilitate himself and countermand any prejudice resulting from the cross-examination, so the testimony was relevant and properly admitted. St. v. Dobson, 2001 MT 167, 306 M 145, 30 P3d 1077 (2001), following St. v. Kinney, 230 M 281, 750 P2d 436 (1988), and distinguishing St. v. Lancione, 1998 MT 84, 288 M 228, 956 P2d 1358 (1998).

Evidence of Conduct of Child Abuse Victim Prior to Assault Irrelevant but Not Prejudicial — Conviction Affirmed: The District Court allowed testimony by two counselors who observed a suspected child abuse victim in the family home. The child exhibited inappropriate sexual conduct and made several sexual comments that ultimately led to the removal of the child from the home and charges against and conviction of Thompson for sexual assault of his child. On appeal, Thompson contended that the testimony was erroneously admitted because it pertained to events that occurred before the assault that he was accused of and was therefore not probative of any fact in issue and was irrelevant. The Supreme Court agreed. Neither witness offered an opinion of who might have been responsible for the child's behavior, and there was no evidence that it was caused by Thompson, so the testimony was irrelevant to the issue being tried. However, the objectionable inference from the evidence was that the child had been sexually abused, a fact that Thompson himself conceded through his own witnesses. The testimony was cumulative and merely illustrated a fact that was not in dispute and thus did not affect Thompson's substantial rights or provide grounds for reversal. St. v. Thompson, 2001 MT 119, 305 M 342, 28 P3d 1068 (2001).

Victim Psychological Autopsy Not Relevant to Defendant's Mental State: Defendant, convicted of deliberate homicide and sexual assault, appealed the District Court's denial of his motion for a psychological autopsy of the victim, alleging that the court's actions prevented him from presenting mitigating evidence by juxtaposing his mental capacity against the victim's confrontational nature. In affirming the District Court's denial, the Supreme Court held that the focus of the mitigated deliberate homicide statute is on the defendant's mental state at the time of the offense. The request for a psychological profile of the victim was not directly related to the defendant's attempt to establish the existence of extreme mental or emotional stress in conjunction with a mitigated deliberate homicide defense. St. v. Hill, 2000 MT 308, 302 M 415, 14 P3d 1237, 57 St. Rep. 1301 (2000).

Clarification of General Requirement of Substantially Similar Circumstances as Precedent to Admission of Evidence of Prior Accident: Evidence of prior accidents, although inadmissible to prove negligence, may be admitted for other purposes, such as to show: (1) the existence of a particular physical condition or defect; (2) the dangerousness of the condition or defect; (3) the possibility that the condition or defect might cause an accident or injury of the type alleged; (4) cause in fact; and (5) knowledge of the condition or defect. (See Modern Evidence: Doctrine and Practice, Mueller & Kirkpatrick, §4.8 at 281, 282 (1995), and McCormick on Evidence §200 at 844-847, 4th Ed. (1992).) Regarding the degree of identity of circumstances required when offering prior accident evidence for the sole purpose of notice or knowledge, the general requirement of substantially similar circumstances is relaxed or less strict when the evidence is proffered to show notice rather than dangerousness or causation, and a lack of exact similarity of conditions will not preclude admission under these circumstances if the accident was of a kind that should have served to warn defendant. In proving notice, there may be dissimilarities between the accidents; however, the differences affect the weight of the evidence, but not necessarily the admissibility. Here, Kissock slipped and fell in defendant's parking lot. The District Court excluded proffered evidence of a fall by another person in the same parking lot days earlier because it occurred at a different time of day under different physical circumstances. The Supreme Court disagreed and reversed, holding that the minor spatial and temporal differences existing between the two slip-and-fall accidents went to the weight rather than admissibility of the evidence in supporting an inference that defendant had notice or knowledge of the icy conditions. The circumstances surrounding the prior accident were not so remote or dissimilar from Kissock's accident that the probative value was substantially outweighed by unfair prejudice to defendant. Kissock v. Butte Convalescent Center, 1999 MT 322, 297 M 307, 992 P2d 1271, 56 St. Rep. 1288 (1999). See also Runkle v. Burlington N., Inc., 188 M 286, 613 P2d 982, 37 St. Rep. 995 (1980), Bailey v. S. Pac. Transp. Co., 613 F2d 1385 (5th Cir. 1980), and Kalanick v. Burlington N. RR Co., 242 M 45, 788 P2d 901, 47 St. Rep. 532 (1990).

Cross-Examination Regarding Unrelated Incidents of Prior Sexual Abuse Properly Limited: The District Court did not err in limiting defendant's cross-examination of his ex-wife regarding two unrelated prior incidents of sexual abuse, one involving the ex-wife and the other involving her infant daughter. Defendant was allowed to present closing arguments concerning the ex-wife's motive, bias, or prejudice, based on evidence in the record. However, allowing cross-examination regarding the two prior unrelated incidents would have created unfair prejudice against the ex-wife and confused the issues for the jury. St. v. MacKinnon, 1998 MT 78, 288 M 329, 957 P2d 23, 55 St. Rep. 331 (1998).

Evidence That Insurance Agent Who Had Premiums Paid With Loans Against Policy Without Plaintiffs' Knowledge Did Same Thing to Other Insureds: An insurance agent testified that

forms that he filled out authorizing loans against plaintiffs' policies to pay premiums must have been authorized by plaintiffs because he would not otherwise have filled them out and sent them in. Plaintiffs testified that they did not authorize, sign, or see the forms. Testimony of other persons to whom the agent sold policies that this also happened to them and that they did not authorize the forms made the agent's statements in this case less credible and was relevant and admissible. Cartwright v. Equitable Life Assurance Soc'y, 276 M 1, 914 P2d 976, 53 St. Rep. 268 (1996).

Defendant's Defiance of Officers — Tends to Show Willingness to Participate in Riot: During a prison riot, Langford refused to follow the orders of officers retaking a cell block until a warning shot was fired. During his trial for burglary and deliberate homicide related to the prison riot, Langford argued that the shooting incident was inadmissible because it was not relevant. The Supreme Court held that the incident was relevant because Langford's defiance of the officers' orders tended to show his willingness to disturb the peace and participate in the riot. St. v. Langford, 267 M 95, 882 P2d 490, 51 St. Rep. 962 (1994).

Cross-Examination of Witness Regarding Civil Action Against Defendant Allowed: In a case of first impression, the Supreme Court adopted the majority view from other jurisdictions that the proper approach to the question of whether a defendant may cross-examine a witness regarding a contemplated civil action against the defendant is to allow the cross-examination. Nevertheless, in the present case, the evidence of aggravated assault by defendant was so overwhelming that the failure of the trial court to allow cross-examination regarding a contemplated civil action would not have materially affected the jury's verdict and was thus harmless error. St. v. Arlington, 265 M 127, 875 P2d 307, 51 St. Rep. 417 (1994). See also St. v. Underwood, 281 NW 2d 337 (1979), St. v. Ferguson, 450 NE 2d 265 (1983), and Wooten v. St., 464 S 2d 640 (1985).

Evidence of Use of Illegal Weapon Admissible in Deliberate Homicide Case — Just Warning Not Required: Defendant in a deliberate homicide case contended that the court erroneously allowed the state to present evidence that the shotgun used in the shootings had been illegally altered, without providing a Just notice or modified Just notice. However, the state was entitled to introduce evidence of the act of owning an illegal shotgun because it was inextricably related to the crime. A Just notice was not required because the evidence was part of the corpus delicti. St. v. Byers, 261 M 17, 861 P2d 860, 50 St. Rep. 1162 (1993).

Evidence Irrelevant and Inadmissible Regarding Drug-Related Activities Beyond Scope of Offense: Facts relevant to the charge of criminal sale (now criminal distribution) of dangerous drugs were whether defendant was in a certain place at a certain time and whether he sold drugs at that time and place. Evidence of matters not pertaining to those facts was irrelevant and inadmissible. The District Court erred in admitting testimony regarding defendant's associates and their drug-related activities, the presence of juveniles at an unrelated drug sale, and places at which defendant may have spent time on occasion, such as bars known to be drug hangouts. A defendant on trial for one offense should be convicted, if at all, by evidence that shows he is guilty of that offense alone. St. v. Webb, 252 M 248, 828 P2d 1351, 49 St. Rep. 236 (1992).

Evidence of Employee Misconduct Improperly Excluded for Remoteness: The District Court excluded offered evidence of instances of employee misconduct on the grounds that the acts were too remote in time to be relevant. The employer sought to introduce evidence of alleged employee dishonesty and theft that occurred within 3 years of termination. Given the relatively short time between the occurrences and the trial, the eyewitness nature of the evidence, and the importance of the evidence to the employer's defense of termination for dishonesty, it was error to exclude the evidence on the basis of remoteness in time. Barrett v. ASARCO Inc., 234 M 229, 763 P2d 27, 45 St. Rep. 1865 (1988).

Exclusion of Evidence of Victim's Later Crimes Proper — Balance of Prejudice and Probative Value: The District Court properly excluded evidence, under Rules 608 and 609, M.R.Ev., of pending or resolved criminal charges against the victim of an assault unless the state alluded to the victim's good character, truthfulness, or veracity. As noted in Cooper v. Rosston, 232 M 186, 756 P2d 1125, 45 St. Rep. 978 (1988), evidence bearing on the issue of the credibility of a witness, in order to be admissible, must be more probative than prejudicial, and the District Court must balance prejudice and probative value pursuant to Rules 401 and 403, M.R.Ev. St. v. Hammer, 233 M 101, 759 P2d 979, 45 St. Rep. 1326 (1988).

Additional Circumstantial Evidence of Burglary Properly Admitted: State's evidence that on the day following the theft of guns a person matching defendant's description and driving an automobile matching the description of defendant's vehicle attempted to pawn guns of the same general description as those stolen, although circumstantial, naturally or logically established

an additional fact implicating defendant's guilt of burglary and was properly admitted. St. v. Oliver, 228 M 322, 742 P2d 999, 44 St. Rep. 1567 (1987).

Attempt by Prosecutor to Provoke Defense Motion for Mistrial — Double Jeopardy: When a defendant moves for a mistrial and the motion is granted, the "manifest necessity" standard allowing a court to lift the double jeopardy bar to a second trial does not apply (U.S. v. Tateo, 377 US 463, 12 L Ed 2d 448, 84 S Ct 1587 (1964)). The Montana Supreme Court recognized a narrow exception to this rule, as outlined in Oreg. v. Kennedy, 456 US 667, 72 L Ed 2d 416, 102 S Ct 2083 (1982), holding that the circumstances under which a defendant may invoke the bar of double jeopardy are limited to cases "in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial". In the case at bar, the District Court held and the Supreme Court affirmed that the prosecutor attempted, through a series of overreaching questions, to shift the focus of the trial from a charge of criminal sale of drugs for which there was only weak evidence to sexual crimes initially reported but later denied on cross-examination. The court found that the questions were so prejudicial that the defendant had little choice but to move for a mistrial to avoid a conviction for crimes with which he had not been charged. St. v. Laster, 223 M 152, 724 P2d 721, 43 St. Rep. 1614 (1986).

Denial of Evidence Relating to Prior Fires — No Error: The Supreme Court found no error in the denial by the District Court Judge of evidence or testimony relating to prior fires from which the insured may have received insurance proceeds. The court held that the proffered evidence did not naturally and logically tend to establish a fact in issue and did not meet the test of relevancy, in that it did not make probable that the insured had committed arson either from the viewpoint of motive, intent, or the deed itself. Britton v. Farmers Ins. Group, 221 M 67, 721 P2d 303, 43 St. Rep. 641 (1986), followed, as to the application of Rule 404, M.R.Ev., in St. v. Enright, 1998 MT 322, 292 M 204, 974 P2d 1118, 55 St. Rep. 1308 (1998), and also followed in St. v. Link, 1999 MT 4, 293 M 23, 974 P2d 1124, 56 St. Rep. 13 (1999). See also Phil-Co Feeds, Inc. v. First Nat'l Bank in Havre, 238 M 414, 777 P2d 1306, 46 St. Rep. 1380 (1989), and St. v. Link, 1999 MT 4, 293 M 23, 974 P2d 1124, 56 St. Rep. 13 (1999).

Tort Action — Admitted Use of Drugs Before Traffic Accident — Motion In Limine to Exclude Unless Foundation Established: Plaintiff admitted certain use of illegal drugs before the traffic accident, but it was not error for the District Court to grant a motion in limine excluding such evidence from the trial unless a foundation could be established showing that at the time of the accident he was under the influence and that his negligence was the proximate or controlling cause of injuries. Because evidence of drugs is very prejudicial, such conditional exclusion requires some link between it and the accident and a weighing of its probative value against its prejudicial effect. Simonson v. White, 220 M 14, 713 P2d 983, 43 St. Rep. 133 (1986).

Evidence of Past Violent Behavior — Admissible in Commitment Proceeding: It was not error, in an involuntary commitment proceeding, to admit evidence of violent behavior by respondent even though the behavior had occurred several years before this proceeding and the incidents were not set forth as allegations in the petition. In re D.B., 218 M 467, 709 P2d 161, 42 St. Rep. 1747 (1985).

Dismissal of Police Officer — Records of Other Disciplinary Proceedings Not Relevant — Protective Order Proper: In a police commission proceeding for dismissal of a police officer, defendant police officer was denied, under Rule 26(c), M.R.Civ.P. (Title 25, ch. 20), access to records of other police disciplinary proceedings which he planned to introduce in support of his defense of "discriminatory law enforcement". The evidence was not relevant to the proceeding, and the protective order was properly granted. In re Raynes, 215 M 484, 698 P2d 856, 42 St. Rep. 569 (1985).

Prior Guilty Plea — Irrelevant to Misconduct or Punitive Damages: Defendant and plaintiff, who was 16, were drinking and driving at a high rate of speed in Anaconda. Defendant was driving plaintiff's car when he lost control and hit a house. Plaintiff was severely injured. At a trial for damages based on negligence, plaintiff's counsel sought to introduce evidence of defendant's having pleaded guilty to two prior incidents of supplying intoxicating beverages to minors. Defendant's attorney moved for a motion in limine, which was denied. The jury awarded compensatory and punitive damages. On appeal the Supreme Court reversed, holding that the evidence of appellant's prior guilty pleas did not have the tendency to make the existence of his alleged willful and wanton misconduct on the night in question more or less probable. The evidence was irrelevant to establishing misconduct on the night in question or for establishing a basis for punitive damages. The fact that defendant had purchased alcohol for minors did not go toward establishing his operation of the vehicle in a reckless fashion, the act complained of. Therefore the evidence was also irrelevant toward showing a basis for punitive damages. Derenberger v. Lutey, 207 M 1, 674 P2d 485, 40 St. Rep. 902 (1983).

Criminal Mischief for Damage to One's Own Property to Defraud Insurer — Relevance of Pictures of Property: Defendant was charged with criminal mischief in that he purposely drove his pickup over a steep bank to wreck it so he could collect from his insurance company. Later the pickup was vandalized. Pictures of the pickup taken after the vandalism were properly admitted as proof of defendant's motive, and their probative value was substantial and was not outweighed by prejudice to defendant, who claimed that they should not have been admitted because they were evidence of other crimes as well as the one with which he was charged and that he had not been charged with vandalism. St. v. Gray, 207 M 261, 673 P2d 1262, 40 St. Rep. 2023 (1983).

Parole Status of Defendant — Prosecution Questions Eliciting: On the first day of trial, the prosecutor agreed to caution his witnesses to avoid mention of defendant's parole status. The prosecutor breached his promise by twice asking one of his witnesses a question eliciting the answer that defendant was on parole. The court cautioned the jury to disregard the testimony. As a matter of law, the Supreme Court could not hold that failure to grant motion for mistrial was an abuse of discretion. Prejudice would not be presumed. Defendant failed to show that a substantial right was denied and that there was a reasonable possibility the inadmissible evidence might have contributed to his conviction. The evidence supporting conviction was substantial, if not overwhelming, and defendant's version of the events was simply incredible. St. v. Gray, 207 M 261, 673 P2d 1262, 40 St. Rep. 2023 (1983).

Health Permit Requirements — Relevance of Prior Licensing: An action was brought by purchasers to rescind contract for bakery. After Department of Health notified purchasers of deficiencies needing correction, they closed the bakery and gave the keys to seller. The seller had stated in the contract that to his knowledge he had complied with government regulations. Seller fixed the deficiencies, received a health license, and opened the bakery, which he had operated for almost 17 years prior to the sale to purchasers. It was not error for the judge to refuse admission of conditional health licenses granted seller in 1968 and 1969 on the ground that they were so remote in time as to have little if any probative value and were therefore not relevant to issue whether seller knew at time of sale that the bakery would not meet health standards. Preston v. McDonnell, 203 M 64, 659 P2d 276, 40 St. Rep. 297 (1983).

Prior Compromise Settlements on Similar Injuries Properly Excluded: Plaintiff injured his back when the seat in the locomotive he was operating broke and threw him backward. Plaintiff had had two prior back injuries that had been successfully treated. The District Court excluded evidence relating to plaintiff's previous settlement of claims with defendant. Defendant contended that since the jury heard evidence regarding the previous injuries, it should have been informed of the settlements. The Supreme Court held that compromise settlements for previous injuries do not necessarily reflect the seriousness of the injuries and may confuse the jury. Any probative value was outweighed by possible prejudice. Callihan v. Burlington N., Inc., 201 M 350, 654 P2d 972, 39 St. Rep. 2158 (1982).

Evidence of Other Crimes Relevant and Therefore Admissible — Shoplifting Coat to Replace Bloodsoaked Coat: Armstrong was caught shoplifting a coat similar to his own bloodsoaked coat. In his trial for deliberate homicide, Armstrong objected to the shoplifting evidence. The Supreme Court said that the shoplifting evidence tended to show the destruction or suppression of evidence by Armstrong and tended to show his guilt and was therefore relevant and clearly admissible. If evidence tends to prove the commission of the crime charged, it is not rendered inadmissible because it also tends to prove the commission of another crime. The test is whether the evidence tends to prove facts material to an issue in the cause before the court. St. v. Armstrong, 189 M 407, 616 P2d 341, 37 St. Rep. 1563 (1980).

Testimony That Defendant Smoked Marijuana With County Attorney — Other Offense — Inadmissible: The State moved to exclude defendant's testimony that he had smoked marijuana with the County Attorney the night before the offense (deliberate homicide and obstructing justice). The trial court in excluding the offered evidence reasoned that it was not relevant, or if relevant, that its probative value was outweighed by its prejudicial effect. The Supreme Court affirmed the District Court. St. v. Beachman, 189 M 400, 616 P2d 337, 37 St. Rep. 1558 (1980).

Admission of Evidence of Prior Relationship Between the Defendant and the Victim's Girlfriend and Threats by Defendant Against Her: The defendant in a deliberate homicide case claimed on appeal that the trial court erred in admitting into evidence acts and statements of the defendant which occurred prior to the shooting. The evidence concerned the former romantic relationship of the victim's girlfriend with the accused, the ill feelings of the defendant toward the victim that developed after the defendant's relationship with the woman was replaced with the victim's relationship with her, and the ensuing threats made by the defendant toward the woman. Because the State had to prove that the defendant purposely or knowingly caused the

victim's death, the evidence of the defendant's intent was relevant in general and specifically because the defendant here alleged that he shot the victim in self-defense. Although threats against a person other than the victim are not admissible generally, when the circumstances are such that the threat tends to show hostility toward the deceased, they are relevant. Although evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith, it may be admissible for other purposes such as proof of motive or intent or where such evidence forms a part of a single chain of facts so intimately connected that the whole must be considered in order to interpret its several parts. Further, the challenged testimony was crucial to prove defendant's mental state at the time of the shooting, and as a result, the probative value outweighed its prejudicial effect. St. v. Bashor, 188 M 397, 614 P2d 470, 37 St. Rep. 1098 (1980).

Evidence of Prior Accidents: Evidence of prior accidents, while inadmissible for the purpose of proving negligence, is nevertheless admissible for the purpose of showing the existence of a danger or defect and notice thereof. Such evidence of prior accidents, however, must show situations substantially similar to or not too remote from the accident in question, although absolute identity of circumstances is not necessary. Here, where there was no offer of proof as to what the prior accidents would have shown, the Supreme Court could not determine admissibility, and therefore no reversible error was committed. Runkle v. Burlington N., 188 M 286, 613 P2d 982, 37 St. Rep. 995 (1980). See also Kissock v. Butte Convalescent Center, 1999 MT 322, 297 M 307, 992 P2d 1271, 56 St. Rep. 1288 (1999).

Testimony Accusing Defendant of Other Crimes — Part of Connected or Continuous Transaction: The court did not err in allowing testimony by a doctor that he had not prepared or signed certain medical reports submitted by defendant on workers' compensation claims even though the defendant argued that such testimony was irrelevant as amounting to an accusation that the defendant had committed crimes other than the ones charged. The evidence tended to show that the defendant submitted fraudulent medical reports and was part of a connected or continuous transaction on the part of the defendant. St. v. Bretz, 185 M 253, 605 P2d 974, 36 St. Rep. 1037 (1979).

Other Crime — Prejudice — Limited Use of Evidence: Testimony concerning another crime in the chain of events with the crime of which the defendant is accused, when used for impeachment purposes, may be admissible in a proper case. Since a stipulation stating the nature of the crime committed and the disposition of other prosecutions stemming from the crime had been read to the jury and since the defendant did not carry his burden of affirmatively showing prejudice, this was such a case. St. v. Holliday, 183 M 251, 598 P2d 1132, 36 St. Rep. 1535 (1979).

WRONGFUL DEATH

Internal Department Memoranda — Relevant to Road Condition: In a wrongful death action plaintiff attempted to introduce into evidence internal Highway Department (now Department of Transportation) memoranda containing evaluations of specific stretches of road within the state, including the location of the accident involved. Plaintiff had a state employee explain the documents and laid a foundation for their admission. The State, a codefendant, contended the documents were irrelevant, confusing, prejudicial, and erroneous. The trial court excluded the evidence. On appeal, the Supreme Court found that the exhibits were relevant. They tended to show the general condition of the highway which was a material issue in the plaintiff's case against the State. The contention that the exhibits would confuse or mislead the jury showed a lack of confidence in the intelligence and common sense of the jury. It was error to exclude the exhibits; however, in light of all the evidence admitted concerning the road conditions, the error was harmless. Lindberg v. Leatham Bros., Inc., 215 M 11, 693 P2d 1234, 42 St. Rep. 137 (1985).

Admission of Evidence of Surviving Spouse's Remarriage as Prejudicial Error in Wrongful Death Action: In an action for the wrongful death of the plaintiff's wife, the court granted the plaintiff's motion to prohibit the defendant's counsel from informing the jury of the plaintiff's subsequent remarriage. Under these circumstances it was prejudicial and reversible error for the court to allow the defendant's lawyer to ask the jury panel on voir dire if any of the panel knew the plaintiff's present wife. Evidence of a surviving spouse's remarriage is irrelevant, and the introduction of the evidence cannot be cured by an admonition by the court. Workman v. McIntyre Constr. Co., 190 M 5, 617 P2d 1281, 37 St. Rep. 1637 (1980).

Relevant Photographs as Demonstrative Evidence: In a wrongful death action in which the decedent's surviving spouse brought suit against the state and its contractor for negligently failing to warn the decedent of an abrupt edge at the shoulder of a highway construction project, the court abused its discretion in refusing to admit into evidence for demonstrative purposes photographs showing the proper use of an "abrupt edge" sign. The photographs were relevant as

demonstrative evidence, as they illustrated an issue in the case and would not prejudice the jury. Workman v. McIntyre Constr. Co., 190 M 5, 617 P2d 1281, 37 St. Rep. 1637 (1980). See also Krueger v. Gen. Motors Corp., 240 M 266, 783 P2d 1340, 46 St. Rep. 2114 (1989).

Wrongful Death Action — Exclusion of Construction Contract Terms Upheld: In a wrongful death action in which the decedent's surviving spouse brought suit against the state and its contractor for negligently failing to warn the decedent of an abrupt edge at the shoulder of a highway construction project, the court properly excluded certain provisions in the contract between the state and the contractor regarding certain traffic control devices mentioned in a payment schedule. Because the question in the case was whether certain devices should have been used, the contract provisions allowing their use were of no probative value and were irrelevant. Workman v. McIntyre Constr. Co., 190 M 5, 617 P2d 1281, 37 St. Rep. 1637 (1980). See also Palmer v. Farmers Ins. Exch., 233 M 515, 761 P2d 401, 45 St. Rep. 1694 (1988).

TAMPERING WITH WITNESS OR EVIDENCE

Condition or Chain of Evidence — Bicycle Ridden by Motor Vehicle Homicide Victims: Defendant purposely hit and killed, with auto he was driving, two persons riding a bicycle. Testimony indicated that investigating officer picked up the bicycle at the scene and that it appeared to be in reasonably the same condition at trial as it was in when he picked it up. There was no indication at trial that it had been tampered with or was in worse condition than when officer picked it up. It was properly admitted in evidence over objection that there was insufficient evidence that it was in the same condition at trial as it was at the scene of the incident and that no chain of evidence establishing to whom it belonged and its condition prior to and after the incident was shown. St. v. Woods, 203 M 401, 662 P2d 579, 40 St. Rep. 533 (1983).

Chain of Custody — Evidence Tampering — Burden of Proof: Testimony established prima facie that no one tampered with the evidence while it was in police custody. Once this was shown, the burden of proving tampering shifted to the defendant. The fact that the FBI found no blood on the boots when they were initially examined does not mean that there was no blood on them. It merely means that the FBI did not find the blood in the first instance. This is not proof of tampering while in police custody. St. v. Armstrong, 189 M 407, 616 P2d 341, 37 St. Rep. 1563 (1980).

Duress Upon Official: The District Court erred in excluding the testimony of a former city councilman and railroad employee regarding the railroad's reaction to his motion to reduce the speed of trains at the crossing. If the railroad in fact utilized its position as employer to exert a form of duress upon its employee acting in an official capacity, such evidence might have a bearing in the mind of the jury to demonstrate wantonness or oppressiveness sufficient to establish a basis for punitive damages. Runkle v. Burlington N., 188 M 286, 613 P2d 982, 37 St. Rep. 995 (1980).

Credibility of Witnesses — Threat to Kill as Motive to Testify Falsely: The plaintiff allegedly assaulted and threatened to kill the witness if he did not testify favorably to plaintiff's case at trial. Testimony concerning the assault was admitted over the objection that it was irrelevant. The Supreme Court stated that although the evidence is irrelevant to the issue in dispute at trial it is admissible if it is otherwise relevant to the credibility of the witness. The fear of plaintiff carrying out the threat could provide a motive for the witness to give false testimony, and therefore evidence of the assault was relevant and properly admitted to show a motive to testify falsely. Cissel v. W. Plumbing & Heating, 188 M 149, 612 P2d 206, 37 St. Rep. 966 (1980).

MISCELLANEOUS

Use of Redacted Pretort Release to Establish Statutory Liability Shield Allowed: A pretort form indicating a prospective release from liability for negligence is illegal. However, it was not improper for a trial court to allow introduction of a redacted version of an illegal exculpatory agreement to show that an equine activity sponsor was statutorily protected from liability from unavoidable risks or from the inherent risks of equine activities of which the participant was or should have been aware. In the present case, plaintiff failed to cite authority or establish error by the trial court in admitting the redacted agreement, and the Supreme Court affirmed the trial court's denial of plaintiff's motion for a new trial on grounds that the redacted agreement was improperly admitted in evidence. McDermott v. Carie, LLC, 2005 MT 293, 329 M 295, 124 P3d 168 (2005).

Preclusion of Evidence of Duty of Care to Supervise Ranch Help — Summary Judgment Proper: Elizabeth sued her husband, Robert, for damages that she received while helping perform chores on Robert's ranch, including being accidentally injected with sheep serum by Robert's father. However, Elizabeth failed to produce any evidence that Robert had any duty to

supervise his father, so the trial court granted Robert's motion in limine, precluding any evidence or testimony regarding the accidental injection, including evidence by Elizabeth's expert regarding the cause of her injuries, and ultimately granted summary judgment to Robert. Elizabeth appealed, but the Supreme Court affirmed. In order to recover for personal injuries, Elizabeth was required to establish a legal duty, a breach of that duty, and damages proximately caused by the breach. Elizabeth did not establish a legal duty, so partial summary judgment for Robert was proper. Absent a legal duty, the evidence regarding the accidental injection and the expert's opinion concerning Elizabeth's injury was irrelevant and properly excluded. Without expert testimony, Elizabeth was unable to present evidence regarding causation and could not prevail on the negligence claim, so summary judgment for Robert was proper. Nelson v. Nelson, 2005 MT 263, 329 M 85, 122 P3d 1196 (2005).

Irrelevant Evidence Unrelated to Employee's Ineligibility for Unemployment Benefits Based on Misconduct Properly Denied: Wiman, a dispatcher at the Fallon County jail, allowed an unauthorized person to enter a convicted felon's cell to give the prisoner a haircut. Wiman's deliberate action violated county security policy, and Wiman was suspended without pay for 60 days, during which time Wiman sought unemployment benefits, but the benefits were denied. Wiman contended that the hearings officer improperly denied her the right to introduce evidence that went to the heart of the misconduct issue, such as evidence regarding the inmate's mental state, whether Wiman or another employee had previously provided items to inmates, and whether Wiman's breach of security policy was adequately investigated. However, the question before the hearings officer was the denial of unemployment benefits during the time that Wiman was suspended for allowing an unauthorized person into the cell—conduct which Wiman admitted—so the evidence related to Wiman's misconduct issue was irrelevant and inadmissible. Wiman v. Mont. Dept. of Labor and Industry, 2004 MT 208, 322 M 332, 96 P3d 710 (2004).

Motion to Introduce Letter Unrelated to Payment for Work Hours Properly Denied: Struble was charged with falsifying work records at the state prison where he was employed. Struble made a motion in limine to introduce a letter from the County Attorney to the Department of Corrections outlining the County Attorney's concern that there was insufficient evidence to prosecute six other employees on similar charges. The motion was denied, and Struble appealed, but the Supreme Court affirmed. The letter did not directly concern Struble, was unrelated to the charges against him, was irrelevant to the state's case against Struble, and thus was properly not admitted into evidence. St. v. Struble, 2004 MT 107, 321 M 89, 90 P3d 971 (2004).

Misleading Testimony of Arresting Officer Not Material to DUI Verdict — No Due Process Violation: At Gratzer's DUI trial, he argued that he could not have been in actual control of a vehicle because he had no ignition key for it. The arresting officer testified that he once owned a similar vehicle and needed no key to operate it. Gratzer filed for postconviction relief after discovering that the officer never actually owned a similar vehicle, but relief was denied. Gratzer appealed, contending that the officer's false testimony violated his due process rights. The Supreme Court noted that under Gollehon v. St., 1999 MT 210, 296 M 6, 986 P2d 395 (1999), it must be shown that false testimony was material to the verdict to prevail on a due process claim. Gratzer argued that Gollehon applied because the officer's testimony was material to the conviction inasmuch as it supported one of the elements of the crime. The Supreme Court disagreed. Although the officer may have been misleading in saying that he had owned a similar vehicle when in fact the vehicle was a county-owned car that was issued to him, ownership of the vehicle was irrelevant to the question of whether the vehicle would start without a key and was not material to the verdict. Further, testimony that the officer saw Gratzer drive and exit the vehicle was sufficient in itself for the trier of fact to determine that Gratzer was driving or in actual physical control of the vehicle. The District Court was affirmed. Gratzer v. St., 2003 MT 169, 316 M 335, 71 P3d 1221 (2003).

Error in Not Excluding Results of Independent Blood Alcohol Test Taken After DUI Arrestee Released From Custody: When Krause was picked up for DUI, he refused to take a Breathalyzer test and his license was revoked. After booking, Krause was released from custody, went to the hospital, and requested a blood alcohol test. The state subsequently obtained the results of the blood test by investigative subpoena, and the District Court allowed admission of the test results at Krause's trial over his objection. Krause appealed on grounds that the test results should not have been admitted because they were not relevant to any issue in the case. Krause pointed out that the decision as to the validity of an arrest must be based on information that the officer had at the time and cannot be justified bolstered by information obtained after the fact. The state argued that the evidence of the blood test was introduced to substantiate the credibility of the arresting officer's observations and opinion, not to retrospectively validate the officer's belief

that Krause had been driving under the influence. The Supreme Court agreed with Krause. The officer's character for truthfulness was not attacked, nor did evidence of Krause's blood test refer to the officer's character for truthfulness. Thus, there was no legitimate purpose for the introduction of the blood test evidence, and the District Court should have excluded it. St. v. Krause, 2002 MT 63, 309 M 174, 44 P3d 493 (2002).

Irrelevant Testimony Improperly Admitted but Not Prejudicial — Conviction Affirmed: The trial court improperly admitted witness testimony that was unrelated to the crime and clearly irrelevant. However, after evaluating the testimony under the totality of the circumstances in the context of the trial record, the Supreme Court concluded that admitting the testimony did not constitute undue prejudicial error and affirmed the conviction. St. v. Lancione, 1998 MT 84, 288 M 228, 956 P2d 1358, 55 St. Rep. 344 (1998), followed in St. v. Gustafson, 2000 MT 364, 303 M 386, 15 P3d 944, 57 St. Rep. 1554 (2000).

Admissibility of Evidence of Intoxication in Trial for Negligent Endangerment: Larson contended that it was error to allow the prosecution's introduction of evidence comparing his alcohol consumption with the level that the scientific community has determined will impair a person's ability to drive a motor vehicle, even though the incident was not a DUI-related case. Noting that there is no longer a presumption of intoxication under Montana law, the District Court properly admitted as relevant evidence Larson's blood alcohol level, which allowed the jury to apply its experience and logic to determine whether Larson's alcohol consumption clouded his judgment and impaired his reactions. St. v. Larson, 255 M 451, 843 P2d 777, 49 St. Rep. 1077 (1992), distinguishing St. v. Morgan, 198 M 391, 646 P2d 1177 (1982), and St. v. Leverett, 245 M 124, 799 P2d 119 (1990).

Water Rights Inconsequential to Determination of Interference With Ditch Use: Evidence of the nature, priority, and extent of water rights is of no consequence to the determination of whether construction of a pond interfered with use of a ditch and was properly excluded as irrelevant. Boylan v. Van Dyke, 247 M 259, 806 P2d 1024, 48 St. Rep. 188 (1991).

Photograph of Forest Fire Scene Conflicting With Other Evidence — Weight of Evidence: In an action against the state for negligence in suppressing a forest fire that later flared up, a photograph of the fire area before the flare-up was admitted into evidence. The photograph showed no smoke even though that conflicted with radio logs; if taken from another angle, it may have shown smoke. The court ruled that it was not error to admit the photograph because such matters affect the weight accorded the photograph and do not make the photo so lack probity or so inaccurate that it is prejudicial. Jacobsen v. St., 236 M 91, 769 P2d 694, 46 St. Rep. 207 (1989).

State Map Depicting Forest Fires — Relevant to Show Use of Firefighting Resources and Effect of Weather Conditions: In an action against the state for negligence in suppressing a forest fire, the use of a state map marked to represent the fires burning during the times involved was relevant to the issues of the prioritization of firefighting resources and the large number of fires resulting from the dry, windy weather occurring at that time. The map showed a larger area than was required by the scope of the issues, but that did not affect its relevancy. Jacobsen v. St., 236 M 91, 769 P2d 694, 46 St. Rep. 207 (1989).

Opposition to New Bank Relevant to State of Mind in Wrongful Attachment Case: Testimony showed that one defendant, an officer in debtor's bank, was opposed to the opening of a new bank. The evidence was relevant to defendant's state of mind, proof of which was required to show the oppression, fraud, or malice necessary for punitive damages. Stensvad v. Towe, 232 M 378, 759 P2d 138, 45 St. Rep. 1129 (1988).

Admission of Magazines in Rape Case — Relevant to Victim's Credibility: Where a child rape victim testified that she had been shown "dirty" magazines prior to the rape and such magazines were found in defendant's apartment, the magazines were relevant because they tended to buttress the victim's credibility. Although she never testified the magazines in evidence were the same ones defendant showed her, defendant's admission that the magazines in evidence were the same present in his room on the date in question provided a sufficient foundation supporting admissibility. St. v. Laird, 225 M 306, 732 P2d 417, 44 St. Rep. 254 (1987).

Blood Alcohol Test Admissible When Good Medical Practice Followed: In a negligence action against the state brought by the guardian of a person who was incapacitated in a motorcycle accident, the trial court admitted into evidence the results of a blood alcohol test performed on the motorcycle operator after the accident. The primary issue raised by the plaintiff on appeal concerns whether an adequate foundation was established for admittance of the test results. In a 4-to-3 decision, the Supreme Court held the results were admissible, as the testing procedure comported with good medical practice for admissibility in a civil case. The court rejected the more stringent rule which requires that each of a list of facts be established as foundation for admissibility of blood alcohol test results. The three dissenting justices found that a proper

foundation would include, at a minimum, evidence that the persons engaged in the test were qualified, the machine and its components were in proper condition, and the test was properly conducted. Bartel v. St., 217 M 380, 704 P2d 1067, 42 St. Rep. 1266 (1985).

Suit for Wrongfully Honoring Checks — Plaintiff's Tax Returns and Financial Statements Irrelevant: Depositor sued his bank for negligently issuing to depositor's partner a card allowing partner to withdraw funds from the partnership account without depositor's cosignature when a prior card required both signatures and for wrongfully honoring the partner's checks. The court properly excluded depositor's tax returns and financial statements relating to sale of a ranch and the gain from the sale and later repossession of the ranch, because the returns and statements had no relation to the lawsuit or the events giving rise to the suit and could not be used to diminish the damages otherwise recoverable from the bank. Tribby v. NW. Bank of Great Falls, 217 M 196, 704 P2d 409, 42 St. Rep. 1133 (1985).

Suit for Wrongfully Honoring Checks — Relevance of Evidence and Claims: Plaintiff depositor's partner induced bank to disregard account signature card requiring signature of each partner on a check and to issue a card allowing the partner to make withdrawals on his signature alone. The partner did so, and the depositor sued the bank. The court should not have excluded bank's offered evidence that the partner told bank he had authority to change the card, testimony of the partner, a letter from partner to the bank on this point, and that portion of the partnership agreement authorizing the partner to write checks. However, the court properly refused to dismiss the complaint on the asserted ground that the partnership agreement authorized the bank's action, because a jury could find the bank unauthorized to act as it did. The court also properly refused to dismiss on the asserted ground that the cause of action was a partnership asset, because depositor could show it was not, particularly when the account was opened and the original signature card issued prior to the formation of the partnership. Tribby v. NW. Bank of Great Falls, 217 M 196, 704 P2d 409, 42 St. Rep. 1133 (1985).

Prostitution at Nude Dancing and Body Painting Business — Relevance of Condom and Photo Album: When an individual openly advertises mutual nude dancing and body painting for a price, displays a photo album containing a photo of a prostrate nude male with erection and genitals painted with body paint, advertises edible body paint and edible bikinis, takes money from another for the services to be performed, escorts the customer to a private room, clothes are removed, massage of the genitals results, sexual arousal occurs, sexual intercourse is imminent, and the individuals are found in a compromising position, there is substantial evidence supporting a jury verdict that the individual committed the crime of prostitution in that she agreed to have sexual intercourse for compensation paid. A photo album and packaged condom seized on the premises under a search warrant were relevant to the question of whether prostitution was the business regularly conducted on the premises and were thus properly admitted in evidence. St. v. Baldwin, 217 M 189, 703 P2d 858, 42 St. Rep. 1126 (1985).

Irrelevant Alibi — No Time Correlation: The defense did not, as required by 46-15-301, give the prosecution pretrial notice of the identity of and intent to call an alibi witness. The judge therefore struck the witness' testimony. Defendant claimed error on appeal. The witness was not an alibi witness, because he testified he was with defendant from about 7:30 to 8:10, and both defendant and the victim testified defendant arrived at the scene of the crime at about 8:10. It was within the court's discretion to strike the testimony, because it was not relevant. St. v. Berg, 215 M 431, 697 P2d 1365, 42 St. Rep. 518 (1985).

Letter Relating to Terms of Lease Found Material: In reviewing the trial court's interpretation of the heating cost provisions of a 5-year lease, the Supreme Court held that a letter containing a payment schedule and testimony relating to the schedule had the tendency to make the reason for the payment schedule more or less probable, and the court dismissed appellant's contention that the letter was immaterial. Martin v. Laurel Cable TV, Inc., 215 M 229, 696 P2d 454, 42 St. Rep. 314 (1985).

Sex Crime Complaint Amendment to Lesser Offense — Admissibility on Issue of Victim's Credibility: Defendant sought to introduce evidence that the State twice amended its original information to reduce charges of sexual intercourse or attempted sexual intercourse to sexual assault. Defendant contended the amendments reflected the alleged victims' changing stories and wished to attack their credibility through the amendments. The evidence was properly denied. The prosecutor had stated the amendments were for tactical reasons, not because of any decision by the alleged victims. Defendant's argument, that because the court judicially noticed the amendments evidence behind their having been made should have been admitted, was without merit because the court noticed them only for the purpose of ruling on the State's motion to exclude evidence of them and not for future evidentiary considerations. St. v. Anderson, 211 M 272, 686 P2d 193, 41 St. Rep. 1357 (1984).

Criminal Mischief for Damage to One's Own Property to Defraud Insurer — Relevance of Pictures of Property: Defendant was charged with criminal mischief in that he purposely drove his pickup over a steep bank to wreck it so he could collect from his insurance company. Later the pickup was vandalized. Pictures of the pickup taken after the vandalism were properly admitted as proof of defendant's motive, and their probative value was substantial and was not outweighed by prejudice to defendant, who claimed that they should not have been admitted because they were evidence of other crimes as well as the one with which he was charged and that he had not been charged with vandalism. St. v. Gray, 207 M 261, 673 P2d 1262, 40 St. Rep. 2023 (1983).

Relevance of Unmailed Letter Contradicting Testimony: A letter that wife wrote to her father, stating that her lawyer was "in cahoots with the psychologist" and that the two were setting her husband up "very smart" in divorce proceeding and would make her look "super good", was a private communication. There was no evidence it was completed or sent. Husband found and copied it. The trial judge allowed wife to testify as to its contents and had the opportunity to determine whether the letter was relevant to the truth of her statements and her credibility. It was not an abuse of discretion to exclude the letter for either evidentiary or impeachment purposes. Cherewick v. Cherewick, 205 M 75, 666 P2d 742, 40 St. Rep. 1106 (1983).

Handwriting Analysis — Not Relevant to Show Mental State in Criminal Action: At issue was the state of mind of arson defendant on the night he allegedly set the fire. Handwriting analyst did not testify as to his mental state that night or to an analysis of a writing he made that night. Her testimony as to analysis of writings made before and after that night was not relevant and was properly excluded. St. v. Gray, 202 M 445, 659 P2d 255, 40 St. Rep. 199 (1983).

Illustrative Exhibits: In reviewing the trial court's ruling on admission of illustrative exhibits, the Supreme Court must give great deference to the trial court's discretion. Barmeyer v. Mont. Power Co., 202 M 185, 657 P2d 594, 40 St. Rep. 23 (1983).

Experiments — Simulated Accident: In action by a father alleging negligent care and supervision of his son at the YMCA swimming pool, evidence showed that one of five qualified lifeguards at the pool found the 6-year-old boy submerged about 4 ½ feet from the surface, that the lifeguard and a young boy pulled the son to the surface, and that one or more lifeguards carried the boy to the edge of the pool. The trial judge admitted evidence of an experiment in which one of the lifeguards threw a diving ring into the pool where the son was recovered and timed how long it took two young boys (one of which had helped save the son) to retrieve it, and then threw a 10-pound diving weight into the pool so that it settled into the pool. The boys were unable to retrieve it. From this the lifeguard concluded that the son was not on the bottom of the pool when rescued. The evidence was properly admitted since it supported the conclusion that the son was rescued in a shorter period of time than it would take for brain damage to result through submersion in water, and the experiment was substantially similar to the accident and rescue so as to lay a sufficient foundation for admission of testimony regarding the experiment. Johnson v. YMCA, 201 M 36, 651 P2d 1245, 39 St. Rep. 1937 (1982).

Corporate Liquidation — Records of Related Family Corporations Relevant: In an action for liquidation of a corporation because of oppression and shareholder deadlock, corporate minutes and financial statements of two separate but closely related family corporations were relevant and therefore admissible. Fox v. 7L Bar Ranch Co., 198 M 201, 645 P2d 929, 39 St. Rep. 862 (1982).

Farmer's Testimony as to Damage to Own Land: Plaintiffs own a farm surrounded on three sides by the Flathead River and Flathead Lake. After Kerr Dam was built in 1939, the water table in the area began to rise. In 1960 plaintiffs filed suit claiming inverse condemnation of their land and damages due to the rising of the water table. The complaint was amended four times over the years and was finally tried in 1979. Defendant claimed that the cause was barred by prescription and the Statute of Limitations. At all times defendant denied any damage. Plaintiffs presented photographs of the land and a chart showing various tracts in different colors, denoting the degree of soil damage in each tract. Defendant objected that the evidence was a self-serving statement. The Supreme Court recognizes a farmer's competence to testify, without proper foundation, about the effects of water damage to his crop and land. (See Watson v. Colusa-Parrot Min. & Smelting Co., 31 M 513, 79 P 14 (1905).) The chart was held to be properly admissible on this basis. Blasdel v. Mont. Power Co., 196 M 417, 640 P2d 889, 39 St. Rep. 219 (1982).

Evidence of Changes External to Subdivision Relevant to Question of Violation of Restrictive Covenant: In an action by subdivision property owners for a preliminary injunction enjoining the use of a building for any purpose other than as a single-family dwelling pursuant to restrictive covenants, evidence as to changes in the character of the subdivision caused by

developments in neighboring land is relevant to the question of whether the restrictions on the use of the dwelling are being violated. The evidence is admissible on the question of whether the character of the neighborhood has changed so radically as to render enforcement of the restrictions inequitable. Porter v. K & S Partnership, 192 M 175, 627 P2d 836, 38 St. Rep. 648 (1981).

Impeachment Evidence Held Relevant — Fair Trial Not Denied: In a prosecution for theft in which the defendant first gave the prosecutor notice of intent to rely on an alibi and later withdrew the notice and obtained a pretrial order limiting the prosecutor's cross-examination to the scope of direct examination, the court did not err in allowing the prosecutor to ask a defense witness, who previously testified about defendant's physical condition during the time the theft was committed, whether she had previously made any statements that she was with the defendant at the time of the offense. The ruling of the trial court was in accordance with the holding in Kipp v. Silverman, 25 M 296, 64 P 884 (1901), in which it was held that cross-examination should be allowed an extended range rather than a limited one. In the present case, the prosecution only attempted to determine if the witness' testimony related to the defendant's condition on the day of the theft. St. v. Hart, 191 M 375, 625 P2d 21, 38 St. Rep. 133 (1981).

Evidence of Payments to Employees as Tending to Refute Performance of Contract: Plaintiff brought suit alleging that, although he had performed in accordance with a land clearing contract, defendant refused to release to him certain slash disposal money due and owing as consideration. Defendant denied that plaintiff had fully performed under the contract and alleged, by way of counterclaim, that because of this failure he had lost the use of his land as farmland for 3 years. Defendant offered evidence of expenditures made in hiring others to complete work allegedly left undone by the plaintiff. The trial court improperly refused the evidence, as it tended to support defendant's denial of plaintiff's allegation that plaintiff had fully performed and was entitled to the slash disposal money. The refusal to admit this evidence did not constitute reversible error, however, as defendant was able to introduce evidence showing the condition of the land after plaintiff finished his work as well as evidence that he hired others to finish the work allegedly left undone by plaintiff. In spite of this evidence, plaintiff prevailed at the trial level, and that judgment was affirmed. Marvin v. Hargrave, 190 M 59, 618 P2d 339, 37 St. Rep. 1737 (1980).

Actions Related to Inadmissible Hearsay — No Probative Value: A police officer testified that he traveled in order to observe the owner of a stolen vehicle signing a stolen property report. The testimony was inadmissible hearsay because it was testimony about an extrajudicial statement in an effort to prove the truth of the statement, i.e., to show that a theft was committed. The actions of the officer in traveling and observing the signing are not admissible, not because they are hearsay but because those actions are irrelevant, having no probative value to the case at hand. In re D.W.L., A Youth, 189 M 267, 615 P2d 887, 37 St. Rep. 1452 (1980), followed in Heisler v. Boule, 226 M 332, 735 P2d 516, 44 St. Rep. 698 (1987).

Nonprejudicial Cumulative Error on Hazard of Crossing: The District Court admitted part and refused part of the State of Montana's Railroad Crossing Protection Policy on the ground that the hazard rating for the railroad crossing in question was not necessarily connected to its hazard rating at the time of the accident. The District Court also admitted some and refused other evidence relating to traffic counts and hazard indexes. The District Court by instruction defined ordinary care and by further instructions told the jury that public authorities have the duty to exercise ordinary or reasonable care to plan and design the highways to make them reasonably safe for the traveling public. The District Court also instructed that the duty of the county in maintaining the crossing was commensurate with the increased hazard occasioned by any obstructions, so that it was the duty of the county to exercise ordinary care under the circumstances shown. Evidence was presented for the jury to consider in determining whether or not the county exercised ordinary care in failing to provide additional signal devices at the crossing. The claimed errors were therefore not prejudicial to plaintiff since they were only cumulative on one side or the other of the issue of how hazardous the crossing was. Wollaston v. Burlington N., 188 M 192, 612 P2d 1277, 37 St. Rep. 1015 (1980).

Effect of Remoteness on Relevancy — Evidence Discovered Less Than Three Months After Crime: The objection that evidence is too remote is directed to the trial court's discretion and is a matter that goes to the credibility of the evidence rather than its admissibility unless the offered evidence is so remote as to have no evidentiary value. When witnesses had testified that the defendant possessed a .45 caliber handgun and wore a ski mask while waiting in a car at the scene of the crime, the District Court did not abuse its discretion by admitting into evidence a ski

mask and a .45 caliber shell casing taken from the car less than 3 months after the crime. St. v. Fitzpatrick, 186 M 187, 606 P2d 1343, 37 St. Rep. 194 (1980).

Relevancy of Usual Fees in Theft Prosecution of Fiduciary: Testimony as to the usual fee charged by an attorney to workers' compensation clients is relevant in a prosecution of the defendant on charges of larceny by bailee. The purpose of expert testimony is to aid the jury, but it does not limit the jury's capacity to decide for itself. Since the statute at the time in question provided that an agreement as to attorney fees could be implied, some standard as to what such an implied agreement might be was essential. St. v. Bretz, 185 M 253, 605 P2d 974, 36 St. Rep. 1037 (1979).

Law Review Articles

Recent Developments in Montana Law—Evidence—State v. Christenson: Videotape Use: Admission Into Evidence and Into the Jury Room, Hamill & Staley, 54 Mont. L. Rev. 405, 444 (1993).

The Modified Just Rule: A New Standard for the Admissibility of Evidence of Other Crimes, Wrongs or Acts Under Rules 403 and 404(b) of the Montana Rules of Evidence, Cameron, 53 Mont. L. Rev. 133 (1992).

Montana Supreme Court Survey—Civil Procedure and Evidence, Dyrud, 42 Mont. L. Rev. 343 (1981).

An Essay on the Determination of Relevancy Under the Federal Rules of Evidence, Travers, 1977 Ariz. St. L. J. 329 (1977).

Collateral References

Evidence *key* 99, 143.

31A C.J.S. Evidence §158, et seq.

29 Am. Jur. 2d Evidence §§255, 256, 304, et seq.

Admissibility and effect of evidence of professional ethics rules in legal malpractice action. 50 ALR 5th 301.

Products liability: admissibility of evidence of absence of other accidents. 51 ALR 4th 1186, §20.

1 Wigmore §§12, 24 through 36.

Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible.

Commission Comments

This rule is identical to Federal Rule 402 except that the clause beginning with "except as otherwise provided" is changed to apply to Montana law and is identical to Uniform Rules (1974) Rule 402 except that "constitution" is added.

This rule codifies a classic formulation and analysis of the admissibility of evidence. Advisory Committee Note to Federal Rule 402, 46 F.R.D. 161, 223. Under this analysis, the admissibility of evidence is determined first by testing relevance and then by determining whether the evidence is excluded by some provision of the law of evidence. Thayer, Preliminary Treatise on Evidence at Common Law 269 (1898). The codification of this formulation in Federal Rule 402 first declares the general principle that all relevant evidence is admissible with exceptions provided by law and then declares the negative of the general principle that whatever is not relevant is not admissible but lists no exceptions. In other words, irrelevant evidence is never admissible.

Existing Montana law, noted in the Commission Comments to Rule 401, is certainly consistent with Rule 402. The exceptions to the general rule that all relevant evidence is admissible contained in Rule 402 refer to situations listed below. The list of exclusionary law and rules is only by way of example, because if a party wishes that relevant evidence be excluded he must object and give the specific reasons and authority therefor under Rule 103.

Constitutional provisions excluding evidence relate primarily to the Fourth, Fifth and Sixth Amendments to the United States Constitution and Sections 11, 24 and 25 of Article II, 1972 Constitution of Montana covering search and seizure, self-incrimination, and right to jury trial and case law under these provisions. Examples given by the Advisory Committee Note to Federal Rule 402, 46 F.R.D. 161, 225, are Weeks v. U.S. 232 U.S. 383 (1914) and Katz v. U.S. 389 U.S. 347 (1967) for unlawful search and seizure and Massiah v. U.S., 377 U.S. 201 (1964) for incriminating statements elicited in violation of right to counsel. Reference to these provisions and cases reflects the intent of the rule to recognize these limitations on the admissibility imposed by these constitutions but not to list each instance of limitation possible.

Statutory provisions which limit the admissibility of evidence in Montana must also be given by way of example because again the rule does not intend to list each limitation imposed: Section

32-1213(c), R.C.M. 1947 [61-7-114], does not allow an accident report under the Uniform Accident Report Act to be used as evidence in any trial. This view was affirmed in Morrison v. City of Butte, 150 Mont. 106, 112, 431 P2d 79 (1967). A similar provision is found in Section 53-428, R.C.M. 1947 [61-6-108], under the Motor Vehicle Safety — Responsibility Act disallowing actions or findings by the supervisor under the act to be admitted as evidence of negligence in an action for damages. Under Section 93-401-13, R.C.M. 1947 [28-2-905, also at 72-11-304, now repealed, and 70-20-202], parol evidence of writings is excluded except in certain circumstances. Under R.C.M. 1947, Sections 93-601-2 [26-1-902] and 93-701-4 [Title 26, ch. 1, part 8] privileges are recognized which do not allow otherwise admissible evidence. Under the code of criminal procedure, two sections (R.C.M. 1947, 95-1803(c) [46-15-302] and 95-1804(c) [46-15-303]) exclude evidence if it has not met discovery, inspection and notice requirements. Two other sections implement statutory guarantees under the Fourth and Fifth Amendments to the U.S. Constitution and Sections 11 and 25 of Article II of The 1972 Montana Constitution; Section 95-1805, R.C.M. 1947 [46-13-301], provides for suppression of involuntary confessions and [Section] 95-1806, R.C.M. 1947 [46-13-302], of illegally seized evidence.

Other rules which exclude evidence will be found following this rule: Rules 403, 404, and 407 through 411 exclude otherwise relevant evidence; Article V excludes evidence through privileges; Article VI presents restrictions upon the examination of witnesses having the effect of excluding evidence; Article VII sets out requirements for expert testimony; Article VIII excludes hearsay evidence; Article IX excludes evidence not properly authenticated and identified; and Article X restricts proof of writings and recordings.

Montana Rules of Civil Procedure applicable in the courts of this state which provide procedures for excluding relevant evidence are Rule 16, allowing limitations upon evidence to be introduced at trial; Rule 30(b), allowing protection of parties or deponents and thereby excluding relevant evidence; and Rule 37, allowing the court to forbid introduction by a party of any evidence for failure to comply with the discovery rules.

Case Notes

Relevant Evidence 231
Irrelevant Evidence 238
Other Crimes or Acts 244

RELEVANT EVIDENCE

Admission of Medical Records to Determine Whether Material Misrepresentation Made on Application — No Prejudice: When applying for credit life insurance, plaintiff's husband, Clarence, indicated that he was in good health. Less than 1 year later, Clarence died, and plaintiff submitted an insurance claim, but the claim was denied and the policy was rescinded, so plaintiff sued. At trial, the District Court admitted Clarence's medical records. Plaintiff argued that the records were allowed without foundation showing that the records existed when Clarence applied for the insurance or that the records were relied on by the parties. The court concluded that it was for the jury to decide whether Clarence made a material misrepresentation that would justify defendant's action in denying the claim and rescinding the policy. The Supreme Court affirmed, holding that the District Court did not act arbitrarily or exceed the bounds of reason in admitting the records for jury inspection and that plaintiff failed to identify any prejudicial information in the records or show how introduction of the records harmed the case. Williams v. Union Fidelity Life Ins. Co., 2005 MT 273, 329 M 158, 123 P3d 213 (2005). See also Lopez v. Josephson, 2001 MT 133, 305 M 446, 30 P3d 326 (2001).

Evidence Related to Plaintiff's Bankruptcy Properly Precluded From Trial Regarding Plaintiff's Purchase of Credit Life Insurance: When Clarence and Barbara purchased a vehicle, the dealer offered credit life insurance as part of the transaction. Clarence died within 1 year of the purchase, but the insurer denied a life insurance claim and rescinded the policy. Barbara sued the insurer for fraud and bad faith. At trial, defendant sought to introduce evidence regarding plaintiff's bankruptcy, but the trial court granted Barbara's motion in limine excluding the bankruptcy evidence, and defendant appealed. The Supreme Court found no evidence that the trial court acted arbitrarily or exceeded the bounds of reason in granting the motion in limine, and the trial court was affirmed. Williams v. Union Fidelity Life Ins. Co., 2005 MT 273, 329 M 158, 123 P3d 213 (2005). See also Lopez v. Josephson, 2001 MT 133, 305 M 446, 30 P3d 326 (2001).

Sufficient Evidence of Attempted Obstruction of Peace Officer — Jury Properly Instructed Regarding Mental Standards of Offense: When she saw heavily armed officers approaching a neighbor's residence, Baker called the neighbor and left a recorded message that it would be in the neighbor's interests to peek out the window. The message was subsequently confiscated, and

Baker was charged with and convicted of attempted obstruction of a police officer. On appeal, Baker challenged the use of evidence regarding the neighbor's history and arrest, the purpose and use of the high-risk unit in arresting the neighbor, and an officer's outrage at Baker's interference with the police, contending that the evidence was irrelevant and unfairly prejudicial. The Supreme Court disagreed. Under the transaction rule set out in St. v. Beavers, 1999 MT 260, 296 M 340, 987 P2d 371 (1999), the trial court did not err in allowing the evidence because it enabled the jury to understand the circumstances surrounding the police activity and how Baker's interference could have affected the outcome. Baker also contested the jury instructions. Under 45-7-302, a person obstructs an officer when the person knowingly hinders the enforcement of the criminal law, so for a person to commit the offense of attempted obstruction, the person need only perform any act toward the commission of obstruction while aware of the fact that the person is performing the act. The instructions to the jury contained an explanation of the "knowingly" standard and multiple instructions on Baker's purpose for making the call and thus were a fair and full instruction on the law. The conviction was affirmed. St. v. Baker, 2004 MT 393, 325 M 229, 104 P3d 491 (2004).

Evidence of History of Violence — Consideration Not Limited to Parent or to Violence of Another Committed During Course of Relationship With Parent — Converse Fallacy of Accident or Hasty Generalization: In a child abuse and neglect proceeding, the physician doing psychological evaluations of the parents was given documents that referred to the father's alleged history of violence in another state. On appeal of the termination of parental rights, the mother argued that because she was neither dating nor married to the father at the time of the alleged violence, the doctor should not have considered the father's violent history in evaluating her. The mother relied on three cases in which evidence of violence by a spouse or intimate partner that was committed during the course of the relationship with the parent, who is the subject of the inquiry, was held admissible. The Supreme Court held that the cases cited by the mother do not require a court to exclude any evidence if that evidence is relevant. If the evidence is admissible in court, a fortiori, it is admissible in the psychologist's evaluation. By relying on the cited cases, the mother committed the converse fallacy of accident or hasty generalization. In re D.B., 2004 MT 371, 325 M 13, 103 P3d 1026 (2004).

Photographs of Nonvictim Children Not Considered Prejudicial or Character Evidence — Probative Value Warranting Admissibility: In Bar-Jonah's aggravated kidnapping, sexual assault, and assault with a weapon trial, the trial court allowed the admission of hundreds of photographs of children seized during a search of Bar-Jonah's residence. Bar-Jonah contended that the photographs were: (1) improperly admitted because only a few were images of the victims; and (2) unfairly prejudicial and tended to erroneously reflect on Bar-Jonah's character. The Supreme Court disagreed. The photographs were relevant by linking them to Bar-Jonah's motive for befriending the victims, for enhancing the credibility of the victims, and to rebut Bar-Jonah's asserted defenses. Even if the photographs could be construed to reflect on Bar-Jonah's character, they were not introduced for that purpose, but rather to prove motive. Any prejudice to Bar-Jonah through introduction of the photographs was outweighed by their probative value, which did not present evidence of other crimes or acts. St. v. Bar-Jonah, 2004 MT 344, 324 M 278, 102 P3d 1229 (2004).

Admissibility and Jury Instructions Related to Unrecorded Subdivision Covenants — Validity of Unrecorded Instrument Between Persons With Notice: At issue in a subdivision dispute were unrecorded covenants prohibiting commercial activity in the subdivision. The District Court allowed the unrecorded instruments into evidence and instructed the jury that the instruments were valid between the parties who had notice of them. On appeal, the Supreme Court found no error either in admission of the covenants into evidence or in the jury instruction. Witnesses testified that copies of the unrecorded instruments had been given to both parties, so the documents were clearly relevant and admissible, and because both parties were notified of the restrictive covenants, an instruction regarding the validity of the instruments was appropriate under 70-21-102. Rice v. C.I. Lanning, 2004 MT 237, 322 M 487, 97 P3d 580 (2004).

Evidence of Defendant's Intoxication Following Arrest Admissible Under Transaction Rule: At McCaslin's trial for aggravated assault, assault, and assault with a weapon, the state introduced evidence of McCaslin's intoxication after arrest. McCaslin contended that the evidence was irrelevant and prejudicial. The Supreme Court disagreed. Under the transaction rule, McCaslin's behavior following arrest was relevant as part of the transaction, and the jury had a right to hear evidence regarding McCaslin's behavior subsequent to arrest in order to provide context to the criminal act. St. v. McCaslin, 2004 MT 212, 322 M 350, 96 P3d 722 (2004). See also St. v. Detonancour, 2001 MT 213, 306 M 389, 34 P3d 487 (2001).

Generalized Expert Testimony Regarding Sexual Abuse and Religious Manipulation and Control Properly Admitted in Sexual Intercourse Without Consent, Incest, and Witness Tampering Case: In Sandrock's trial for sexual intercourse without consent, incest, and witness tampering, an expert testified regarding sexual abuse and religious manipulation and control based on experiences in a Christian sect. Sandrock moved for mistrial on grounds that the testimony was irrelevant and tended to supplant the state's need to prove Sandrock's mental state. The motion was denied, and on appeal, the Supreme Court affirmed. The expert did not provide any testimony specific to Sandrock, but rather provided the jury a context within which to understand the intricacies of religious groups in general, so the court concluded that the testimony was relevant. Further, the testimony did not prejudice Sandrock because Sandrock himself admitted to controlling his wife and daughters, and the expert never stated that Sandrock exhibited or performed the beliefs that were typical of the religious groups about which the expert testified in general. The mistrial motion was properly denied. St. v. Sandrock, 2004 MT 195, 322 M 231, 95 P3d 153 (2004).

No Violation of Pretrial Order Precluding Evidence of Negligence by Plaintiff's Employer — New Trial Properly Denied: Plaintiff was employed by a vocational day-care program that took developmentally disabled persons on day outings. Plaintiff was assaulted by a developmentally disabled person from a group home managed by defendant corporation and sued the corporation for negligence for failing to control the assailant. Before trial, the District Court granted plaintiffs' motion to exclude any evidence of negligence by plaintiff's employer and ruled that defendant had a special relationship of custody and control over the disabled person and thus had a legal duty of care to those placed within the foreseeable zone of risk created by any breach of that duty. Nevertheless, the jury found for defendant, and plaintiffs' motion for a new trial was denied. On appeal, plaintiffs contended that when defense counsel repeatedly referred to the individual planning process for the assailant, in which plaintiff's employer was a partner, blame for the injury was thereby shifted to plaintiff's employer in violation of the pretrial order and prevented plaintiffs from receiving a fair trial. The Supreme Court disagreed, pointing out that plaintiffs opened the door by presenting evidence regarding the individual planning process in questioning plaintiffs' first witness and that both parties subsequently presented evidence about the process. Further, evidence regarding the individual planning process was relevant to a limit on defendant's ability to monitor the assailant and did not equate to evidence of negligence by plaintiff's employer, nor did defense counsel ever attempt to establish that any breach of legal duty by the employer led to plaintiff's injury. Thus, the District Court did not manifestly abuse its discretion in denying plaintiffs' motion for a new trial, and the verdict was affirmed. Papich v. Quality Life Concepts, Inc., 2004 MT 116, 321 M 156, 91 P3d 553 (2004), distinguishing Cech v. St., 183 M 75, 598 P2d 584 (1979), Durden v. Hydro Flame Corp., 1998 MT 47, 288 M 1, 955 P2d 160 (1998), St. v. Ingraham, 1998 MT 156, 290 M 18, 966 P2d 103 (1998), Unmack v. Deaconess Medical Center, 1998 MT 262, 291 M 280, 967 P2d 783 (1998), and Lopez v. Josephson, 2001 MT 133, 305 M 446, 30 P3d 326 (2001).

Discovery of Medical Records Upon Commencement of Action for Damages Placing Mental and Physical Condition at Issue — Waiver of Physician-Patient Privilege as to Condition in Controversy: Plaintiff's child fell through the second story railing at the Montana State University-Bozeman library and suffered brain injuries. Plaintiff brought damage claims related to the child's injuries and claims related to plaintiff's own emotional distress, loss of consortium, and posttraumatic stress disorder. The state moved to compel production of all of plaintiff's health care records from before and after the fall. The District Court denied the motion, holding that the records were constitutionally protected and irrelevant to the case and therefore not discoverable. On appeal, the Supreme Court noted plaintiff's constitutional right to confidentiality of medical records, but cited State ex rel. Mapes v. District Court, 250 M 524, 822 P2d 91 (1991), for the holding that that right must be balanced against a defendant's right to defend itself in an informed manner and that records of prior physical or mental conditions are discoverable only if they relate to currently claimed damages. Here, plaintiff commenced an action for damages that placed in issue the mental and physical condition arising from the accident, thus waiving any physician-patient privilege as to the condition in controversy, and the state had the right to discover evidence related to prior medical conditions that was possibly connected to plaintiff's current damages. Denial of the discovery motion prejudiced the state's right to defend itself in an informed manner, constituting reversible error. Henricksen v. St., 2004 MT 20, 319 M 307, 84 P3d 38 (2004).

Motion In Limine to Exclude Relevant Statements Made by Defendant During and After Assault Properly Denied: During a bar fight, Brasda brandished a knife and stated that he would use it because he was not afraid to go back to prison. After the fight, Brasda stated to a deputy

that he didn't try to stab anyone. At trial, Brasda made a motion in limine to suppress the statements on grounds that they were irrelevant to any fact at issue or, alternatively, that they were statements of other crimes or acts and inadmissible because no exception applied. The trial court denied the motion, and the Supreme Court affirmed. Both statements were clearly relevant and integral to the state's proof of the elements of the crime and to the jury's ability to evaluate witness testimony. Further, the statements were admissible under the mental, emotional, or physical condition exception to the hearsay rule and under the transaction rule in 26-1-103. The court also noted that under St. v. Bauer, 2002 MT 7, 308 M 99, 39 P3d 689 (2002), statements regarding a defendant's history or imprisonment and probationary status that are inextricably linked to circumstances surrounding the crime are admissible. Denial of the motion in limine was proper. St. v. Brasda, 2003 MT 374, 319 M 146, 82 P3d 922 (2003).

Supreme Court Reduction of Offense of Sexual Intercourse Without Consent to Sexual Assault — Relevance of Testimony of Victims Regarding Belief That Massage Therapist's Actions Were Criminal: Stevens was convicted of two counts of sexual intercourse without consent after having sexual contact with two female patients at his massage clinic. The Supreme Court determined that there was insufficient proof that the offenses were committed without consent and, without addressing whether sexual assault was a lesser included offense of sexual intercourse without consent, reduced the offenses to sexual assault. Even though Stevens was not specifically charged with sexual assault, there was no question that he was reasonably apprised of the sexual assault charges against him. Stevens offered a jury instruction, which was given without objection, stating that sexual intercourse without consent necessarily included the offense of sexual assault. Evidence clearly showed that Stevens had sexual contact with the victims, and testimony from the victims regarding whether they considered sexual contact by a massage professional to be criminal was relevant and admissible, tending to make the existence of a material element of the crime, namely whether the crime was committed without consent, more likely than without the evidence. St. v. Stevens, 2002 MT 181, 311 M 52, 53 P3d 356 (2002), distinguishing St. v. Black, 270 M 329, 891 P2d 1162 (1995).

Defendant's Testimony Regarding Law-Abiding Nature Opening Door to Cross-Examination Regarding Belligerent Conduct When Arrested: Dobson testified at trial that he would have cooperated with law enforcement officers if they would have had a warrant, implying that he was peaceful and law-abiding by nature, so the state attempted to elicit testimony regarding the fact that during his arrest, Dobson was belligerent and hostile. Dobson objected on grounds that the testimony was irrelevant to the charge of sexual intercourse without consent. On a stand-alone basis, Dobson's cross-examination testimony about the details of his arrest did not tend to make the existence of any fact that he committed sexual intercourse without consent more or less probable; however, Dobson did not have a right to offer an unnecessary, self-serving statement, intended to place him in a better light with the jury, without laying the statement open to cross-examination. The state created a sufficient nexus between Dobson's direct testimony and his behavior during arrest, and Dobson opened the door through which the state was entitled to walk. Dobson had an adequate opportunity to rehabilitate himself and countermand any prejudice resulting from the cross-examination, so the testimony was relevant and properly admitted. St. v. Dobson, 2001 MT 167, 306 M 145, 30 P3d 1077 (2001), following St. v. Kinney, 230 M 281, 750 P2d 436 (1988), and distinguishing St. v. Lancione, 1998 MT 84, 288 M 228, 956 P2d 1358 (1998).

Defendant Acquitted of Murder — Evidence of Motive for Murder Admissible on Arson Charge — Evidence Admissible as to One Defendant Properly Introduced in Consolidated Trial: Link was acquitted by a jury of purposefully or knowingly causing Leonard's death. In a later trial on charges of arson and deliberate homicide under the felony-murder rule, Link argued that evidence of his financial motive for wanting Leonard's death was inadmissible on the arson charge because he had already been acquitted of accountability for Leonard's death. The Supreme Court held that the evidence was properly admitted because it was not made irrelevant by the fact that Link could collect only if Leonard actually died as a result of the fire. Link also argued that evidence that Enright, a codefendant with whom Link's trial had been consolidated, also committed similar crimes against Leonard was not admissible because it did not pertain to him. The Supreme Court held that the evidence against Enright was admissible because the jury was capable of considering the evidence only as it pertained to Enright and had been instructed by the District Court to do so. St. v. Enright, 2000 MT 372, 303 M 457, 16 P3d 366, 57 St. Rep. 1590 (2000).

No Prejudice From Use of Inadmissible, but Simple and Distinct, Evidence: Southern was charged with two counts of kidnapping, one count of burglary, one count of theft, and five counts of sexual intercourse without consent. In moving to sever the nine counts in the information into

four separate trials pursuant to 46-13-211, Southern argued that the prejudicial effect of the other crimes evidence substantially outweighed its probative value and thus evidence of the other crimes would not have been admissible in separate trials. It is inevitable that evidence of other crimes will have some prejudicial effect, so under the fourth part of the modified Just rule (see St. v. Matt, 249 M 136, 814 P2d 52 (1991)), relevant evidence will be inadmissible only when its probity is substantially outweighed by the danger of unfair prejudice. Pursuant to St. v. Huether, 284 M 259, 943 P2d 1291, 54 St. Rep. 872 (1997), the prejudicial effect of relevant evidence will substantially outweigh the probative value when the evidence will prompt the jury to decide the case on an improper basis. Thus, evidence is inadmissible under the fourth part of the modified Just rule if it arouses the jury's sympathy for one side without regard to its probative value, if it confuses or misleads the jury, or if it distracts the jury from the main issues in the case. Prejudice arising from the use of inadmissible evidence will not be found when the evidence is simple and distinct. Even though the other crimes evidence in Southern's case would have been prejudicial, the jury was instructed that each count was a distinct offense and had to be decided separately. There was nothing in the record to suggest that the jury did not keep the relevant evidence separate. Since the other crimes evidence was simple and distinct and would have been admissible at separate trials, Southern failed to establish that the jury used evidence of guilt on one charge to convict him of other charges on the theory that the evidence would have been inadmissible in trials on the other charges. St. v. Southern, 1999 MT 94, 294 M 225, 980 P2d 3, 56 St. Rep. 395 (1999).

Stipulation Precluding Need to Bring Evidence of Insurance Settlement Before Jury: Dill suffered damages after being hit as a pedestrian by a vehicle operated by Jardine. State Farm Mutual Automobile Insurance Company (State Farm) provided both liability insurance for Jardine and underinsured motorist coverage for Dill. Dill maintained that State Farm's settlement of the underlying liability claim against Jardine was admissible as relevant under Rule 401, M.R.Ev., and this rule and as impeachment evidence pursuant to Rules 607 and 801(d)(2), M.R.Ev. However, it was not necessary to bring evidence of the settlement before the jury in light of the fact that State Farm stipulated that it had paid Dill the liability policy limit on behalf of Jardine and would pay any jury verdict that exceeded that amount up to the policy limit under the underinsured motorist policy. Simple knowledge that the policy limits were paid was sufficient. Dill v. District Court, 1999 MT 85, 294 M 134, 979 P2d 188, 56 St. Rep. 350 (1999).

Evidence of Son's SIDS Death Relevant in Homicide Trial Following Daughter's Death — Just Notice Not Required: The prosecution sought to introduce evidence that, only 7 months prior to the death of his infant daughter, Huether's 7-month-old son had died of sudden infant death syndrome (SIDS) while in Huether's care. The trial court allowed the evidence pursuant to Rule 404(b), M.R.Ev. On appeal, the Supreme Court found that the evidence was improperly admitted pursuant to Rule 404(b) because the trial court misconstrued the evidence, which did not pertain to other crimes, wrongs, or acts. However, the evidence was nevertheless admissible pursuant to this rule because it was relevant to the question of whether Huether, in caring for his daughter, consciously disregarded a risk of which the death of his son should have made him aware. The probative value of the evidence outweighed its prejudicial effect. Because the evidence was not Rule 404(b) "other crimes" or character evidence but, rather, relevant circumstantial evidence, the prosecution was not required to comply with the Just notice provisions. St. v. Huether, 284 M 259, 943 P2d 1291, 54 St. Rep. 872 (1997).

Admissibility of Booking Photograph Not Part of Reciprocal Discovery Package: McKeon contended that a booking photograph taken 2 days after commission of a robbery unfairly surprised him, allowing the prosecution an unfair advantage and prejudicing his case because the photograph was not part of the reciprocal discovery package and was produced only the day before trial. The Iowa state trooper who had arrested McKeon brought the photograph when he came to Montana to testify, and as soon as the prosecution became aware of the photograph, McKeon was notified. McKeon had based his mistaken identity defense on the fact that the witness description of a robbery suspect did not match his appearance at trial, but the booking photograph showed that the description was accurate at the time of the robbery. Absent a showing that the prosecution had intentionally withheld the photograph until immediately before trial, the Supreme Court held that the prosecution had complied with the spirit of the discovery rules. McKeon's decision to alter his appearance at trial from his described appearance at the time of the robbery was a strategic decision that failed, and admission of the booking photograph did not result in unfair prejudice. St. v. McKeon, 282 M 397, 938 P2d 643, 54 St. Rep. 404 (1997).

Photographs of Defendant and Accomplices Relevant for Corroboration of Accomplice Testimony: McKeon contended that dated photographs depicting him brandishing firearms with

his alleged robbery accomplices should have been excluded as irrelevant and highly prejudicial. The Supreme Court disagreed, holding that the photographs were relevant for the purpose of corroborating portions of an accomplice's testimony in which the chain of events leading up to the robbery were described, including the fact that the parties were traveling around the West around the time of the crime and that the accomplice had purchased firearms for McKeon and another accomplice similar to those in the photographs. Corroboration of the accomplice testimony was necessary and prudent, and the probative value of the photographs outweighed any possible prejudicial effect. St. v. McKeon, 282 M 397, 938 P2d 643, 54 St. Rep. 404 (1997).

Evidence That Insurance Agent Who Had Premiums Paid With Loans Against Policy Without Plaintiffs' Knowledge Did Same Thing to Other Insureds: An insurance agent testified that forms that he filled out authorizing loans against plaintiffs' policies to pay premiums must have been authorized by plaintiffs because he would not otherwise have filled them out and sent them in. Plaintiffs testified that they did not authorize, sign, or see the forms. Testimony of other persons to whom the agent sold policies that this also happened to them and that they did not authorize the forms made the agent's statements in this case less credible and was relevant and admissible. Cartwright v. Equitable Life Assurance Soc'y, 276 M 1, 914 P2d 976, 53 St. Rep. 268 (1996).

Admissibility of Victim Testimony as to Sexual Acts Committed by Nondefendants — Not Hearsay: The trial court allowed the victim to testify not only to the sexual acts committed by defendants but also to similar acts committed at about the same time by three other men not on trial. Defendants contended that the court abused its discretion in allowing the testimony because it was hearsay and violated the res gestae doctrine. However, the evidence was admissible because it was closely related to and explanatory of the offense and was therefore part of the transaction, as contemplated under 26-1-103. The testimony was not considered hearsay because the testimony of the other three men was not offered into evidence to prove the sexual acts. St. v. Wing, 264 M 215, 870 P2d 1368, 51 St. Rep. 223 (1994), followed in St. v. Maier, 1999 MT 51, 293 M 403, 977 P2d 298, 56 St. Rep. 208 (1999). See also St. v. Beavers, 1999 MT 260, 296 M 340, 987 P2d 371, 56 St. Rep. 1035 (1999).

General Standard of Review of Holdings on Admissibility of Evidence: Rulings on the admissibility of evidence are within the sound discretion of the District Court and will not be overturned on appeal absent an abuse of discretion by the trial court. St. v. Mayes, 251 M 358, 825 P2d 1196, 49 St. Rep. 75 (1992).

Evidence That Dentist "Stopped to Smell the Roses" Admissible: The plaintiff in a personal injury action objected to the admission of an advertisement for the sale of his dental practice published in a medical journal prior to his injury. The Supreme Court held that the fact that the advertisement stated that the plaintiff worked only 4 days a week and took plenty of time off to "smell the roses" was relevant to the question of his lost earning capacity. Linden v. Huestis, 247 M 383, 807 P2d 185, 48 St. Rep. 241 (1991).

Admissibility of Evidence of Similar Injury Occurring Six Years Before: A railroad employee sued the railroad for injuries he received on the job. The Supreme Court affirmed the lower court's admission of evidence of a similar accident that happened 6 years prior to the plaintiff's injury. The court found that both accidents involved a laborer working under the same foreman, lifting rail ties manually and thereby injuring his back. The evidence was held admissible to show the existence of danger and notice thereof. Kalanick v. Burlington N. RR Co., 242 M 45, 788 P2d 901, 47 St. Rep. 532 (1990).

Admissibility of Testimony of Nontreating Physician: The lower court denied the plaintiff's motion in limine to exclude the testimony of a physician who did not treat the plaintiff and who examined the patient only one time, for approximately 15 minutes. The ruling was affirmed on appeal on the grounds that the testimony went to the credibility of the plaintiff and her witnesses and that the testimony was not so unfairly prejudicial that it substantially outweighed its probative value. Feller v. Fox, 237 M 150, 772 P2d 842, 46 St. Rep. 694 (1989).

Evidence of Employee Misconduct Improperly Excluded for Remoteness: The District Court excluded offered evidence of instances of employee misconduct on the grounds that the acts were too remote in time to be relevant. The employer sought to introduce evidence of alleged employee dishonesty and theft that occurred within 3 years of termination. Given the relatively short time between the occurrences and the trial, the eyewitness nature of the evidence, and the importance of the evidence to the employer's defense of termination for dishonesty, it was error to exclude the evidence on the basis of remoteness in time. Barrett v. ASARCO Inc., 234 M 229, 763 P2d 27, 45 St. Rep. 1865 (1988).

Admission of Magazines in Rape Case — Relevant to Victim's Credibility: Where a child rape victim testified that she had been shown "dirty" magazines prior to the rape and such magazines

were found in defendant's apartment, the magazines were relevant because they tended to buttress the victim's credibility. Although she never testified the magazines in evidence were the same ones defendant showed her, defendant's admission that the magazines in evidence were the same present in his room on the date in question provided a sufficient foundation supporting admissibility. St. v. Laird, 225 M 306, 732 P2d 417, 44 St. Rep. 254 (1987).

Motion In Limine — Denial of Offer of Proof on Question Going to Issues of Fact — Reversible Error: Several months after an accident at a bridge, the state improved the bridge and approach, then made a motion in limine, which was granted, that the District Court hold inadmissible any evidence relating to the subsequent improvement project. At trial, a Highway Department (now Department of Transportation) engineer was asked if the state had ever planned to change the bridge and approach prior to the accident. The question was objected to, and plaintiff's counsel made an offer of proof that the engineer would answer affirmatively and thereafter counsel would ask why the improvements had not been made prior to the accident. The court ruled that the question violated the motion in limine and overruled the offer of proof. On appeal, the Supreme Court reversed, holding that the District Court erred in denying the offer of proof and in not permitting the witness to answer because the question went to two other issues of fact important in the case: notice of hazardous condition, if it was hazardous, and time and opportunity to act. Buck v. St., 222 M 423, 723 P2d 210, 43 St. Rep. 1384 (1986).

Evidence Relevant — Inadmissible as Unfair Prejudice: In a tort action, on the issue of the causation of damages, the trial court abused its discretion in allowing testimony concerning the plaintiff's home environment and whether her father's alleged drinking and fighting caused her symptoms rather than an earlier vehicular accident. The questioned testimony had a tendency to make the alleged cause of the symptoms more or less probable than it would have been without the testimony. The testimony therefore was relevant but not admissible as its probative value was substantially outweighed by the danger of unfair prejudice. Kimes v. Herrin, 217 M 330, 705 P2d 108, 42 St. Rep. 1231 (1985), followed in Newville v. St., 267 M 237, 883 P2d 793, 51 St. Rep. 758 (1994), Werre v. David, 275 M 376, 913 P2d 625, 53 St. Rep. 187 (1996), and Henricksen v. St., 2004 MT 20, 319 M 307, 84 P3d 38 (2004).

Internal Department Memoranda — Relevant to Road Condition: In a wrongful death action plaintiff attempted to introduce into evidence internal Highway Department (now Department of Transportation) memoranda containing evaluations of specific stretches of road within the state, including the location of the accident involved. Plaintiff had a state employee explain the documents and laid a foundation for their admission. The State, a codefendant, contended the documents were irrelevant, confusing, prejudicial, and erroneous. The trial court excluded the evidence. On appeal, the Supreme Court found that the exhibits were relevant. They tended to show the general condition of the highway which was a material issue in the plaintiff's case against the State. The contention that the exhibits would confuse or mislead the jury showed a lack of confidence in the intelligence and common sense of the jury. It was error to exclude the exhibits; however, in light of all the evidence admitted concerning the road conditions, the error was harmless. Lindberg v. Leatham Bros., Inc., 215 M 11, 693 P2d 1234, 42 St. Rep. 137 (1985).

Intoxication — Expert Testimony Within Court's Discretion: Plaintiff was injured when she opened an elevator door and fell 15 feet because the car was not on the floor level. After a verdict was returned for plaintiff, defendants appealed, alleging the trial court erred in excluding testimony from a toxicology expert regarding the number of drinks consumed by the plaintiff on the night of the accident. Plaintiff's alcoholic blood content of .16% was admitted without objection. Over objection, the toxicologist testified about the effect upon a person of different ranges of alcohol blood content. The trial court then excluded testimony as to the amount of alcohol necessary to be consumed to reach plaintiff's blood alcohol content. The Supreme Court said the admission of this kind of testimony was discretionary with the trial court. The relevant consideration is whether plaintiff was intoxicated, and if so, how that affected her conduct on the night in question. The trial court received testimony on the relevant matters. The trial court is vested with great latitude in ruling on the admissibility of expert testimony. Exclusion of the offered evidence was not clearly erroneous or sufficiently prejudicial to require a new trial. Cash v. Otis Elevator Co., 210 M 319, 684 P2d 1041, 41 St. Rep. 1077 (1984), followed in Niles v. Big Sky Eyewear, 236 M 455, 771 P2d 114, 46 St. Rep. 504 (1989).

Circumstances of Case and Discretion of Judge: A trial court is not guided by fixed rules in determining whether evidence is too remote in time to be relevant. The nature of the evidence and the circumstances of the case control. For this reason the determination is left in great part to the discretion of the judge and is subject to review only in the event of manifest abuse. Preston v. McDonnell, 203 M 64, 659 P2d 276, 40 St. Rep. 297 (1983), followed in Safeco Ins. Co. v. Ellinghouse, 223 M 239, 725 P2d 217, 43 St. Rep. 1689 (1986), In re Marriage of Cole, 224 M 207,

729 P2d 1276, 43 St. Rep. 2136 (1986), and in In re Marriage of Starks, 259 M 138, 855 P2d 527, 50 St. Rep. 719 (1993). See also Zugg v. Ramage, 239 M 292, 779 P2d 913, 46 St. Rep. 1693 (1989).

Town Meeting Minutes and Related Documents: The Troy Town Council had passed a resolution requesting a speed limit of 25 miles per hour on trains passing through town, due to the hazardous nature at the crossing where the accident in question occurred. The minutes of the Town Council, letters between the Town Council and the railroad, and intercorporate memoranda between railroad officials on the subject matter of the crossing should have been admitted into evidence. They were relevant to show notice of the claimed hazardous conditions and the intent of the railroad with respect to the same. These documents go to the issue of ordinary care to be exercised by the railroad and may go to the issue of punitive damages as an indication of wantonness or oppressiveness. The intercorporate memoranda are also relevant as possible admissions of a party opponent. Runkle v. Burlington N., 188 M 286, 613 P2d 982, 37 St. Rep. 995 (1980).

Credibility of Witnesses — Threat to Kill as Motive to Testify Falsely: The plaintiff allegedly assaulted and threatened to kill the witness if he did not testify favorably to plaintiff's case at trial. Testimony concerning the assault was admitted over the objection that it was irrelevant. The Supreme Court stated that although the evidence is irrelevant to the issue in dispute at trial it is admissible if it is otherwise relevant to the credibility of the witness. The fear of plaintiff carrying out the threat could provide a motive for the witness to give false testimony, and therefore evidence of the assault was relevant and properly admitted to show a motive to testify falsely. Cissel v. W. Plumbing & Heating, 188 M 149, 612 P2d 206, 37 St. Rep. 966 (1980). See also St. v. Flores, 1998 MT 328, 292 M 255, 974 P2d 124, 55 St. Rep. 1329 (1998).

Relevance of Evidence Showing Control Over Premises in Possessory Crime: Two license plates bearing the defendant's nickname and a letter to the defendant addressed to the premises at which prohibited drugs were discovered were properly admitted as evidence tending to show defendant's dominion and control over the residence. St. v. Meader, 184 M 32, 601 P2d 386, 36 St. Rep. 1747 (1979), followed in St. v. Caekaert, 1999 MT 147, 295 M 42, 983 P2d 332, 56 St. Rep. 583 (1999).

IRRELEVANT EVIDENCE

Irrelevant Evidence Unrelated to Employee's Ineligibility for Unemployment Benefits Based on Misconduct Properly Denied: Wiman, a dispatcher at the Fallon County jail, allowed an unauthorized person to enter a convicted felon's cell to give the prisoner a haircut. Wiman's deliberate action violated county security policy, and Wiman was suspended without pay for 60 days, during which time Wiman sought unemployment benefits, but the benefits were denied. Wiman contended that the hearings officer improperly denied her the right to introduce evidence that went to the heart of the misconduct issue, such as evidence regarding the inmate's mental state, whether Wiman or another employee had previously provided items to inmates, and whether Wiman's breach of security policy was adequately investigated. However, the question before the hearings officer was the denial of unemployment benefits during the time that Wiman was suspended for allowing an unauthorized person into the cell—conduct which Wiman admitted—so the evidence related to Wiman's misconduct issue was irrelevant and inadmissible. Wiman v. Mont. Dept. of Labor and Industry, 2004 MT 208, 322 M 332, 96 P3d 710 (2004).

Financial Documents, School Transcripts, and Personnel Records Irrelevant to Medical Damages Claim — Discovery Properly Disallowed: Plaintiff's child fell through the second story railing at the Montana State University-Bozeman library and suffered brain injuries. Plaintiff brought damage claims related to the child's injuries and claims related to plaintiff's own medical problems stemming from trauma associated with the fall. The state moved to compel production of plaintiff's financial documents, school transcript, and personnel records. The District Court denied the motion, finding that plaintiff's statement of damages was sufficient and that the requested documents were unlikely to lead to discovery of any relevant information. On appeal, the Supreme Court affirmed. Plaintiff did not claim lost earnings or lost earning capacity. Only plaintiff's mental and emotional conditions were at issue, and the documents were irrelevant to those legitimate issues, so absent a showing of prejudice to the state's case, denial of discovery was proper. Henricksen v. St., 2004 MT 20, 319 M 307, 84 P3d 38 (2004).

Error in Not Excluding Results of Independent Blood Alcohol Test Taken After DUI Arrestee Released From Custody: When Krause was picked up for DUI, he refused to take a Breathalyzer test and his license was revoked. After booking, Krause was released from custody, went to the hospital, and requested a blood alcohol test. The state subsequently obtained the results of the blood test by investigative subpoena, and the District Court allowed admission of the test results

at Krause's trial over his objection. Krause appealed on grounds that the test results should not have been admitted because they were not relevant to any issue in the case. Krause pointed out that the decision as to the validity of an arrest must be based on information that the officer had at the time and cannot be justified bolstered by information obtained after the fact. The state argued that the evidence of the blood test was introduced to substantiate the credibility of the arresting officer's observations and opinion, not to retrospectively validate the officer's belief that Krause had been driving under the influence. The Supreme Court agreed with Krause. The officer's character for truthfulness was not attacked, nor did evidence of Krause's blood test refer to the officer's character for truthfulness. Thus, there was no legitimate purpose for the introduction of the blood test evidence, and the District Court should have excluded it. St. v. Krause, 2002 MT 63, 309 M 174, 44 P3d 493 (2002).

Improper Admission of Rape Examination Evidence as Not Probative of Issue of Consent — Error Harmless in Light of Other Admissible Evidence on Consent: At defendant's trial for sexual assault, the District Court admitted the testimony of a nurse practitioner regarding the mechanics of completing a rape kit. Defendant maintained on appeal that the evidence was not probative of the ultimate issue of consent, and the Supreme Court agreed. The evidence was irrelevant and admitted erroneously. However, the jury was presented with enough cumulative admissible evidence on the issue of consent as to render introduction of the inadmissible rape examination evidence harmless. Qualitatively, and in comparison to the victim's testimony concerning the examination, there was no reasonable possibility that the erroneously admitted evidence contributed to defendant's conviction or resulted in prejudice. St. v. Detonancour, 2001 MT 213, 306 M 389, 34 P3d 487 (2001).

Evidence Improperly Admitted Regarding Incident With "Baby Think It Over" Doll — Parental Rights Terminated Based on Statutory Criteria: The Department received a referral regarding J.M.'s birth, indicating that the parents had intellectual disabilities. The parents were provided with a "Baby Think It Over" doll, which is an infant simulator used in parenting classes that records incidents of neglect and significant abuse if not tended to. The simulator also measures a parent's ability or willingness to respond to an infant's time demands. The simulator recorded an incident of abuse for which the parents had no explanation. As part of a subsequent proceeding to terminate parental rights, the District Court allowed the introduction of evidence regarding the incident. Parental rights were terminated based on the parents' noncompliance with their treatment plan. On appeal, the mother contended that the court erred in allowing evidence regarding the doll because a sufficient foundation was not provided for admission of the evidence. The Supreme Court agreed that the state failed to provide a sufficient foundation for admission of the evidence, such as whether the doll was functioning properly at the time that it was used and whether the results of its use were reliable. The doll's recordation of an incident of abuse did not establish a consequential fact relevant to the state's contention that the parents had not complied with their treatment plan and that the parents' condition was unlikely to change, so the evidence was inadmissible. However, the state did provide sufficient other evidence to support its contention. Thus, although evidence regarding the doll was erroneously allowed, the evidence would not have affected the outcome of the case, so the error was harmless. In re J.M., 2001 MT 51, 304 M 303, 21 P3d 618 (2001).

Evidence of Reliability of Breathalyzer Irrelevant When Test Refused: Because Robertson refused to take a DUI Breathalyzer test, he lacked grounds to later challenge whether the machine in question produced reliable results; nevertheless, his refusal to take the test was admissible under 61-8-404. Missoula v. Robertson, 2000 MT 52, 298 M 419, 998 P2d 144, 57 St. Rep. 250 (2000), following St. v. Jackson, 206 M 338, 672 P2d 255, 40 St. Rep. 1698 (1983).

Drug Evidence Irrelevant and Prejudicial — Introduction Reversible Error: Ingraham was convicted of negligent homicide, criminal endangerment, and criminal trespass to property in relation to an automobile accident. Ingraham filed a motion in limine to exclude evidence of drugs detected in his system and found in his car and to exclude evidence of warnings about drug and alcohol interactions. The motion in limine was denied, and the evidence was introduced. Whether the evidence was relevant and admissible depended on the state's ability to demonstrate a link between the evidence and the accident. The Supreme Court found that because uncontradicted evidence presented to the jury established that none of the drugs had any impairing effect whatsoever on Ingraham's ability to drive at the time of the accident, evidence of their presence was irrelevant and prejudicial and had virtually no probative value. The same reasoning was applied to the warnings. Admission of the evidence constituted reversible prejudicial error. Ingraham's motion in limine properly preserved his objection to the introduction of the evidence for appeal. St. v. Ingraham, 1998 MT 156, 290 M 18, 966 P2d 103, 55 St. Rep. 611 (1998). See also State ex rel. Mazurek v. District Court, 2000 MT 266, 302 M 39, 22

P3d 166, 57 St. Rep. 1111 (2000), in which the use of Ingraham's testimony from the first trial was not precluded, constitutionally or statutorily, from use by the state in its case in chief at the retrial.

Irrelevant Testimony Improperly Admitted but Not Prejudicial — Conviction Affirmed: The trial court improperly admitted witness testimony that was unrelated to the crime and clearly irrelevant. However, after evaluating the testimony under the totality of the circumstances in the context of the trial record, the Supreme Court concluded that admitting the testimony did not constitute undue prejudicial error and affirmed the conviction. St. v. Lancione, 1998 MT 84, 288 M 228, 956 P2d 1358, 55 St. Rep. 344 (1998).

FELA Action Against Amtrak — Negligent Failure to Provide Personnel for Safe Baggage Handling Procedure — Evidence of Baggage Volume at Other Stations Excluded: McGregor, a ticket agent for Amtrak, sued Amtrak for damages under the Federal Employers' Liability Act (FELA) for injuries that she sustained while lifting heavy baggage off a train car onto a baggage cart at the Whitefish Amtrak station. McGregor claimed that Amtrak was negligent in failing to provide enough personnel for safe handling of baggage and sought to introduce evidence that the baggage volume at Whitefish was higher than at either Spokane or Seattle. The evidence was excluded by the District Court based upon testimony by an Amtrak employee that baggage volume should not be compared among the three Amtrak stations because of differences in the type of stations and type of baggage handled. McGregor also admitted on cross-examination that there was a sufficient crew at Whitefish to perform the baggage handling function. The Supreme Court upheld the exclusion of evidence, finding that there was no abuse of discretion in the District Court's ruling. McGregor v. Nat'l RR Passenger Corp., 284 M 178, 943 P2d 1269, 54 St. Rep. 834 (1997).

FELA Action Against Amtrak — No Negligence Found — Evidence of Another Lawsuit Held Harmless Error: McGregor, a ticket agent for Amtrak, sued Amtrak under the Federal Employers' Liability Act (FELA) for damages that she sustained while lifting heavy baggage off a train car onto a baggage cart at the Whitefish Amtrak station. McGregor claimed that Amtrak was negligent in failing to adopt safe baggage handling procedures and in failing to provide enough personnel for safe handling of baggage. During cross-examination and over the objection of her counsel, McGregor admitted that she had another lawsuit pending against Amtrak. Her counsel moved for a mistrial on the grounds that the information concerning the other lawsuit might adversely affect the jury's computation of McGregor's damages. The Supreme Court held that the District Court's curative instructions for the jury to disregard evidence of another lawsuit were sufficient and that if there was any error, it was harmless error because the jury found that there was no negligence by Amtrak. McGregor v. Nat'l RR Passenger Corp., 284 M 178, 943 P2d 1269, 54 St. Rep. 834 (1997).

Evidence Tending to Support Discharge for Reasons Other Than Stated in Discharge Letter Held Irrelevant: Galbreath injured his knee, neck, and head while working for Golden Sunlight Mines, Inc. (GSM), and took a 3-month medical leave of absence. GSM later accepted liability for Galbreath's injuries. Upon Galbreath's attempt to return to work, GSM terminated his employment, claiming that Galbreath had failed to provide documentation of the reason for his absence. The District Court admitted evidence that Galbreath was terminated for reasons other than stated in the discharge letter. Citing Swanson v. St. John's Lutheran Hosp., 182 M 414, 597 P2d 702 (1979), the Supreme Court held that in a wrongful discharge action, the only reason for discharge that the District Court could consider was the reason stated in the discharge letter. The Supreme Court held that other reasons were irrelevant and that evidence supporting the other reasons should have been excluded. Galbreath v. Golden Sunlight Mines, Inc., 270 M 19, 890 P2d 382, 52 St. Rep. 58 (1995), followed in McGillen v. Plum Creek Timber Co., 1998 MT 193, 290 M 264, 964 P2d 18, 55 St. Rep. 808 (1998), and Bean v. Bd. of Labor Appeals, 1998 MT 222, 290 M 496, 965 P2d 256, 55 St. Rep. 927 (1998).

Evidence of When Life Begins and Biblical or Moral Justification Inadmissible as Criminal Defense: As a defense, defendants who blocked access to an abortion clinic sought to introduce evidence of when life begins, as well as biblical and moral justification for their actions. Evidence of when life begins was properly excluded by the trial court absent any citation to a defense to which the evidence might be relevant. Further, defendants' individual religious and moral beliefs were neither included in nor relevant to any allowable statutory defense. Personal beliefs do not provide legal justification for or immunize a person from the consequences of acts that violate state criminal laws. Missoula v. Asbury, 265 M 14, 873 P2d 936, 51 St. Rep. 383 (1994), distinguishing Strzelczyk v. Jett, 264 M 153, 870 P2d 730, 51 St. Rep. 206 (1994).

Knowledge of Statutory Inference of Intoxication Irrelevant: Dixon was charged with rape of H.D., which occurred while H.D. was intoxicated. On cross-examination, Dixon's counsel asked

H.D. whether she knew that the legal limit of intoxication in Montana is .10, to which question the prosecution objected on grounds of relevancy. The District Court sustained the objection, holding that the evidence of intoxication was relevant, but H.D.'s knowledge of the legal limit was irrelevant. The Supreme Court held that H.D.'s knowledge of her condition was relevant as impeachment evidence, but since there was no evidence that H.D. was in control of a motor vehicle, her knowledge of the .10 legal limit was irrelevant. St. v. Dixon, 264 M 38, 869 P2d 779, 51 St. Rep. 135 (1994).

Denial of Defendant's Access to Rape Victim's Counselor and Counselor's Records Upheld: Muir was convicted of sexual intercourse without consent with a victim under 16 years of age. Prior to and during trial, Muir requested access to the victim's psychological counselor and to the counselor's records because the counselor was listed as a potential witness. However, after an in camera review of the records by the District Court, Muir was given access only to an investigator's note of an interview with the victim's counselor. The Supreme Court held that Muir was properly denied access to the counselor and the counselor's records because the victim's conversations with the counselor are privileged and the District Court found no exculpatory evidence in the records. Citing St. v. Reynolds, 243 M 1, 792 P2d 1111 (1990), the Supreme Court also reasoned that a defendant's right to pretrial discovery is not equivalent to a defendant's constitutional right of confrontation and that Muir had shown no correlation between the victim's emotional problems and her consent to sexual intercourse. St. v. Muir, 263 M 211, 867 P2d 1094, 51 St. Rep. 19 (1994).

Photographs of Site of Alleged Sexual Assault Properly Excluded: Little was convicted of sexual intercourse without consent and sexual assault on his two minor stepdaughters. During trial, he attempted to introduce photographs of a cherry orchard to show that a sexual assault upon his older stepdaughter could not have occurred at the place and in the manner alleged by the older stepdaughter. The District Court excluded two of the photos because they were closeup pictures of cherry trees and did not, as Little's counsel acknowledged, disprove the possibility of the acts occurring elsewhere in the orchard. The Supreme Court held that because the District Court has wide latitude over the admission of evidence, the Supreme Court could not conclude that the evidentiary ruling of the District Court constituted an abuse of discretion. St. v. Little, 260 M 460, 861 P2d 154, 50 St. Rep. 1124 (1993).

Common Law Defense — Choice of Evils Not Included in Compulsion: The trial court granted the prosecution's motion to exclude Lewis's and Brisendine's argument that they were not guilty of trespass under the compulsion statute. The Supreme Court ruled that the compulsion statute does include the common law defense of "choice of evils" and that the common law elements of the defense are not recognized in Montana. Helena v. Lewis, 260 M 421, 860 P2d 698, 50 St. Rep. 1103 (1993).

Defense of Compulsion Properly Excluded in Abortion Clinic Trespass Case: The trial court granted the prosecution's motion to exclude Lewis's and Brisendine's argument that they were not guilty of trespass under the compulsion statute. The Supreme Court ruled that the compulsion statute does include imminent threats of harm to third persons. The defendants' argument concerning compulsion was properly excluded as inapplicable as a matter of law. Helena v. Lewis, 260 M 421, 860 P2d 698, 50 St. Rep. 1103 (1993).

In Camera Inspection of Private Employment Records — Court Discretion in Suppressing Discovery Proper: The state attempted to compel discovery of defendant's personnel files from the Helena Catholic Diocese. The State sought information regarding reports of similar misconduct, disciplinary actions, transfer records, and witness names to use in rebutting and cross-examining defendant's character witnesses. After initial refusal to surrender the records, the parties agreed to an in camera review of the records by the presiding judge. The judge ruled that the information was not discoverable because it contained personal and private information. The in camera review and the subsequent prohibition on discovery of material that was not probative were held to be within the discretionary power of the judge in controlling discovery. Absent an abuse of that discretion, denial of access to the records was affirmed. St. v. Burns, 253 M 37, 830 P2d 1318, 49 St. Rep. 353 (1992).

Evidence Irrelevant and Inadmissible Regarding Drug-Related Activities Beyond Scope of Offense: Facts relevant to the charge of criminal sale (now criminal distribution) of dangerous drugs were whether defendant was in a certain place at a certain time and whether he sold drugs at that time and place. Evidence of matters not pertaining to those facts was irrelevant and inadmissible. The District Court erred in admitting testimony regarding defendant's associates and their drug-related activities, the presence of juveniles at an unrelated drug sale, and places at which defendant may have spent time on occasion, such as bars known to be drug hangouts. A

defendant on trial for one offense should be convicted, if at all, by evidence that shows he is guilty of that offense alone. St. v. Webb, 252 M 248, 828 P2d 1351, 49 St. Rep. 236 (1992).

Homicide Victim's Medical Records Irrelevant: Homicide victim's medical records were not relevant to prove her violent and unstable personality because the medical treatment was remote in time and not relevant to the alleged defense. St. v. Mix, 239 M 351, 781 P2d 751, 46 St. Rep. 1740 (1989).

Evidence of Secondary Gain Irrelevant — New Trial Warranted: A physician's testimony on motives of secondary gain, which he defined as that financial, emotional, or other type of benefit received by virtue of an injury that serves to encourage continuation of the injury, was so irrelevant and prejudicial to plaintiff's injury case as to amount to abuse of discretion, warranting a new trial. Dahlin v. Holmquist, 235 M 17, 766 P2d 239, 45 St. Rep. 2127 (1988).

Nature of Crime Scene Irrelevant to Homicide Charge: Defendant contended District Court error in disallowing evidence regarding the nature of the apartment complex where the crime occurred, asserting that the dangerous surroundings magnified his fear. It was within the court's discretion to hold the evidence irrelevant as to whether deliberate homicide was committed and as to defendant's claim of self-defense. St. v. Crazy Boy, 232 M 398, 757 P2d 341, 45 St. Rep. 1145 (1988), followed in St. v. Walters, 247 M 84, 806 P2d 497, 48 St. Rep. 102 (1991).

Evidence Unrelated to Claim as Prejudicial — Mistrial Motion Improperly Denied: Plaintiff's testimony in a trial to recover damages for a partial crop loss included emotional testimony about the loss of his wife, who died during preparation of the case for trial. There was no claim that her death was caused in any way by defendants. It was improper for the trial court to deny a defense motion for a mistrial based on relevance and prejudice. Gurnsey v. Conklin Co., Inc., 230 M 42, 751 P2d 151, 45 St. Rep. 1 (1988).

Letters Introduced in Trial on First Claim but Relating to Second — Admission Improper: The trial court severed, for separate trial, a bad faith claim from a fraud or negligence claim. Letters written subsequent to the incident that was the basis for the fraud claim were admitted in the first trial. The Supreme Court found the letters did not directly relate to a fraud theory or support a claim for emotional distress. On retrial, the letters were not to be admitted. Gurnsey v. Conklin Co., Inc., 230 M 42, 751 P2d 151, 45 St. Rep. 1 (1988).

Denial of Evidence Relating to Prior Fires — No Error: The Supreme Court found no error in the denial by the District Court Judge of evidence or testimony relating to prior fires from which the insured may have received insurance proceeds. The court held that the proffered evidence did not naturally and logically tend to establish a fact in issue and did not meet the test of relevancy, in that it did not make probable that the insured had committed arson either from the viewpoint of motive, intent, or the deed itself. Britton v. Farmers Ins. Group, 221 M 67, 721 P2d 303, 43 St. Rep. 641 (1986), followed, as to the application of Rule 404, M.R.Ev., in St. v. Enright, 1998 MT 322, 292 M 204, 974 P2d 1118, 55 St. Rep. 1308 (1998). See also Phil-Co Feeds, Inc. v. First Nat'l Bank in Havre, 238 M 414, 777 P2d 1306, 46 St. Rep. 1380 (1989).

Prior Civil Action Against Victim — Exclusion: In the trial of a defendant for felony assault (now assault with a weapon) against a woman and her 14-month-old daughter, the trial court excluded testimony regarding a previous civil child protective action against the mother on grounds that the subject matter of the previous action was not relevant and its introduction would only serve to confuse the issues. The Supreme Court held that the District Court Judge did not abuse his discretion in determining that the offered evidence was irrelevant and that there was sufficient evidence to support the jury verdict despite the victim's denial of her previous statements about the assault. St. v. Oman, 218 M 260, 707 P2d 1117, 42 St. Rep. 1565 (1985).

Evidence of Concurrent and Subsequent Negligence Irrelevant: In a medical malpractice action, evidence of the surgical nurses' concurrent negligence and the radiologist's subsequent negligence was irrelevant on the issue of the surgeon's negligence. The fact that the active and simultaneous negligent act of the nurses was also a substantial factor in bringing about harm to the patient does not protect the surgeon from liability. As to negligence of the radiologist, the law requires that at times an initial tortfeasor, such as the surgeon, must answer for the subsequent negligence of a subsequent tortfeasor. Rudeck v. Wright, 218 M 41, 709 P2d 621, 42 St. Rep. 1380 (1985).

Prior Guilty Plea — Irrelevant to Misconduct or Punitive Damages: Defendant and plaintiff, who was 16, were drinking and driving at a high rate of speed in Anaconda. Defendant was driving plaintiff's car when he lost control and hit a house. Plaintiff was severely injured. At a trial for damages based on negligence, plaintiff's counsel sought to introduce evidence of defendant's having pleaded guilty to two prior incidents of supplying intoxicating beverages to minors. Defendant's attorney moved for a motion in limine, which was denied. The jury awarded compensatory and punitive damages. On appeal the Supreme Court reversed, holding that the

evidence of appellant's prior guilty pleas did not have the tendency to make the existence of his alleged willful and wanton misconduct on the night in question more or less probable. The evidence was irrelevant to establishing misconduct on the night in question or for establishing a basis for punitive damages. The fact that defendant had purchased alcohol for minors did not go toward establishing his operation of the vehicle in a reckless fashion, the act complained of. Therefore the evidence was also irrelevant toward showing a basis for punitive damages. Derenberger v. Lutey, 207 M 1, 674 P2d 485, 40 St. Rep. 902 (1983), followed in Maurer v. Clausen Distrib. Co., 275 M 229, 912 P2d 195, 53 St. Rep. 78 (1996).

Causal Relationship for Relevance — Watergate and Split Tire Rim: In a tort action relating to the explosive failure of a Goodyear K-type split tire rim, it was error to admit material relating to Watergate in an attempt to receive exemplary damages. The Supreme Court held that the Watergate material was irrelevant under this rule because the record showed only a speculative connection between the incident complained of and allegations by the plaintiff that political activities by defendant Goodyear Tire and Rubber Company during Watergate included an illegal political contribution by Goodyear in an attempt to avoid the recall of the K-type rims by the Nixon administration. Kuiper v. Goodyear Tire & Rubber Co., 207 M 37, 673 P2d 1208, 40 St. Rep. 1861 (1983).

Prejudice Stemming From Evidence Held Inadmissible as Irrelevant: In a tort action relating to the explosive failure of a Goodyear K-type split tire rim where the Supreme Court held inadmissible as irrelevant testimony regarding political bribery during Watergate by the defendant Goodyear Tire and Rubber Company, the failure of the trial court to exclude such evidence was prejudicial to the defendant and permitted the jury to indulge in improper speculation and guesswork. Kuiper v. Goodyear Tire & Rubber Co., 207 M 37, 673 P2d 1208, 40 St. Rep. 1861 (1983).

Failure to Admit Warranty Into Evidence — No Relevancy to Credibility of Contrary Testimony: Where the plaintiff brought an action for breach of warranty against the defendant and the defendant sought to introduce the text of a warranty whose provisions were contrary to the testimony of one of the plaintiff's employees, the District Court did not err in refusing to admit the warranty into evidence. The warranty was in keeping with evidence obtained during discovery, but that evidence was not used to impeach. While the discovery evidence might have had impeachment value, the text of the warranty alone would have been insufficient for impeachment, was therefore irrelevant, and was properly excluded. Iowa Mfg. Co. v. Joy Mfg. Co., 206 M 26, 669 P2d 1057, 40 St. Rep. 1479 (1983).

Motion In Limine — Irrelevant Evidence on Statute of Limitations and Release Properly Excluded: Where the plaintiff brought a third-party action against the defendant for breach of a warranty of performance of certain air pollution control equipment, the District Court properly granted the plaintiff's motion in limine to exclude evidence of the plaintiff's release from liability signed by the plaintiff in the original action and evidence that the date of delivery of the equipment was the starting time of the running of the Statute of Limitations. While the defendant argues that this evidence shows a lack of any real liability to the plaintiff in the original action and therefore a lack of liability of the defendant, the evidence shows that the release had nothing to do with the issue of the warranty and that the evidence concerning the date of delivery was excluded as irrelevant because the trial court properly found that a cause of action for breach of warranty of performance began when the breach was discovered and not when the equipment was delivered. Iowa Mfg. Co. v. Joy Mfg. Co., 206 M 26, 669 P2d 1057, 40 St. Rep. 1479 (1983).

Health Permit Requirements — Relevance of Prior Licensing: An action was brought by purchasers to rescind contract for bakery. After Department of Health notified purchasers of deficiencies needing correction, they closed the bakery and gave the keys to seller. The seller had stated in the contract that to his knowledge he had complied with government regulations. Seller fixed the deficiencies, received a health license, and opened the bakery, which he had operated for almost 17 years prior to the sale to purchasers. It was not error for the judge to refuse admission of conditional health licenses granted seller in 1968 and 1969 on the ground that they were so remote in time as to have little if any probative value and were therefore not relevant to issue whether seller knew at time of sale that the bakery would not meet health standards. Preston v. McDonnell, 203 M 64, 659 P2d 276, 40 St. Rep. 297 (1983), followed in Waller v. Hayden, 268 M 204, 885 P2d 1305, 51 St. Rep. 1291 (1994).

Relevance of Testimony on Defendant's Past Sexual Relationships: In a prosecution for sexual intercourse without consent, it was improper to ask a witness who had had sexual relations with the defendant whether other women became upset with defendant because he failed to carry on relationships with them. St. v. Dickens, 198 M 482, 647 P2d 338, 39 St. Rep. 1137 (1982).

Admission of Evidence of Surviving Spouse's Remarriage as Prejudicial Error in Wrongful Death Action: In an action for the wrongful death of the plaintiff's wife, the court granted the plaintiff's motion to prohibit the defendant's counsel from informing the jury of the plaintiff's subsequent remarriage. Under these circumstances it was prejudicial and reversible error for the court to allow the defendant's lawyer to ask the jury panel on voir dire if any of the panel knew the plaintiff's present wife. Evidence of a surviving spouse's remarriage is irrelevant, and the introduction of the evidence cannot be cured by an admonition by the court. Workman v. McIntyre Constr. Co., 190 M 5, 617 P2d 1281, 37 St. Rep. 1637 (1980).

Wrongful Death Action — Exclusion of Construction Contract Terms Upheld: In a wrongful death action in which the decedent's surviving spouse brought suit against the State and its contractor for negligently failing to warn the decedent of an abrupt edge at the shoulder of a highway construction project, the court properly excluded certain provisions in the contract between the state and the contractor regarding certain traffic control devices mentioned in a payment schedule. Because the question in the case was whether certain devices should have been used, the contract provisions allowing their use were of no probative value and were irrelevant. Workman v. McIntyre Constr. Co., 190 M 5, 617 P2d 1281, 37 St. Rep. 1637 (1980).

Right to Compulsory Process — Irrelevant Testimony: Defendant was not denied his right to compulsory process because of the exclusion of certain testimony when the testimony excluded was not relevant. St. v. Bretz, 185 M 253, 605 P2d 974, 36 St. Rep. 1037 (1979).

OTHER CRIMES OR ACTS

Objectionable Testimony Elicited by Defendant's Own Actions — Right to Allege Error on Appeal Waived: Smith was charged with stealing his mother's credit card and using the card to withdraw money from her bank account and charge items for his personal use. Pretrial, Smith moved in limine to preclude witnesses at trial from testifying regarding Smith's prior criminal convictions, and the motion was granted. When his mother testified, Smith's counsel asked what efforts she made to locate Smith after discovering that her credit card was gone, and the mother responded that she had checked with Smith's parole officer to see if the officer knew where Smith was. Smith immediately moved for a mistrial, asserting that the comment violated the motion in limine, but the motion was denied. On appeal, the Supreme Court affirmed. Because the objectionable testimony was elicited by Smith's own actions, he waived the right to allege error on appeal because he actively participated in creating the error. St. v. Smith, 2005 MT 18, 325 M 374, 106 P3d 553 (2005), following St. v. Gafford, 172 M 380, 563 P2d 1129 (1977).

Failure by State to Articulate Permissible Purpose for Introduction of Evidence of Other Crimes — Lack of Proof of Defendant's Knowledge of Fact of Consequence: During pretrial proceedings for Dobson's trial for sexual intercourse without consent, the state indicated its intent to introduce evidence that Dobson had been previously charged with sexual intercourse without consent with a minor. The purported purpose was for proof of knowledge or the absence of mistake or accident, establishing that Dobson knew that someone under 16 years of age could not legally consent to sexual intercourse. Instead of objecting, defense counsel offered to stipulate that Dobson did have knowledge of that fact. The state objected that Dobson should not be able to stipulate away its case, and urged that the jury instructions contain details of the prior charge. The trial court declined the specific instructions offered by both Dobson and the state and fashioned and gave its own instruction, advising the jury that Dobson was previously charged with sexual intercourse without consent with a minor and thus had knowledge of the law, but instructing that the evidence was not to be construed by the jury as evidence of Dobson's character, but only as evidence of Dobson's prior knowledge that such conduct was criminal. On appeal, Dobson contended that the instruction was erroneous. The Supreme Court agreed that the trial court abused its discretion in giving the instruction because it did not meet the third criteria of the modified Just rule (see St. v. Matt, 249 M 136, 814 P2d 52 (1991)). Although it appeared at first blush that the state asserted permissible purposes of knowledge or the absence of mistake or accident for the admission of other crimes evidence, merely reciting an allowable purpose is not sufficient if the evidence does not further that purpose or if that purpose is not an issue in dispute (see St. v. Weldy, 273 M 68, 902 P2d 1 (1995)). Rather, as set out in U.S. v. Mehrmanesh, 689 F2d 822 (9th Cir. 1982), the state must articulate precisely the evidential hypothesis by which a fact of consequence may be inferred from the other acts evidence, which in this case, the state did not do. Dobson's knowledge of the law that it is a felony offense to have sexual intercourse with someone under 16 years of age was not a fact of consequence to the action. Thus, admission of the evidence via the jury instruction was reversible error, and the case was remanded for a new trial. St. v. Dobson, 2001 MT 167, 306 M 145, 30 P3d 1077 (2001). See also St. v. Anderson, 275 M 344, 912 P2d 801 (1996).

Introduction of Evidence of Acts Not Referred to in Pretrial Order — Not Grounds for New Trial: As a result of a dispute, the relationship between neighbors Lopez, Monroe, and Josephson deteriorated until assault charges were filed against Josephson. The operative contentions in the pretrial order were that Josephson assaulted Lopez by pointing a firearm at Lopez's face and assaulted Monroe verbally and fired a weapon toward Monroe's property. The District Court found it impossible to determine from the allegations the dates, times, and places that the alleged assaults took place, but the court concluded that the pretrial order nevertheless placed Josephson on notice that he was being accused of assault on multiple occasions over an unspecified period of time. Josephson moved for a new trial on grounds that plaintiffs were improperly allowed to introduce evidence of acts not referred to in the pretrial order, evidence of bad character, and evidence of other crimes, wrongs, or acts. However, because Josephson waited until the day of trial to clarify which assaults formed the basis of the case against him, rather than using available pretrial motions and rules of discovery, the District Court was not found to have abused its discretion in giving plaintiffs latitude in their proof of the various assaults at trial, including allowing evidence of bad character to impeach Josephson's testimony. The District Court did properly preclude evidence of assaults by Josephson on nonparty persons. Lopez v. Josephson, 2001 MT 133, 305 M 446, 30 P3d 326 (2001).

Evidence of Assault Victim's Prior Conviction Properly Excluded: Medrano pulled Jenness from a vehicle and kicked and beat him, rupturing Jenness's spleen. Medrano claimed self-defense based on an unsubstantiated belief that Jenness had a weapon and sought to introduce evidence that Jenness had been previously convicted of misdemeanor assault after attacking a couple in another vehicle. The claim of self-defense was not based on any awareness by Medrano of Jenness's violent nature or on Medrano's knowledge of the prior conviction at the time of the confrontation with Jenness. The District Court properly excluded evidence of the prior incident as irrelevant to the claim of self-defense. St. v. Medrano, 285 M 69, 945 P2d 937, 54 St. Rep. 1048 (1997).

Law Review Articles

Montana Supreme Court Survey—Evidence, Jones, 43 Mont. L. Rev. 301 (1982).

State v. Brecht: Evolution or Offshoot of the Fourth Amendment Exclusionary Rule, Johnson, 34 Mont. L. Rev. 187 (1973).

Collateral References

Evidence *key* 99, et seq.

31A C.J.S. Evidence §158, et seq.

5 Am. Jur. 2d Appellate Review §752; 29 Am. Jur. 2d Evidence §301.

Admissibility of computer-generated animation. 111 ALR 5th 529.

Admissibility, in homicide prosecution, of evidence as to tests made to ascertain distance from gun to victim when gun was fired. 11 ALR 5th 497.

Permissibility of in-court demonstration to show effect of injury in action for bodily injury. 82 ALR 4th 980.

Admissibility, in prosecution for sex-related offense, of results of tests on semen or seminal fluids. 75 ALR 4th 897.

Thermographic tests: admissibility of test results in personal injury suits. 56 ALR 4th 1105.

Admissibility of voice stress evaluation test results or of statements made during test. 47 ALR 4th 1202.

Admissibility and weight of blood-grouping tests in disputed paternity cases. 43 ALR 4th 579.

Admissibility in criminal case of evidence that accused refused to take test of intoxication. 26 ALR 4th 1112.

Admissibility of evidence as to other offense as affected by defendant's acquittal of that offense. 25 ALR 4th 934.

Modern status of rules as to admissibility of evidence of prior accidents or injuries at same place. 21 ALR 4th 472.

Admissibility in criminal case of blood-alcohol test where blood was taken despite defendant's objection or refusal to submit to test. 14 ALR 4th 690.

Evidence of automobile passenger's blood-alcohol level as admissible in support of defense that passenger was contributorily negligent or assumed risk of automobile accident. 5 ALR 4th 1194.

Admissibility and effect, on issue of party's credibility or merits of his case, of evidence of attempts to intimidate or influence witness in civil action. 4 ALR 4th 829.

Search and seizure: admissibility of evidence discovered in warrantless search of rental property authorized by lessor of such property—state cases. 2 ALR 4th 1173, superseded by 61 ALR 5th 1.

Admissibility, weight, and sufficiency of blood-grouping tests in criminal cases. 2 ALR 4th 500.

Constitutionality of "rape shield" statute restricting use of evidence of victim's sexual experiences. 1 ALR 4th 283.

Admissibility in evidence of sound recording as affected by hearsay and best evidence rules. 58 ALR 3d 598.

Admissibility in evidence, on issue of negligence, of codes or standards of safety issued or sponsored by governmental body or by voluntary association. 58 ALR 3d 148.

Admissibility of lie detector test taken upon stipulation that the result will be admissible in evidence. 53 ALR 3d 1005.

Admissibility of evidence of neutron activation analysis. 50 ALR 3d 117.

Admissibility, in criminal case, of evidence obtained by search conducted by school official or teacher. 49 ALR 3d 978, superseded by 31 ALR 5th 229.

Admissibility of evidence that injured plaintiff received benefits from a collateral source, on issue of malingering or motivation to extend period of disability. 47 ALR 3d 234.

Admissibility in evidence of composite picture or sketch produced by police to identify offender. 42 ALR 3d 1217, superseded by 23 ALR 5th 672.

Products liability: admissibility of evidence of other accidents to prove hazardous nature of product. 42 ALR 3d 780.

Admissibility, in civil action, of disposal of property as bearing on question of liability. 38 ALR 3d 996.

Admissibility, in criminal case, of statistical or mathematical evidence offered for purpose of showing probabilities. 36 ALR 3d 1194.

Admissibility, in criminal case, of evidence obtained by search by private individual. 36 ALR 3d 553.

Admissibility of evidence of accused's reenactment of crime. 100 ALR 2d 1257.

Admissibility, in wrongful death action for pecuniary loss suffered by next of kin, etc., of evidence as to decedent's personal qualities with respect to sobriety or morality. 99 ALR 2d 972.

Propriety and prejudicial effect of comment or evidence as to accused's willingness to take lie detector test. 95 ALR 2d 819.

Admissibility in evidence of sample or samples of article or substance of which the quality, condition, or the like is involved in litigation. 95 ALR 2d 681.

What evidence is admissible to identify plaintiff as person defamed. 95 ALR 2d 227.

Evidence of acquisition or possession of money, source of which is not traced, as admissible against defendant in criminal case. 91 ALR 2d 1046.

Admissibility in civil action, apart from res gestae, of lay testimony as to another's expressions of pain. 90 ALR 2d 1071.

Admissibility, on issue of testamentary capacity, of previously executed wills. 89 ALR 2d 177.

Admissibility, in prosecution for assault or similar offense involving physical violence, of extent or effect of victim's injuries. 87 ALR 2d 926.

Admissibility in evidence of braces, crutches, or other prosthetic or orthopedic devices used by injured party. 83 ALR 2d 1271.

Propriety, in trial of criminal case, of use of skeleton or model of human body or part. 83 ALR 2d 1097.

Admissibility of evidence of plaintiff's or decedent's drawings from partnership or other business as evidence of earning capacity, in action for personal injury or death. 82 ALR 2d 679.

Admissibility, as against objection of remoteness, of evidence as to past earnings, upon issue as to amount of damages in an action for personal injury or death. 81 ALR 2d 733.

Admissibility in evidence of receipt of third person. 80 ALR 2d 915.

Admissibility, in wrongful death action brought for benefit of minor children, of evidence of decedent's desertion, nonsupport, abandonment, or the like, of said children. 79 ALR 2d 819.

Admissibility of testimony of actuary or mathematician as to present value of loss or impairment of injured person's general earning capacity. 79 ALR 2d 275.

Admissibility in wrongful death action of testimony of actuary or mathematician for purpose of establishing present worth of pecuniary loss. 79 ALR 2d 259.

Admissibility of experimental evidence, skidding tests, or the like, relating to speed or control of motor vehicle. 78 ALR 2d 218.

Admissibility of experimental evidence to show visibility or line of vision. 78 ALR 2d 152.

Admissibility and weight of surveys or polls of public or consumers' opinion, recognition, preference, or the like. 76 ALR 2d 619, §§35, 36 superseded by 98 ALR Fed. 20.

Admissibility of experimental evidence as to explosion. 76 ALR 2d 402.

Admissibility of experimental evidence to determine chemical or physical qualities or character of material or substance. 76 ALR 2d 354.

Admissibility of photograph of corpse in prosecution for homicide or civil action for causing death. 73 ALR 2d 769.

Propriety, in trial of civil action, of use of model of object or instrumentality, or of site or premises, involved in the accident or incident. 69 ALR 2d 424.

Admissibility, in prosecution for maintaining liquor nuisance, of evidence of general reputation of premises. 68 ALR 2d 1300.

Admissibility, in homicide prosecution, of deceased's clothing worn at time of killing. 68 ALR 2d 903.

Admissibility and propriety, in homicide prosecution, of evidence as to deceased's spouse and children. 67 ALR 2d 731.

Admissibility of evidence of value or extent of decedent's estate in action against estate for reasonable value of services furnished decedent. 65 ALR 2d 945.

Admissibility of evidence as to manner or case of firing gun, in civil action involving issue of accidental death or suicide. 63 ALR 2d 1150.

Admissibility, in nonstatutory rape prosecution, of evidence of pregnancy of prosecutrix. 62 ALR 2d 1083.

Admissibility and propriety, in rape prosecution, of evidence that accused is married, has children, and the like. 62 ALR 2d 1067.

Admissibility of evidence of precautions taken, or safety measures used, on earlier occasions at place of accident or injury. 59 ALR 2d 1379.

Propriety, in trial of civil action, of use of skeleton or model of human body or part. 58 ALR 2d 689.

Admissibility and permissible use, in malicious prosecution action, of documentary evidence showing that prior criminal proceedings against instant plaintiff were terminated in his favor. 57 ALR 2d 1086.

Admissibility and weight of party's admissions as to tort occurring during his absence. 54 ALR 2d 1069.

Admissibility of evidence as to experiments or tests in civil action for death, injury, or property damage against electric power company or the like. 54 ALR 2d 922.

Admissibility in evidence of colored photographs. 53 ALR 2d 1102.

Admissibility of testimony of transferee as to his knowledge, purpose, intention, or good faith on issue whether conveyance was in fraud of transferor's creditors. 52 ALR 2d 418.

Admissibility of mortality tables in personal injury action as dependent upon showing of permanency of injury. 50 ALR 2d 419.

Admissibility in evidence of rules of defendant in action for negligence. 50 ALR 2d 16.

Blood grouping tests. 46 ALR 2d 1000, §§10, 13 through 16 superseded by 43 ALR 4th 579.

Admissibility, in railroad crossing accident case, of evidence of other functional failures of railroad crossing devices and appliances of the same kind at other times. 46 ALR 2d 935.

Admissibility of evidence showing plaintiff's antecedent intemperate habits, in personal injury motor vehicle accident action. 46 ALR 2d 103.

Admissibility, in action involving motor vehicle accident, of evidence as to manner in which participant was driving before reaching scene of accident. 46 ALR 2d 9.

Admissibility, in damage action arising out of explosion or blasting, of evidence of damage to other property in vicinity. 45 ALR 2d 1121.

Admissibility of evidence of absence of other accidents or injuries from a customary practice or method asserted to be negligent. 42 ALR 2d 1055.

Admissibility of extrinsic evidence to explain or contradict bank deposit slips, deposit entries in passbooks, certificates of deposit, or similar instruments. 42 ALR 2d 600.

Valuation for taxation purposes as admissible to show value for other purposes. 39 ALR 2d 209.

Admissibility of evidence of absence of other accidents or injuries at place where injury or damage occurred. 31 ALR 2d 190, superseded by 10 ALR 5th 371.

Lack of proper automobile registration or operator's license as evidence of operator's negligence. 29 ALR 2d 963.

Admissibility in homicide prosecution for purpose of showing motive of evidence as to insurance policies on life of deceased naming accused as beneficiary. 28 ALR 2d 857.

Admissibility of evidence of unperformed compromise agreement. 26 ALR 2d 858.

Physiological or psychological truth and deception tests. 23 ALR 2d 1306, §2.5 superseded by 47 ALR 4th 1202, §6 superseded by 53 ALR 3d 1005.

Admissibility in evidence of unsigned confession. 23 ALR 2d 919.

Admissibility of evidence as to tire tracks or marks on or near highway. 23 ALR 2d 112.

Evidence: use and admissibility of maps, plats, and other drawings to illustrate or express testimony. 9 ALR 2d 1044.

Admissibility, in negligence action against bank of depositor, of evidence as to custom of banks in locality in handling and dealing with checks and other items involved. 8 ALR 2d 446.

1 Wigmore §§9, 10.

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

Commission Comments

This rule is identical to Federal and Uniform Rules (1974) Rule 403. The Commission intends, by adoption of this rule, to make no change in Montana law in this area. Terms used by this rule which may be new to Montana law are to be construed as synonymous with current practice; for example, "unfair prejudice" is synonymous with the usual use of the term prejudice.

A key element of this rule is the discretion of the judge in deciding whether otherwise relevant evidence is to be excluded because of the factors listed in the rule. Montana law is consistent with this approach: Section 93-401-25, R.C.M. 1947 [superseded], allows "discretion of the court to permit inquiry into collateral facts..."; Section 93-1201-1, R.C.M. 1947 [superseded], allows the admission of demonstrative or real evidence to be "regulated by the sound discretion of the court". Section 93-1901-3, R.C.M. 1947 [superseded], contains a statement which is similar to the policy of the proposed rule: "The court, however, may stop the production of further evidence upon a particular point when the evidence upon it is already so full as to preclude reasonable doubt". Case law is also consistent with this rule. In State v. Rollins, 149 Mont. 481, 484, 428 P2d 962 (1967) the court allowed a photograph to be admitted and held that when admissibility of such evidence is being considered the court should "weigh its probative value against its prejudicial effect.... The trial judge should have latitude of discretion in passing upon the admissibility of such evidence". Other cases have dealt with similar questions that arise under the rule and have been treated similarly: State v. Bischert, 131 Mont. 152, 159, 308 P2d 969 (1957) on gruesome photographs; State v. Satterfield, 114 Mont. 122, 127, 132 P2d 372 (1943) on remote evidence; and Wallin v. Kinyon Estate, 164 Mont. 160, 164, 519 P2d 1236 (1974) on exclusion of prejudicial evidence through the use of a motion *in limine.*

Case Notes

Probative Value Versus Prejudicial Effect 248
Other Crimes 260
Common Scheme 264
Cautionary Instruction 265
Miscellaneous 265

PROBATIVE VALUE VERSUS PREJUDICIAL EFFECT

Exclusion of Assault Victim's Prior Assault Record — Probative Value Outweighed by Prejudicial Effect: Grixti was arrested for family member assault against his wife. At trial, Grixti sought to introduce evidence of the wife's prior family member assault against Grixti, but the trial court granted the state's motion in limine excluding evidence of the wife's prior assault. On appeal, the Supreme Court noted that evidence of a witness's prior crimes and wrongs is inadmissible to show action in conformity with the prior crime under this rule, but may be admissible under Rule 404, M.R.Ev., to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident and under Rule 608, M.R.Ev., to attack a witness's character if probative of truthfulness or untruthfulness. However, in this case, the trial court found that the potential prejudicial effect of the wife's prior arrest record likely outweighed any probative value regarding the wife's character for truthfulness or untruthfulness. The Supreme Court deferred to the trial court's discretion in making evidentiary character determinations and affirmed the grant of the motion in limine. St. v. Grixti, 2005 MT 296, 329 M 330, 124 P3d 177 (2005).

No Error in Disallowing Expert to Testify Regarding Nonwitness Third-Party Experiences With Product Given Minimal Probative Value: Plaintiffs sought to introduce testimony from an expert regarding the functioning of a type of subflooring that was installed in plaintiffs' home, resulting in a squeaky floor. The District Court allowed the expert to testify concerning the

expert's experiments on pieces of the subflooring and concerning the experience of another witness who previously testified to a squeaky floor after using the subflooring, but the court did not allow the expert to speak to the experiences of nonwitness third parties concerning other experiences with the subflooring. On appeal, plaintiffs contended that the expert's testimony on other incidents of subflooring failures should have been allowed because they formed the basis for the expert's opinion and demonstrated notice. The Supreme Court concluded that excluding the testimony was not an abuse of the trial court's discretion. Although under Rule 703, M.R.Ev., an expert witness may testify to evidence that might be otherwise inadmissible, if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice or confusion, the evidence may be excluded under this rule. With the expert's foundational testimony already in evidence, the probative value of the expert's testimony regarding experiences of nonwitness third parties would likely have been minimal, particularly since plaintiffs had declined the opportunity to cross-examine the witness who testified to a squeaky floor after using the subflooring. Tripp v. Jeld-Wen, Inc., 2005 MT 121, 327 M 146, 112 P3d 1018 (2005). See also Kissock v. Butte Convalescent Center, 1999 MT 322, 297 M 307, 992 P2d 1271 (1999).

Videotape of Detention Center Altercation Properly Admitted: At a trial for assaulting peace officers during an altercation at a detention center, the trial court allowed introduction of a videotape of the altercation. Pittman contended that the videotape was prejudicial and needlessly presented cumulative evidence because the officers who appeared in the videotape also testified at trial. The Supreme Court held that introduction of the videotape was not an abuse of the trial court's discretion because the videotape was instructive and corroborative and the probative value of the videotape was not substantially outweighed by any danger of unfair prejudice to Pittman. St. v. Pittman, 2005 MT 70, 326 M 324, 109 P3d 237 (2005).

Photographs of Nonvictim Children Not Considered Prejudicial or Character Evidence — Probative Value Warranting Admissibility: In Bar-Jonah's aggravated kidnapping, sexual assault, and assault with a weapon trial, the trial court allowed the admission of hundreds of photographs of children seized during a search of Bar-Jonah's residence. Bar-Jonah contended that the photographs were: (1) improperly admitted because only a few were images of the victims; and (2) unfairly prejudicial and tended to erroneously reflect on Bar-Jonah's character. The Supreme Court disagreed. The photographs were relevant by linking them to Bar-Jonah's motive for befriending the victims, for enhancing the credibility of the victims, and to rebut Bar-Jonah's asserted defenses. Even if the photographs could be construed to reflect on Bar-Jonah's character, they were not introduced for that purpose, but rather to prove motive. Any prejudice to Bar-Jonah through introduction of the photographs was outweighed by their probative value, which did not present evidence of other crimes or acts. St. v. Bar-Jonah, 2004 MT 344, 324 M 278, 102 P3d 1229 (2004).

No Prejudice by Inability to Depose or Call Child Accident Victim as Witness: A 3-year-old child fell through the second story railing at the Montana State University-Bozeman library and suffered brain injuries. The state sought to depose the child and call him as a witness in the ensuing trial, but the District Court concluded that because of the child's age, little probative information could be gained by forcing him to testify and that such testimony would be traumatic and unduly burdensome, so testimony at deposition and trial was denied. On appeal, the Supreme Court affirmed. Although there is no minimum age requirement regarding child testimony, nevertheless, child witnesses need protection against the potential emotional and psychological injuries that may occur with regular litigation procedures. Any information that the child could have provided was available from other witnesses and was thus needlessly cumulative and subject to exclusion under this rule. The state was not prejudiced by its inability to call the child as a witness, and the District Court did not abuse its discretion in protecting the child from having to testify at deposition and trial. Henricksen v. St., 2004 MT 20, 319 M 307, 84 P3d 38 (2004).

Certain Relevant Evidence of Defendant's Conduct Following Sexual Assault Properly Admitted Under Transaction Rule: Immediately following a sexual assault, defendant went into the victim's daughter's room, then came back into the living room wearing a pair of the daughter's panties. Prior to trial, defendant moved in limine to exclude this evidence, as well as evidence that he then masturbated in front of the victim while wearing the panties. The District Court granted defendant's motion excluding testimony about the alleged masturbation, but allowed testimony about the panties and allowed the panties into evidence. Defendant contended on appeal that allowing the evidence was prejudicial and designed to inflame the jury. The Supreme Court held that the evidence was admissible under the transaction rule in 26-1-103. The conduct occurred immediately after the assault and was intertwined with the crime and relevant as part of the transaction, plus the victim testified that the conduct made her

fearful. The evidence was highly probative, and the jury had the right to evaluate the evidence in the context in which the crime occurred. St. v. Detonancour, 2001 MT 213, 306 M 389, 34 P3d 487 (2001).

Evidence of Munchausen Syndrome by Proxy Proper to Prove Motive, Not Character: Hocevar was charged with attempted deliberate homicide, two counts of deliberate homicide, criminal endangerment, and assault in connection with the deaths of her two sons. She contended on appeal that it was error to introduce evidence of another son's death to prove her character, in that she suffered from Munchausen Syndrome by Proxy (MSBP), which is a pattern of behavior wherein a caretaker, usually a mother, fabricates or causes illness in another, usually a preverbal child, to gain attention, and then to use MSBP as the common plan or motive for her actions against her other children. The Supreme Court considered the third and fourth elements of the modified Just rule, holding that the evidence was admissible. MSBP is not a psychiatric diagnosis of a mental disorder, but rather a pediatric diagnosis of a form of child abuse. The "disorder" consists of the behavior of the person suffering from it, so there is no distinction between the disorder and the behavior associated with the disorder. As such, MSBP did not describe Hocevar's character, but rather her behavior toward her children. The evidence showed motive and was properly admitted under the third requirement of the modified Just rule because it was used to establish Hocevar's motive in smothering one child and poisoning another, not to establish Hocevar's character and that she acted in conformity with MSBP. The possible prejudicial effect of the evidence was substantially outweighed by its great probative weight because it tended to establish the MSBP diagnosis and Hocevar's motive. St. v. Hocevar, 2000 MT 157, 300 M 167, 7 P3d 329, 57 St. Rep. 625 (2000).

Clarification of General Requirement of Substantially Similar Circumstances as Precedent to Admission of Evidence of Prior Accident: Evidence of prior accidents, although inadmissible to prove negligence, may be admitted for other purposes, such as to show: (1) the existence of a particular physical condition or defect; (2) the dangerousness of the condition or defect; (3) the possibility that the condition or defect might cause an accident or injury of the type alleged; (4) cause in fact; and (5) knowledge of the condition or defect. (See Modern Evidence: Doctrine and Practice, Mueller & Kirkpatrick, §4.8 at 281, 282 (1995), and McCormick on Evidence §200 at 844-847, 4th Ed. (1992).) Regarding the degree of identity of circumstances required when offering prior accident evidence for the sole purpose of notice or knowledge, the general requirement of substantially similar circumstances is relaxed or less strict when the evidence is proffered to show notice rather than dangerousness or causation, and a lack of exact similarity of conditions will not preclude admission under these circumstances if the accident was of a kind that should have served to warn defendant. In proving notice, there may be dissimilarities between the accidents; however, the differences affect the weight of the evidence, but not necessarily the admissibility. Here, Kissock slipped and fell in defendant's parking lot. The District Court excluded proffered evidence of a fall by another person in the same parking lot days earlier because it occurred at a different time of day under different physical circumstances. The Supreme Court disagreed and reversed, holding that the minor spatial and temporal differences existing between the two slip-and-fall accidents went to the weight rather than admissibility of the evidence in supporting an inference that defendant had notice or knowledge of the icy conditions. The circumstances surrounding the prior accident were not so remote or dissimilar from Kissock's accident that the probative value was substantially outweighed by unfair prejudice to defendant. Kissock v. Butte Convalescent Center, 1999 MT 322, 297 M 307, 992 P2d 1271, 56 St. Rep. 1288 (1999). See also Runkle v. Burlington N., Inc., 188 M 286, 613 P2d 982, 37 St. Rep. 995 (1980), Bailey v. S. Pac. Transp. Co., 613 F2d 1385 (5th Cir. 1980), and Kalanick v. Burlington N. RR Co., 242 M 45, 788 P2d 901, 47 St. Rep. 532 (1990).

Results of Prior Horizontal Gaze Nystagmus Test Improperly Admitted — Harmless Error: At Berosik's DUI trial, he argued that because his eyes had been injured in his youth, the horizontal gaze nystagmus test (HGN) was not valid. The District Court concluded that Berosik opened the door to evidence of a prior DUI incident in testifying on direct examination about the eye condition and admitted evidence of the results of the prior HGN, which Berosik had also failed. The Supreme Court decided on appeal that the court abused its discretion in admitting the evidence because it did not rebut Berosik's suggestion that he scored high on the test due to the injuries and because the prior test results had, at most, a negligible probative value that was substantially outweighed by the risk of confusion of the issues. However, the error was harmless because Berosik failed to show that any of his substantive rights were prejudiced or that his right to a fair trial was impaired. Even without the prior test results, there was overwhelming evidence that Berosik was guilty of DUI, so the conviction was affirmed. St. v. Berosik, 1999 MT

238, 296 M 165, 988 P2d 775, 56 St. Rep. 938 (1999), applying St. v. Partin, 287 M 12, 951 P2d 1002, 54 St. Rep. 1474 (1997).

No Prejudice From Use of Inadmissible, but Simple and Distinct, Evidence: Southern was charged with two counts of kidnapping, one count of burglary, one count of theft, and five counts of sexual intercourse without consent. In moving to sever the nine counts in the information into four separate trials pursuant to 46-13-211, Southern argued that the prejudicial effect of the other crimes evidence substantially outweighed its probative value and thus evidence of the other crimes would not have been admissible in separate trials. It is inevitable that evidence of other crimes will have some prejudicial effect, so under the fourth part of the modified Just rule (see St. v. Matt, 249 M 136, 814 P2d 52 (1991)), relevant evidence will be inadmissible only when its probity is substantially outweighed by the danger of unfair prejudice. Pursuant to St. v. Huether, 284 M 259, 943 P2d 1291, 54 St. Rep. 872 (1997), the prejudicial effect of relevant evidence will substantially outweigh the probative value when the evidence will prompt the jury to decide the case on an improper basis. Thus, evidence is inadmissible under the fourth part of the modified Just rule if it arouses the jury's sympathy for one side without regard to its probative value, if it confuses or misleads the jury, or if it distracts the jury from the main issues in the case. Prejudice arising from the use of inadmissible evidence will not be found when the evidence is simple and distinct. Even though the other crimes evidence in Southern's case would have been prejudicial, the jury was instructed that each count was a distinct offense and had to be decided separately. There was nothing in the record to suggest that the jury did not keep the relevant evidence separate. Since the other crimes evidence was simple and distinct and would have been admissible at separate trials, Southern failed to establish that the jury used evidence of guilt on one charge to convict him of other charges on the theory that the evidence would have been inadmissible in trials on the other charges. St. v. Southern, 1999 MT 94, 294 M 225, 980 P2d 3, 56 St. Rep. 395 (1999).

Evidence of Defendant's Participation Admissible Although Actions Not Direct Cause of Victim's Death: Lantis was tried for deliberate homicide by accountability. He argued that evidence of his involvement in the crime relating to the victim being stabbed should have been excluded because the victim died because of strangulation at the hands of another person. The Supreme Court ruled that the evidence was admissible because it established facts connecting the defendant to the crime scene and suggested his involvement in the crime. St. v. Lantis, 1998 MT 172, 289 M 480, 962 P2d 1169, 55 St. Rep. 694 (1998).

Drug Evidence Irrelevant and Prejudicial — Introduction Reversible Error: Ingraham was convicted of negligent homicide, criminal endangerment, and criminal trespass to property in relation to an automobile accident. Ingraham filed a motion in limine to exclude evidence of drugs detected in his system and found in his car and to exclude evidence of warnings about drug and alcohol interactions. The motion in limine was denied, and the evidence was introduced. Whether the evidence was relevant and admissible depended on the state's ability to demonstrate a link between the evidence and the accident. The Supreme Court found that because uncontradicted evidence presented to the jury established that none of the drugs had any impairing effect whatsoever on Ingraham's ability to drive at the time of the accident, evidence of their presence was irrelevant and prejudicial and had virtually no probative value. The same reasoning was applied to the warnings. Admission of the evidence constituted reversible prejudicial error. Ingraham's motion in limine properly preserved his objection to the introduction of the evidence for appeal. St. v. Ingraham, 1998 MT 156, 290 M 18, 966 P2d 103, 55 St. Rep. 611 (1998). See also State ex rel. Mazurek v. District Court, 2000 MT 266, 302 M 39, 22 P3d 166, 57 St. Rep. 1111 (2000), in which the use of Ingraham's testimony from the first trial was not precluded, constitutionally or statutorily, from use by the state in its case in chief at the retrial.

Cross-Examination Regarding Unrelated Incidents of Prior Sexual Abuse Properly Limited: The District Court did not err in limiting defendant's cross-examination of his ex-wife regarding two unrelated prior incidents of sexual abuse, one involving the ex-wife and the other involving her infant daughter. Defendant was allowed to present closing arguments concerning the ex-wife's motive, bias, or prejudice, based on evidence in the record. However, allowing cross-examination regarding the two prior unrelated incidents would have created unfair prejudice against the ex-wife and confused the issues for the jury. St. v. MacKinnon, 1998 MT 78, 288 M 329, 957 P2d 23, 55 St. Rep. 331 (1998).

Admission of Criminal Justice Information as Evidence in Tort Action Upheld: David, his wife Susan, their minor child, and the parties' defunct business sued Pierce Flooring and others for damages, including damages for emotional distress, stemming from criminal acts of vandalism taken against the plaintiffs' competing business. In the course of the trial, the District

Court allowed the defendants to inspect, copy, and introduce evidence in police records concerning domestic violence complaints made by Susan against David. The Supreme Court held that the evidence was relevant because it showed that there may have been another cause for the Blacks' emotional distress other than the acts of vandalism. The Supreme Court also held that the record showed that the District Court properly exercised its discretion under this rule in allowing the admission of some of the evidence but excluding other evidence because the Blacks' right to privacy exceeded the public's right to know. The Supreme Court held that the District Court's failure to make the written finding required by 44-5-303(1) was harmless error. Rocky Mtn. Enterprises, Inc. v. Pierce Flooring, 286 M 282, 951 P2d 1326, 54 St. Rep. 1410 (1997).

Pending Criminal Charges Inadmissible: Clews sued Montana Mining Properties, Inc. (MMPI), for failure to pay him for his consulting services. MMPI argued that the lower court erred in not admitting evidence of pending stock fraud charges in England against Clews and another company principal that were related to the mining project involving Clews and MMPI. The Supreme Court held that evidence of the charges was not probative of the relationship that existed between Clews and the other company principal, that charges do not prove anything, and that therefore their prejudicial value exceeded any probative value. C. Haydon Ltd. v. Mont. Min. Properties, Inc., 286 M 138, 951 P2d 46, 54 St. Rep. 1341 (1997).

Evidence of Prior Corporal Punishment Properly Excluded: When Huerta was tried on charges of assault of a juvenile, he attempted to introduce testimony of 26 witnesses who would testify that the child's mother had the habit of severely punishing the child. In an effort to reduce delay caused by redundant testimony, the District Court required Huerta to summarize the testimony of all of the witnesses by affidavits. The District Court held that the testimony would constitute "character assassination" and excluded the evidence. Citing St. v. Sigler, 210 M 248, 688 P2d 749 (1984), the Supreme Court held that the evidence that was excluded by the District Court was not inadmissible evidence of character but was evidence of habit that was relevant and therefore admissible under Rule 406, M.R.Ev. However, the Supreme Court also pointed out that this rule allows the trial court to exclude relevant evidence if it finds that the value of the evidence will be outweighed by prejudice, will confuse the issues, or will mislead the jury. After reviewing the record, the Supreme Court concluded that Huerta was able to sufficiently present his defense without the excluded testimony and, for that reason, that the District Court did not abuse its discretion in excluding the evidence. St. v. Huerta, 285 M 245, 947 P2d 483, 54 St. Rep. 1133 (1997).

Irrelevant and Prejudicial Evidence of Consumption of Alcohol by Plaintiff: Violette pulled out of a store's parking lot in front of Havens, and the two collided. Havens sued the state, claiming negligent failure to place a stoplight at the parking lot entrance. It was not error to deny Havens' motion to exclude evidence of his alcohol consumption before the accident when the state opposed the motion by stating that it would show that the consumption was a cause of the accident. However, this forced Havens to introduce evidence of, and to address, his alcohol consumption. In addition, the state offered no evidence that Havens' alcohol consumption helped cause the accident and the state's medical expert and a law enforcement officer both testified that Havens was not negligent. Evidence of the alcohol consumption prejudiced the whole trial. It was reversible error to deny a motion for a new trial. Havens v. St., 285 M 195, 945 P2d 941, 54 St. Rep. 1108 (1997), followed in St. v. Ingraham, 1998 MT 156, 290 M 18, 966 P2d 103, 55 St. Rep. 611 (1998).

Sexual Preference Relevant to and Probative of Issue of Same Gender Sex Offense: The question of Ford's sexual preference was raised during cross-examination and in closing arguments of his trial for sexual intercourse without consent committed upon a person of the same gender. Ford asserted on appeal that the question was so prejudicial as to deprive him of a fair trial. However, the question was probative of whether Ford fit the profile of a person who would commit such an act and did not prejudice Ford's substantial rights. The possible impact of the jury's knowledge that Ford was a bisexual paled by comparison to the likely impact of the overwhelming evidence of his guilt. St. v. Ford, 278 M 353, 926 P2d 245, 53 St. Rep. 947 (1996).

Lawyer's Letter to Veterans Administration Claiming Plaintiff's Death Caused by Preexisting Condition Not Admissible to Show Hospital Not Liable for Plaintiff's Death: Columbus Hospital argued that the lower court had erred in refusing to admit a letter written by the plaintiff's lawyer to the Veterans Benefits Administration stating that Busta's death was due to a preexisting condition incurred when he was in the service. The hospital alleged that the letter should have been admitted because it had a tendency to make more probable the hospital's claim that Busta had died due to a preexisting condition. The Supreme Court held that an attorney is not qualified to express a medical opinion that is admissible in court and that even if relevant, the letter presented substantial potential for confusing or misleading the jury and therefore had

been properly excluded. Busta v. Columbus Hosp. Corp., 276 M 342, 916 P2d 122, 53 St. Rep. 428 (1996).

Error in Exclusion of Evidence of Stress-Provoking Event Other Than Accident in Determining Loss of Established Course of Life: Maurer was injured in a car accident, after which he was depressed. This depression led him to leave the family ranch and contributed to his "course of life" damages. Defendants should have been allowed to introduce evidence of another stress-provoking incident that occurred about the same time and could have contributed to Maurer's depression. The incident involved the injury of Maurer's girlfriend, criminal charges against Maurer, and his subsequent trial and acquittal on felony assault (now assault with a weapon) charges. The link between the incident and Maurer's depression was self-evident, and the jury should have been allowed to consider evidence of the incident from a common sense viewpoint to determine to what degree, if any, the stress from the incident contributed to Maurer's loss of established course of life. The probative value of evidence of the incident was not substantially outweighed by its prejudicial nature. Maurer v. Clausen Distrib. Co., 275 M 229, 912 P2d 195, 53 St. Rep. 78 (1996).

DNA Evidence — Statistical Evidence Not Inherently Prejudicial: Weeks was convicted of sexual intercourse without consent with his stepdaughter. The conviction was based in part upon DNA evidence. Weeks argued that the statistical evidence resulting from the DNA testing was prejudicial. The Supreme Court held that because Weeks introduced no specific evidence showing that he was prejudiced by the statistical evidence resulting from the DNA testing, the statistical evidence was more probative than prejudicial. St. v. Weeks, 270 M 63, 891 P2d 477, 52 St. Rep. 78 (1995).

Introduction of Polygraph Results in Custody or Visitation Dispute Prohibited: As part of a modification of Robert's visitation rights, the District Court required that Robert undergo a sex offender evaluation. Robert argued that the results of a polygraph test taken as a part of the sex offender evaluation should not be introducible. Citing St. v. Staat, 248 M 291, 811 P2d 1261 (1991), and 37-62-302 (now repealed), the Supreme Court held that the results of a polygraph test taken as part of a court-ordered sex offender evaluation would not be admissible in subsequent proceedings in the case. In re Marriage of Njos/Allard, 270 M 54, 889 P2d 1192, 52 St. Rep. 74 (1995), followed in St. v. Anderson, 1999 MT 58, 293 M 472, 977 P2d 315, 56 St. Rep. 243 (1999).

Prejudicial Effect of Photographs: In a prosecution for accountability for aggravated kidnapping when offenders pleaded guilty to the underlying offense, bodily injury was not in dispute and photographs of the injuries were of little or no probative value in establishing accountability. The probative value of the photographs was far outweighed by their prejudicial effect on the jury to the detriment of the defendant. St. v. Bristow, 267 M 170, 882 P2d 1041, 51 St. Rep. 1010 (1994).

Autopsy Photographs as Instructive and Corroborative — Admissibility: Defendant convicted of five counts of deliberate homicide in a prison riot asserted District Court error in admitting into evidence autopsy photographs of the five deceased inmates. The medical examiner stated on cross-examination that he could present his testimony without the autopsy photographs. However, the medical examiner also testified that the photographs were necessarily instructive and essential in enabling the jury to understand the nature of the injuries and that the photographs, which were carefully selected as the best representations of the injuries sustained by the victims, simplified his task of explaining the injuries. In addition, the photographs corroborated testimony by inmates whose credibility was hotly contested at trial. The probative value of the photographs outweighed their prejudicial effect and were properly admitted. St. v. Wild, 266 M 331, 880 P2d 840, 51 St. Rep. 872 (1994), following St. v. Gollehon, 262 M 293, 864 P2d 1257 (1993). See also St. v. Close, 267 M 44, 881 P2d 1312, 51 St. Rep. 876 (1994), St. v. Flores, 1998 MT 328, 292 M 255, 974 P2d 124, 55 St. Rep. 1329 (1998), and St. v. Dunfee, 2005 MT 147, 327 M 335, 114 P3d 217 (2005).

Wrongful Death Action — Plaintiff's Miscarriage Admissible: A District Court is vested with discretion to weigh the probative value of evidence against its prejudicial effect and to admit or exclude the evidence. When the defendant made no showing of prejudice, the District Court did not commit error and did not abuse its discretion in allowing evidence of the plaintiff's miscarriage. Lutz v. Nat'l Crane Corp., 267 M 368, 884 P2d 455, 51 St. Rep. 810 (1994).

Cumulative Evidence of Past Incidents of Consensual Sexual Contact Properly Excluded: The jury was presented with ample evidence of prior consensual acts between defendants and the victim from which it could determine without bias the credibility of defendants' claim that the sexual acts in question were also consensual. It was not an abuse of discretion for the trial court to restrict additional relevant and admissible evidence of the victim's past sexual conduct that

was merely cumulative in nature and that could easily have had the effect of being more prejudicial to the victim than probative to the jury. In light of the abundance of evidence, the restriction did not prevent defendants from presenting their consent defense. St. v. Wing, 264 M 215, 870 P2d 1368, 51 St. Rep. 223 (1994).

Color Slides of Child's Autopsy Properly Admitted: Mergenthaler was charged with negligent homicide of Ashley, a 13-month-old female. The state's evidence showed that Ashley suffered injuries to her skull and brain that were attributed by all of the state's medical experts to "whiplash shaken infant syndrome" and not to a fall from a couch, as claimed by Mergenthaler. The state introduced testimony of a physician who performed the autopsy and who used color slides to illustrate his testimony. Citing St. v. Gollehon, 262 M 293, 864 P2d 1257, 50 St. Rep. 1564 (1993), followed in St. v. Langford, 267 M 95, 882 P2d 490, 51 St. Rep. 962 (1994), the Supreme Court held that the District Court properly allowed the use of the slides because they were used for illustrative purposes only, they were not introduced in evidence, and the jury was not allowed to take them to the jury room. The slides provided important evidence in explaining how and why Ashley died. The Supreme Court also upheld the use of a photograph showing Ashley as a normal, happy, healthy baby because the photograph depicted the child's size, age, health, and vulnerability, all of which were issues in the case. St. v. Mergenthaler, 263 M 198, 868 P2d 560, 51 St. Rep. 13 (1994).

Discretion of Court to Reopen Case in Chief — Admissibility of Surprise Defense Testimony: The District Court allowed the state to reopen its case in chief after defense testimony at trial revealed that a defense witness had fabricated evidence and that a previously unknown witness, who had also fabricated physical evidence, was involved. These facts constituted good cause sufficient to allow the court to exercise its discretion to depart from the usual order of trial and allow examination of the witnesses and the relevance of the fabricated evidence. Further, introduction of the surprise testimony was relevant, and its probative value far outweighed any danger of unfair prejudice to the defendant. St. v. Snaric, 262 M 62, 862 P2d 1175, 50 St. Rep. 1443 (1993).

Defendant Not Entitled to Introduce Evidence of 13-Year-Old Child's Prior Sexual Misconduct: Passama, accused of sexual assault upon an 8-year-old girl, attempted to question her 13-year-old brother, a witness against him, concerning the brother's prior sexual misconduct. The Supreme Court ruled that the trial court had properly excluded the evidence on the basis that its prejudicial value outweighed its probative value. St. v. Passama, 261 M 338, 863 P2d 378, 50 St. Rep. 1349 (1993).

Admissibility of Evidence of Insurer's Postfiling Litigation Conduct — Balancing Test: The District Court allowed Palmer to introduce evidence of insurer Farmers Insurance Exchange (Farmers) litigation strategy and tactics that Farmers' attorneys used in defending Palmer's uninsured motorist case and of Farmers' decision to appeal the judgment in that case, raising the question of whether evidence of an insurer's postfiling conduct was admissible in a bad faith action. The Supreme Court held that an insurer's duty to deal fairly and not withhold payment of valid claims does not end when an insured files a complaint against the insurer, but the continuing duty of good faith does not necessarily render evidence of an insurer's postfiling conduct admissible. The court reiterated the balancing test in this rule as the correct approach between deterring improper conduct by insurers and allowing insurers to defend themselves against spurious claims. When an insurer's postfiling conduct has some relevance, the trial court must weigh its probative value against the inherently high prejudicial effect of such evidence, keeping in mind the insurer's fundamental right to defend itself. In this case, the prejudicial nature of evidence regarding litigation strategy and tactics and the decision to appeal far outweighed any relevance of the conduct, and the decision to admit the evidence was erroneous. Palmer v. Farmers Ins. Exch., 261 M 91, 861 P2d 895, 50 St. Rep. 1210 (1993), followed in Federated Mut. Ins. Co. v. Anderson, 1999 MT 288, 297 M 33, 991 P2d 915, 56 St. Rep. 1152 (1999). See also White v. W. Title Ins. Co., 710 P2d 309 (Cal. 1985).

Videotaping Techniques Not Prejudicial: The District Court did not abuse its discretion by allowing the jury to watch videotaped testimony in which the videocamera operator zoomed in on the child sexual assault victim when she cried or was otherwise distressed. Whether prejudicial effect is outweighed by probative value is a matter within the discretion of the trial court. The Supreme Court declined a request to implement uniform procedures applicable to videotaping of testimony. St. v. Scott, 257 M 454, 850 P2d 286, 50 St. Rep. 353 (1993).

Evidence Regarding Equipment Placed Two Miles From Accident Site Properly Excluded: The District Court properly disallowed redirect examination about equipment placed about 2 miles from an accident site, either for potential impeachment or probative purposes, because of

the irrelevance and possible prejudicial effect of the testimony as it related to conditions at the actual accident site. Brockie v. Omo Constr., Inc., 255 M 495, 844 P2d 61, 49 St. Rep. 1092 (1992).

Admissibility of Probative Evidence Refuting Expert Testimony: Rieger was injured when a light fixture dislodged from the ceiling, striking him. In light of expert testimony that the sheetrock at the accident scene was defective, Rieger should have been allowed to offer evidence that other light fixtures were loose and were subsequently repaired. The evidence was probative and tended to refute the expert testimony that the sheetrock at the accident scene was defective and was the sole cause of the accident. Rieger v. Coldwell, 254 M 507, 839 P2d 1257, 49 St. Rep. 768 (1992).

Evidence of Incest Victim's Claimed Abortion Properly Excluded: An incest victim told an investigating officer that she had become pregnant by defendant and had an abortion but maintained that she did not know where the procedure took place. Defendant's attempts to find any record of the abortion were unsuccessful. Evidence of the abortion was relevant to the issue of the victim's veracity, but the probative value of the evidence was outweighed by its prejudice to the victim and confusion of the issues under this rule and was properly excluded. St. v. Rhyne, 253 M 513, 833 P2d 1112, 49 St. Rep. 577 (1992).

Failure to Allow Evidence of Victim's Prior Arrest — Evidence of Charges Rather Than Conviction as Prejudicial: Defendant convicted of aggravated assault contended that it was error for the trial court to refuse the introduction of evidence regarding the victim's prior arrest for aggravated assault. The danger of unfair prejudice to the state clearly outweighed the probative value of the evidence, given that the evidence concerned only charges, not a conviction, and that the charges were 2 years old at the time of trial. St. v. Benton, 251 M 401, 825 P2d 565, 49 St. Rep. 95 (1992), followed in St. v. Eklund, 264 M 420, 872 P2d 323, 51 St. Rep. 335 (1994).

Photos of Beating Victim and Crime Scene Admissible: The balancing of probative value against unfair prejudice is a matter for the discretion of the trial court. The trial court did not abuse its discretion when it admitted 12 of 34 photographs depicting the victim's injuries and the crime scene. St. v. Devlin, 251 M 278, 825 P2d 185, 48 St. Rep. 1093 (1991).

Necessity of Defendant's Statement to Explain Focus of Criminal Investigation: Defendant initially claimed he was not present at the crime scene. After being told by the police that they were investigating physical evidence found at the scene, defendant stated that he had been at the scene the day before the crime. Introduction of his statement was necessary after cross-examination to explain why the police focused their examination solely on defendant. The statement was therefore relevant and nonprejudicial in light of a cautionary instruction to the jury regarding defendant's conduct at the scene. St. v. Hall, 244 M 161, 797 P2d 183, 47 St. Rep. 1501 (1990).

Expert's Testimony Regarding Defendant's Statements Inadmissible: The defendant desired to have his psychiatric expert testify as to the defendant's statements to him describing the events surrounding the alleged crime. The Supreme Court held that the statements were properly excluded because the defendant's testimony was not reliable enough to overcome the possible prejudicial effect of the evidence. St. v. Van Dyken, 242 M 415, 791 P2d 1350, 47 St. Rep. 835 (1990).

No Claim of Prejudice by Party Allowed for Admission of Evidence He Introduced: Prior to trial, the plaintiff made a motion in limine to exclude evidence of certain prior conduct on his part. The Supreme Court held that he could not argue that he had been prejudiced by the admission of the evidence because during the trial he had introduced most of the evidence himself. Smith v. Roosevelt County, 242 M 27, 788 P2d 337, 47 St. Rep. 506 (1990).

Evidence of Victim's Drug Use Excluded in Product Liability Case: In a product liability case, the District Court properly excluded evidence of the victim's alleged habitual drug use that was offered on the issues of his life expectancy and assumption of risk. The evidence was speculative at best and was of such a highly prejudicial nature in comparison to its probative value that its admission could constitute error. Krueger v. Gen. Motors Corp., 240 M 266, 783 P2d 1340, 46 St. Rep. 2114 (1989).

Admissibility Within Discretion of Trial Judge: The determination of whether relevant evidence may be excluded is within the discretion of the trial judge and will not be disturbed unless there is a manifest abuse of discretion. The judge did not abuse his discretion by granting a new trial on the grounds that admission of certain evidence prejudiced defendant. Zeke's Distrib. Co. v. Brown-Forman Corp., 239 M 272, 779 P2d 908, 46 St. Rep. 1678 (1989), followed in Hansen v. Hansen, 254 M 152, 835 P2d 748, 49 St. Rep. 677 (1992), Waller v. Hayden, 268 M 204, 885 P2d 1305, 51 St. Rep. 1291 (1994), and Houdashelt v. Lutes, 282 M 435, 938 P2d 665, 54 St. Rep. 420 (1997). See also Simmons Oil Corp. v. Wells Fargo Bank, N.A., 1998 MT 129, 289 M 119, 960 P2d 291, 55 St. Rep. 508 (1998).

Communications to Parole Officer Not Privileged: After his arrest for burglary, the defendant called his parole officer and told him of the crime. The defendant's motion to suppress the parole officer's testimony was denied on the basis that the parole officer was not an elected officer or director and therefore communications made to him were not subject to a statutory privilege. The Supreme Court also held that the probative value of the evidence outweighed the relatively slight prejudicial impact the evidence carried in showing the jury that the defendant had been convicted of a prior crime. St. v. Higareda, 238 M 130, 777 P2d 302, 46 St. Rep. 1146 (1989), followed in St. v. Thompson, 263 M 17, 865 P2d 1125, 50 St. Rep. 1683 (1993), in which the prejudicial effect of defendant's voluntary statement that First Amendment allowed stepdaughter's punishment was outweighed by its probative value.

Secondhand Nature of Testimony: The trial court excluded testimony on grounds that its secondhand nature would mislead and confuse the jury and result in unfair prejudice. The Supreme Court reversed, stating that exclusion for confusion is an "extreme measure" not properly used unless the evidential material is thoroughly objectionable or of minor utility. Phillip R. Morrow, Inc. v. FBS Ins. Mont.-Hoiness Labar, Inc., 236 M 394, 770 P2d 859, 46 St. Rep. 455 (1989).

Photograph of Forest Fire Scene Conflicting With Other Evidence — Weight of Evidence: In an action against the state for negligence in suppressing a forest fire that later flared up, a photograph of the fire area before the flare-up was admitted into evidence. The photograph showed no smoke even though that conflicted with radio logs; if taken from another angle, it may have shown smoke. The court ruled that it was not error to admit the photograph because such matters affect the weight accorded the photograph and do not make the photo so lack probity or so inaccurate that it is prejudicial. Jacobsen v. St., 236 M 91, 769 P2d 694, 46 St. Rep. 207 (1989).

Use of Map Representing Forest Fires — Action Against State for Negligence in Forest Fire Suppression: In an action against the state for negligence in suppressing a forest fire, a state map, marked to represent the fires burning during the times involved, was used in evidence. The accuracy of the map was not disputed, but it showed a larger area than was required by the scope of the issues in this case. The court ruled that use of the map did not have a prejudicial effect that outweighed its probative effect. The map was relevant and was not so lacking in probity to be solely for the purpose of drawing the jury's attention from the main issues. Jacobsen v. St., 236 M 91, 769 P2d 694, 46 St. Rep. 207 (1989).

Claim for Emotional Distress — Evidence of Plaintiffs' Net Worth Permissible: The District Court did not abuse its discretion by allowing evidence of plaintiffs' net worth to show the effect of a financial loss on plaintiff's state of mind where plaintiffs sought considerable damages for emotional distress. Ahmann v. Am. Fed. S&L Ass'n, 235 M 184, 766 P2d 853, 45 St. Rep. 2305 (1988).

Evidence Offered to Rebut Presumption of Good Faith Improperly Excluded: The trial court instructed the jury that an employee's good faith must be presumed and that the presumption could only be rebutted by proof of bad faith. The court then excluded the very evidence offered by the employer to rebut that presumption. The probative value of the evidence outweighed any prejudice to the employee because of the reciprocal nature of the covenant of good faith and fair dealing. The employer was entitled to have the jury consider all evidence probative on the issues, not just evidence favoring the employee, and exclusion of such evidence was improper. Barrett v. ASARCO Inc., 234 M 229, 763 P2d 27, 45 St. Rep. 1865 (1988).

Accomplice Testimony Not Unduly Prejudicial: The testimony of accomplices that they had previously pleaded guilty to charges arising out of the incident with which appellant was charged was not unduly prejudicial. Although the general rule is that evidence of a codefendant's guilty plea is inadmissible, there is an exception where the codefendant takes the witness stand. In that situation, such evidence is admissible to aid the jury in assessing the codefendant's credibility. St. v. Price, 234 M 144, 762 P2d 232, 45 St. Rep. 1798 (1988).

Evidence of Flight Properly Admitted: An instruction allowing the jury to infer a consciousness of guilt from evidence of defendant's failure to appear at his first trial, where jury had the opportunity to hear defendant's explanation for his nonappearance, is not so prejudicial as to be barred by this rule. St. v. Burk, 234 M 119, 761 P2d 825, 45 St. Rep. 1777 (1988). See also St. v. Campbell, 241 M 323, 787 P2d 329, 47 St. Rep. 321 (1990).

Exclusion of Evidence of Victim's Later Crimes Proper — Balance of Prejudice and Probative Value: The District Court properly excluded evidence, under Rules 608 and 609, M.R.Ev., of pending or resolved criminal charges against the victim of an assault unless the state alluded to the victim's good character, truthfulness, or veracity. As noted in Cooper v. Rosston, 232 M 186, 756 P2d 1125, 45 St. Rep. 978 (1988), evidence bearing on the issue of the credibility of a witness, in order to be admissible, must be more probative than prejudicial, and the District Court must

balance prejudice and probative value pursuant to Rules 401 and 403, M.R.Ev. St. v. Hammer, 233 M 101, 759 P2d 979, 45 St. Rep. 1326 (1988), followed in St. v. Kowalski, 252 M 166, 827 P2d 1253, 49 St. Rep. 197 (1992).

Evidence Unrelated to Claim as Prejudicial — Mistrial Motion Improperly Denied: Plaintiff's testimony in a trial to recover damages for a partial crop loss included emotional testimony about the loss of his wife, who died during preparation of the case for trial. There was no claim that her death was caused in any way by defendants. It was improper for the trial court to deny a defense motion for a mistrial based on relevance and prejudice. Gurnsey v. Conklin Co., Inc., 230 M 42, 751 P2d 151, 45 St. Rep. 1 (1988).

Probative Value of Evidence of Insurance Status Outweighed by Potential Prejudice: Evidence of a party's insured status is generally inadmissible in Montana tort actions because of the prejudicial potential of such evidence. A statement with regard to insurance determined to be a minor part, at best, of a claim of fraud or misrepresentation was directed to be excluded on retrial. Gurnsey v. Conklin Co., Inc., 230 M 42, 751 P2d 151, 45 St. Rep. 1 (1988).

Attorney's Voluntary Disclosure of Confidential Statements — No Waiver of Attorney-Client Privilege: Defendant's court-appointed attorney called himself to the stand to testify about defendant's inconsistent statements. Based on the District Court's acceptance of the testimony, the Supreme Court found the following factors prejudiced defendant's right to a fair trial: (1) the attorney's testimony of defendant's statements was extremely prejudicial and had limited probative value; (2) the state presented no evidence that defendant intended to waive his right not to divulge this privileged information; and (3) given defendant's unfamiliarity with courtroom procedure, defendant's right against self-incrimination need not be surrendered in order to assert a statutory right. Conviction was reversed. St. v. Statczar, 228 M 446, 743 P2d 606, 44 St. Rep. 1668 (1987).

Admissibility of Photographs of Objects Having Probative Value: Photographs of objects having probative value forming circumstantial evidence from which to infer that defendant was perpetrator of a homicide and to infer a motive from evidence of his interest in violent sex were properly admitted into evidence. Defendant's contention that, even if relevant, the prejudicial effect of the items outweighed any probative value was rejected by the court, which noted that the state used photographs of the objects rather than the objects themselves, the latter of which may have had even greater potential for prejudice. St. v. Pease, 222 M 455, 724 P2d 153, 43 St. Rep. 1417 (1986).

Tort Action — Admitted Use of Drugs Before Traffic Accident — Motion In Limine to Exclude Unless Foundation Established: Plaintiff admitted certain use of illegal drugs before the traffic accident, but it was not error for the District Court to grant a motion in limine excluding such evidence from the trial unless a foundation could be established showing that at the time of the accident he was under the influence and that his negligence was the proximate or controlling cause of injuries. Because evidence of drugs is very prejudicial, such conditional exclusion requires some link between it and the accident and a weighing of its probative value against its prejudicial effect. Simonson v. White, 220 M 14, 713 P2d 983, 43 St. Rep. 133 (1986).

Medical Malpractice — Not Error to Permit Highlighted Medical Records and Photographs in Jury Room: In a medical malpractice action in which appellant claimed that negligent medical treatment of his ingrown toenail caused the necessity for amputation of his leg, it was not error for the trial judge to permit the jury to have, during its deliberations, highlighted copies of appellant's medical records and photographs of his leg. Kyriss v. St., 218 M 162, 707 P2d 5, 42 St. Rep. 1487 (1985).

Evidence Relevant — Inadmissible as Unfair Prejudice: In a tort action, on the issue of the causation of damages, the trial court abused its discretion in allowing testimony concerning the plaintiff's home environment and whether her father's alleged drinking and fighting caused her symptoms rather than an earlier vehicular accident. The questioned testimony had a tendency to make the alleged cause of the symptoms more or less probable than it would have been without the testimony. The testimony therefore was relevant but not admissible as its probative value was substantially outweighed by the danger of unfair prejudice. Kimes v. Herrin, 217 M 330, 705 P2d 108, 42 St. Rep. 1231 (1985), followed in Newville v. St., 267 M 237, 883 P2d 793, 51 St. Rep. 758 (1994), Werre v. David, 275 M 376, 913 P2d 625, 53 St. Rep. 187 (1996), and Henricksen v. St., 2004 MT 20, 319 M 307, 84 P3d 38 (2004).

Vague Testimony of Driver and Vehicle Remote From Scene of Accident — Prejudicial — Foundation Lacking: In a trial arising from an intersection collision between plaintiff's motorcycle and defendant's auto, testimony of defendant's proposed witness was properly excluded as having prejudicial effect outweighing any probative value. He would have testified regarding a motorcyclist he saw while closing his shop. He could not positively identify plaintiff

as the motorcyclist, and his description of the cycle and its driver varied from that of other witnesses and from the actual cycle and driver. His view occurred 300 yards from the accident. He was vague as to the time. Other cycles could have passed him by unobserved. His testimony characterized the driver as a stereotypical biker driving fast. The testimony also lacked a sufficient foundation, because there was insufficient connection between the driver witness saw and plaintiff. Welnel v. Hall, 215 M 78, 694 P2d 1346, 42 St. Rep. 195 (1985).

Admission of Drug Paraphernalia Found in Accident Victim's Car — Prejudicial Effect Outweighed by Probative Value: In a case involving negligence in an automobile accident, the prejudicial effect of allowing the introduction of drug paraphernalia found in the car in which the accident victim had been riding was outweighed by its probative value. Testimony of the driver and victim was that they had not smoked marijuana on the day of the accident, but because the vehicle had been owned only a short time, the existence of the paraphernalia would tend to show that the driver actively consumed marijuana within a few days of the accident, thus tending to impeach the testimony. Foreman v. Minnie, 211 M 441, 689 P2d 1210, 41 St. Rep. 1478 (1984).

Admissibility of Serologist Testimony: D.K. was forcibly raped at knife point in her home in Butte. After the rape, D.K. called the police, who took D.K. to the hospital where staff acquired pubic hair and blood samples and took vaginal swabs to secure semen samples. The samples were tested by a serologist. At trial, the serologist testified as to blood types, PGM subtypes, and "H" factors present in secreted body fluids. Defendant contended that the testimony was more prejudicial than probative and should have been excluded. Defendant relied on People v. Robinson, 27 NY 2d 864, 265 NE 2d 543 (1970), where the court concluded that evidence of blood type was not probative in view of the large portion of the general population having the same blood type. On appeal, the Supreme Court found that evidence of blood type, secretor status, and PGM subtype correlates with the significantly smaller population of Silver Bow County. The court also found, as in Robinson, that there was other independent evidence of defendant's guilt. The court found the evidence admissible. St. v. Bauer, 210 M 298, 683 P2d 946, 41 St. Rep. 1066 (1984).

Photos of Persons Hit by Auto — Probative Value Outweighed Inflammatory Nature in Homicide Case: Photographs of place at which defendant purposely hit and killed two bicycle riders with auto he was driving were testified to by police officers who did not take or direct the taking of the photos but who came to the scene and investigated a very short time after the victims were hit. They testified that the photos depicted the scene as they remembered it. The photos were properly admitted in evidence. The probative value of a color photo of one victim was not outweighed by its allegedly inflammatory nature, and the photo was admissible since it lent credence to testimony of a witness that death was caused from injuries received when victim was struck by the auto. St. v. Woods, 203 M 401, 662 P2d 579, 40 St. Rep. 533 (1983).

Prior Compromise Settlements Properly Excluded: Plaintiff injured his back when the seat in the locomotive he was operating broke and threw him backward. Plaintiff had had two prior back injuries that had been successfully treated. The District Court excluded evidence relating to plaintiff's previous settlement of claims with defendant. Defendant contended that since the jury heard evidence regarding the previous injuries, it should have been informed of the settlements. The Supreme Court held that compromise settlements for previous injuries do not necessarily reflect the seriousness of the injuries and may confuse the jury. Any probative value was outweighed by possible prejudice. Callihan v. Burlington N., Inc., 201 M 350, 654 P2d 972, 39 St. Rep. 2158 (1982).

Admissibility of Tape of Call to Police by Witness to Shooting — Probative Value: Defendant was convicted of deliberate homicide of his brother. At the trial, a tape recording of a call made by defendant's sister to the police after the shooting was admitted into evidence. Defendant can be heard in the background shouting obscenities and shooting. The Supreme Court refused to reverse the District Court's discretionary decision to allow the tape to be admitted, reasoning that although the tape was inflammatory, it had probative value with respect to the credibility of witnesses who were present at the shooting and its probative value outweighed its prejudicial effect. St. v. Johns, 201 M 192, 653 P2d 494, 39 St. Rep. 2049 (1982).

Photographs at Victim's Autopsy: Defendant objected to admission of photographs of victim's body. The court found that the pictures accurately represented victim's appearance at the autopsy and were reasonably necessary to depict the multiplicity and the extent of the injuries, how they were caused, and their age. The pictures taken at the autopsy definitely related to the charges against defendant and were properly admitted. St. v. Riley, 199 M 413, 649 P2d 1273, 39 St. Rep. 1491 (1982), followed in St. v. Doll, 214 M 390, 692 P2d 473, 42 St. Rep. 40 (1985).

Habitual Traffic Offender — Proper Foundation Required: In an action arising out of an automobile accident, the District Court advised counsel for the plaintiff that testimony

regarding defendant's bad driving record would not be admitted unless a foundation was laid establishing a clear connection between defendant operating his vehicle as an unlicensed habitual traffic offender and plaintiff's injuries. No such foundation was laid, and the evidence was not admitted. This ruling was proper since the evidence was highly prejudicial and was relevant only to an issue of competency and could not be used to prove any specific act of negligence at issue in the case. It was error to grant a new trial on the basis that this evidence was excluded. Nelson v. Hartman, 199 M 295, 648 P2d 1176, 39 St. Rep. 1409 (1982).

Objection by Party Not Prejudiced: While making a left turn, the plaintiff's car was struck by a passing vehicle. The plaintiff testified that several miles before the accident he had seen the passing vehicle parked alongside the road with its occupants relieving themselves. The plaintiff could not later claim that the probative value of this testimony was outweighed by its prejudicial effect, because the testimony was not prejudicial to the plaintiff. Goodnough v. St., 199 M 9, 647 P2d 364, 39 St. Rep. 1170 (1982).

Beating Death — Color Photographs of Autopsy: A doctor testified that color photographs of an autopsy of a child, the victim of a beating death, accurately represented the victim's appearance at the autopsy and were reasonably necessary to depict the multiplicity and extent of the injuries, how they were caused, and their age. Because the probative value of the photographs outweighed their prejudicial effect, they were properly admitted into evidence. St. v. Powers, 198 M 289, 645 P2d 1357, 39 St. Rep. 989 (1982).

Admissibility of Photographs — Probative Value Versus Prejudice: Once the relevance of a photograph is established, the fact that it may be inflammatory should not render it inadmissible any more than inflammatory word descriptions should render testimony inadmissible, so long as the purpose is probative and the true facts and conditions are described. The trial judge, in his discretion, must determine whether the probative value is outweighed by potential prejudice. St. v. Austad, 197 M 70, 641 P2d 1373, 39 St. Rep. 356 (1982), cited in St. v. Grant, 221 M 122, 717 P2d 562, 43 St. Rep. 685 (1986). See also St. v. Beavers, 1999 MT 260, 296 M 340, 987 P2d 371, 56 St. Rep. 1035 (1999); Barnes v. United Indus., Inc., 275 M 25, 909 P2d 700, 53 St. Rep. 17 (1996); St. v. Cox, 266 M 110, 879 P2d 662, 51 St. Rep. 680 (1994); St. v. Turner, 265 M 337, 877 P2d 978, 51 St. Rep. 467 (1994); St. v. Gollehon, 262 M 293, 864 P2d 1257, 50 St. Rep. 1564 (1993); St. v. Mayes, 251 M 358, 825 P2d 1196, 49 St. Rep. 75 (1992); St. v. Kills On Top, 243 M 56, 793 P2d 1273, 47 St. Rep. 984 (1990); St. v. Henry, 241 M 524, 788 P2d 316, 47 St. Rep. 476 (1990); Lindberg v. Leatham Bros., Inc., 215 M 11, 693 P2d 1234, 42 St. Rep. 137 (1985); St. v. Sigler, 210 M 248, 688 P2d 749, 41 St. Rep. 1039 (1984); and St. v. Hoffman, 196 M 268, 639 P2d 507, 39 St. Rep. 29 (1982).

Testimony That Defendant Smoked Marijuana With County Attorney — Other Offense — Inadmissible: The State moved to exclude defendant's testimony that he had smoked marijuana with the County Attorney the night before the offense (deliberate homicide and obstructing justice). The trial court in excluding the offered evidence reasoned that it was not relevant, or if relevant, that its probative value was outweighed by its prejudicial effect. The Supreme Court affirmed the District Court. St. v. Beachman, 189 M 400, 616 P2d 337, 37 St. Rep. 1558 (1980).

Threat to Kill Witness — Probative Value Not Outweighed by Prejudicial Effect: The plaintiff allegedly assaulted and threatened to kill a witness if he did not testify favorably to the plaintiff's case. Testimony concerning the assault was admitted to show that the witness had a motive to testify falsely over the objection that it was prejudicial. The Supreme Court found that the facts testified to by the witness were crucial to the issues of the case and therefore the witness' credibility was important. The prejudicial effect of the assault evidence did not substantially outweigh its probative value. Cissel v. W. Plumbing & Heating, 188 M 149, 612 P2d 206, 37 St. Rep. 966 (1980).

Evidence of Other Sex Crimes — Prejudice to the Defendant: There is inherent prejudice in showing a defendant has committed a prior sex offense, and when the acts involved were not sufficiently similar and occurred 2 ½ years apart, the prejudicial effect of introduction of evidence of the first act substantially outweighed its probative value. St. v. Hansen, 187 M 91, 608 P2d 1083, 37 St. Rep. 657 (1980), explained in St. v. T.W., 220 M 280, 715 P2d 428, 43 St. Rep. 368 (1986).

Admissibility of Photographs: Photographs are admissible for the purpose of explaining and applying the evidence and assisting the court and the jury in understanding the case. When the purpose of an exhibit is to inflame the minds of the jury or excite the feelings rather than to enlighten the jury as to any fact, it should be excluded. Photographs that were used by the pathologist to show body creases which indicated how long the body had been at the site where it was found and photographs that showed the nature of the wounds and explained the evidence that formed the basis of the pathologist's opinion of the size and configuration of the weapon that

inflicted the wounds were relevant, useful, and necessary in explaining the evidence and assisting the trial court and the jury in understanding the case. They were properly admitted, as was a photograph of a can of paint in the defendant's possession. In upholding the admission of the photograph, the Montana Supreme Court held that any prejudicial implication of flight, which might have arisen because the can was photographed in a suitcase, could be rebutted easily. St. v. McKenzie, 186 M 481, 608 P2d 428, 37 St. Rep. 325 (1980).

Gruesome Photographs — Error: Defendant contends that photographs of murder victims were gruesome, inflammatory, and unduly prejudicial and that they should not have been introduced at trial. The photographs were introduced in identifying the victims, demonstrating the position of the bodies, and establishing the cause of death. This could have been done without the use of the photographs, which makes their probative value low. The introduction of the photographs was error, and as a result the defendant is entitled to a new trial. St. v. Allies, 186 M 99, 606 P2d 1043 (1979).

Exclusion of Photographic Evidence: A District Court does not abuse its discretion in excluding photographs that are calculated to arouse the sympathies of the jury, particularly if they are not substantially necessary or instructive to show material facts or conditions. St. v. Azure, 181 M 47, 591 P2d 1125, 36 St. Rep. 514 (1979).

Assault by Defendant Fleeing Another Crime: A patrolman's testimony that he was assaulted by the defendant who resisted arrest after fleeing from the alleged crime of aggravated assault was properly admitted in evidence because it was probative of defendant's state of mind and outweighed possible unfair prejudice to the defendant. St. v. Gone, 179 M 271, 587 P2d 1291, 35 St. Rep. 1540 (1978).

Tape of Rape Victim's Call for Assistance Inadmissible: A tape recording by the police of the victim's telephone call for assistance immediately following a rape incident should not have been admitted in evidence and played to the jury because the probative value of the tape was substantially outweighed by its unfair prejudicial effect. The admission of the tape and playing it to the jury were reversible error. St. v. Pendergrass, 179 M 106, 586 P2d 691, 35 St. Rep. 1512 (1978).

Proof of Alleged Collateral Crime — Prejudicial: The probative value, if any, of the challenged testimony was clearly outweighed by its unfair prejudice. The testimony that defendant appeared intoxicated on amphetamines was remote and cumulative and tended to confuse the issues by alleging a collateral crime with which defendant was not charged. Although this rule was not then effective, the court discussed the rule and current law and concluded that such testimony should have been excluded and failure to do so was an abuse of discretion constituting reversible error. St. v. Zimmerman, 175 M 179, 573 P2d 174 (1977).

Motion In Limine Appropriate to Exclude Evidence: A motion in limine may be used to exclude evidence that, even if relevant, has probative value substantially outweighed by the danger of unfair prejudice. Wallin v. Kinyon Estate, 164 M 160, 519 P2d 1236 (1974). See also St. v. Lias, 218 M 124, 706 P2d 500, 42 St. Rep. 1453 (1985).

OTHER CRIMES

Facts Regarding Defendant's Prison Incarceration and Probationary Status Properly Admitted as Inextricably Linked to Circumstances Surrounding Incest Charge: At Bauer's incest trial, the District Court barred mention by the prosecution of Bauer's two prior felony convictions, but did rule that the fact of Bauer's lengthy prior prison incarceration and status as a probationer at the time of the incest were admissible as part of the transaction. Bauer contended on appeal that the incarceration and probation information were highly prejudicial and constituted evidence of other crimes that should have been admitted only after the appropriate notice under the Just rules. The state cited the transaction rule in 26-1-103, which provides that when a declaration, act, or omission forms part of a transaction that is itself the fact in dispute or evidence of that fact, then the declaration, act, or omission is admissible as part of the transaction. The Supreme Court agreed with the state. In order for the jury to understand the context of the alleged incest, the victim needed to explain that she had not known or seen her father because he had been incarcerated since she was a small child. Thus, the District Court acted conscientiously and within the bounds of reason in allowing the facts of Bauer's prison incarceration and probationary status into evidence. St. v. Bauer, 2002 MT 7, 308 M 99, 39 P3d 689 (2002).

Introduction of Evidence of Acts Not Referred to in Pretrial Order — Not Grounds for New Trial: As a result of a dispute, the relationship between neighbors Lopez, Monroe, and Josephson deteriorated until assault charges were filed against Josephson. The operative contentions in the pretrial order were that Josephson assaulted Lopez by pointing a firearm at

Lopez's face and assaulted Monroe verbally and fired a weapon toward Monroe's property. The District Court found it impossible to determine from the allegations the dates, times, and places that the alleged assaults took place, but the court concluded that the pretrial order nevertheless placed Josephson on notice that he was being accused of assault on multiple occasions over an unspecified period of time. Josephson moved for a new trial on grounds that plaintiffs were improperly allowed to introduce evidence of acts not referred to in the pretrial order, evidence of bad character, and evidence of other crimes, wrongs, or acts. However, because Josephson waited until the day of trial to clarify which assaults formed the basis of the case against him, rather than using available pretrial motions and rules of discovery, the District Court was not found to have abused its discretion in giving plaintiffs latitude in their proof of the various assaults at trial, including allowing evidence of bad character to impeach Josephson's testimony. The District Court did properly preclude evidence of assaults by Josephson on nonparty persons. Lopez v. Josephson, 2001 MT 133, 305 M 446, 30 P3d 326 (2001).

No Prejudice From Use of Inadmissible, but Simple and Distinct, Evidence: Southern was charged with two counts of kidnapping, one count of burglary, one count of theft, and five counts of sexual intercourse without consent. In moving to sever the nine counts in the information into four separate trials pursuant to 46-13-211, Southern argued that the prejudicial effect of the other crimes evidence substantially outweighed its probative value and thus evidence of the other crimes would not have been admissible in separate trials. It is inevitable that evidence of other crimes will have some prejudicial effect, so under the fourth part of the modified Just rule (see St. v. Matt, 249 M 136, 814 P2d 52 (1991)), relevant evidence will be inadmissible only when its probity is substantially outweighed by the danger of unfair prejudice. Pursuant to St. v. Huether, 284 M 259, 943 P2d 1291, 54 St. Rep. 872 (1997), the prejudicial effect of relevant evidence will substantially outweigh the probative value when the evidence will prompt the jury to decide the case on an improper basis. Thus, evidence is inadmissible under the fourth part of the modified Just rule if it arouses the jury's sympathy for one side without regard to its probative value, if it confuses or misleads the jury, or if it distracts the jury from the main issues in the case. Prejudice arising from the use of inadmissible evidence will not be found when the evidence is simple and distinct. Even though the other crimes evidence in Southern's case would have been prejudicial, the jury was instructed that each count was a distinct offense and had to be decided separately. There was nothing in the record to suggest that the jury did not keep the relevant evidence separate. Since the other crimes evidence was simple and distinct and would have been admissible at separate trials, Southern failed to establish that the jury used evidence of guilt on one charge to convict him of other charges on the theory that the evidence would have been inadmissible in trials on the other charges. St. v. Southern, 1999 MT 94, 294 M 225, 980 P2d 3, 56 St. Rep. 395 (1999).

Pending Criminal Charges Inadmissible: Clews sued Montana Mining Properties, Inc. (MMPI), for failure to pay him for his consulting services. MMPI argued that the lower court erred in not admitting evidence of pending stock fraud charges in England against Clews and another company principal that were related to the mining project involving Clews and MMPI. The Supreme Court held that evidence of the charges was not probative of the relationship that existed between Clews and the other company principal, that charges do not prove anything, and that therefore their prejudicial value exceeded any probative value. C. Haydon Ltd. v. Mont. Min. Properties, Inc., 286 M 138, 951 P2d 46, 54 St. Rep. 1341 (1997).

Sexual Assault — Evidence of Previous Crimes:

The District Court did not err in admitting evidence that Brooks had previously committed a similar sexual assault upon a youth under similar circumstances (while playing with a youth in the water) because all of the criteria required in St. v. Matt, 249 M 136, 814 P2d 52 (1991), had been met. St. v. Brooks, 260 M 79, 857 P2d 734, 50 St. Rep. 967 (1993).

The District Court did not commit a reversible error by not excluding testimony relating to other incidents of sexual assault. The court had granted a motion to suppress testimony by the minors involved in the other incidents, but the judge specifically restricted his ruling to testimony by, as opposed to testimony relating to, the minors, and the defense attorney did not object. Further, he did not object at the trial when the testimony of the prosecutrix relating to statements made by the defendant was introduced. The testimony was relevant not to prove the occurrence of the incidents but to prove the intent of the accused. The testimony was of sufficient probative value to outweigh any possible prejudicial effect of its introduction. St. v. Patton, 183 M 417, 600 P2d 194, 36 St. Rep. 1731 (1979).

Evidence of Similar Rape Introduced to Prove Identity of Assailant: K.B. was raped by an unknown assailant after she awoke to find the assailant lying next to her on her bed. At trial, the District Court allowed the state to introduce evidence of another rape in a nearby town, in which

the victim had found her assailant, identified as the defendant, sitting next to her on her bed when she awoke. The Supreme Court held that the evidence was properly allowed under Rule 404(b) and this rule because it fit within the exception to establish identity and because its probative value was not outweighed by its prejudicial effect. St. v. Kordonowy, 251 M 45, 823 P2d 854, 48 St. Rep. 1148 (1991).

Admission of Evidence of Prior Fires — Improperly Introduced: Defendants were prosecuted and found guilty of criminal mischief in relation to a fire that destroyed their mobile home. At the trial, there was no direct evidence linking defendants with intentionally causing the fire. The state was allowed to introduce evidence of several other fires in buildings owned or occupied by defendants in the previous 7 years. The Supreme Court reversed and remanded on the grounds that the admittance of evidence of the prior fires unfairly prejudiced defendants because no evidence existed that linked them with intentionally causing the prior fires. The prior fires are not other crimes, wrongs, or acts under this rule. St. v. Johnson, 250 M 496, 821 P2d 1039, 48 St. Rep. 1063 (1991), followed in St. v. Enright, 1998 MT 322, 292 M 204, 974 P2d 1118, 55 St. Rep. 1308 (1998), and St. v. Link, 1999 MT 4, 293 M 23, 974 P2d 1124, 56 St. Rep. 13 (1999).

Prior Crimes or Acts — Modified Just Rule: The following basis must be used to determine the admissibility of evidence of other crimes, wrongs, or acts: (1) the other crimes, wrongs, or acts must be similar; (2) the other crimes, wrongs, or acts may not be remote in time; (3) the evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity with such character; but it may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, or identity or absence of mistake or accident; and (4) although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading of the jury, considerations of undue delay, waste of time, or needless presentation of cumulative evidence. St. v. Matt, 249 M 136, 814 P2d 52, 48 St. Rep. 614 (1991), followed in St. v. Brooks, 260 M 79, 857 P2d 734, 50 St. Rep. 967 (1993), St. v. Romero, 261 M 221, 861 P2d 929, 50 St. Rep. 1296 (1993), and St. v. Henderson, 278 M 376, 925 P2d 475, 53 St. Rep. 958 (1996).

Prior Crimes Introduced to Prove Element of Witness Tampering: The defendant was charged with domestic abuse and witness tampering for attempting to coerce his girlfriend not to testify against him on abuse charges. The Supreme Court ruled that the lower court properly admitted evidence of the abuse charge because the state had to prove that there was a pending action in order to prove all elements of witness tampering. St. v. Matt, 245 M 208, 799 P2d 1085, 47 St. Rep. 1988 (1990).

Evidence of Other Crimes — Admission of Prior Sexual Assault Conviction Upheld to Prove Defendant Acted Knowingly: In 1989, the defendant was charged with sexually assaulting his 15-year-old daughter. At trial, the defendant was convicted after evidence of a 1984 conviction of sexual assault upon the same daughter was admitted into evidence. On appeal, the state argued that admission of the 1984 conviction was appropriate to prove that the defendant acted knowingly because it showed the defendant's motive, intent, absence of mistake or accident, and knowledge. The Supreme Court examined the factors required by St. v. Just, 184 M 262, 602 P2d 957 (1979), balanced the probative value of the evidence against the possibility of prejudice, and concluded that evidence of the 1984 conviction was properly admitted by the District Court. St. v. Medina, 245 M 25, 798 P2d 1032, 47 St. Rep. 1832 (1990), followed in St. v. Brooks, 260 M 79, 857 P2d 734, 50 St. Rep. 967 (1993).

Inadvertent Testimony — No "Just" Notice Required: A police officer testified to other crimes despite a prior agreement and without the required Just notice. The Supreme Court found that no Just notice was required because the County Attorney never intended to introduce evidence of other crimes and the testimony was an inadvertent and unintentional response to a nonsuggestive question. Any error was rendered harmless by the trial court's cautionary jury instructions, and the motion for a new trial or mistrial was properly denied. St. v. Brush, 228 M 247, 741 P2d 1333, 44 St. Rep. 1495 (1987), followed in St. v. Seaman, 236 M 466, 771 P2d 950, 46 St. Rep. 512 (1989), and St. v. Long, 2005 MT 130, 327 M 238, 113 P3d 290 (2005).

Motion Granted to Exclude Evidence Not Specifically Named — Error to Introduce: As defendant was not notified of the state's intention to introduce evidence of other crimes, the District Court properly granted defendant's motion in limine to exclude all "evidence items allegedly taken by the defendant which are not specifically named in the informations". Two items, which were the basis of the misdemeanor charges, were found in a package sent by defendant, along with other items that had no connection with the charges. During trial, despite its ruling, the court allowed the package and its entire contents into evidence. Failure by the court to adhere to its own ruling was an abuse of discretion, prejudicial and harmful to

defendant, and constituted reversible error. St. v. Howell, 226 M 148, 734 P2d 214, 44 St. Rep. 542 (1987).

Impeachment — Permissible Scope of Cross-Examination: Defendant was charged with eight counts of sexual intercourse without consent with his stepdaughter. Defendant, after conviction, appealed, contending he was improperly cross-examined on many separate, collateral crimes or wrongs that were irrelevant. In the alternative, he contended that even if relevant the prejudicial effect upon the jury outweighed probative value. The Supreme Court held that the proper scope of cross-examination is determined by the scope of the direct testimony. Defendant offered direct testimony about specific instances of past conduct. Cross-examination showing that defendant attempted to intimidate his wife went to the heart of the defense theory that the wife had coerced the children and perjured herself in order to frame defendant. The jury was required to resolve a contradiction between the testimony of the defendant and the victim. The cross-examination was no broader than was required to meet the bold assertions and admissions during the direct examination of the defendant. St. v. Clark, 209 M 473, 682 P2d 1339, 41 St. Rep. 833 (1984), distinguished in St. v. Eklund, 264 M 420, 872 P2d 323, 51 St. Rep. 335 (1994).

Prejudice Stemming From Evidence Held Inadmissible as Irrelevant: In a tort action relating to the explosive failure of a Goodyear K-type split tire rim where the Supreme Court held inadmissible as irrelevant testimony regarding political bribery during Watergate by the defendant Goodyear Tire and Rubber Company, the failure of the trial court to exclude such evidence was prejudicial to the defendant and permitted the jury to indulge in improper speculation and guesswork. Kuiper v. Goodyear Tire & Rubber Co., 207 M 37, 673 P2d 1208, 40 St. Rep. 1861 (1983).

Other Similar Conduct of Witness — Impeachment: At trial of defendant convicted of aggravated assault arising from fight outside a bar, it was reversible error for the court to allow the prosecutor to interrogate one of defendant's witnesses as to past instances of misconduct of the witness at the bar, unconnected to the assault, for the purpose of impeaching the witness. St. v. White, 202 M 491, 658 P2d 1111, 40 St. Rep. 235 (1983).

Testimony on Previous Incarceration — No Showing of Contribution to Conviction — Overwhelming Evidence of Guilt: Defendant, convicted of aggravated assault, aggravated burglary, and attempted sexual intercourse without consent, contended that a mistrial should have been granted when a witness made reference to the fact that defendant had been in the state penitentiary. Defendant's motion was denied, but the court struck the material from the record and gave the jury an instruction to ignore evidence stricken from the record. The Supreme Court, applying the test of whether there was a reasonable possibility the inadmissible evidence might have contributed to the conviction, therefore requiring reversal, held that there was no evidence defendant was denied a substantial right. There was no showing that the reference might have contributed to his conviction in the face of overwhelming evidence directly proving his guilt. St. v. Wells, 202 M 337, 658 P2d 381, 40 St. Rep. 127 (1983).

Similar Break-Ins on Same Day Admissible: Defendant was charged with felony theft for stealing a pickup, burglary for a break-in at the Ulm Bar, burglary for a break-in at the Mountain Palace Bar, and theft of personal property from the Ulm Bar break-in. On the same day as these break-ins occurred, the Craig Bar was broken into and burglarized. The District Court denied defendant's motion in limine to exclude evidence from similar crimes committed on the same date as those with which defendant was charged. Applying the four-part test set forth in St. v. Just, 184 M 262, 602 P2d 957 (1979), on appeal the Supreme Court said that the evidence was admissible, that the proper procedure was followed as to the form and content of the notice, and that the jury was properly instructed. St. v. Van Natta, 200 M 312, 651 P2d 57, 39 St. Rep. 1771 (1982).

Evidence of Other Crimes — Remoteness: Evidence that defendant charged with sexual intercourse without consent had committed a similar act 2 ½ years before was too remote to fall within the exception to the general rule that evidence of other crimes is not admissible. St. v. Hansen, 187 M 91, 608 P2d 1083, 37 St. Rep. 657 (1980), explained in St. v. T.W., 220 M 280, 715 P2d 428, 43 St. Rep. 368 (1986).

Evidence of Other Crimes — Sequence of Events Not Unusual: When the alleged similarities between crimes reveal nothing more than a sequence of events common in the crime charged, the acts are not unusual and distinctive enough to come within the purview of the exception allowing evidence of other crimes to be admitted. St. v. Hansen, 187 M 91, 608 P2d 1083, 37 St. Rep. 657 (1980), explained in St. v. T.W., 220 M 280, 715 P2d 428, 43 St. Rep. 368 (1986), and followed in St. v. Rogers, 1999 MT 305, 297 M 188, 992 P2d 229, 56 St. Rep. 1228 (1999).

Similarity of Acts of Intercourse Without Consent: Numerous rapes follow the pattern of barroom pickup, voluntary entry into defendant's vehicle by victim, driving to a remote area,

advances, resistance, and forcible intercourse. The sequence of events has no distinctive qualities that distinguish the acts from other rapes as necessary to bring the events within the purview of the similarity element of the "other crimes" admission rule exception. St. v. Hansen, 187 M 91, 608 P2d 1083, 37 St. Rep. 657 (1980), explained in St. v. T.W., 220 M 280, 715 P2d 428, 43 St. Rep. 368 (1986), and followed in St. v. Rogers, 1999 MT 305, 297 M 188, 992 P2d 229, 56 St. Rep. 1228 (1999).

Admission of Evidence of Other Crime — Living Upon Earnings of Prostitute: The court did not err in rejecting defendant's contention that a mistrial should have been declared upon his testimony on cross-examination that he lived with and was supported by a female who was a prostitute. The evidence was introduced to show financial status, not that he acted in conformity with his character in committing the crime charged. St. v. Williams, 185 M 140, 604 P2d 1224, 36 St. Rep. 2328 (1979).

Other Crime — Prejudice — Limited Use of Evidence: Testimony concerning another crime in the chain of events with the crime of which the defendant is accused, when used for impeachment purposes, may be admissible in a proper case. Since a stipulation stating the nature of the crime committed and the disposition of other prosecutions stemming from the crime had been read to the jury and since the defendant did not carry his burden of affirmatively showing prejudice, this was such a case. St. v. Holliday, 183 M 251, 598 P2d 1132, 36 St. Rep. 1535 (1979).

COMMON SCHEME

Common Scheme — Homicide Trial — Prior Similar Acts: In a homicide trial following the shooting of recently divorced ex-wife's boyfriend, ex-wife testified that defendant had often, during the period of from 1 to 3 ½ years prior to the homicide, pointed guns at her, held a knife to her throat, strangled her, and slapped her. That testimony was admissible under State's theory of prior acts showing a common scheme, plan, or design, i.e., the threat and possible carrying out of violence to intimidate her and those associated with her. The testimony met the tests of similarity to the act charged; nearness in time; and tendency to establish a common scheme, plan, or design. Probative value was not substantially outweighed by prejudice to defendant, and the State gave defendant notice of its intent to introduce the evidence and why. The judge's failure to admonish the jury that the testimony was admitted only for the State's stated purpose was not reversible error because defendant did not object to the failure. Once the State has given notice, the remaining procedures are mandatory only upon defendant's request and/or objection. He cannot consciously plant errors by remaining silent and then objecting on appeal. St. v. Stroud, 210 M 58, 683 P2d 459, 41 St. Rep. 919 (1984).

Evidence of Much Greater Amount of Marijuana Than Defendant Charged With — Prejudice: County Sheriffs saw defendant place a garbage bag in his truck and drive away from residence that was under surveillance for suspicion of drug-related activity in house. The officers followed defendant, and although he eluded them briefly, they caught up with him and searched his vehicle. Since the officers did not find a garbage bag in the truck, they retraced the truck's route and discovered a garbage bag similar to the bag seen in defendant's possession earlier. The bag contained about 10 pounds of marijuana. Later the officers obtained a warrant to search the house and a vehicle parked in front of it. This search resulted in the seizure of 80 pounds of marijuana, scales for weighing it, and bags for packaging it. The occupant of the house was arrested. During defendant's trial, much evidence concerning the search of the residence was admitted under the state's theory that it was relevant to prove a common scheme or plan. The Supreme Court reversed defendant's conviction of possession of dangerous drugs with intent to sell because of prosecutor's failure to comply with rule for determining admissibility of evidence of other crimes or evidence of a common scheme or plan. The court also stated that the evidence may have been inadmissible under this rule. St. v. Stemple, 198 M 409, 646 P2d 539, 39 St. Rep. 1085 (1982).

Common Scheme or Plan Evidence Admissible: Evidence presented by the prosecution concerning two television thefts by the defendants from two different motels introduced in order to link the defendants to a third theft from a third motel has probative value tending to prove common scheme and is not so inherently prejudicial that it is inadmissible and a denial of a fair trial to defendants. The evidence has the effect of helping to prove through circumstantial evidence the commission of the crime and the connection of the defendants with the common scheme. Prejudicial evidence is not always inadmissible evidence. St. v. Strain, 190 M 44, 618 P2d 331, 37 St. Rep. 1763 (1980).

Evidence of Other Crimes — Tendency to Establish Common Scheme: Evidence that the defendant, charged with sexual intercourse without consent, had 2 ½ years earlier raped another woman after picking her up in a bar and driving her to a remote area did not tend to establish a

common scheme, plan, or system. On the first occasion, the defendant and the victim were alone when he allegedly committed the act, and in the crime charged the defendant and the victim were in the company of a third party. St. v. Hansen, 187 M 91, 608 P2d 1083, 37 St. Rep. 657 (1980), explained in St. v. T.W., 220 M 280, 715 P2d 428, 43 St. Rep. 368 (1986).

Admissibility of Evidence of Prior Crimes or Acts: The court did not commit error in admitting prosecutrix's uncorroborated testimony of prior uncharged sexual assaults by prosecutrix's stepfather for the limited purpose of showing plan, scheme, or design, as there was no showing of substantial prejudice to the defendant by admitting such evidence. St. v. Just, 184 M 262, 602 P2d 957, 36 St. Rep. 1649 (1979), following St. v. Jensen, 153 M 233, 455 P2d 631 (1969), and followed in St. v. Tecca, 220 M 168, 714 P2d 136, 43 St. Rep. 264 (1986), St. v. T.W., 220 M 280, 715 P2d 428, 43 St. Rep. 368 (1986), and in St. v. Fitzgerald, 238 M 261, 776 P2d 1222, 46 St. Rep. 1253 (1989). Just was clarified, with regard to the applicability of the corpus delicti rule, in St. v. Hansen, 1999 MT 253, 296 M 282, 989 P2d 338, 56 St. Rep. 997 (1999).

CAUTIONARY INSTRUCTION

Testimony on Previous Incarceration — No Showing of Contribution to Conviction — Overwhelming Evidence of Guilt: Defendant, convicted of aggravated assault, aggravated burglary, and attempted sexual intercourse without consent, contended that a mistrial should have been granted when a witness made reference to the fact that defendant had been in the state penitentiary. Defendant's motion was denied, but the court struck the material from the record and gave the jury an instruction to ignore evidence stricken from the record. The Supreme Court, applying the test of whether there was a reasonable possibility the inadmissible evidence might have contributed to the conviction, therefore requiring reversal, held that there was no evidence defendant was denied a substantial right. There was no showing that the reference might have contributed to his conviction in the face of overwhelming evidence directly proving his guilt. St. v. Wells, 202 M 337, 658 P2d 381, 40 St. Rep. 127 (1983).

Admissibility of Mug Shots: Defendant was identified as the perpetrator of a burglary by identification of mug shots by the two victims of the burglary and a next-door neighbor. The identifications were made from a mug shot book. The viewings were conducted separately and within a few days of the burglary. The parties did not discuss the identifications with each other. Defendant contended that the mug shots should not have been allowed to be introduced because they implied that he had committed prior criminal acts. The mug shots were booking photographs and merely indicated that defendant had been booked on prior occasions. The photographs were used for identification. No evidence was adduced indicating that defendant had ever been convicted of any crime. The photographs were relevant for purposes of identification. The judge also gave a cautionary instruction regarding the photographs. This instruction dealt with possible prejudicial effect, and it was within the discretion of the trial judge to admit the photographs. St. v. Stokes, 195 M 321, 637 P2d 498, 38 St. Rep. 1889 (1981).

Cautionary Instruction When No Evidence Other Than Photo Identification: Although a special cautionary instruction may be required where identification testimony is the only evidence tending to connect a defendant with commission of the act charged, where there is other evidence, such as similar modus operandi, a cautionary instruction is not required. St. v. Strain, 190 M 44, 618 P2d 331, 37 St. Rep. 1763 (1980).

Witness' Claim of Intimidation by Defense Counsel: Every excited utterance of a witness does not call for a cautionary instruction. There was no prejudice to the defendants when the court failed to issue a cautionary instruction to the jury regarding testimony of a witness in relation to her claim of intimidation by defense counsel. St. v. Strain, 190 M 44, 618 P2d 331, 37 St. Rep. 1763 (1980).

MISCELLANEOUS

Admission of Evidence Regarding Language on Defendant's Vehicle and Clothing — Relationship to Crime of Assault With Weapon: Cesnik was charged with assaulting a fellow gun club member with a weapon. The trial court admitted evidence regarding phrases on Cesnik's vehicle and clothing. Cesnik contended that the evidence was unrelated to the assault charge and should not have been admitted. The Supreme Court held that the evidence provided further context regarding the animosity between the men and explained why the club member wanted Cesnik removed from the gun club—an issue that Cesnik's counsel broached on direct examination. The evidence was relevant and admissible. St. v. Cesnik, 2005 MT 257, 329 M 63, 122 P3d 456 (2005).

Inadmissibility of Reverse 404(b) Evidence — No Prejudice to State Prosecution: Defendant contended that the trial court improperly excluded character evidence regarding another person,

which could have been introduced under the seldom used "reverse 404(b) evidence" theory to identify the other person as the author of various threatening letters. Defendant claimed that exclusion of the evidence violated the right to present a defense and the right to confront witnesses. Even though there was little risk that admitting the reverse 404(b) evidence would prejudice the state, most of the evidence was propensity evidence, and the evidence in question did not meet the modified Just test for admissibility of character evidence, so the District Court did not err in refusing to admit the reverse 404(b) evidence. St. v. Clifford, 2005 MT 219, 328 M 300, 121 P3d 489 (2005).

Evidence of Blood Alcohol Content of Other Vehicle Occupant Properly Excluded: The trial court excluded evidence regarding the blood alcohol content (BAC) of a passenger in Larson's car on grounds that it was irrelevant and not probative of Larson's BAC or level of impairment at the time of an accident. Larson maintained that admission of the evidence would have supported prospective testimony regarding the parties' drinking activities and countered the state's expert regarding Larson's level of impairment. The Supreme Court affirmed. The passenger's actions were not on trial, nor was there evidence suggesting that both parties consumed alcohol in the same amounts at the same times. Any probative value of the evidence was outweighed by its prejudicial effect, and it was properly excluded. St. v. Larson, 2004 MT 345, 324 M 310, 103 P3d 524 (2004). See also St. v. Krause, 2002 MT 63, 309 M 174, 44 P3d 493 (2002).

No Dispute Regarding Dangerous Road — Evidence That Highway Signs Erected Following Accident Properly Excluded: The trial court granted the state's motion in limine to exclude evidence of highway signs erected at a frontage road accident scene following the accident unless the evidence was offered to rebut or refute evidence that the state did not consider the accident site to be dangerous. Larson contended that the absence of signs established the roadway's danger and partially vitiated his negligence. The Supreme Court held that granting the motion in limine was not an abuse of discretion. The state conceded that the road was dangerous, and excluding the signs as evidence did not preclude Larson from fully presenting his theory that the road was dangerous, so evidence of signs erected subsequent to the accident would only have substantiated proof already offered at trial. St. v. Larson, 2004 MT 345, 324 M 310, 103 P3d 524 (2004).

Admissibility of Inmate Testimony Regarding Jail Drug Use — Criminal Drug Sale Conviction Affirmed: Defendant was convicted of sale of dangerous drugs after a jail inmate testified that he observed defendant and another inmate taking drugs that could have come only from defendant's prescription in the jail medication box. Defendant contended that the testimony should have been excluded on grounds of relevance, relying on Havens v. St., 285 M 195, 945 P2d 941 (1997). The Supreme Court distinguished Havens because the testimony here was based on eyewitness testimony that was clearly relevant to the state's case against defendant. The exception in this rule for the exclusion of relevant evidence because of prejudicial effect or potentially misleading impact on the jury did not embrace competent eyewitness testimony describing the commission of defendant's offense. The trier of fact is in the best position to determine the weight of the evidence and credibility of witnesses, and a witness's appreciation of the duty to tell the truth is not necessarily diminished by prior violations of the law. Thus, the testimony was properly before the trial court, and defendant's motion in limine to exclude the testimony was properly denied. St. v. Vandersloot, 2003 MT 179, 316 M 405, 73 P3d 174 (2003), followed in St. v. Ferguson, 2005 MT 343, 330 M 103, 126 P3d 463 (2005).

One-on-One Showup Identification Impermissibly Suggestive — Witness Testimony Permissible Under Totality of Circumstances: Bingman sought to exclude the testimony of witnesses in a felony DUI trial on grounds that the witnesses' observation of Bingman through a two-way window at the police department was impermissibly suggestive, resulting in an unreliable identification. The suggestive nature of one-on-one showup identifications has been previously recognized. In St. v. Clark, 2000 MT 40, 298 M 300, 997 P2d 107 (2000), the Supreme Court set out a two-part test for determining whether evidence gained from such an identification is permissible. The state conceded that the identification procedure was impermissibly suggestive, satisfying the first part of the Clark test. The second part of the test requires a determination of whether, under the totality of the circumstances, the identification gave rise to a substantial likelihood of irreparable misidentification. In this case, despite the impermissibly suggestive nature of the showup identification procedure, the certainty with which the witnesses identified Bingman outweighed the likelihood of misidentification, so the District Court did not err in allowing the witnesses' testimony. St. v. Bingman, 2002 MT 350, 313 M 376, 61 P3d 153 (2002).

Evidence of Conduct of Child Abuse Victim Prior to Assault Irrelevant but Not Prejudicial — Conviction Affirmed: The District Court allowed testimony by two counselors who observed a

suspected child abuse victim in the family home. The child exhibited inappropriate sexual conduct and made several sexual comments that ultimately led to the removal of the child from the home and charges against and conviction of Thompson for sexual assault of his child. On appeal, Thompson contended that the testimony was erroneously admitted because it pertained to events that occurred before the assault that he was accused of and was therefore not probative of any fact in issue and was irrelevant. The Supreme Court agreed. Neither witness offered an opinion of who might have been responsible for the child's behavior, and there was no evidence that it was caused by Thompson, so the testimony was irrelevant to the issue being tried. However, the objectionable inference from the evidence was that the child had been sexually abused, a fact that Thompson himself conceded through his own witnesses. The testimony was cumulative and merely illustrated a fact that was not in dispute and thus did not affect Thompson's substantial rights or provide grounds for reversal. St. v. Thompson, 2001 MT 119, 305 M 342, 28 P3d 1068 (2001).

Inadmissibility of Evidence of Receipt of Workers' Compensation Benefits — Reversible Error: Mickelson was injured when the fire truck that he was driving was struck by a Montana Rail Link (MRL) train and sought damages. Prior to trial, Mickelson filed a motion in limine to preclude MRL from mentioning or arguing at trial that Mickelson was receiving workers' compensation benefits as a result of the injuries. The District Court denied the motion, concluding that MRL should be allowed to show that Mickelson did not take reasonable steps to mitigate the damages by accepting a retraining employment position because of fear of losing the workers' compensation benefits. At trial, evidence of Mickelson's workers' compensation benefits was allowed throughout the proceedings, and the jury decided for MRL. On appeal, MRL argued that the evidence had significant probative value as to why Mickelson had not returned to work, perhaps even indicating that Mickelson was malingering by not accepting a supported employment position. The Supreme Court noted the District Court's broad discretion in determining the relevance and admissibility of evidence, but recited several prior holdings that evidence of receipt of workers' compensation benefits or other collateral source benefits constitutes prejudicial and reversible error requiring a new trial. Despite MRL's argument to the contrary, introduction of the evidence could not be considered harmless because the evidence could have an impact on the jury's verdict on the issue of liability as well as damages. The Supreme Court reversed and remanded for a new trial. Mickelson v. Mont. Rail Link, Inc., 2000 MT 111, 299 M 348, 999 P2d 985, 57 St. Rep. 446 (2000), following Mydlarz v. Palmer/Duncan Constr. Co., 209 M 325, 682 P2d 695, 41 St. Rep. 738 (1984). See also Goggans v. Winkley, 159 M 85, 495 P2d 594 (1972), Allers v. Willis, 197 M 499, 643 P2d 592, 39 St. Rep. 745 (1982), and Thomsen v. St., 253 M 460, 833 P2d 1076, 49 St. Rep. 533 (1992).

Identification Procedure Impermissibly Suggestive — Motion In Limine to Suppress Witness's In-Court Identification Properly Denied — No Substantial Likelihood of Irreparable Misidentification: The witness stood by defendant's car for several minutes after an accident observing him for injuries and then left to get help when she saw that he appeared drunk and that there was a pistol on the car seat. When the witness and police returned, the defendant and pistol were gone. After many procedural delays and the suppression of evidence of defendant's driver's license taken from the car, the County Attorney's office sent a letter to the witness along with two photographs of defendant in jailhouse attire. The state affirmatively identified the person in the photos as defendant and asked the witness to notify the County Attorney's office if the photos didn't depict the person whom she saw in the car. Defendant's motion in limine to prohibit the witness's identification testimony was denied by the District Court. On appeal, the Supreme Court held that although the identification procedure was impermissibly suggestive, considering the totality of the circumstances, it did not create a substantial likelihood of misidentification and the motion was properly denied. St. v. Clark, 2000 MT 40, 298 M 300, 997 P2d 107, 57 St. Rep. 185 (2000).

Testimonial Tape-Recorded Interview Improperly Submitted to Jury — Error Harmless Because of Cumulative Nature of Evidence: Following an automobile accident in which his girlfriend was killed, Bales was interviewed by a highway patrol officer who taped the interview, during which Bales failed the HGN test and made allegedly prejudicial statements. Over Bales' objection, the District Court admitted the tape as an exhibit that the jury could listen to during deliberations. The Supreme Court noted that because the jury had not requested the playing of the tape, 46-16-504 applied, rather than 46-16-503. The Supreme Court found that the tape had a testimonial character and, citing St. v. Harris, 247 M 405, 808 P2d 453 (1991), for the common-law rule against submitting testimonial materials to the jury for unsupervised and unrestricted review during deliberations, held that the District Court abused its discretion in allowing the tape to go to the jury. However, allowing the jury to hear the tape did not unduly

emphasize that testimony to the exclusion of other witnesses, nor were statements on the tape inconsistent with statements given by the witnesses at trial. Rather, the tape was merely cumulative of other evidence and did not prejudice Bales, so the error was harmless. St. v. Bales, 1999 MT 334, 297 M 402, 994 P2d 17, 56 St. Rep. 1334 (1999), distinguishing St. v. Morse, 229 M 222, 746 P2d 108, 44 St. Rep. 1919 (1987), and overruling it to the extent that it is inconsistent with St. v. Harris, 247 M 405, 808 P2d 453, 48 St. Rep. 62 (1991), regarding the submission of testimonial materials to a deliberating jury. See also St. v. Mayes, 251 M 358, 825 P2d 1196, 49 St. Rep. 75 (1992), and St. v. Evans, 261 M 508, 862 P2d 417, 50 St. Rep. 1431 (1993).

Prohibiting Nontreating Doctor's Testimony That Person's Medical Records Did Not Have Certain Information: The decedent medical patient's wife was not allowed to call to the stand a family friend who was a doctor to testify that he found the decedent's medical records, which he examined after the death and at the family's request, devoid of a history and physical exam. Upon defendants' motion to exclude the testimony, the doctor said that he did not recall seeing the history and physical exam documentation in the records, but that it did not mean that they were not there, just that he did not recall seeing them. Assuming that such testimony would be relevant, it was of minimal probative value. Further, plaintiff called other doctors as experts, and allowing the family friend doctor to testify would likely confuse the jury, which might take his testimony to be that of an expert instead of that of a person testifying as to facts. Prohibiting the testimony was proper. Bueling v. Swift, 1998 MT 112, 288 M 472, 958 P2d 694, 55 St. Rep. 441 (1998).

General Standard of Review of Holdings on Admissibility of Evidence: Rulings on the admissibility of evidence are within the sound discretion of the District Court and will not be overturned on appeal absent an abuse of discretion by the trial court. St. v. Mayes, 251 M 358, 825 P2d 1196, 49 St. Rep. 75 (1992).

Admissibility of Extrinsic Evidence Regarding Informant's Drug Use as Relevant to Motive for False Testimony: A trial court's discretion in exercising control and excluding evidence of a witness's bias or motive to testify falsely becomes operative only after the constitutionally required threshold level of inquiry has been afforded the defendant. Therefore, subject to the limitations of Rules 403 and 611, M.R.Ev., a defendant should be afforded latitude in cross-examination and be allowed to introduce extrinsic evidence regarding an informant's alleged habitual drug use as relevant to the informant's motive to testify falsely, if denied by the informant. St. v. Gommenginger, 242 M 265, 790 P2d 455, 47 St. Rep. 681 (1990), followed in St. v. Haskins, 255 M 202, 841 P2d 542, 49 St. Rep. 922 (1992), and St. v. Milton, 280 M 142, 930 P2d 28, 53 St. Rep. 1337 (1996). However, see St. v. Allen, 276 M 298, 916 P2d 112, 53 St. Rep. 403 (1996).

Overheard Conversation — Repetitious: The District Court did not err in excluding testimony from a person not present at the assault who would have testified that she overheard a conversation in which the victim stated that as far as he knew, he had only been hit once. Such testimony would have been repetitious because it would have been consistent with the victim's own testimony at the trial. Sloan v. St., 236 M 100, 768 P2d 1365, 46 St. Rep. 214 (1989).

Parole Violation — Evidence Not Within Scope of Appeal Properly Excluded: Defendant convicted of parole violation contended that tape recordings, which might have shown distress and suicidal tendencies, were useful in his development of a defense of "duress" and "necessity". However, admission of the evidence was properly denied because it was cumulative and irrelevant to the issue of parole violation and revocation of the suspended sentence. St. v. Pease, 233 M 65, 758 P2d 764, 45 St. Rep. 1296 (1988).

Demonstration of Fighting Prowess Disallowed as Cumulative: Defendant contended District Court error in disallowing a demonstration of how he "punches like a woman, blocks like a sissy and why a knife was an appropriate choice" to equalize his opponent's fighting prowess, asserting the evidence would show he could not defend himself without a weapon. The demonstrative evidence was cumulative and its exclusion did not constitute reversible error. St. v. Crazy Boy, 232 M 398, 757 P2d 341, 45 St. Rep. 1145 (1988).

Diagram and Written Rendition of Defendant's Story — Excludable as Repetitious: The trial court did not err in refusing to admit into evidence a document that included diagrams and a written rendition by defendant of his version of the crimes. Defendant claimed the document showed that his story was consistent with earlier versions and that he did not concoct his story; however, the document was disallowed as being repetitious testimony. St. v. Miller, 231 M 497, 757 P2d 1275, 45 St. Rep. 790 (1988).

Tape Recordings — Repetitious Evidence Excluded: The District Court did not abuse its discretion in excluding a tape recording of a conversation between two witnesses when time necessary to hear the tapes would not be judiciously expended because the evidence was merely

cumulative and otherwise before the jury. St. v. Short, 217 M 62, 702 P2d 979, 42 St. Rep. 1026 (1985).

Internal Department Memoranda — Relevant to Road Condition: In a wrongful death action plaintiff attempted to introduce into evidence internal Highway Department (now Department of Transportation) memoranda containing evaluations of specific stretches of road within the state, including the location of the accident involved. Plaintiff had a state employee explain the documents and laid a foundation for their admission. The State, a codefendant, contended the documents were irrelevant, confusing, prejudicial, and erroneous. The trial court excluded the evidence. On appeal, the Supreme Court found that the exhibits were relevant. They tended to show the general condition of the highway which was a material issue in the plaintiff's case against the State. The contention that the exhibits would confuse or mislead the jury showed a lack of confidence in the intelligence and common sense of the jury. It was error to exclude the exhibits; however, in light of all the evidence admitted concerning the road conditions, the error was harmless. Lindberg v. Leatham Bros., Inc., 215 M 11, 693 P2d 1234, 42 St. Rep. 137 (1985).

Relevancy of "Other Accidents" Evidence — Substantial Similarity Required: In order to prevent the jury from being misled, the party offering "other accidents" evidence bears the burden of showing that the circumstances surrounding the product involved in the other accidents were substantially the same or similar to the accident at issue. Kuiper v. Goodyear Tire & Rubber Co., 207 M 37, 673 P2d 1208, 40 St. Rep. 1861 (1983).

Prior Compromise Settlements Properly Excluded: Plaintiff injured his back when the seat in the locomotive he was operating broke and threw him backward. Plaintiff had had two prior back injuries that had been successfully treated. The District Court excluded evidence relating to plaintiff's previous settlement of claims with defendant. Defendant contended that since the jury heard evidence regarding the previous injuries, it should have been informed of the settlements. The Supreme Court held that compromise settlements for previous injuries do not necessarily reflect the seriousness of the injuries and may confuse the jury. Any probative value was outweighed by possible prejudice. Callihan v. Burlington N., Inc., 201 M 350, 654 P2d 972, 39 St. Rep. 2158 (1982).

Prosecutor Not Required to Stipulate Defendant's Admissions: An admission by a defendant does not prevent the state from presenting separate and independent proof of the fact admitted. St. v. Dickens, 198 M 482, 647 P2d 338, 39 St. Rep. 1137 (1982).

Auto Negligence Suit — Admission of Reinjury Evidence — Denial of Evidence on Workers' Compensation Claim for Reinjury: Evidence that personal injury tort claimant reinjured his back at work some 10 months after accident in which his back was injured as a result of defendant's alleged negligence was properly admitted into evidence, but evidence that he had a pending workers' compensation claim arising from the reinjury was properly excluded by the trial judge. Allers v. Willis, 197 M 499, 643 P2d 592, 39 St. Rep. 745 (1982).

Evidence of Alteration of Accident Scene After Accident Excluded: Evidence of subsequent repairs or improvements by a defendant altering the scene of an accident may not be admitted in evidence to show negligence on the part of the defendant. The evidence erroneously admitted here put before the jury the idea that the State, by constructing an additional guardrail at the scene of the accident after the accident, admitted to antecedent negligence. Cech v. St., 183 M 75, 598 P2d 584, 36 St. Rep. 1348 (1979), affirmed on rehearing, 184 M 522, 604 P2d 97, 36 St. Rep. 2185 (1979).

Exclusion of Testimony — Repetitious: Testimony concerning threats to members of defendant's family made by the victim of the defendant's assault prior to the assault may be excluded if the testimony is repetitious and likely to distract and mislead the jury from the issues actually in controversy. The exclusion of such testimony is within the court's discretion. St. v. Breitenstein, 180 M 503, 591 P2d 233, 36 St. Rep. 403 (1979).

Identification of Criminal Suspects: The test for admissibility of evidence based on a lineup is a determination of whether or not the identification procedure was impermissibly suggestive and, if so, whether or not the procedure, under the totality of the circumstances, would have such a tendency to give rise to a substantial likelihood of irreparable misidentification that to allow the witness to make an in-court identification would violate due process. St. v. Lara, 179 M 201, 587 P2d 930, 35 St. Rep. 1699 (1978), followed in St. v. Schoffner, 248 M 260, 811 P2d 548, 48 St. Rep. 424 (1991). See also St. v. Clark, 2000 MT 40, 298 M 300, 997 P2d 107, 57 St. Rep. 185 (2000).

Polygraph Test: The mention by a prosecution witness that he had taken a polygraph test did not prejudice a criminal defendant's case. St. v. McClean, 179 M 178, 587 P2d 20, 35 St. Rep. 1790 (1978).

Character Evidence to Demonstrate Motive in Testifying: The point of Rule 608, M.R.Ev., for the purposes of this appeal is that reference to specific instances of a witness' conduct for the purpose of proving his character for truthfulness or untruthfulness is never permitted on direct examination. This rule, in conjunction with Rules 403 and 405, M.R.Ev., supports the trial court's limitation on impeachment evidence, which defendant argues should have been permitted to establish a prosecution witness' personal habits for marijuana use to demonstrate a profit motive in obtaining a conviction. St. v. McClean, 179 M 178, 587 P2d 20, 35 St. Rep. 1790 (1978).

Unfair Trial — Prosecutorial Misconduct: It is not the duty of the prosecuting attorney to make independent determinations concerning the admissibility of evidence once the court rules such evidence is inadmissible. Willful attempts by the prosecutor in this case to place excluded evidence before the jury resulted in a reversal of conviction because of its prejudicial effect. St. v. Bain, 176 M 23, 575 P2d 919 (1978), followed in St. v. McLeod, 227 M 482, 740 P2d 672, 44 St. Rep. 1251 (1987).

Surprise Testimony Discounted: The Supreme Court rejected defendant's contention that trial testimony constituted surprise and should have been excluded when a witness testifying as to admissions made by defendant quoted certain profane and vulgar language not previously mentioned in a statement provided to defendant by the prosecution. St. v. Hallam, 175 M 492, 575 P2d 55 (1978).

Law Review Articles

The Modified Just Rule: A New Standard for the Admissibility of Evidence of Other Crimes, Wrongs or Acts Under Rules 403 and 404(b) of the Montana Rules of Evidence, Cameron, 53 Mont. L. Rev. 133 (1992).

The Use of Gruesome Photographs in Criminal and Civil Cases in Montana, Stratton, 30 Mont. L. Rev. 247 (1969).

Juror Understanding of DNA Evidence: An Empirical Assessment of Presentation Formats for Trace Evidence With a Relatively Small Random-Match Probability, Nance & Morris, 34 J. Legal Stud. 395 (2005).

Old Chief v. United States: Interpretation and Misapplication of Federal Rule of Evidence 403, Pavloski, 33 New Eng. L. Rev. 797 (1999).

A Test Both Lawyers and Scientists Can Live With: The Rigorous Five-Prong Test for the Admission of DNA Profiling Evidence (case note), United States v. Two Bulls, 918 F. 2d 56 (8th Cir. 1990), Brashears-Macatee, 71 Neb. L. Rev. 920 (1992).

Causal Inference in Epidemiology: Implications for Toxic Tort Litigation, Thompson, 71 N.C.L. Rev. 247 (1992).

DNA Evidence in Criminal Trials: Modifying the Law's Approach to Protect the Accused From Prejudicial Genetic Evidence, Shank, 34 Ariz. L. Rev. 829 (1992).

Frye or Frye Not: Should the Reliability of DNA Evidence Be a Question of Weight or Admissibility? (use of test for admissibility established in United States v. Frye) (case note), Flannery, 30 Am. Crim. L. Rev. 161 (1992).

Surprise! That damaging turncoat witness is still with us: An analysis of Federal Rules of Evidence 607, 801(d)(1)(A) and 403, Ordover, 5 Hofstra L. Rev. 65 (1976).

Rule 403: The Prejudice Rule in Evidence, Dolan, 49 So. Cal. L. Rev. 220 (1976).

Collateral References

Evidence *key* 143.

31A C.J.S. Evidence §166.

5 Am. Jur 2d Appellate Review §§752, 753, 759; 29 Am. Jur. 2d Evidence §§311, 331, 355, 356.

Admissibility in homicide prosecution of allegedly gruesome or inflammatory visual recording of crime scene. 37 ALR 5th 515.

Admissibility, in prosecution for sex-related offense, of results of tests on semen or seminal fluids. 75 ALR 4th 897.

Admissibility, in criminal cases, of evidence of electrophoresis of dried evidentiary bloodstains. 66 ALR 4th 588.

Admissibility of evidence summaries under Uniform Evidence Rule 1006. 59 ALR 4th 971.

Propriety and prejudicial effect of prosecution's calling as witness, to extract claim of self-incrimination privilege, one involved in offense charged against accused. 19 ALR 4th 368.

Propriety and prejudicial effect of trial court's limiting number of character or reputation witnesses. 17 ALR 3d 327.

Propriety and prejudicial effect of comment or evidence as to accused's willingness to take a lie detector test. 95 ALR 2d 819.

Propriety and prejudicial effect of showing, in criminal case, withdrawn guilty plea. 89 ALR 2d 326.

Admissibility of photograph of corpse in prosecution for homicide or civil action for causing death. 73 ALR 2d 769.

Admissibility and propriety, in homicide prosecution, of evidence as to deceased's spouse and children. 67 ALR 2d 731.

Admissibility and propriety, in rape prosecution, of evidence that accused is married, has children, and the like. 62 ALR 2d 1067.

6 Wigmore §§1849, 1864, 1865, 1906, 1907.

Rule 404. Character evidence not admissible to prove conduct, exceptions; other crimes; character in issue.

Commission Comments

This rule deals only with the admissibility of character evidence. Rule 405 deals with how such evidence may be proven.

(a) Character evidence generally. This subdivision is identical to Federal and Uniform Rules (1974) Rule 404(a) except that "or in an assault case where the victim is incapable of testifying" is added in (a)(2) to cover a situation to which the Commission believes the rule should logically extend; and "as provided in Article VI" is changed in (a)(3) to delete reference to specific rules.

The Commission intends, with one exception in (a)(2), this subdivision to express the generally accepted rules on the admissibility of character evidence when it is used as circumstantial evidence to infer conduct. The rule provides that such use of character evidence is not admissible unless it falls within one of the exceptions provided in paragraph (1), (2), or (3), which generally limit such evidence to criminal cases.

Paragraph (1) expresses the rule that the accused may introduce evidence of his good character to infer that he did not commit the crime, and the prosecution may rebut the same. Paragraph (2) expresses the two usual rules on the character of the victim in the first clause and an entirely new rule in the second clause. The two usual rules in the first clause, "evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same", provide that the accused may introduce evidence of the violent character of the victim to show that the victim was the first aggressor or to show that the accused used a reasonable amount of force in defending himself, and the prosecution may rebut this evidence of violent character with evidence of peaceful character. The new rule in the second clause, "evidence of a character trait of peacefulness of the victim offered by the prosecution...to rebut evidence that the victim was the first aggressor", provides that the prosecution may rebut evidence offered by the accused to show that he acted in self-defense with evidence of the peaceful character of the victim to show who was the first aggressor. Paragraph (3) expresses the usual rule that character evidence may be used to attack or support the credibility of a witness, as provided in Article VI.

This subdivision is generally consistent with Montana law. Section 93-1901-13, R.C.M. 1947 [superseded], provides that evidence of good character of a party or witness is not admissible until the character of the party or witness is attacked or unless an issue involves such character. Cases construing and using this statute have expressed this same meaning. In re Williams Estate, 52 Mont. 192, 203, 156 P 1087 (1916); State v. Jackson, 71 Mont. 421, 433, 230 P 370 (1924); Meinecke v. Skaggs, 123 Mont. 308, 311, 213 P2d 237 (1949); and Goggans v. Winkley, 159 Mont. 85, 93, 495 P2d 549 (1972). One reason given for this statute excluding such evidence is that a person is presumed to have good character and there is no need for such evidence until that good character is attacked. Fowlie v. Cruse, 52 Mont. 222, 237, 157 P 958 (1916). A limitation upon this statute can be implied from other cases which do not allow an attack upon character, or character evidence in civil cases. Kornec v. Mike Horse Mining Co., 120 Mont. 1, 13, 180 P2d 252 (1947); Gunderson v. Brewster, 154 Mont. 405, 431, 466 P2d 589 (1970); and Holland v. Biggs, 166 M 278, 532 P2d 411 (1975). While these cases are civil assault cases, it can be implied that the rule would hold true for all civil cases; the apparent reason for exclusion, as expressed in each of the cases, is that evidence of character is not relevant and therefore lacks probative value.

The rule contained in paragraph (1) that the accused may introduce evidence of his good character to show that he did not commit the crime is followed in Montana. State v. Moorman, 133 Mont. 148, 151, 321 P2d 236 (1957); State v. Popa, 56 Mont. 587, 590, 185 P 1114 (1919); and State v. Jones, 48 Mont. 505, 516, 139 P 441 (1914). These cases also stand for the proposition that the prosecution may cross-examine the witnesses for the accused concerning rumors or reports concerning the reputation of the accused which would rebut their good character

testimony and may cross-examine the witnesses to determine the sufficiency of grounds upon which they base their testimony. (See Rule 405(a) for further discussion.)

The rules contained in the first clause of paragraph (2), concerning evidence of character of the victim introduced by the accused, are also followed in Montana. Under Montana case law the accused must first lay a foundation that he acted in self-defense before he can introduce evidence of the violent character of the victim. State v. Logan, 156 Mont. 48, 64, 472 P2d 833 (1970). Then evidence of the violent character of the victim may be introduced for two purposes: to show that the victim, not the accused, was the first aggressor, State v. Jones, *supra* at 519, and to show that the accused acted reasonably or used a reasonable amount of force in defending himself against a victim of violent character. State v. Shadwell, 22 Mont. 559, 572, 57 P 281 (1899). There is a great deal of case law on these rules, much of it relating to methods of proof as applied to each of the two purposes. (See Rule 405 for further discussion.) This paragraph also contains the rule that the prosecution may introduce evidence of the peaceful character of the victim to rebut evidence offered by the accused showing that the victim was the first aggressor. This use of character evidence of the victim has not been recognized by Montana statutes or cases and is therefore new to Montana law. The rule adds a phrase making it applicable to assault cases where the victim cannot testify as well as to homicide cases where the same consideration applies. The Commission does not intend that this subdivision conflict with Section 94-5-503(5), R.C.M. 1947 [45-5-503], which limits use of a rape victim's character to two instances.

The rule contained in paragraph (3) that evidence of the character of the witness may be used to attack or support the credibility of the witness is provided by Section 93-1901-13, R.C.M. 1947 [superseded], among other statutes. Cases construing it are In re Williams Estate, *supra*, and State v. Jackson, *supra*. It should be noted that evidence of good character is not admissible until the character of the witness has been attacked. State v. Deidtman, 58 Mont. 13, 19, 190 P 117 (1920). (See rules in Article VI dealing with the character of witnesses for further discussion.)

(b) Other crimes, wrongs, acts. This subdivision is identical to Federal Rule 404(b). It states the general rule that evidence of another crime is not admissible to prove a criminal disposition or character trait and therefore that the accused committed the crime for which he is on trial. However, this narrow rule does have its exceptions, for evidence of other crimes is admissible for purposes other than as evidence of a criminal character trait. These purposes are listed by way of example, as indicated by use of the phrase, "such as". The beginning of the second sentence of the Uniform Rule (1974) 404(b) retains language from an earlier Federal draft which reads: "This subdivision does not exclude evidence when offered for another purpose, such as...". The Commission concurs in statements of intent concerning this amendment found in the Report of the Senate Judiciary Committee, 93d Cong., 2d Sess., October 18, 1974, pp 24-25 that there is probably "...no necessity in amending the rule..." and that use of the word "may" in the amendment "...is not intended to confer any arbitrary discretion on the trial judge. Rather, it is anticipated that with respect to permissible uses for such evidence, the trial judge may exclude it only on the basis of those considerations set forth in Rule 403...". The final draft of the Federal Rules was adopted for purposes of uniformity, and the Commission intends that there be no change in the admissibility of such evidence under existing Montana law.

Present Montana law is consistent with this subdivision, although this has not always been true. In State v. Sauter, 125 Mont. 109, 144, 232 P2d 731 (1951), evidence of other sex crimes was held inadmissible for any purpose; this was expanded in State v. Searlye, 125 Mont. 467, 471, 239 P2d 995 (1952) to disallow evidence of other crimes for any reason in a trial for any crime. This unorthodox rule reversed earlier cases in Montana (State v. Simpson, 109 Mont. 198, 208, 95 P2d 761 (1939)) and eventually was overruled in a series of cases: State v. Merritt, 138 Mont. 546, 548, 357 P2d 683 (1960); State v. Teidmann, 139 Mont. 237, 242, 362 P2d 529 (1960); State v. Tully, 148 Mont. 166, 169, 418 P2d 549 (1960); and finally in State v. Jensen, 153 Mont. 233, 238, 455 P2d 63 (1969) where evidence of other sex crimes was held admissible because of similarity, nearness of time, and tendency to establish a common scheme or plan of the other crimes. The list of purposes allowing such evidence to be admitted, found in Tully, compares closely to those found in the rule, but as Jensen indicates, purposes other than those contained in Tully are allowable; therefore, Montana law is consistent with the concept that purposes other than those listed in the rule may be found and used to admit evidence of other crimes. (See also State v. Frates, 160 Mont. 431, 436, 503 P2d 47 (1972); State v. Taylor, 163 Mont. 106, 120, 515 P2d 677 (1973).) It should be noted that State v. Skinner, 163 Mont. 58, 64, 505 P2d 81 (1973) indicated that courts are obliged to examine "the relative probative value of the evidence of other offenses...and weigh this against the prejudice inherent in this type of evidence in light of the actual need to introduce (it)", factors similar to those found in Rule 403.

(c) Character in issue. This subdivision is original and therefore not identical to any Federal or Uniform Rule (1974). The language, taken from Rules 404(a) and 405(b), is very close to phrases contained in the same Federal and Uniform Rules (1974).

The Federal drafters clearly intended to make character in issue admissible because Federal Rule 405(b) has a provision for proving character in issue; however, the Commission believes that a rule which is meant to deal with the admissibility of character evidence should contain a provision for evidence which most obviously must be admitted, particularly in light of Section 93-1901-13, R.C.M. 1947 [superseded], and cases construing it. It should be noted that character is not automatically placed in issue under Montana case law: good character of a party to the action is not in issue and therefore not admissible until it is questioned or attacked by the other party. Fowlie v. Cruse, *supra*, and Meinecke v. Skaggs, *supra*.

COMMISSION COMMENT TO JUNE 1990 AMENDMENT

The revision establishes gender neutral format only. No substantive change.

Compiler's Comments

1990 Amendment: Substituted gender neutral language for gender specific language. Amendment effective June 7, 1990.

Case Notes

General 273
Other Crimes — Generally 281
Other Crimes — Common Design, Scheme, or Plan 295
Act or Crime Inseparable From Crime Charged 300

GENERAL

Exclusion of Assault Victim's Prior Assault Record — Probative Value Outweighed by Prejudicial Effect: Grixti was arrested for family member assault against his wife. At trial, Grixti sought to introduce evidence of the wife's prior family member assault against Grixti, but the trial court granted the state's motion in limine excluding evidence of the wife's prior assault. On appeal, the Supreme Court noted that evidence of a witness's prior crimes and wrongs is inadmissible to show action in conformity with the prior crime under Rule 403, M.R.Ev., but may be admissible under this rule, to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident and under Rule 608, M.R.Ev., to attack a witness's character if probative of truthfulness or untruthfulness. However, in this case, the trial court found that the potential prejudicial effect of the wife's prior arrest record likely outweighed any probative value regarding the wife's character for truthfulness or untruthfulness. The Supreme Court deferred to the trial court's discretion in making evidentiary character determinations and affirmed the grant of the motion in limine. St. v. Grixti, 2005 MT 296, 329 M 330, 124 P3d 177 (2005).

Inadmissibility of Reverse 404(b) Evidence — No Prejudice to State Prosecution: Defendant contended that the trial court improperly excluded character evidence regarding another person, which could have been introduced under the seldom used "reverse 404(b) evidence" theory to identify the other person as the author of various threatening letters. Defendant claimed that exclusion of the evidence violated the right to present a defense and the right to confront witnesses. Even though there was little risk that admitting the reverse 404(b) evidence would prejudice the state, most of the evidence was propensity evidence, and the evidence in question did not meet the modified Just test for admissibility of character evidence, so the District Court did not err in refusing to admit the reverse 404(b) evidence. St. v. Clifford, 2005 MT 219, 328 M 300, 121 P3d 489 (2005).

Failure of Defendant to Establish Knowledge of Victim's Past as Element of Justifiable Use of Force — Evidence of Victim's Violent History Inadmissible: At Montgomery's negligent homicide trial, Montgomery relied on a justifiable use of force defense. Anticipating that Montgomery would seek to introduce evidence of the victim's prior acts of violence and reputation for violence, the state requested and was granted a motion in limine prohibiting use of the victim's criminal history or reputation. Following conviction, Montgomery appealed on grounds that the victim's character evidence should not have been prohibited. However, trial testimony showed that Montgomery's fear of the victim was based on the victim's behavior just before the shooting, and Montgomery failed to establish that knowledge of the victim's past led him to use lethal force. Thus, evidence of the victim's alleged violent past was irrelevant and inadmissible, and the motion in limine was properly granted. St. v. Montgomery, 2005 MT 120, 327 M 138, 112 P3d 1014 (2005).

Photographs of Nonvictim Children Not Considered Prejudicial or Character Evidence — Probative Value Warranting Admissibility: In Bar-Jonah's aggravated kidnapping, sexual assault, and assault with a weapon trial, the trial court allowed the admission of hundreds of photographs of children seized during a search of Bar-Jonah's residence. Bar-Jonah contended that the photographs were: (1) improperly admitted because only a few were images of the victims; and (2) unfairly prejudicial and tended to erroneously reflect on Bar-Jonah's character. The Supreme Court disagreed. The photographs were relevant by linking them to Bar-Jonah's motive for befriending the victims, for enhancing the credibility of the victims, and to rebut Bar-Jonah's asserted defenses. Even if the photographs could be construed to reflect on Bar-Jonah's character, they were not introduced for that purpose, but rather to prove motive. Any prejudice to Bar-Jonah through introduction of the photographs was outweighed by their probative value, which did not present evidence of other crimes or acts. St. v. Bar-Jonah, 2004 MT 344, 324 M 278, 102 P3d 1229 (2004).

Character Evidence Improperly Admitted — Harmless Error: Defendant was charged with manufacture of dangerous drugs and sex crimes. The drug charge was severed, and defendant was convicted. When the sex crimes came to trial, the District Court allowed evidence of defendant's drug use. Defendant contended that the evidence was improperly admitted as bad character evidence because the state failed to meet the procedural requirements of the modified Just rule. The state asserted that the evidence was not admitted as character evidence, but rather admitted pursuant to the transaction rule because the drug use explained the circumstances surrounding the alleged sex offenses. The Supreme Court held that although the challenged evidence may have been relevant to explain the transaction, the evidence was improperly admitted in this case because the District Court had earlier determined that the charges were sufficiently distinct to warrant separate trials, so admission of drug use evidence in the sex crimes trial somewhat undermined the benefit that defendant gained from the earlier granting of the request for severance. Having defended against the drug charges in the first trial, defendant was faced with the evidence again. However, the Supreme Court then went on to apply the test in St. v. Van Kirk, 2001 MT 184, 306 M 215, 32 P3d 735 (2001), to determine if admission of the evidence prejudiced defendant's right to a fair trial and found that the error was harmless. The evidence of drug use did not go to the proof of an element of the sex crimes, and only brief mention was made of drug use in closing arguments and then only in conjunction with other admissible evidence related to the transaction. Thus, the impact of the tainted evidence was minimal, and given other ample evidence upon which the state could develop its case, there was no reasonable possibility that the tainted evidence contributed to the conviction, which was therefore affirmed. St. v. Insua, 2004 MT 14, 319 M 254, 84 P3d 11 (2004).

Generalized Motion In Limine Insufficient to Preserve Appeal of Issue of Admissibility of Specific Prior Bad Conduct Absent Objection: Vukasin's generalized motion in limine to exclude evidence of prior crimes and bad acts was granted. Vukasin later contended that the prosecution introduced improper witness testimony of prior violent conduct that was prejudicial and prevented a fair trial. The Supreme Court noted that while a motion in limine may preserve a specification of error for appeal, the mere act of filing the motion does not negate the obligation to object and to make the basis and grounds for the objection clear to the trial court and that a trial court will not be put in error when that court does not have the opportunity to rule on the admissibility of the evidence and to correct itself. Here, Vukasin made no objection when the evidence was introduced, nor was the broad motion in limine specific enough in itself as to the basis for an objection. The motion did not identify either the specific witness or testimony to which Vukasin later objected on appeal, so the trial court was not alerted by the motion that Vukasin was objecting to the testimony given. Thus, the motion was a generalized objection that did not preserve the evidentiary issue, so appeal of the issue was waived. St. v. Vukasin, 2003 MT 230, 317 M 204, 75 P3d 1284 (2003), followed in St. v. Ferguson, 2005 MT 343, 330 M 103, 126 P3d 463 (2005), and St. v. Paoni, 2006 MT 26, 331 M 86, 128 P3d 1040 (2006). See also St. v. Stuit, 277 M 227, 921 P2d 866 (1996).

Tainted Character Evidence Considered Prejudicial — New Trial Warranted: During Nolan's trial for resisting arrest, criminal endangerment, and bail-jumping, Nolan was asked why he did not appear on the original trial date and jumped bail instead. Nolan stated that he was taking pain medication for a bad tooth and overslept, and had just started a new job and did not want to miss work because he needed the money to pay the bills and feed his children, whom he loved. Over objection, the prosecutor pursued an extended series of questions regarding Nolan's job history and personal relationships, which revealed that Nolan had fathered a number of children by several women, none of whom he had married, and that he did not pay child support because none had been ordered. Other testimony related to Nolan's character, including rebuttal

testimony from one woman that Nolan acted as pimp for her prostitution activities. The state contended that Nolan opened the door to the questioning by asserting that he was a decent man and member of the community who cared about his family. Nolan contended that the cross-examination and rebuttal evidence forced him to defend his lifestyle choices and impermissibly turned a bail-jumping trial into a trial of his morals. The Supreme Court agreed with Nolan. The state's right to a full cross-examination of a defendant's character traits, once placed at issue, is not limitless. Here, the prosecutor went beyond permissible cross-examination and rebuttal and ended up trying Nolan's character. Because trial error is not presumptively prejudicial, the Supreme Court reviewed the error under 46-20-701 to determine whether the error prejudiced Nolan's case. The court concluded that the evidence was highly inflammatory and presented a significant possibility that the qualitative effect of the cross-examination and rebuttal contributed to Nolan's conviction. Because of the prejudice involved, Nolan's conviction was reversed and the case was remanded for further proceedings related to the charges. St. v. Nolan, 2003 MT 55, 314 M 371, 66 P3d 269 (2003).

Statement and Letter Related to Incest Charge Properly Admitted as Evidence: In Rodarte's incest trial, he sought to exclude statements that he made to his wife's brother that he thought that his own daughter was "hot" and that he didn't worry about sex because he could just go to another bedroom, as well as letters that he sent to his wife stating that if she and his daughter did not show up in court, he could "get off and get out". The District Court allowed the evidence, and Rodarte appealed, contending that the evidence was neither a part of the case nor an admission or confession, and thus was inadmissible. The Supreme Court disagreed. The prosecution is permitted to introduce evidence that tends to explain the circumstances surrounding the alleged offense if the evidence is relevant, probative, and competent. The evidence in this case was not wholly independent of the crime charged and tended to show guilt, so it was admissible, and Rodarte's motion for a mistrial on those grounds was properly denied. St. v. Rodarte, 2002 MT 317, 313 M 131, 60 P3d 983 (2002).

Evidence of Other Crimes, Though Prejudicial, Admissible Unless Prejudicial Effect Substantially Outweighs Probative Value: Hart argued that the lower court erred in allowing testimony alleging that he owned a cattle prod used in an assault because he made his money by shoplifting and had the prod in case he was detected stealing. The Supreme Court ruled against Hart and held that, in general, all evidence of other crimes is prejudicial, but as in the case before it, the evidence was not inadmissible under the fourth part of the modified Just rule unless its prejudicial effect substantially outweighed its probative value. St. v. Hart, 2000 MT 332, 303 M 71, 15 P3d 917, 57 St. Rep. 1398 (2000).

Only Defendant Allowed to "Open the Door" to Rebuttal Character Evidence: Gowan was charged with two felony counts of criminal sale of dangerous drugs. The state indicated that it would not rely on Gowan's prior acts or convictions. The trial court ruled that although direct evidence of a prior conviction was not admissible, the state would be allowed to ask Gowan, if he chose to testify, only if he had lied under oath in the past. At trial, Gowan's girlfriend testified, but not as a character witness. On direct examination, she offered no character testimony, but on cross-examination, she testified as to Gowan's honesty. The trial court concluded that she had opened the door to character evidence, even though the testimony was in response to cross-examination, and allowed the state to inquire whether she was aware of Gowan's perjury conviction, probation, and a suit against him for failure to deliver a vehicle title. Gowan was convicted, contending on appeal that the trial court erred in holding that the defense witness's gratuitous statement in response to cross-examination opened the door for rebuttal character evidence. The Supreme Court concluded that although a defendant can open the door with statements made during either direct or cross-examination and a defense witness can open the door on direct examination, a defense witness cannot inadvertently open the door to character evidence on cross-examination. Under subsection (a)(1) of this rule, only the accused can open the door for the prosecution to introduce rebuttal character evidence. The state argued that once the statement was made, it was necessary to counter its effect on the jury and that, as a general rule, a wide latitude should be permitted in cross-examination of an adverse witness. However, the right to a full cross-examination of a defendant's character traits, once placed at issue, is not limitless. Unless and until the accused places character at issue, the door is closed to the state to enter evidence of the defendant's character because the dangers of prejudice, confusion, and time consumption outweigh the probative value. Inquiry into the defendant's character is not rejected because character is irrelevant, but rather because it weighs too much with the jury members as to overpersuade them to prejudge a person with a bad general record and deny the opportunity to defend against a particular charge. In this case, rather than introducing rebuttal character evidence, the state should have requested that the witness confine her answers to the questions

asked and that her statement be stricken from the record. Because only a defendant can open the door to rebuttal character evidence, the trial court erred in holding that the defense witness could do so in a statement made during cross-examination, something defendant had no control over. The conviction was reversed, and the case remanded for a new trial. St. v. Gowan, 2000 MT 277, 302 M 127, 13 P3d 376, 57 St. Rep. 1155 (2000), distinguishing St. v. Austad, 197 M 70, 641 P2d 1373 (1982).

Question of Gun Ownership — Pawnshop Records Allowed as Rebuttal to Character Evidence Regarding Defendant's Credibility: Weitzel was charged with felony assault. The state's witnesses testified that Weitzel had assaulted Brewer with a handgun. As part of Weitzel's character evidence, he testified that he did not presently own a handgun, but went on to describe how he had purchased a handgun as a gift for his brother several years earlier. Weitzel's brother confirmed that he had received a gun as a gift and corroborated that Weitzel did not presently own a handgun. Over Weitzel's objection, the District Court allowed the state to introduce, as rebuttal evidence, pawnshop records showing that Weitzel had pawned a handgun in 1996 and then retrieved it, ruling that the evidence was very relevant to Weitzel's credibility. On appeal, Weitzel alleged error in the introduction of the pawnshop records, contending that there was no basis in the record for the introduction and that the state failed to follow 46-15-322 and subsection (b) of this rule when it did not disclose the records in advance of trial. The Supreme Court held that Weitzel opened the door to the rebuttal testimony by choosing to testify as to his gun ownership. The records were properly introduced to rebut the misimpression that Weitzel had purchased only one handgun in the past, as a gift for his brother. Further, the state was not obligated to disclose its knowledge of the records before trial because the prosecution is under no statutory duty to provide pretrial notice of a witness called to impeach the credibility of a defense witness. The rebuttal evidence did not become relevant until Weitzel and his brother testified, and the state had no reason to know in advance of trial that Weitzel would defend against the charges by testifying that he did not own or possess any handguns. Once Weitzel opened the door to the question of his character, the state was not precluded from presenting rebuttal testimony without adhering to the notice requirements. St. v. Weitzel, 2000 MT 86, 299 M 192, 998 P2d 1154, 57 St. Rep. 368 (2000), following St. v. Hildreth, 267 M 423, 884 P2d 771, 51 St. Rep. 1086 (1994).

Evidence of Victim's Statements as to Perpetrator of Crime Not Within Concept of Corpus Delicti or Res Gestae — Use of Terms "Corpus Delicti" and "Res Gestae" Discouraged: The Supreme Court extensively reviewed the use of the terms "corpus delicti" and "res gestae", examining definitions and the historical development of Montana case law referencing the concepts. Here, statements by the victim to family members and friends regarding her troubled relationship with her husband, were not within the bounds of the concept of the corpus delicti because they tended to establish the perpetrator of the crime, which is not an element of the corpus delicti, and should not have been admitted under that rule. The statements were also inadmissible under the concept of res gestae. However, the admission of the victim's statements was merely cumulative and constituted harmless error. The Supreme Court urged that these vague and imprecise terms not be used in the future and advised that the court will henceforth review claims of error in the admission of evidence by determining whether the evidence was admissible under some provision of the Montana Code Annotated or under the Montana Rules of Evidence. St. v. Hansen, 1999 MT 253, 296 M 282, 989 P2d 338, 56 St. Rep. 997 (1999), clarifying numerous Montana cases that have properly or improperly applied the concepts.

No Prejudice From Use of Inadmissible, but Simple and Distinct, Evidence: Southern was charged with two counts of kidnapping, one count of burglary, one count of theft, and five counts of sexual intercourse without consent. In moving to sever the nine counts in the information into four separate trials pursuant to 46-13-211, Southern argued that the prejudicial effect of the other crimes evidence substantially outweighed its probative value and thus evidence of the other crimes would not have been admissible in separate trials. It is inevitable that evidence of other crimes will have some prejudicial effect, so under the fourth part of the modified Just rule (see St. v. Matt, 249 M 136, 814 P2d 52 (1991)), relevant evidence will be inadmissible only when its probity is substantially outweighed by the danger of unfair prejudice. Pursuant to St. v. Huether, 284 M 259, 943 P2d 1291, 54 St. Rep. 872 (1997), the prejudicial effect of relevant evidence will substantially outweigh the probative value when the evidence will prompt the jury to decide the case on an improper basis. Thus, evidence is inadmissible under the fourth part of the modified Just rule if it arouses the jury's sympathy for one side without regard to its probative value, if it confuses or misleads the jury, or if it distracts the jury from the main issues in the case. Prejudice arising from the use of inadmissible evidence will not be found when the evidence is simple and distinct. Even though the other crimes evidence in Southern's case would

have been prejudicial, the jury was instructed that each count was a distinct offense and had to be decided separately. There was nothing in the record to suggest that the jury did not keep the relevant evidence separate. Since the other crimes evidence was simple and distinct and would have been admissible at separate trials, Southern failed to establish that the jury used evidence of guilt on one charge to convict him of other charges on the theory that the evidence would have been inadmissible in trials on the other charges. St. v. Southern, 1999 MT 94, 294 M 225, 980 P2d 3, 56 St. Rep. 395 (1999).

Evidence of Unrelated Assault Allowed Because of Defense Opening Door: The defense questioned a state witness about the witness's frequent moves, implying that the witness moved because of involvement in the drug culture. The state on redirect examination allowed the witness to testify that she moved often because the defendant had assaulted her once because of her knowledge of the defendant's guilt. The Supreme Court affirmed the lower court's admission of the testimony on the grounds that the defense had opened the door during its cross-examination of the witness. St. v. Berger, 1998 MT 170, 290 M 78, 964 P2d 725, 55 St. Rep. 686 (1998).

Evidence of Victim's Character and Prior Violent Act Inadmissible as Element of Self-Defense: Sattler claimed that his homicide of Martinson was in self-defense and sought to introduce evidence of a prior act of violence that was committed by Martinson 8 years before his death as proof of Martinson's aggressiveness and Sattler's need to use force in his defense. However, nothing in 45-3-102 relates directly to the question of the identity of the aggressor as an essential element of the justifiable use of force defense. Further, evidence of the prior act did not support any claim that the force used against Martinson was reasonable based on Sattler's knowledge of Martinson's history of violence. Also, the act was remote in time, and the lapse of time between the prior act and Martinson's death rendered the probity of the act minimal at best. Refusing to admit the evidence would not have resulted in prejudicial and reversible error or affected Sattler's substantial rights in light of the other evidence of record. Thus, reversal was not warranted. St. v. Sattler, 1998 MT 57, 288 M 79, 956 P2d 54, 55 St. Rep. 230 (1998). See also St. v. Benton, 251 M 401, 825 P2d 565 (1992).

Evidence of Son's SIDS Death Relevant in Homicide Trial Following Daughter's Death — Just Notice Not Required: The prosecution sought to introduce evidence that, only 7 months prior to the death of his infant daughter, Huether's 7-month-old son had died of sudden infant death syndrome (SIDS) while in Huether's care. The trial court allowed the evidence pursuant to subsection (b) of this rule. On appeal, the Supreme Court found that the evidence was improperly admitted pursuant to subsection (b) because the trial court misconstrued the evidence, which did not pertain to other crimes, wrongs, or acts. However, the evidence was nevertheless admissible pursuant to Rule 402, M.R.Ev., because it was relevant to the question of whether Huether, in caring for his daughter, consciously disregarded a risk of which the death of his son should have made him aware. The probative value of the evidence outweighed its prejudicial effect. Because the evidence was not subsection (b) "other crimes" or character evidence but, rather, relevant circumstantial evidence, the prosecution was not required to comply with the Just notice provisions. St. v. Huether, 284 M 259, 943 P2d 1291, 54 St. Rep. 872 (1997).

Admission of Evidence of Prior Game Farm (now Alternative Livestock Ranch) Acts Proper: The District Court did not err in admitting evidence of prior game farm (now alternative livestock ranch) acts and in limiting references to those acts and not to any subsequent convictions since the earlier case was still pending on appeal because: (1) the prior acts were sufficiently similar, although not identical, to those for which defendant was presently charged; (2) the acts, although occurring 3 years prior, were not so remote as to be inadmissible because of the similarity of the acts; and (3) the state's purpose in introducing the evidence was to establish absence of mistake or accident regarding defendant's possession of unlawfully taken wildlife. St. v. Brogan, 272 M 156, 900 P2d 284, 52 St. Rep. 636 (1995). See also St. v. Matt, 249 M 136, 814 P2d 52 (1991), and St. v. Romero, 261 M 221, 861 P2d 929 (1993).

Denial of Motion In Limine in Presence of Jury Without Comment on Evidence — No Error: Before the state began to question a sexual assault victim about similar assaults by defendant, the trial court ruled against defendant's motion in limine to exclude the evidence, in the presence of the jury, and then properly instructed the jury that it could not consider the evidence to prove defendant's character in order to show that he acted in conformity with that character in the charged offense. Defendant claimed that ruling on the motion in the jury's presence constituted an improper comment on the evidence, pursuant to St. v. Liddell, 211 M 180, 685 P2d 918 (1984). The Supreme Court distinguished Liddell because the court's statement in this case was not an obvious comment on the evidence and did not improperly draw the jury's attention to the

evidence. Denial of the motion in limine in the jury's presence was not error. St. v. Hildreth, 267 M 423, 884 P2d 771, 51 St. Rep. 1086 (1994).

Admission of Evidence of Prior Fires — Improperly Introduced: Defendants were prosecuted and found guilty of criminal mischief in relation to a fire that destroyed their mobile home. At the trial, there was no direct evidence linking defendants with intentionally causing the fire. The state was allowed to introduce evidence of several other fires in buildings owned or occupied by defendants in the previous 7 years. The Supreme Court reversed and remanded on the grounds that the admittance of evidence of the prior fires unfairly prejudiced defendants because no evidence existed that linked them with intentionally causing the prior fires. The prior fires are not other crimes, wrongs, or acts under this rule. St. v. Johnson, 250 M 496, 821 P2d 1039, 48 St. Rep. 1063 (1991), followed in St. v. Enright, 1998 MT 322, 292 M 204, 974 P2d 1118, 55 St. Rep. 1308 (1998), and St. v. Link, 1999 MT 4, 293 M 23, 974 P2d 1124, 56 St. Rep. 13 (1999).

Community Involvement of Developer as Inadmissible Evidence in Real Estate Transaction Suit: This rule has no application in a civil case unless the character trait sought to be placed in evidence is an essential element of the charge, claim, or defense. In a suit involving a complex three-way property exchange between defendants (developer and builders) and plaintiff purchasers, it was error to allow developer to testify as to his community activities. Developer's character was not at issue, and the testimony was thus irrelevant. Vestre v. Lambert, 249 M 455, 817 P2d 219, 48 St. Rep. 769 (1991).

Character Testimony on Rebuttal: When defendant had his aikido instructor testify as to defendant's training and nonaggressiveness, the state could offer testimony of defendant's prior crimes and alleged acts. Character having been put in issue, it was properly rebutted under subsection (a)(1) of this rule. St. v. Baker, 249 M 156, 815 P2d 587, 48 St. Rep. 685 (1991), followed in St. v. Arlington, 265 M 127, 875 P2d 307, 51 St. Rep. 417 (1994).

Evidence of Prior Misconduct — Single Similar Act Admissible: In a trial for deliberate homicide, the trial court did not abuse its discretion in allowing evidence of an incident that occurred 3 years prior to the crime when defendant threatened suicide over the breakup of his marriage and when he momentarily pointed a gun at a police officer. The linchpin for determining whether a single instance of prior conduct is sufficient to prove intent is relevancy based on similarity. St. v. Sadowski, 247 M 63, 805 P2d 537, 48 St. Rep. 93 (1991), discussed in St. v. Weldy, 273 M 68, 902 P2d 1, 52 St. Rep. 729 (1995).

Letter From Prison Not Evidence of Other Crimes Warranting Inadmissibility of Letter: Defendant admitted in a letter written to his wife from prison that he intimately touched his stepdaughter. The letter was later introduced on direct examination of his wife to prove authenticity of the letter. His imprisonment was mentioned three times at trial; however, the underlying offense was never mentioned. The fact that he was in prison when he wrote the letter was not introduced to prove his character, and the references to his imprisonment were insignificant and nonprejudicial in light of the entire record. Therefore, the District Court properly admitted the fact that defendant was in prison when he wrote the letter. St. v. Kao, 245 M 263, 800 P2d 714, 47 St. Rep. 2100 (1990).

Evidence of Prior Acts Admissible for Rebuttal: The defendant argued that testimony of his ex-wife that he did have an interest in anal intercourse was inadmissible as evidence of other acts. The Supreme Court held that the evidence was introduced to rebut the defendant's contention that he had no interest in anal sex and therefore was admissible. St. v. Newman, 242 M 315, 790 P2d 971, 47 St. Rep. 711 (1990).

Character Not Put Into Issue by Defendant — Evidence as to Reputation Reversible Error: When the defendant did not put his character or community reputation into issue so as to open the door and allow the state to present character evidence in its case in chief, it was improper to admit hearsay, opinion, and reputation evidence of the defendant's bad character as relating to his disposition to commit the crime with which he was charged. Admission of the evidence constituted reversible error. St. v. Gommenginger, 242 M 265, 790 P2d 455, 47 St. Rep. 681 (1990). However, see St. v. Bower, 254 M 1, 833 P2d 1106, 49 St. Rep. 586 (1992), in which even though admission of character testimony offered by the prosecution was error, conviction was affirmed because the testimony was not prejudicial and the error was therefore harmless. Bower was followed in St. v. Carter, 285 M 449, 948 P2d 1173, 54 St. Rep. 1235 (1997).

Admissibility of Evidence of Similar Injury Occurring Six Years Before: A railroad employee sued the railroad for injuries he received on the job. The Supreme Court affirmed the lower court's admission of evidence of a similar accident that happened 6 years prior to the plaintiff's injury. The court found that both accidents involved a laborer working under the same foreman, lifting rail ties manually and thereby injuring his back. The evidence was held admissible to

show the existence of danger and notice thereof. Kalanick v. Burlington N. RR Co., 242 M 45, 788 P2d 901, 47 St. Rep. 532 (1990).

Error in Admission of Evidence Cured Upon Jury Admonishment: An error in the admission of evidence may be cured if the jury is admonished to disregard it. St. v. Conrad, 241 M 1, 785 P2d 185, 47 St. Rep. 32 (1990), followed in St. v. Ford, 278 M 353, 926 P2d 245, 53 St. Rep. 947 (1996).

Motion In Limine Regarding Character Evidence — Opening Door by Defense: Prior to trial, defendant filed a motion in limine requesting in part that the state be precluded from offering evidence of any character trait of defendant, other than credibility. The motion was granted with the understanding that the state might use such evidence for cross-examination or rebuttal, after obtaining the court's permission outside the presence of the jury. When the defense first raised the issue of defendant's character, his use of alcohol, and his state of mind on the night in question, it was not a violation of the motion in limine for the state to respond to that evidence on cross-examination. The evidence was held nonprejudicial by the trial court because: (1) it was character evidence of a general nature; and (2) defense counsel did not object until the questions had been asked and answered. St. v. DeMers, 234 M 273, 762 P2d 860, 45 St. Rep. 1901 (1988).

Reciprocal Duty of Good Faith and Fair Dealing Between Employer and Employee — Character of Employee Relevant to Expectation of Job Security: The Supreme Court applied the holding in Los Angeles Mem. Coliseum Comm'n v. NFL, 791 F2d 1356 (9th Cir. 1986), in finding that the implied covenant of good faith and fair dealing mandated a reciprocal duty in the employment relationship, applicable to both employer and employee. Breach by one party served to negate any breach by the other party, so that neither party was entitled to recovery. This rule applied only narrowly to factual contexts where both breaches concerned the same issue and occurred during one episode of the relationship. In the present case, an employee who breached the covenant could not then complain of unfair dealing by the employer. The District Court improperly excluded evidence of specific misconduct related to the employee's character because the alleged misconduct was relevant to whether the employee had a reasonable expectation of job security and could thus claim protection under the covenant. Barrett v. ASARCO Inc., 234 M 229, 763 P2d 27, 45 St. Rep. 1865 (1988). See also Story v. Bozeman, 259 M 207, 856 P2d 202, 50 St. Rep. 761 (1993), Flanigan v. Prudential Fed. S&L, 221 M 419, 720 P2d 257, 43 St. Rep. 941 (1986), and Dare v. Mont. Petroleum Mkting. Co., 212 M 274, 687 P2d 1015, 41 St. Rep. 1735 (1984).

Adequacy of Notice of Intent to Introduce Evidence of Prior Acts Six Days Prior to Trial: The state's notice of intent to introduce evidence of prior acts, which was given 6 days prior to trial, met the requirement of timely notice. St. v. Murray, 228 M 125, 741 P2d 759, 44 St. Rep. 1394 (1987).

Defendant Portrayed as Loving Husband — Videotaped Testimony Concerning Extramarital Affair Admissible: The District Court did not err in allowing videotaped testimony of defendant's former lover concerning an extramarital affair when defendant himself opened the door on the relevance of character evidence by portraying himself as a loving husband. The videotaped testimony was relevant to rebuttal and motive. St. v. Atlas, 224 M 92, 728 P2d 421, 43 St. Rep. 2042 (1986).

Expert Testimony — Character Evidence: A physician's expert testimony about the defendant dentist's ability to recognize and treat infections and his capability and conscientiousness as a dentist was not impermissible character evidence and was properly admitted on cross-examination. Ostermiller v. Alvord, 222 M 208, 720 P2d 1198, 43 St. Rep. 1180 (1986).

Pretrial Order Allowing Use of Evidence of Other Crimes Appealable: A pretrial order denying a motion in limine to preclude the state from using evidence of other crimes pursuant to Rule 404(b), M.R.Ev., is appealable within the scope of 46-20-103. St. v. T.W., 220 M 280, 715 P2d 428, 43 St. Rep. 368 (1986).

Cross-Examination of Character Witness — Reference to Prior Acts: Defendant's character witness was a private investigator who testified that defendant was truthful and had no prior criminal record. On cross-examination, the witness volunteered that he checked out a charge against defendant in another state and that "it came back negative". On appeal, defendant asserted that the cross-examination was improper under Rule 404(b), M.R.Ev., and constituted grounds for mistrial. The court disagreed, holding that defendant put his character at issue and that it was a proper subject for cross-examination by the state under Rule 404(a), M.R.Ev. Defendant attempted to prove his reputation under Rule 405, M.R.Ev., by testimony of a private investigator. The District Court did not err in allowing cross-examination on the issue of defendant's purported lack of prior crimes. St. v. D.B.S., 216 M 234, 700 P2d 630, 42 St. Rep. 770 (1985).

Character Evidence in Civil Case: In a wrongful death action arising out of a head-on collision, plaintiff attempted to introduce evidence that the driver of the truck had been fired from a bus driving job for being late for work. This evidence is relevant only to prove a character trait of the driver. Character evidence of this nature is specifically proscribed. In a criminal case, the accused may introduce evidence of his good character and the prosecution may introduce rebuttal evidence. This rule has no application in civil cases unless the character trait is an essential element of the charge, claim, or defense. A character trait of tardiness is not an essential element of an action alleging negligent driving. Lindberg v. Leatham Bros., Inc., 215 M 11, 693 P2d 1234, 42 St. Rep. 137 (1985).

Doctor's Testimony Concerning Defendant's State of Mind — Not Character Evidence: A doctor's testimony that, in his opinion, the defendant had the capacity to act purposefully and knowingly at the time of the crime was properly admissible as his professional opinion as an expert witness. The doctor's testimony was not character evidence. St. v. Doll, 214 M 390, 692 P2d 473, 42 St. Rep. 40 (1985).

Factual Testimony Not Offered to Prove Character Traits: Testimony of the defendant's father concerning the defendant's childhood circumstances, marital history, and education level was not inadmissible as evidence of the defendant's character or a trait of his character; it was not prejudicial to him, nor was evidence of the defendant's extramarital affair. It was properly offered to negate the defendant's claim of mitigating circumstances in his trial for deliberate homicide. St. v. Doll, 214 M 390, 692 P2d 473, 42 St. Rep. 40 (1985).

Sex Crime Defendant's Character Testimony — Rebuttal by Minor Nonvictim Female: The major aim of the testimony for defendant charged with sexual assault was that he never engaged in improper sexual activity with the victims or anyone else and that he was a person of high morality. Thus the State could use the testimony of a minor nonvictim female to rebut his testimony. She testified to sleeping in defendant's bed while he was present and naked. St. v. Anderson, 211 M 272, 686 P2d 193, 41 St. Rep. 1357 (1984).

Deliberate Homicide — Prior Acts of Discipline Toward Child Admissible: Defendant was charged with and convicted of the deliberate homicide of the 19-month-old child of the woman with whom he was living. On appeal, defendant attacked the testimony of witnesses relating to other crimes, wrongs, or acts by him toward the child on the grounds that the elements required in St. v. Just, 184 M 262, 602 P2d 957 (1979), were not met. The Supreme Court said, when a battered child is the victim, the pattern of conduct exhibited by the defendant-caretaker toward the child victim is within the scope of the issues before the court. The only available link between the specific nature of the child's injuries and the caretaker may be the evidence of prior abusive conduct by the caretaker. Under Rule 406, M.R.Ev., the acts habitually performed by defendant in response to his perceived need for discipline of the child were admissible. As a matter of habit, his discipline of the child was excessively harsh. There was no error in allowing witnesses to testify to the disciplinary acts administered by defendant to the child. St. v. Sigler, 210 M 248, 688 P2d 749, 41 St. Rep. 1039 (1984), followed in St. v. Murray, 228 M 125, 741 P2d 759, 44 St. Rep. 1394 (1987), and St. v. Huerta, 285 M 245, 947 P2d 483, 54 St. Rep. 1133 (1997).

Imputing Criminal Record — Unrelated to Relevant Character — Denial of Fair Trial: Defendant was convicted of the felony theft of an air compressor. On appeal, defendant contended that the suggestion by the prosecution on cross-examination that he had an FBI criminal record was prejudicial. The Supreme Court held that imputing to a defendant by implication a criminal record unrelated to any trait of character involved in the offense charged denied the defendant a fair trial. St. v. Kramp, 200 M 383, 651 P2d 614, 39 St. Rep. 1819 (1982).

Evidence of Threats Against Homicide Defendant — Showing of Self-Defense a Necessary Foundation: Defendant charged with deliberate homicide did not admit the killing, and therefore no issue of whether he acted in self-defense was raised at the trial. Before he could introduce evidence that victim and members of her family had in the past made threats against defendant, he had to introduce evidence that he acted in self-defense. Thus, the trial court properly refused to admit evidence of the threats. St. v. Cartwright, 200 M 91, 650 P2d 758, 39 St. Rep. 1598 (1982).

Child Beating Death — Common Design — Other Acts: Defendants were members of a religious sect that practiced violent child discipline techniques. While caring for a child at different times, each of four defendants engaged in incidences of child beating, eventually leading to the child's death. It was not error to admit evidence of the acts by church members other than defendants and acts by the defendants against children other than the victim to show the common design toward disciplining children by beatings arising out of the church policy. The evidence also provided proof of defendants' motive, intent, and plan. St. v. Powers, 198 M 289, 645 P2d 1357, 39 St. Rep. 989 (1982).

Admissibility of Character and Other Crimes Evidence When Defendant "Opens Door" on Cross-Examination: Where defendant on cross-examination stated he was not the kind of person who could commit the crime of which he was accused, evidence of character was admissible because defendant opened the door to rebuttal evidence by his statement. When defendant on cross-examination further stated he had never committed a burglary, evidence of prior burglary conviction was admissible for the same reason. St. v. Austad, 197 M 70, 641 P2d 1373, 39 St. Rep. 356 (1982).

Testimony That Defendant Smoked Marijuana With County Attorney — Other Offense — Inadmissible: The State moved to exclude defendant's testimony that he had smoked marijuana with the County Attorney the night before the offense (deliberate homicide and obstructing justice). The trial court in excluding the offered evidence reasoned that it was not relevant, or if relevant, that its probative value was outweighed by its prejudicial effect. The Supreme Court affirmed the District Court. St. v. Beachman, 189 M 400, 616 P2d 337, 37 St. Rep. 1558 (1980).

Evidence of Party's Companion's Criminal Record: After a jury found plaintiff not guilty of shoplifting, she brought a false arrest suit against Buttrey Food, Inc. In the false arrest suit, Buttrey was allowed to introduce evidence of plaintiff's companion's reputation and past criminal record for shoplifting. On appeal, the Supreme Court said that the right to detain and arrest by a merchant depends on reasonable cause for belief that shoplifting has occurred and not merely on the ground that one of the persons has a reputation for shoplifting. The evidence should have been excluded. Duran v. Buttrey Food, Inc., 189 M 381, 616 P2d 327, 37 St. Rep. 1545 (1980).

Evidence of Prior Wrongs: Evidence that defendant had full knowledge of revocation of outfitting license was admissible under subsection (b) of this rule to show defendant was not acting under mistake or accident. St. v. Leighty, 179 M 366, 588 P2d 526, 35 St. Rep. 2017 (1978).

OTHER CRIMES — GENERALLY

Ambiguous Statements Concerning Prior Family Member Assaults Nonprejudicial in Light of Evidence: Prior to Hofeldt's trial for family member assault, Hofeldt was granted a motion in limine precluding testimony regarding prior family member assaults. At trial, the victim and the investigating officer made comments that Hofeldt asserted violated the motion in limine, and Hofeldt moved for mistrial. However, the trial court denied the motion, and Hofeldt was convicted. On appeal, the Supreme Court affirmed. The statements were not elicited by the prosecution and did not reference prior incidents specifically involving Hofeldt. In light of the strong evidence against Hofeldt and the fact that he did not request a curative instruction, the ambiguous statements could not be considered prejudicial, and denial of the mistrial motion was not an abuse of discretion. St. v. Hofeldt, 2005 MT 178, 328 M 1, 116 P3d 810 (2005).

Defense Expert Testimony Properly Limited to General Review of Legal and Medical Documents: The District Court did not abuse its discretion when it limited the testimony of defendant's medical expert regarding whether defendant's assault victim suffered a seizure on the night of the assault. The expert was allowed to address two of six instances of the victim's previous conduct, to testify that the victim's file had been reviewed and that the expert opinion was based on other incidents, and to give a general explanation of the nature and symptomatology of the victim's disorder, including the effect of medications and alcohol. However, the expert was precluded from testifying about the specific nature of the other documents that were reviewed. The Supreme Court held that it was proper to limit the expert's testimony to general references in light of the prohibition against the introduction of evidence of other crimes, wrongs, or acts. Thus, defendant was afforded ample opportunity to demonstrate the victim's conditions and limitations in support of the defense theory, and the conviction was affirmed. St. v. Slavin, 2004 MT 76, 320 M 425, 87 P3d 495 (2004). See also Benjamin v. Torgerson, 1999 MT 216, 295 M 528, 985 P2d 734 (1999).

Evidence of Other Theft and Property Damage and Threatening Note Admissible Under Transaction Rule: During defendant's trial for theft and burglary, the District Court allowed the introduction of evidence of a prior theft and property damage, as well as a threatening note, that defendant had been involved with earlier in the day. Defendant contended that the evidence related to other acts or crimes and should not have been admitted. However, the prior theft and property damage and the note were intertwined with the theft and burglary, and the jury was entitled to hear what had transgressed immediately prior to the commission of the crime charged, so the evidence was admissible under the transaction rule. St. v. Flowers, 2004 MT 37, 320 M 49, 86 P3d 3 (2004).

Statement Admitting Prior Drug Use Not Considered Evidence of Other Crimes — Admissibility of Statement Under Transaction Rule: When his probation officer searched

Lozon's room early one morning, the officer discovered a vial that Lozon admitted contained methamphetamine, but Lozon would not say to whom the vial belonged. However, Lozon did admit taking methamphetamine the previous evening. When the state sought to admit Lozon's statement, Lozon objected on grounds that the statement constituted evidence of prior crimes and that because the state had not provided notice that the statement would be used and the purpose for the evidence, as required in this rule, it was inadmissible. The trial court admitted the statement under the transaction rule, and Lozon appealed, but the Supreme Court affirmed. Under the transaction rule in 26-1-103, evidence of matters that are inextricably linked to and explanatory of the charged offense is admissible, notwithstanding rules related to the admission of other crimes evidence, and when the evidence at issue is not wholly independent of or unrelated to the charged offense, it is not considered other crimes evidence for which notice of intent to introduce is required. Here, Lozon's statement established Lozon's knowledge and possession of drugs in his room shortly before the search, was closely related to the possession charge, and was therefore admissible. St. v. Lozon, 2004 MT 34, 320 M 26, 85 P3d 753 (2004).

All Elements of Modified Just Rule to Be Met Before Evidence of Prior Crimes Admissible: Before evidence of prior acts, crimes, or wrongs may be admitted, all four substantive prongs of the modified Just rule—similarity, remoteness, purpose, and prejudicial effect versus probative value—must be met. Additionally, a party offering evidence of prior acts must also comply with the procedural requirements set out in St. v. Matt, 249 M 136, 814 P2d 52 (1991), regarding notice to defendant of intent to introduce the evidence, explanation to the jury regarding the limited purpose of the evidence, and admonishment in jury instructions that misapplication of the evidence may result in double punishment. Here, Ayers contended that none of the substantive prongs were met, so the Supreme Court considered each in turn. As related to Ayers' prior Wyoming conviction, the first two prongs were clearly met. Regarding purpose, the court noted that merely reciting an allowable purpose is not sufficient if the evidence does not further that purpose or if the purpose is not an issue in dispute. For a prior act to be admissible as relevant toward motive, the commission of the first crime should give rise to a motive or reason for commission of the second crime, and in this case, there was sufficient proof of a connection between the prior Wyoming crime and Ayers' present charge to meet the third prong. Finally, with regard to the prejudice issue, the court noted that Ayers failed to object to the extent or scope of testimony presented by the state's expert or preserve that issue for appeal, so the District Court never had the opportunity to limit the evidence that Ayers argued on appeal was prejudicial. Nevertheless, Ayers' prior conviction clearly had great probative value, and under St. v. Henderson, 278 M 376, 925 P2d 475 (1996), even though probative evidence will frequently be prejudicial, when the first three prongs are met, prejudice alone is not a sufficient reason to refuse admission. Thus, in this case, the four prongs were met and the District Court did not err in admitting evidence of Ayers' prior Wyoming conviction of a similar crime. St. v. Ayers, 2003 MT 114, 315 M 395, 68 P3d 768 (2003).

Evidence of Prior DUI Conviction Not Related to Crime Charged — Harmless Error: In a trial for fourth offense DUI, Bingman contended that the trial court erred in admitting testimony related to Bingman's two most recent DUI convictions. However, as in St. v. Austad, 197 M 70, 641 P2d 1373 (1982), the evidence here was admitted for the purpose of proving not that Bingman had committed the DUI charged, but rather that Bingman had lied under oath. Bingman's own testimony opened the door to evidence of the past convictions and provided the jury with self-serving statements that Bingman knew to be untrue, but that were intended to place Bingman in a better light with the jury. As such, the testimony was not the sort of evidence contemplated by Rule 609, M.R.Ev., which prohibits the admission of evidence that a witness has been convicted of a crime for the purpose of attacking the witness's credibility. There was no reasonable possibility that the jury would have acquitted Bingman had he lied under oath only once instead of twice. Evidence of Bingman's prior convictions under these circumstances constituted harmless error and did not contribute to Bingman's conviction. St. v. Bingman, 2002 MT 350, 313 M 376, 61 P3d 153 (2002).

Abuse of Discretion Standard of Review Applicable to Rulings on Other Crimes Evidence: Because the admission of evidence of other crimes is directed to the relevance and admissibility of that evidence, the Supreme Court will apply the abuse of discretion standard when reviewing a trial court's decision on whether to admit evidence of other crimes, wrongs, or acts, which is the same standard applied to evidentiary rulings regarding the relevance and admissibility of evidence generally. St. v. Aakre, 2002 MT 101, 309 M 403, 46 P3d 648 (2002).

Failure by State to Articulate Permissible Purpose for Introduction of Evidence of Other Crimes — Lack of Proof of Defendant's Knowledge of Fact of Consequence: During pretrial proceedings for Dobson's trial for sexual intercourse without consent, the state indicated its

intent to introduce evidence that Dobson had been previously charged with sexual intercourse without consent with a minor. The purported purpose was for proof of knowledge or the absence of mistake or accident, establishing that Dobson knew that someone under 16 years of age could not legally consent to sexual intercourse. Instead of objecting, defense counsel offered to stipulate that Dobson did have knowledge of that fact. The state objected that Dobson should not be able to stipulate away its case, and urged that the jury instructions contain details of the prior charge. The trial court declined the specific instructions offered by both Dobson and the state and fashioned and gave its own instruction, advising the jury that Dobson was previously charged with sexual intercourse without consent with a minor and thus had knowledge of the law, but instructing that the evidence was not to be construed by the jury as evidence of Dobson's character, but only as evidence of Dobson's prior knowledge that such conduct was criminal. On appeal, Dobson contended that the instruction was erroneous. The Supreme Court agreed that the trial court abused its discretion in giving the instruction because it did not meet the third criteria of the modified Just rule (see St. v. Matt, 249 M 136, 814 P2d 52 (1991)). Although it appeared at first blush that the state asserted permissible purposes of knowledge or the absence of mistake or accident for the admission of other crimes evidence, merely reciting an allowable purpose is not sufficient if the evidence does not further that purpose or if that purpose is not an issue in dispute (see St. v. Weldy, 273 M 68, 902 P2d 1 (1995)). Rather, as set out in U.S. v. Mehrmanesh, 689 F2d 822 (9th Cir. 1982), the state must articulate precisely the evidential hypothesis by which a fact of consequence may be inferred from the other acts evidence, which in this case, the state did not do. Dobson's knowledge of the law that it is a felony offense to have sexual intercourse with someone under 16 years of age was not a fact of consequence to the action. Thus, admission of the evidence via the jury instruction was reversible error, and the case was remanded for a new trial. St. v. Dobson, 2001 MT 167, 306 M 145, 30 P3d 1077 (2001). See also St. v. Anderson, 275 M 344, 912 P2d 801 (1996).

Felony DUI — Failure to Object and Statements by Defense Counsel Held Waiver of Evidence of Other Crimes — Motion for Mistrial Based Upon Evidence of Other Crimes Properly Denied: Schwein moved for a mistrial because the District Court Judge gave a jury instruction indicating that Schwein was charged with felony DUI, implying that Schwein had previous DUI convictions and that that resulted in the automatic upgrading of the most recent DUI charge from a misdemeanor to felony DUI. Schwein argued that the judge's instruction constituted evidence of other crimes introduced contrary to subsection (b) of this rule. The Supreme Court pointed out that the instructions were settled prior to trial, that Schwein did not object to the instruction before it was given, and that Schwein's own counsel raised the issue of felony DUI during voir dire. The Supreme Court held that Schwein's objection was untimely and that any error was harmless in light of the statements made by Schwein's counsel during voir dire. St. v. Schwein, 2000 MT 371, 303 M 450, 16 P3d 373, 57 St. Rep. 1587 (2000).

Sexual Abuse and Violence Against Women Act — Limitation of Evidence of Inappropriate Touching of Another: Evert sought damages against Swick based on Swick's alleged sexual abuse and violation of the federal Violence Against Women Act of 1994 (42 U.S.C. 13981). The District Court excluded proffered testimony of Evert's sister that Swick had also sexually and physically abused her. Swick was ultimately acquitted. Evert asserted on appeal that her sister's testimony was admissible to show opportunity, identity, or absence of mistake, that it was part of the res gestae, and that it should have been allowed as rebuttal testimony. The Supreme Court found no issue of opportunity, identity, or mistake because Swick and Evert had lived together, so the opportunity for abuse clearly existed. Moreover, the sister's testimony did not fall within any of the hearsay exceptions in Rule 803, M.R.Ev. The res gestae argument, when properly phrased in the context of the transaction rule, showed no evidence that Swick's contact with the sister involved part of the same transaction contained in Evert's complaint, a necessary element under 26-1-103. The Supreme Court also concluded that the testimony had no rebuttal value that would outweigh its prejudicial effect. The District Court correctly deduced that the evidence of other inappropriate touching was offered to impugn Swick's credibility and bolster Evert's credibility, which is not permitted under the modified Just rule and this rule. The court properly exercised its discretion in weighing the probative value of the testimony against its prejudicial effect in limiting the sister's testimony to the allegations contained in the complaint and excluding the portion of her testimony regarding other acts. Evert v. Swick, 2000 MT 191, 300 M 427, 8 P3d 773, 57 St. Rep. 757 (2000).

Admissibility of Evidence of Prior Crime to Prove Identity — Greater Degree of Similarity Between Crimes Required When Evidence Introduced to Prove Identity: The state introduced evidence of Sweeney's 1989 Wisconsin sexual assault conviction to prove Sweeney's identity as the perpetrator of a sexual assault in Montana in 1996, contending that the evidence was

probative in light of Sweeney's assertion of an alibi defense. Sweeney argued that because the victim of the 1996 assault testified that Sweeney was the person who assaulted her, Sweeney's identity as the alleged perpetrator was never at issue. Identity is rarely a distinct ground for admission of other acts or crimes, usually flowing from one or more of the other listed purposes, so when evidence of other acts or crimes is introduced to prove identity, the other acts or crimes must be sufficiently distinctive to warrant an inference that the person who committed the act also committed the offense at issue. A much greater degree of similarity between the charged crime and the other crime is required when the evidence is introduced to prove identity than when it is introduced to prove a state of mind. Here, there was some similarity between the age and gender of the victims in both the 1989 and 1996 assaults, but Sweeney's alleged conduct was not necessarily sufficiently distinctive in the context of sexual assaults to warrant an inference that because he committed the 1989 assault, he must have also committed the 1996 assault. The District Court erroneously allowed introduction of evidence of the 1989 assault to prove Sweeney's identity as the perpetrator of the 1996 assault. St. v. Sweeney, 2000 MT 74, 299 M 111, 999 P2d 296, 57 St. Rep. 325 (2000). See also U.S. v. Luna, 21 F3d 874 (9th Cir. 1994).

Admissibility of Evidence of Prior Crime to Prove Knowledge — Connection Required: When evidence of a prior crime is admitted to prove knowledge, its admissibility requires a logical connection between the knowledge gained as a result of the commission of the prior act and the knowledge at issue in the charged act. The inquiry is whether defendant's prior crime or act made the existence of defendant's knowledge concerning the current crime more probable than not. Here, the state introduced evidence of Sweeney's prior claim of a disassociative disorder at the time of a 1989 Wisconsin sexual assault conviction and the fact that Sweeney had indicated to a police investigator that he placed boundaries on himself when around children, yet Sweeney denied suffering from a disorder at the time of an alleged sexual assault in Montana in 1996 and did not testify at trial regarding any self-imposed boundaries. However, Sweeney did not claim that he did not know that his actions constituted a crime, nor did he claim that he did not have the requisite mental state at the time of the crime. Instead, Sweeney steadfastly maintained that he did not commit either of the offenses charged. Thus, evidence of Sweeney's prior conviction did not make the existence of his knowledge concerning the 1996 sexual assault more probable than not, so evidence of the 1989 conviction was improperly admitted for the purpose of proving knowledge. St. v. Sweeney, 2000 MT 74, 299 M 111, 999 P2d 296, 57 St. Rep. 325 (2000). See also U.S. v. Martinez, 182 F3d 1107 (9th Cir. 1999).

Justifiable Use of Force Not Raised at Trial — Character Evidence of Victim Inadmissible: Nelson was charged with partner assault after striking his wife several times in the face and breaking her jaw. At trial, he sought to introduce evidence of his wife's prior convictions for assault to show that he used reasonable force against her. On appeal, the Supreme Court noted that Nelson had not relied on the defense of justifiable use of force, claiming instead that the contact was accidental, and that evidence of his wife's prior convictions lacked relevance because Nelson never asserted that he knew of the convictions when he struck her. Nelson's mere mention of self-defense in his notice of intent to rely on the defense of self-defense, in his trial brief, and in response to the city's motion in limine did not place the matter at issue in the trial. Thus, evidence of his wife's prior convictions was not relevant to the defense of accident upon which Nelson relied and was properly disallowed. Red Lodge v. Nelson, 1999 MT 246, 296 M 190, 989 P2d 300, 56 St. Rep. 955 (1999).

Results of Prior Horizontal Gaze Nystagmus Test Improperly Admitted — Harmless Error: At Berosik's DUI trial, he argued that because his eyes had been injured in his youth, the horizontal gaze nystagmus test (HGN) was not valid. The District Court concluded that Berosik opened the door to evidence of a prior DUI incident in testifying on direct examination about the eye condition and admitted evidence of the results of the prior HGN, which Berosik had also failed. The Supreme Court decided on appeal that the court abused its discretion in admitting the evidence because it did not rebut Berosik's suggestion that he scored high on the test due to the injuries and because the prior test results had, at most, a negligible probative value that was substantially outweighed by the risk of confusion of the issues. However, the error was harmless because Berosik failed to show that any of his substantive rights were prejudiced or that his right to a fair trial was impaired. Even without the prior test results, there was overwhelming evidence that Berosik was guilty of DUI, so the conviction was affirmed. St. v. Berosik, 1999 MT 238, 296 M 165, 988 P2d 775, 56 St. Rep. 938 (1999), applying St. v. Partin, 287 M 12, 951 P2d 1002, 54 St. Rep. 1474 (1997).

Crimes Need Not Be Identical — Sexual Assault:

Although the first prong of the Matt test (formerly modified Just test) does not require that prior acts be identical to the crime charged, they must be sufficiently similar. Conduct very

similar in specific details may not be required in every case. It is within the broad discretion of the District Court to find evidence of prior acts too dissimilar to be admitted because they possessed significant distinguishing characteristics from the conduct in question. Benjamin v. Torgerson, 1999 MT 216, 295 M 528, 985 P2d 734, 56 St. Rep. 847 (1999).

Little was convicted of sexual intercourse without consent and sexual assault on two minors. Over Little's objection, the state introduced evidence at trial of other sexual assaults upon the same stepdaughter. The Supreme Court held that the other assaults satisfied the criteria of the modified Just rule. The Supreme Court noted that the former crimes did not have to be identical with the most recent crime charged and that they were sufficiently similar to be admissible because the crime was against the same stepdaughter and involved sexual intercourse without consent. St. v. Little, 260 M 460, 861 P2d 154, 50 St. Rep. 1124 (1993).

Modified Just Rule Analysis — Insufficient Evidence to Apply Four-Part Analysis for Introduction of Evidence of Other Crimes, Wrongs, or Act: Enright was charged with felony arson and deliberate homicide as the result of a trailer home fire. In the course of the trial, the District Court allowed the state to introduce evidence of a 1995 trailer fire with which Enright was involved. Citing Britton v. Farmers Ins. Group, 221 M 67, 721 P2d 303 (1986), and St. v. Johnson, 250 M 496, 821 P2d 1039 (1991), and distinguishing St. v. Paulson, 250 M 32, 817 P2d 1137 (1991), the Supreme Court held that there was insufficient evidence that Enright started the 1995 trailer home fire and that, because of that lack of evidence, the District Court should not even have undertaken the four-part analysis required by the modified Just rule applied in St. v. Matt, 249 M 136, 814 P2d 52 (1991), for the introduction of evidence of the 1995 fire. The Supreme Court concluded that because the 1995 fire was not sufficiently relevant, the District Court's analysis and admission of the evidence of the 1995 fire unfairly prejudiced the jury against Enright, so the Supreme Court remanded the case for a new trial. St. v. Enright, 1998 MT 322, 292 M 204, 974 P2d 1118, 55 St. Rep. 1308 (1998), followed in St. v. Link, 1999 MT 4, 293 M 23, 974 P2d 1124, 56 St. Rep. 13 (1999).

Rule Inapplicable to Child's Testimony Regarding Other Acts of Sexual Abuse — Rebuttal Evidence Allowed — Correct Result but Wrong or Unspecified Reason: Veis was charged with unlawful intercourse with two sons of a woman he had dated. At trial, the District Court allowed one of the boys to testify about prior acts by Veis in order to explain a note, the existence of which was raised by Veis, written by the boy to one of his teachers about the sexual abuse. After Veis raised the existence of the note at trial, the District Court allowed the prosecution to present evidence as to its content and purpose. The Supreme Court held that, contrary to Veis's argument, testimony about the note, which involved testimony about other acts of Veis, did not violate this rule. The record showed that even though the District Court did not explain its ruling allowing the testimony, the testimony was allowed only for purposes of the state's rebuttal after Veis had raised the existence of the note as an issue in the trial. Relying upon St. v. Arthun, 274 M 82, 906 P2d 216 (1995), and St. v. Huether, 284 M 259, 943 P2d 1291 (1997), for the proposition that the Supreme Court will not reverse a District Court if it reaches the correct result for the wrong reason and upon Cline v. Durden, 246 M 154, 803 P2d 1077 (1990), and St. v. McQuiston, 227 M 397, 922 P2d 519 (1996), for the proposition that once a party opens an evidentiary door the opposing party has the right to offer evidence in rebuttal, even evidence of other acts, the Supreme Court held that the District Court did not abuse its discretion in allowing into evidence the boy's testimony regarding other acts by Veis. St. v. Veis, 1998 MT 162, 289 M 450, 962 P2d 1153, 55 St. Rep. 651 (1998).

Prejudicial Prior Arrest Testimony Ordered Excluded in Pretrial Order — Weak Case Against Defendant — New Trial Granted: In a prosecution for forgery, a detective's testimony concerning defendant's handwriting samples obtained during a prior arrest was inadmissible because it violated a pretrial order not to give such testimony. No eyewitness tied defendant to the offense, and the detective's handwriting testimony was the only link between defendant and the offense. There were weaknesses and conflicts in the detective's testimony and handwriting analysis. Defendant denied committing the offense and offered a plausible explanation of who committed the offense. The testimony of the prior arrest was inherently prejudicial, which the prosecutor conceded when the pretrial motion was made to exclude the testimony. The trial judge's cautionary instruction that the prior arrest handwriting samples testimony was improper and should be disregarded did not overcome the prejudice. There was a reasonable possibility that the reference to the prior arrest might have contributed to the conviction; therefore, defendant was denied a fair and impartial trial, it was an abuse of discretion to deny defendant's motion for a new trial, the conviction was reversed, and the case was remanded for a new trial. St. v. Partin, 287 M 12, 951 P2d 1002, 54 St. Rep. 1474 (1997), distinguished in St. v. Scarborough, 2000 MT 301, 302 M 350, 14 P3d 1202, 57 St. Rep. 1268 (2000).

Explanation of How Facts Regarding Other Crimes and Present Crime Relate to Purpose — Differentiation From "Shotgun" Approach: In considering the admissibility of evidence of Whitlow's prior sexual assault, the Supreme Court applied the modified Just rule and identified the four substantive elements justifying admissibility. Whitlow nevertheless contended that the state failed to specify in its other crimes notice the purposes for which the evidence would be offered, instead using the impermissible "shotgun" approach in listing the purposes. Although nearly every purpose for admitting evidence of other crimes was stated in the state's notices of intent to introduce the evidence, it is not impermissible to list more than one applicable purpose. What is impermissible is a mere recitation of the purposes listed in this rule; however, the state did far more than simply recite the purposes, instead explaining how the facts surrounding the other crimes and the facts surrounding the current charges related to each specific purpose—an approach not at all similar to the "shotgun" approach. Thus, the state satisfied both the substantive and procedural requirements for the admission of evidence of other crimes. St. v. Whitlow, 285 M 430, 949 P2d 239, 54 St. Rep. 1227 (1997), distinguishing St. v. Croteau, 248 M 403, 812 P2d 1251 (1991).

Alleged Error Part of Defense Strategy — Trial Not Constitutionally Defective — Plain Error and Cumulative Error Doctrines Held Inapplicable: Hanson was charged with sexual assault of and deviate sexual conduct with his former girlfriend's son, Aaron. Hanson alleged that the testimony of his victim and certain witnesses was unreliable, that certain testimony was incorrectly presented on rebuttal, that the state introduced evidence of other acts in violation of both subsection (b) of this rule and his constitutional right to due process, that the state's cross-examination of him went too far, that he was improperly impeached by certain state evidence, and that the prosecutor incorrectly commented on the veracity of a witness. For these reasons, Hanson argued that he was deprived of a fair trial in violation of the constitutional guaranty of a fair trial and that the doctrines of plain error and cumulative error applied so as to require a new trial even though he had not objected to the evidence before the District Court. The Supreme Court reviewed the trial record and pointed out that Hanson either failed to object to testimony by Aaron, Aaron's therapist, and a Deputy Sheriff or he actually solicited their testimony himself in an effort to show their lack of credibility. The Supreme Court held, citing St. v. Campbell, 241 M 323, 787 P2d 329 (1990), and St. v. Finley, 276 M 126, 915 P2d 208 (1996), that the alleged errors did not rise to the level of a manifest miscarriage of justice, did not leave unsettled the question of the fundamental fairness of the trial, and did not compromise the integrity of the judicial system. Therefore, the court refused to invoke the plain or cumulative error doctrine to review issues raised for the first time on appeal. St. v. Hanson, 283 M 316, 940 P2d 1166, 54 St. Rep. 678 (1997).

Testimony Elicited on Cross-Examination and for Impeachment Properly Admitted: McQuiston questioned whether testimony regarding previous acts was admissible. Because the testimony was elicited on cross-examination and revisited on direct or redirect examination of subsequent witnesses or elicited on cross-examination in an effort to impeach McQuiston's prior testimony, the testimony was properly admitted. St. v. McQuiston, 277 M 397, 922 P2d 519, 53 St. Rep. 729 (1996).

Introduction of Photographs — Totality of Circumstances Test — No Prejudice: In a trial for kidnapping and assault, the District Court allowed introduction of photographs of the victim that showed assault and injury of the victim several days prior to the date of the crimes charged. The Supreme Court ruled, based on the totality of the circumstances, that even if the admission of evidence of the earlier attacks was in violation of this rule, under the totality of the circumstances, it was not prejudicial error. St. v. Eichenlaub, 272 M 332, 901 P2d 90, 52 St. Rep. 786 (1995).

Other Acts Not Sufficiently Similar to Charged Offense — Admission Improper: The defendant was charged and convicted of burglary and deliberate homicide. The defendant appealed, alleging that the District Court erred in admitting evidence of other acts. The Supreme Court held that when the defendant's other acts were not sufficiently similar to the charged offense to satisfy the first element of the modified Just rule (similarity of acts), there is no need to analyze other elements of the rule. When evidence of the other acts could not meet the elements of the modified Just rule, the District Court abused its discretion in admitting the evidence. St. v. Pace, 272 M 464, 901 P2d 557, 52 St. Rep. 768 (1995).

Election of More Than One Applicable Purpose for Admission of Evidence of Other Acts Not Precluded: Defendant claimed that under St. v. Croteau, 248 M 403, 812 P2d 1251 (1991), the state's Just notice was procedurally defective because it used the impermissible "shotgun" approach, naming several exceptions from this rule. The notice stated that the other acts "evidence is relevant in that it tends to establish plan, knowledge and absence of mistake or

accident concerning the commission of the offenses currently charged". While Croteau does stand for the proposition that the shotgun approach is impermissible when identifying the purpose for which the evidence is to be introduced, it does not prohibit the election of more than one applicable purpose for the admission of the other acts evidence. Given the fact that the defense was based on the argument that defendant's conduct was not what the victims alleged it to be, the alleged purposes set out in the notice were sufficient to notify defendant of the reason that the other acts evidence was to be introduced. St. v. Steffes, 269 M 214, 887 P2d 1196, 51 St. Rep. 1463 (1994). See also St. v. Johnston, 267 M 474, 885 P2d 402, 51 St. Rep. 1078 (1994).

Dissimilarity Between Misdemeanor Forgery and Felony Burglary — Evidence of Prior Crime Inadmissible: In a prosecution for accountability for felony burglary, the state sought to introduce evidence of Johnston's prior conviction for misdemeanor forgery. Under the modified Just rule, there was insufficient similarity between the two offenses to satisfy the requirement that the crimes be similar in nature before evidence of the prior crime may be allowed. St. v. Johnston, 267 M 474, 885 P2d 402, 51 St. Rep. 1078 (1994).

Past Acts Held Too Remote to Be Admissible — Therefore Prejudicial: Ray argued that the trial court erred in admitting testimony concerning two instances of sexual abuse that had happened 16 to 18 years in the past. The Supreme Court held that although it refused to set arbitrary time limits for admitting prior acts evidence, events occurring that far in the past without other intervening similar acts are too remote and do not meet one of the requirements of the modified Just rule. Therefore, introduction of the evidence was prejudicial to the defendant. St. v. Ray, 267 M 128, 882 P2d 1013, 51 St. Rep. 968 (1994), following St. v. Matt, 249 M 136, 814 P2d 52 (1991), and as to prejudice to defendant of admitting prior acts, St. v. Croteau, 248 M 403, 812 P2d 1251 (1991).

Prejudice Through Inadmissible Evidence — Fair Trial Denied: Generally, character evidence is inadmissible to prove conduct. The prosecution is allowed to rebut the accused's offer of a pertinent trait of character; however, the prosecution must present legitimate and relevant character evidence. An accused's entire life should not be searched in an effort to convict. In this case, the trial court improperly allowed cross-examination of Eklund's character witness regarding Eklund's prior murder charges when the witness was called to rebut the nonviolent character evidence. The danger of unfair prejudice of evidence of charges, not a conviction, clearly outweighed the probative value. After considering the totality of the circumstances, the Supreme Court determined that there was a reasonable possibility that the inadmissible evidence of Eklund's murder charge denied him a fair and impartial trial and remanded for a new trial. St. v. Eklund, 264 M 420, 872 P2d 323, 51 St. Rep. 335 (1994).

Evidence of Prior Indecent Exposure Not Admissible: In a trial for sexual intercourse without consent, the only issue of contention was consent. A prior act in which defendant asked a woman to go outside a bar and while outside exposed himself and stated that he wanted intercourse was not similar to defendant's actions in this case and was not admissible on the issue of victim's consent. In addition, innuendos that could be drawn from the evidence would improperly tend to go to defendant's character and propensity to act in a certain way, and defendant's motive or intent was not the issue. Remand for a new trial was necessary. St. v. Keys, 258 M 311, 852 P2d 621, 50 St. Rep. 547 (1993), followed, with regard to inadmissibility of evidence of prior crimes or acts insufficiently similar or relevant to prove the crime charged, in St. v. Garn, 264 M 296, 871 P2d 878, 51 St. Rep. 285 (1994).

Redirect Examination as to Other Crimes Following Cross-Examination as to Whether Search Took Place: During cross-examination of a recalled prosecution witness in a prosecution for conspiracy to sell dangerous drugs, a detective was asked if defendant's house was searched and answered that they had no reason to do it. On redirect examination, it was error for the judge to allow, over objections, questions and answers regarding other evidence of defendant's prior involvement with drugs. The testimony exceeded the scope of the cross-examination and violated defendant's right to notice that the information would be brought out at trial. St. v. Shaw, 255 M 298, 843 P2d 316, 49 St. Rep. 1012 (1992).

Evidence of Other Crimes by Defendant Inadmissible to Bolster Credibility of Witness: Based on the testimony of witness Grotjohn, defendant Cameron was convicted of the sale of dangerous drugs (now criminal distribution of dangerous drugs). In order to explain Grotjohn's behavior as a witness at trial, the state introduced evidence over defendant's objection of a gun threat made by Cameron against Grotjohn. The Supreme Court held that the evidence of the gun threat was inadmissible because Grotjohn's reputation for truthfulness was not attacked at trial. The evidence of the threat was also inadmissible because under the rule in St. v. Just, 184 M 262, 602 P2d 957 (1979), as modified by St. v. Matt, 249 M 136, 814 P2d 52 (1991), the state failed to give written notice of the evidence to be admitted and the purpose of the evidence. Moreover, there

was no similarity between the gun threat and the charged crime of sale of dangerous drugs (now criminal distribution of dangerous drugs). The District Court therefore committed reversible error in admitting the evidence of the gun threat. St. v. Cameron, 255 M 14, 839 P2d 1281, 49 St. Rep. 861 (1992), clarified, with regard to the applicability of the corpus delicti rule, in St. v. Hansen, 1999 MT 253, 296 M 282, 989 P2d 338, 56 St. Rep. 997 (1999).

Evidence of Activity Following Commission of Crime Improperly Suppressed: The state sought to introduce evidence of defendant Moore's activities following the alleged homicide of Brisbin. The District Court denied admission of the evidence based on the potential for prejudice. The Supreme Court held that the evidence was improperly suppressed because it was relevant as tending to prove commission of the crime charged and the defendant's responsibility for it. As stated in Cruz v. St., 645 SW 2d 498 (Tex. Ct. App. 1982), admissibility is predicated on the jury's right to hear what transgressed immediately prior and subsequent to the commission of the crime charged so that the jury may evaluate the evidence in the context in which the criminal act occurred. Actions of a defendant subsequent to the alleged commission of a crime tend to show the consciousness of guilt and are a part of the res gestae and corpus delicti of the crime charged. Such evidence is highly probative, is not subject to the "other crimes" restriction of this rule, and is therefore admissible. St. v. Moore, 254 M 241, 836 P2d 604, 49 St. Rep. 752 (1992), followed in St. v. Berosik, 1999 MT 238, 296 M 165, 988 P2d 775, 56 St. Rep. 938 (1999).

No Similarity Between Crime Charged and Previous Acts — Evidence Inadmissible: In Crist's trial for sexual assault of a child, the state successfully introduced testimony of another alleged victim who stated that Crist had once showed her a pornographic magazine, once gave her an alcoholic beverage and joked that he would get her drunk and take advantage of her, and then later that night tried to get her to dress in a nightgown. The Supreme Court applied the first prong of the Just test and found the testimony inadmissible because it lacked the requisite similarity to the crime charged. St. v. Crist, 253 M 442, 833 P2d 1052, 49 St. Rep. 525 (1992).

Evidence of Similar Rape Introduced to Prove Identity of Assailant: K.B. was raped by an unknown assailant after she awoke to find the assailant lying next to her on her bed. At trial, the District Court allowed the state to introduce evidence of another rape in a nearby town, in which the victim had found her assailant, identified as the defendant, sitting next to her on her bed when she awoke. The Supreme Court held that the evidence was properly allowed under Rule 403 and subsection (b) of this rule because it fit within the exception to establish identity and because its probative value was not outweighed by its prejudicial effect. St. v. Kordonowy, 251 M 45, 823 P2d 854, 48 St. Rep. 1148 (1991).

Corroborative Evidence to Be Viewed in Light Most Favorable to Prosecution: The defendant, accused of selling illegal drugs, argued that the evidence corroborating an accomplice's testimony was insufficient to support introducing the accomplice's testimony. The Supreme Court held that the corroborating evidence had to be viewed in the light most favorable to the prosecution and that in the case before it, the corroborating evidence was sufficient to support admitting the accomplice's testimony. St. v. Paulson, 250 M 32, 817 P2d 1137, 48 St. Rep. 838 (1991).

Modified Just Rule Applied: The defendant argued that the lower court erred in not determining, before admitting the evidence, that the sufficiency of evidence of other crimes would support a jury's finding that the defendant had committed the other crimes. The Supreme Court held that the Modified Just Rule, as developed in St. v. Matt, 249 M 136, 814 P2d 52, 48 St. Rep. 614 (1991), provided proper protection against improper admissibility without adopting a separate standard of review and that the evidence had been properly admitted under the modified rule. St. v. Paulson, 250 M 32, 817 P2d 1137, 48 St. Rep. 838 (1991), followed in St. v. McKnight, 250 M 457, 820 P2d 1279, 48 St. Rep. 981 (1991), and St. v. Romero, 261 M 221, 861 P2d 929, 50 St. Rep. 1296 (1993), and distinguished in St. v. Enright, 1998 MT 322, 292 M 204, 974 P2d 1118, 55 St. Rep. 1308 (1998). Enright was followed in St. v. Link, 1999 MT 4, 293 M 23, 974 P2d 1124, 56 St. Rep. 13 (1999).

Evidence of Prior Acts Not Limited to Common Scheme, Plan, or System — Admission of Other Crimes Harmless Error: While the Just rule clearly provides for the admission of evidence for purposes other than a common scheme, plan, or system, the District Court's improper admission of evidence that defendant had been involved 3 months earlier in an assault on a woman during which he repeatedly shoved a Deputy Sheriff did not constitute grounds for reversal of his conviction for felony assault (now assault with a weapon). St. v. Matt, 249 M 136, 814 P2d 52, 48 St. Rep. 614 (1991), discussed in St. v. Weldy, 273 M 68, 902 P2d 1, 52 St. Rep. 729 (1995).

Prior Crimes or Acts — Modified Just Rule: The following basis must be used to determine the admissibility of evidence of other crimes, wrongs, or acts: (1) the other crimes, wrongs, or acts must be similar; (2) the other crimes, wrongs, or acts may not be remote in time; (3) the evidence

of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity with such character; but it may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, or identity or absence of mistake or accident; and (4) although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading of the jury, considerations of undue delay, waste of time, or needless presentation of cumulative evidence. St. v. Matt, 249 M 136, 814 P2d 52, 48 St. Rep. 614 (1991), followed with regard to necessity of similarity of acts or crimes and use of evidence of similar crimes to prove character in St. v. Wells, 252 M 121, 827 P2d 801, 49 St. Rep. 175 (1992), and followed in St. v. McKnight, 250 M 457, 820 P2d 1279, 48 St. Rep. 981 (1991), St. v. Keys, 258 M 311, 852 P2d 621, 50 St. Rep. 547 (1993), St. v. Romero, 261 M 221, 861 P2d 929, 50 St. Rep. 1296 (1993), St. v. Garn, 264 M 296, 871 P2d 878, 51 St. Rep. 285 (1994), St. v. Steffes, 269 M 214, 887 P2d 1196, 51 St. Rep. 1463 (1994), St. v. Weldy, 273 M 68, 902 P2d 1, 52 St. Rep. 729 (1995), St. v. Anderson, 275 M 344, 912 P2d 801, 53 St. Rep. 172 (1996), St. v. Henderson, 278 M 376, 925 P2d 475, 53 St. Rep. 958 (1996), and St. v. Sweeney, 2000 MT 74, 299 M 111, 999 P2d 296, 57 St. Rep. 325 (2000). St. v. Anderson was followed in St. v. Hagberg, 277 M 33, 920 P2d 86, 53 St. Rep. 528 (1996).

Delay in Giving "Just" Instruction Not Prejudicial: At the time that evidence of other crimes was offered, defendant neither objected to the evidence nor requested a cautionary instruction. After the state completed its proof, it pointed out to the District Court that the Just instruction had not been given, at which time the court gave an instruction that met with defendant's approval. Additionally, the court included a second cautionary instruction during its final instructions to the jury. While it would have been preferable for the cautionary instruction to have been given at the time the evidence was introduced, the delay was not prejudicial. St. v. Goodwin, 249 M 1, 813 P2d 953, 48 St. Rep. 539 (1991).

Notice to Specify Purpose of Proposed Evidence: The prosecution's notice to the defendant of the state's intent to introduce evidence of prior conduct stated that the evidence was to be introduced for the purpose of showing "opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident in committing the offenses charged". The Supreme Court held that the introduction of the evidence was reversible error because the prosecution had used a "shotgun" approach in listing reasons for introducing the evidence rather than giving the defendant a specific purpose for the evidence's admission. St. v. Croteau, 248 M 403, 812 P2d 1251, 48 St. Rep. 484 (1991).

Prejudice of Untimely Notice Not Cured by Right to Continuance: On the first day of trial, the prosecution gave the defense notice of additional evidence of prior acts that the state intended to introduce. The Supreme Court held that the defendant had the right to a speedy trial and to proper notice and that the defendant could not be compelled due to untimely notice to choose between the two. St. v. Croteau, 248 M 403, 812 P2d 1251, 48 St. Rep. 484 (1991).

Reference to Incarceration in Reform School Not Prejudicial: The defendant argued that a witness's reference to the defendant's incarceration in the Pine Hills School for Boys (now Pine Hills Youth Correctional Facility) was prejudicial evidence of other crimes. The Supreme Court held that the testimony was admissible because it was introduced to establish a chain of custody for an exhibit seized in Minnesota and retrieved by school employees when they went to Minnesota to retrieve the defendant from that state. St. v. Daniels, 248 M 343, 811 P2d 1286, 48 St. Rep. 464 (1991).

Identification of Witness During Closing Argument as Defendant's Probation Officer — No Prejudice: In accord with an order in limine that no reference was to be made at trial to defendant's criminal record, the testimony of defendant's probation officer and records introduced in connection with her testimony were sanitized at trial. However, in closing, the prosecution referred to the testimony of the defendant's probation officer, which defendant contended on appeal was a violation of the restriction in subsection (b) of this rule—a restriction on introduction of evidence of other crimes without formal notice. The Supreme Court, noting that several references had been made to defendant's criminal record by defendant's own witnesses by the time closing arguments were made, found that identification of the parole officer was not prejudicial to the defense. St. v. West, 245 M 298, 800 P2d 1047, 47 St. Rep. 2129 (1990).

Evidence of Sexual Abuse by Another Person Inadmissible in Incest Trial: Defendant on trial for incest with his stepdaughter sought to introduce evidence of sexual abuse by the victim's natural father under the "pertinent trait of character of the victim" standard of subsection (a)(2) of this rule or the "other crimes" exception of subsection (b) of this rule. However, 45-5-511(4)

provides no exception to warrant admittance of evidence to establish that another person had sexually abused the victim. St. v. Kao, 245 M 263, 800 P2d 714, 47 St. Rep. 2100 (1990).

Evidence of Other Crimes — Admission of Prior Sexual Assault Conviction Upheld to Prove Defendant Acted Knowingly: In 1989, the defendant was charged with sexually assaulting his 15-year-old daughter. At trial, the defendant was convicted after evidence of a 1984 conviction of sexual assault upon the same daughter was admitted into evidence. On appeal, the state argued that admission of the 1984 conviction was appropriate to prove that the defendant acted knowingly because it showed the defendant's motive, intent, absence of mistake or accident, and knowledge. The Supreme Court examined the factors required by St. v. Just, 184 M 262, 602 P2d 957 (1979), balanced the probative value of the evidence against the possibility of prejudice, and concluded that evidence of the 1984 conviction was properly admitted by the District Court. St. v. Medina, 245 M 25, 798 P2d 1032, 47 St. Rep. 1832 (1990).

Evidence of "Other Crimes" Relating to Prior Offenses: In defendant's trial for assault, the District Court erred in allowing evidence to be introduced relating to crimes allegedly committed by defendant after the offense for which he was being tried. The Just requirement of nearness in time relates to other crimes or wrongs committed prior to the offense in issue. The prejudice to defendant in allowing evidence of wrongs committed after the offense for which he was being tried in order to prove the assault charge is obvious and not harmless. St. v. Heinrich, 242 M 110, 788 P2d 1346, 47 St. Rep. 314 (1990), distinguished in St. v. Gambrel, 246 M 84, 803 P2d 1071, 47 St. Rep. 2270 (1990).

Disclosure by Defense Witness of Other Crimes — Improper Prosecutorial Inquiry: A defense witness was impeached on cross-examination when asked if he had been convicted of a crime and what crime he had committed. The prosecutor's inquiry was clearly improper under Rule 609, M.R.Ev., and none of the exceptions in subsection (b) of this rule applied. The conviction was reversed and the case remanded for a new trial. St. v. Shaw, 237 M 451, 775 P2d 207, 46 St. Rep. 942 (1989).

Letter Attempting to Influence Witness Admissible to Show Consciousness of Guilt: While in jail, the defendant sent a letter to another prisoner suggesting that if the other prisoner developed amnesia prior to testifying against the defendant, the defendant would make it worth his while. The court ruled that the evidence was admissible because the attempt to influence or intimidate a witness is admissible to show consciousness of guilt. St. v. Baker, 237 M 140, 773 P2d 1194, 46 St. Rep. 686 (1989).

Inconsistent Statement by Victim — Character Not Automatically at Issue: An inconsistent statement in a victim's account of a sexual assault does not automatically put her character in issue and thus does not open the door for evidence of any past misconduct. St. v. Courville, 236 M 253, 769 P2d 44, 46 St. Rep. 338 (1989).

Knowledge of Term of Art Shown Through Testimony — Evidence of Prior Crimes Admissible: When a defendant understands the intricacy of proving a legal term of art and attempts through his own testimony to subvert proof of this element, he has clearly shown knowledge. A defendant who said he was not familiar with the term "under the influence" at the time of arrest and did not believe he was under the influence when arrested, opened the door to evidence of previous DUI convictions, which evidence was then properly admitted under the knowledge exception of Rule 404(b), M.R.Ev. St. v. Kinney, 230 M 281, 750 P2d 436, 45 St. Rep. 205 (1988).

Inadvertent Testimony — No "Just" Notice Required: A police officer testified to other crimes despite a prior agreement and without the required Just notice. The Supreme Court found that no Just notice was required because the County Attorney never intended to introduce evidence of other crimes and the testimony was an inadvertent and unintentional response to a nonsuggestive question. Any error was rendered harmless by the trial court's cautionary jury instructions, and the motion for a new trial or mistrial was properly denied. St. v. Brush, 228 M 247, 741 P2d 1333, 44 St. Rep. 1495 (1987), followed in St. v. Seaman, 236 M 466, 771 P2d 950, 46 St. Rep. 512 (1989), and St. v. Long, 2005 MT 130, 327 M 238, 113 P3d 290 (2005).

Admissibility of Evidence of Prior Similar Crime When Present Crime Denied — Procedural Requirements Followed: When search of a storage shed pursuant to a court order to retrieve marital property revealed illegal drugs, knowledge of which was denied by defendant, evidence of a prior federal conviction for sale of drugs was admissible since the procedural requirements of Just were met. St. v. Clausen, 228 M 20, 740 P2d 679, 44 St. Rep. 1308 (1987).

Motion Granted to Exclude Evidence Not Specifically Named — Error to Introduce: As defendant was not notified of the state's intention to introduce evidence of other crimes, the District Court properly granted defendant's motion in limine to exclude all "evidence items allegedly taken by the defendant which are not specifically named in the informations". Two items, which were the basis of the misdemeanor charges, were found in a package sent by

defendant, along with other items that had no connection with the charges. During trial, despite its ruling, the court allowed the package and its entire contents into evidence. Failure by the court to adhere to its own ruling was an abuse of discretion, prejudicial and harmful to defendant, and constituted reversible error. St. v. Howell, 226 M 148, 734 P2d 214, 44 St. Rep. 542 (1987).

Abbreviated "Just" Instruction Upheld — Use With Other Mitigating Instructions: Defense counsel objected to use of the word "crime" in the District Judge's application of the procedural rules set out in St. v. Just, 184 M 262, 602 P2d 957 (1979), regarding admissibility of evidence of other crimes, contending that the inference taken from the "other crimes" instruction converted acts of doubtful criminal nature into evidence of a course of conduct of sexual assault. The Supreme Court noted that the District Judge drew attention to defense counsel's objection, explained to the jury that it would be instructed on what constituted the "crime", explained that the jury would be free to exercise its own discretion in determining whether the acts constituted crimes, and gave a cautionary instruction that "[a]lthough I use the term crimes to describe the acts testified to, I didn't mean to suggest that they were criminal acts". The Supreme Court held that while use of an abbreviated Just "other crimes" instruction was not suggested, the final cautionary instruction protected the balance between probative value and prejudicial effect by alleviating potential misconstruction of the Just instruction. St. v. Long, 223 M 502, 726 P2d 1364, 43 St. Rep. 1948 (1986).

Attempt by Prosecutor to Provoke Defense Motion for Mistrial — Double Jeopardy: When a defendant moves for a mistrial and the motion is granted, the "manifest necessity" standard allowing a court to lift the double jeopardy bar to a second trial does not apply (U.S. v. Tateo, 377 US 463, 12 L Ed 2d 448, 84 S Ct 1587 (1964)). The Montana Supreme Court recognized a narrow exception to this rule, as outlined in Oreg. v. Kennedy, 456 US 667, 72 L Ed 2d 416, 102 S Ct 2083 (1982), holding that the circumstances under which a defendant may invoke the bar of double jeopardy are limited to cases "in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial". In the case at bar, the District Court held and the Supreme Court affirmed that the prosecutor attempted, through a series of overreaching questions, to shift the focus of the trial from a charge of criminal sale of drugs for which there was only weak evidence to sexual crimes initially reported but later denied on cross-examination. The court found that the questions were so prejudicial that the defendant had little choice but to move for a mistrial to avoid a conviction for crimes with which he had not been charged. St. v. Laster, 223 M 152, 724 P2d 721, 43 St. Rep. 1614 (1986).

Notice of Witness to Other Acts or Wrongs — Sex Assault Witness in Sex Assault Case — New Trial: If the prosecution intends to introduce evidence of other crimes, wrongs, or acts it must notify the defendant of that intent and identify the purpose for which the evidence will be introduced. In this sexual assault case, it was reversible error requiring a new trial when the State did not give such notice, and the witness testified that defendant had previously kissed her despite her resistance. St. v. Berg, 215 M 431, 697 P2d 1365, 42 St. Rep. 518 (1985).

Decision After Opening of Trial to Allow Evidence of Prior Crimes Reversible Error: In a case in which the defendant was convicted of deliberate homicide, the trial court committed reversible error when it initially granted the defendant's motion to exclude evidence of his prior assaults, and then 3 days into the trial reversed its ruling to allow such evidence. This decision was prejudicial to the defendant because he lost his opportunity to voir dire the jury regarding the effect evidence of prior crimes would have on their decision. Also, the defendant, if he had had advance notice that the evidence would be allowed, could have prepared in order to lessen the impact of such testimony. St. v. Doll, 214 M 390, 692 P2d 473, 42 St. Rep. 40 (1985), distinguished in St. v. Scarborough, 2000 MT 301, 302 M 350, 14 P3d 1202, 57 St. Rep. 1268 (2000).

Testimony of Defendant's Marijuana Use — Harmless Error — Mitigation by State's Action and Court's Instruction: It was harmless error when a state witness departed from the established time sequence of her testimony and blurted out that the defendant smoked half a marijuana cigarette before the crime because the State did not dwell on the topic and the court gave a cautionary instruction. St. v. Liddell, 211 M 180, 685 P2d 918, 41 St. Rep. 1293 (1984).

Evidence of Prior Crimes — Motion In Limine — Admissible for Purposes of Impeachment: Defendant had motion in limine based on Rule 404, M.R.Ev., to exclude from his homicide trial any matters or things pertaining to prior prosecutions, convictions, arrests, and uncharged criminal acts of the defendant. It was not error for the prosecution to ask the defendant about whether he had friendly relations with third parties and then to impeach his testimony that he did have such friendly relations by introducing testimony implicating him in other crimes relating to the third parties. St. v. Kutnyak, 211 M 155, 685 P2d 901, 41 St. Rep. 1277 (1984).

Homicide Trial — Claim of Nonviolent Character — Prior Assaults Admissible to Rebut: In defendant's homicide trial for killing his recently divorced ex-wife's boyfriend, testimony by certain persons about defendant's prior assaults on his ex-wife was properly admitted to rebut defendant's claims on the witness stand that he was peace-loving and nonviolent. St. v. Stroud, 210 M 58, 683 P2d 459, 41 St. Rep. 919 (1984), followed in St. v. Mix, 239 M 351, 781 P2d 751, 46 St. Rep. 1740 (1989).

Character Witness — Scope of Cross-Examination: Defendant was charged with eight counts of sexual intercourse without consent with his stepdaughter. At trial defendant called character witnesses. Simpson had hired defendant to work on his ranch. Simpson testified at length as to defendant's truthfulness and peacefulness. On cross-examination the State inquired whether Simpson was aware of defendant's conviction of armed robbery, his attempt to hijack a plane in Vietnam, and his violent escapes from a prison cell block in Vietnam and from jail in Great Falls. On appeal the Supreme Court said that Montana follows the modern trend to accept both reputation and opinion evidence regarding character. The court relied on the critical factors set out in Michelson v. U.S., 335 US 469, 93 L Ed 168, 69 S Ct 213 (1948): (1) the trial court ascertained the prior crime was an actual event; (2) the court instructed the jury to consider the inquiry only for the limited purpose of evaluating a witness' testimony; and (3) there was no specific objection made by the defense attorney. The court said Rule 405, M.R.Ev., extends beyond Michelson to allow inquiry on cross-examination into relevant, specific instances of conduct. The court found the cross-examination of Simpson was within the scope of the direct examination, consisted of inquiry into relevant, specific instances of conduct, and was proper to impeach the witness' opinion testimony. St. v. Clark, 209 M 473, 682 P2d 1339, 41 St. Rep. 833 (1984), distinguished in St. v. Eklund, 264 M 420, 872 P2d 323, 51 St. Rep. 335 (1994).

Late Notice of Evidence to Be Used — Waiver of Continuance: The night before trial the prosecutor phoned the defense and gave notice that he would use a piece of evidence of a prior criminal act. Judicially mandated notice was served the next morning. The judge granted a 2 ½-day continuance to the defense. Defense counsel waived his right to additional time when he told the judge after the continuance that he had had enough time to investigate the evidence and did not need time beyond the 2 ½ days. St. v. Azure, 208 M 233, 676 P2d 785, 41 St. Rep. 302 (1984).

Cautionary Instruction — Testimony as to Prior Incarceration — No Contribution to Conviction: Defendant, convicted of aggravated assault, aggravated burglary, and attempted sexual intercourse without consent, contended that a mistrial should have been granted when a witness made reference to the fact that defendant had been in the state penitentiary. Defendant's motion was denied, but the court struck the material from the record and gave the jury an instruction to ignore evidence stricken from the record. The Supreme Court, applying the test of whether there was a reasonable possibility the inadmissible evidence might have contributed to the conviction, therefore requiring reversal, held that there was no evidence defendant was denied a substantial right. There was no showing that the reference might have contributed to his conviction in the face of overwhelming evidence directly proving his guilt. St. v. Wells, 202 M 337, 658 P2d 381, 40 St. Rep. 127 (1983).

Acts Not Constituting a Crime and Excluded Testimony — No Evidence of Other Crimes Given: Where the defendant fired a rifle through the door of his home and was later tried and convicted of aggravated assault against two police officers, the District Court did not erroneously admit testimony of other crimes in violation of the procedure established in St. v. Just, 184 M 262, 602 P2d 957 (1979). Portions of the testimony did not show the commission of a crime and were not objected to at trial. Other portions were objected to and the objection was sustained, precluding further such testimony, and a question as to whether charges were brought was never answered. Under these circumstances there was no error. St. v. Warnick, 202 M 120, 656 P2d 190, 39 St. Rep. 2369 (1982).

Evidence of Another Offense Admitted to Prove Consciousness of Guilt — Probative Value of Evidence: Where the defendant was charged with felony theft following a break-in at a veteran's club, the District Court did not err in admitting evidence that the defendant attempted to intimidate one of the state's witnesses who was also an accomplice of the defendant. There was no requirement that the District Court follow the admissibility test and procedural requirements established in St. v. Just, 184 M 262, 602 P2d 957 (1979), because the reason for those safeguards is to prevent the defendant from being surprised by the evidence of collateral, unrelated issues. When, as here, the evidence is introduced to show consciousness of guilt of an offense already charged and its probative value outweighs any prejudice to the defendant, there is no reason to apply those safeguards. St. v. Shaw, 199 M 248, 648 P2d 287, 39 St. Rep. 1324 (1982). See also St. v. Pease, 222 M 455, 724 P2d 153, 43 St. Rep. 1417 (1986).

Evidence of Other Crimes — Procedural Requirements Not Followed: Gray drove his pickup off an embankment and reported to the police that he was forced off the road. The truck was not totaled and was taken to a body shop for repairs. While at the body shop, the truck was vandalized on Gray's instructions. After the vandalism, the truck was not repairable. Gray was charged with criminal mischief with the purpose to defraud an insurer for driving the truck off an embankment. The evidence of Gray's involvement in the vandalism is evidence of other crimes. The court held that the four-element test to determine the admissibility of evidence of other crimes set out in St. v. Just, 184 M 262, 602 P2d 957 (1979), was met but that the procedural requirements of Just were not followed. The judgment was reversed and a new trial ordered. St. v. Gray, 197 M 348, 643 P2d 233, 39 St. Rep. 622 (1982), distinguished in St. v. Gillham, 206 M 169, 670 P2d 544, 40 St. Rep. 1576 (1983).

Admissibility of Character and Other Crimes Evidence When Defendant "Opens Door" on Cross-Examination: Where defendant on cross-examination stated he was not the kind of person who could commit the crime of which he was accused, evidence of character was admissible because defendant opened the door to rebuttal evidence by his statement. When defendant on cross-examination further stated he had never committed a burglary, evidence of prior burglary conviction was admissible for the same reason. St. v. Austad, 197 M 70, 641 P2d 1373, 39 St. Rep. 356 (1982), followed in St. v. Mix, 239 M 351, 781 P2d 751, 46 St. Rep. 1740 (1989).

Waiver — Discussion by Defendant's Counsel Prior to Introduction by State: Defense counsel's discussion of an unsolicited response from a State's witness concerning evidence of other crimes, before the State introduced this evidence, did not amount to a waiver of the defendant's right to object to the evidence. St. v. Casagranda, 196 M 56, 637 P2d 826, 38 St. Rep. 2122 (1981).

Other Crimes — Burden of Proof: A criminal defendant need not prove that evidence is from another crime. Rather, the State has the burden of proving that the evidence is connected with the crime at issue. St. v. Casagranda, 196 M 56, 637 P2d 826, 38 St. Rep. 2122 (1981).

State's Failure to Prove Evidence Connected With Crime: The State failed to prove that a pharmaceutical bottle of a kind which usually contains narcotics and which was found in the room of suspected drugstore burglar was in fact connected to the burglary. Hence, the bottle was evidence of other crimes and was improperly admitted. St. v. Casagranda, 196 M 56, 637 P2d 826, 38 St. Rep. 2122 (1981).

Admissibility of Mug Shots — Cautionary Instruction: Defendant was identified as the perpetrator of a burglary by identification of mug shots by the two victims of the burglary and a next-door neighbor. The identifications were made from a mug shot book. The viewings were conducted separately and within a few days of the burglary. The parties did not discuss the identifications with each other. Defendant contended that the mug shots should not have been allowed to be introduced because they implied that he had committed prior criminal acts. The mug shots were booking photographs and merely indicated that defendant had been booked on prior occasions. The photographs were used for identification. No evidence was adduced indicating that defendant had ever been convicted of any crime. The photographs were relevant for purposes of identification. The judge also gave a cautionary instruction regarding the photographs. This instruction dealt with possible prejudicial effect, and it was within the discretion of the trial judge to admit the photographs. St. v. Stokes, 195 M 321, 637 P2d 498, 38 St. Rep. 1889 (1981).

Different Robbery — Failure to Meet Elements — Mere Similarity Not Sufficient: At defendant's trial, at which he was convicted of robbery, the State presented testimony, through a codefendant, of the planning and commission of another robbery. The specific details of the robbery, other than its commission, were not revealed. Defendant argues that such evidence was improperly admitted. Admissibility of evidence of other crimes is to be determined by the District Court pursuant to a four-element test: (1) similarity of crimes; (2) nearness in time; (3) tendency to establish a common scheme, plan, or system; and (4) the probative value of the evidence is not substantially outweighed by prejudice to the defendant. Only the time factor was met in this case. That sole similarity is not sufficient to trigger the exception making the evidence admissible. The improper admission of the evidence under the exception is reversible error. St. v. Case, 190 M 450, 621 P2d 1066, 37 St. Rep. 2057 (1980), following St. v. Just, 184 M 262, 602 P2d 957, 36 St. Rep. 1649 (1979). See also St. v. Mix, 239 M 351, 781 P2d 751, 46 St. Rep. 1740 (1989).

Evidence of Other Crimes — Sequence Not Unusual: When the alleged similarities between crimes reveal nothing more than a sequence of events common in the crime charged, the acts are not unusual and distinctive enough to come within the purview of the exception allowing evidence of other crimes to be admitted. St. v. Hansen, 187 M 91, 608 P2d 1083, 37 St. Rep. 657

(1980), explained in St. v. T.W., 220 M 280, 715 P2d 428, 43 St. Rep. 368 (1986), and followed in St. v. Rogers, 1999 MT 305, 297 M 188, 992 P2d 229, 56 St. Rep. 1228 (1999).

Evidence of Other Sex Crimes — Prejudice to the Defendant: There is inherent prejudice in showing a defendant has committed a prior sex offense, and when the acts involved were not sufficiently similar and occurred 2 ½ years apart, the prejudicial effect of introduction of evidence of the first act substantially outweighed its probative value. St. v. Hansen, 187 M 91, 608 P2d 1083, 37 St. Rep. 657 (1980), explained in St. v. T.W., 220 M 280, 715 P2d 428, 43 St. Rep. 368 (1986).

Similarity of Acts of Intercourse Without Consent: Numerous rapes follow the pattern of barroom pickup, voluntary entry into defendant's vehicle by victim, driving to a remote area, advances, resistance, and forcible intercourse. The sequence of events has no distinctive qualities that distinguish the acts from other rapes as necessary to bring the events within the purview of the similarity element of the "other crimes" admission rule exception. St. v. Hansen, 187 M 91, 608 P2d 1083, 37 St. Rep. 657 (1980), explained in St. v. T.W., 220 M 280, 715 P2d 428, 43 St. Rep. 368 (1986), and followed in St. v. Rogers, 1999 MT 305, 297 M 188, 992 P2d 229, 56 St. Rep. 1228 (1999).

Admission of Evidence of Other Crime — Living Upon Earnings of Prostitute: The court did not err in rejecting defendant's contention that a mistrial should have been declared upon his testimony on cross-examination that he lived with and was supported by a female who was a prostitute. The evidence was introduced to show financial status, not that he acted in conformity with his character in committing the crime charged. St. v. Williams, 185 M 140, 604 P2d 1224, 36 St. Rep. 2328 (1979).

Evidence of Other Crimes, Wrongs, or Acts — Hearsay — Prejudicial Error: Direct evidence of other crimes, if such evidence came within the exceptions of Rule 404(3)(b), M.R.Ev., would be admissible. Indirect, hearsay evidence must also conform to the rules relating to the admission of hearsay testimony, including the exceptions. If the severely beaten victim were regarded as an unavailable witness because of her physical condition, her statements would be admissible if they came within the exceptions of Rule 804, M.R.Ev. Here, however, the hearsay declarant was not found to have circumstantial guarantees of trustworthiness because she admittedly disliked the defendant. Nor could the victim's statements be admitted as "excited utterances" because such utterances are admissible only if they are part of the res gestae of the crime charged. Admission of the statements of the victim to a friend and to her doctor, therefore, constituted prejudicial error. Admission of proof of wholly independent crimes requires a balancing of the relative probative value of the evidence against the prejudicial effect. Evidence of a course of conduct similar to the crime charged tends to prove the crime charged, but such evidence should not be admitted unless the proof thereof tends toward the conclusion that the defendant is guilty of the crime charged with moral certainty and beyond a reasonable doubt. With proper safeguards, the court would allow evidence of previous assaults. St. v. Brubaker, 184 M 294, 602 P2d 974, 36 St. Rep. 1915 (1979).

Admissibility of Evidence of Prior Crimes or Acts — Procedure to Be Followed: To introduce evidence of prior uncharged offenses for the limited purposes allowed, the potential for prejudice to the defendant requires the prospective application of a three-part procedure in addition to any other requirements: (1) the defendant must be given notice of planned introduction and its purpose, following the form and procedure in 46-18-503 (renumbered 46-13-108); (2) the court must give a cautionary instruction on the purpose of the evidence; and (3) the court must charge the jury that the defendant is not being tried and may not be convicted for any other offense. St. v. Just, 184 M 262, 602 P2d 957, 36 St. Rep. 1649 (1979), discussed in St. v. Mix, 239 M 351, 781 P2d 751, 46 St. Rep. 1740 (1989), and in St. v. Sadowski, 247 M 63, 805 P2d 537, 48 St. Rep. 93 (1991), followed in St. v. St. Goddard, 226 M 158, 734 P2d 680, 44 St. Rep. 551 (1987), St. v. Gilpin, 232 M 56, 756 P2d 445, 45 St. Rep. 863 (1988), St. v. Eiler, 234 M 38, 762 P2d 210, 45 St. Rep. 1710 (1988), St. v. Hall, 234 M 57, 761 P2d 1283, 45 St. Rep. 1726 (1988), St. v. Randall, 237 M 271, 772 P2d 868, 46 St. Rep. 794 (1989), St. v. Fitzgerald, 238 M 261, 776 P2d 1222, 46 St. Rep. 1253 (1989), St. v. Heinrich, 242 M 110, 788 P2d 1346, 47 St. Rep. 314 (1990), St. v. Johnstone, 244 M 450, 798 P2d 978, 47 St. Rep. 1715 (1990), St. v. McKnight, 250 M 457, 820 P2d 1279, 48 St. Rep. 981 (1991), and St. v. Weldy, 273 M 68, 902 P2d 1, 52 St. Rep. 729 (1995), and distinguished in St. v. Laster, 223 M 152, 724 P2d 721, 43 St. Rep. 1614 (1986). The modified Just rule was adopted in St. v. Matt, 249 M 136, 814 P2d 52, 48 St. Rep. 614 (1991).

Sexual Assault — Evidence of Previous Crimes: The District Court did not commit a reversible error by not excluding testimony relating to other incidents of sexual assault. The court had granted a motion to suppress testimony by the minors involved in the other incidents, but the judge specifically restricted his ruling to testimony by, as opposed to testimony relating

to, the minors and the defense attorney did not object. Further, he did not object at the trial when the testimony of the prosecutrix relating to statements made by the defendant was introduced. The testimony was relevant not to prove the occurrence of the incidents but to prove the intent of the accused. The testimony was of sufficient probative value to outweigh any possible prejudicial effect of its introduction. St. v. Patton, 183 M 417, 600 P2d 194, 36 St. Rep. 1731 (1979), followed in St. v. Long, 223 M 502, 726 P2d 1364, 43 St. Rep. 1948 (1986). See also St. v. Eiler, 234 M 38, 762 P2d 210, 45 St. Rep. 1710 (1988).

Other Crimes — Prejudice — Limited Use of Evidence: Testimony concerning another crime in the chain of events with the crime of which the defendant is accused, when used for impeachment purposes, may be admissible in a proper case. Since a stipulation stating the nature of the crime committed and the disposition of other prosecutions stemming from the crime had been read to the jury and since the defendant did not carry his burden of affirmatively showing prejudice, this was such a case. St. v. Holliday, 183 M 251, 598 P2d 1132, 36 St. Rep. 1535 (1979).

OTHER CRIMES — COMMON DESIGN, SCHEME, OR PLAN

Admissibility of Evidence of Other Crimes — "Plan" Synonymous With "Common Scheme" — Sixteen-Year Period Since Prior Acts Considered Too Remote to Constitute Common Scheme: To prevent convictions based merely on a jury finding that someone has a propensity to do certain things, this rule provides that evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity with character on a particular occasion. One exception to that rule allows admission of character evidence when other crimes prove a defendant's plan. Although the word "plan" is not a defined term of art in the context of the criminal code, the Supreme Court determined that a plan is encompassed within the definition of common scheme in 45-2-101. In the present case, character evidence was admitted on the basis that the sexual assault committed by Aakre upon his stepgranddaughter was sufficiently similar to an assault by Aakre upon his stepdaughter 16 years earlier to establish a plan or modus operandi because of the similarity of the incidents, and because both involved a continuous pattern of conduct rather than a single instance of conduct. Following conviction, Aakre moved for a new trial on grounds that the other crimes evidence was improperly admitted under St. v. Sweeney, 2000 MT 74, 299 M 111, 999 P2d 296 (2000), and the motion was granted. The state appealed, but the Supreme Court affirmed. Aakre's alleged plan did not meet the definition of common scheme for several reasons. Evidence of the prior crimes did not prove that Aakre was motivated by a purpose to accomplish a single criminal objective or by a common purpose or plan resulting in the repeated commission of the same offense. Further, incidents occurring 16 years apart were not considered near enough in time to establish a common scheme. St. v. Aakre, 2002 MT 101, 309 M 403, 46 P3d 648 (2002).

Evidence of Munchausen Syndrome by Proxy Proper to Prove Motive, Not Character: Hocevar was charged with attempted deliberate homicide, two counts of deliberate homicide, criminal endangerment, and assault in connection with the deaths of her two sons. She contended on appeal that it was error to introduce evidence of another son's death to prove her character, in that she suffered from Munchausen Syndrome by Proxy (MSBP), which is a pattern of behavior wherein a caretaker, usually a mother, fabricates or causes illness in another, usually a preverbal child, to gain attention, and then to use MSBP as the common plan or motive for her actions against her other children. The Supreme Court considered the third and fourth elements of the modified Just rule, holding that the evidence was admissible. MSBP is not a psychiatric diagnosis of a mental disorder, but rather a pediatric diagnosis of a form of child abuse. The "disorder" consists of the behavior of the person suffering from it, so there is no distinction between the disorder and the behavior associated with the disorder. As such, MSBP did not describe Hocevar's character, but rather her behavior toward her children. The evidence showed motive and was properly admitted under the third requirement of the modified Just rule because it was used to establish Hocevar's motive in smothering one child and poisoning another, not to establish Hocevar's character and that she acted in conformity with MSBP. The possible prejudicial effect of the evidence was substantially outweighed by its great probative weight because it tended to establish the MSBP diagnosis and Hocevar's motive. St. v. Hocevar, 2000 MT 157, 300 M 167, 7 P3d 329, 57 St. Rep. 625 (2000).

Admissibility of Evidence of Prior Crime to Prove Motive or Intent — First Crime to Give Rise to Motive for Second Crime: For evidence of prior crimes to be admissible to show motive or intent, the commission of the first crime or act should give rise to a motive or reason for defendant to commit the second crime. Here, the state failed to show a connection between Sweeney's 1989 Wisconsin sexual assault conviction that would give rise to a motive or reason for

Sweeney to commit a sexual assault in Montana in 1996. Thus, evidence of the 1989 conviction was improperly admitted for purposes of proving motive. St. v. Sweeney, 2000 MT 74, 299 M 111, 999 P2d 296, 57 St. Rep. 325 (2000), followed in St. v. Aakre, 2002 MT 101, 309 M 403, 46 P3d 648 (2002). See also St. v. Weldy, 273 M 68, 902 P2d 1, 52 St. Rep. 729 (1995).

Evidence That Insurance Agent Who Had Premiums Paid With Loans Against Policy Without Plaintiffs' Knowledge Did Same Thing to Other Insureds: An insurance agent testified that forms that he filled out authorizing loans against plaintiffs' policies to pay premiums must have been authorized by plaintiffs because he would not otherwise have filled them out and sent them in. Plaintiffs testified that they did not authorize, sign, or see the forms. Testimony of other persons to whom the agent sold policies that this also happened to them and that they did not authorize the loans was not inadmissible under this rule. The fact that loans against the other persons' existing policies were used to fund new policies, whereas in this case a loan against each policy was used to fund that policy, did not make the agent's acts dissimilar. In addition, the agent's acts relative to plaintiffs and the other persons occurred at about the same time and the acts relative to both groups were probative of a plan to earn commissions by fraudulently misrepresenting policies that people would not otherwise have bought. The probative value of the evidence also outweighed the danger of unfair prejudice. Cartwright v. Equitable Life Assurance Soc'y, 276 M 1, 914 P2d 976, 53 St. Rep. 268 (1996).

Evidence That Similar Wrongs to Others Were Remedied: Plaintiffs were entitled to corroborate their testimony as to the defendant insurance agent's fraudulent acts and to impeach his testimony as to the acts by evidence of other insureds that established a pattern of conduct. Defendants were entitled to show that when the agent's acts as to the other insureds were brought to the company's attention, the other insureds' problems were resolved to their satisfaction. Defendants were not entitled to give evidence of the particular manner in which the other insureds' problems were resolved because the evidence had no bearing on this case. Cartwright v. Equitable Life Assurance Soc'y, 276 M 1, 914 P2d 976, 53 St. Rep. 268 (1996).

Uncorroborated Testimony of Alleged Accomplice of Past Arson Conspiracy Inadmissible as Prejudicial: In an arson case, the state appealed the lower court's refusal to allow the introduction of evidence by an alleged conspirator that he and the defendant, Rippingale, had conspired in the past to burn down another building. The Supreme Court held that the lower court had not abused its discretion in ruling that the two fires were not similar enough, as required by St. v. Just, 184 M 262, 602 P2d 957 (1979). The Supreme Court also held that the alleged conspirator's credibility was to be contested in the trial and therefore admitting his testimony on the previous fines could be prejudicial to Rippingale. St. v. Andersen, 260 M 354, 860 P2d 115, 50 St. Rep. 1095 (1993).

Evidence of Other Crimes as Proof of Continuing Course of Conduct — Adequacy of Jury Instruction — Failure to Make Specific Objection: Defendant Howell contended that the District Court's instruction to the jury that it could consider evidence of other crimes as proof of a continuous pattern of conduct violated the Just notice and jury instructions. Although the phrase "continuing course of conduct" has never been specifically approved for use in a jury instruction, it has been used interchangeably with several of the Just requirements. Use of the phrase in this case was found to be surplusage that was improperly included in the instruction; however, its use was not prejudicial and constituted harmless error. Further, Howell's failure to object to the adequacy of the Just notice requirements waived any deficiency in the notice. St. v. Howell, 254 M 438, 839 P2d 7, 49 St. Rep. 759 (1992).

Evidence of Prior Acts Not Limited to Common Scheme, Plan, or System — Admission of Other Crimes Harmless Error: While the Just rule clearly provides for the admission of evidence for purposes other than a common scheme, plan, or system, the District Court's improper admission of evidence that defendant had been involved 3 months earlier in an assault on a woman during which he repeatedly shoved a Deputy Sheriff did not constitute grounds for reversal of his conviction for felony assault (now assault with a weapon). St. v. Matt, 249 M 136, 814 P2d 52, 48 St. Rep. 614 (1991).

Evidence of Prior Theft Admissible: The Supreme Court held that evidence of a prior theft committed by the defendant was admissible because it was strikingly similar to the crime with which the defendant was presently charged. Each theft involved the theft of recyclable metal products from private property, and each resulted in the sale of the stolen items by the defendant to a recycling business. St. v. Ramstead, 243 M 162, 793 P2d 802, 47 St. Rep. 1101 (1990).

Similar Acts Not Probative of Common Scheme: Defendant was charged with felony assault, (now assault with a weapon) driving under the influence, and driving while his license was suspended. The District Court erred in allowing introduction of evidence of defendant's arrest for certain crimes during the 4 months prior to trial. Applying the Just test, the Supreme Court

found the crimes were similar in nature and not remote in time; however, the acts did not establish a common scheme, plan, or system. Although the evidence showed that when defendant was intoxicated he became verbally and physically abusive toward officers who tried to arrest or restrain him, this was a demonstration of spontaneous acts dictated by his character and the situation at hand rather than a common scheme or plan. The probative value of the evidence did not outweigh the prejudice flowing to defendant under these circumstances. St. v. Brown, 242 M 506, 791 P2d 1384, 47 St. Rep. 935 (1990).

Introduction of Evidence of Other Crimes Prior to Case in Chief — Court Discretion to Allow Chronological Presentation of Evidence: Defendant claimed the District Court improperly allowed introduction of evidence of other crimes, wrongs, and acts before the prosecution presented evidence of the crime charged. The state gave sufficient notice that it intended to introduce evidence of five burglaries or attempted burglaries, in chronological order, attributed to defendant. To cure any defect, the state filed a sealed affidavit with the court 1 week before trial, setting out what this evidence would prove. The court carefully apprised the jury of what crime was charged and admonished the jury as to the limited purposes of the prior crimes and acts evidence. The Just rules for admissibility having been met and an offer of proof having been received by the court for the chronological presentation of evidence, it was within the court's discretion to allow the sequence and order of presentation. St. v. Keefe, 232 M 258, 759 P2d 128, 45 St. Rep. 1034 (1988).

Denial of Evidence Relating to Prior Fires — No Error: The Supreme Court found no error in the denial by the District Court Judge of evidence or testimony relating to prior fires from which the insured may have received insurance proceeds. The court held that the proffered evidence did not naturally and logically tend to establish a fact in issue and did not meet the test of relevancy, in that it did not make probable that the insured had committed arson either from the viewpoint of motive, intent, or the deed itself. Britton v. Farmers Ins. Group, 221 M 67, 721 P2d 303, 43 St. Rep. 641 (1986), followed in St. v. Enright, 1998 MT 322, 292 M 204, 974 P2d 1118, 55 St. Rep. 1308 (1998). See also St. v. Link, 1999 MT 4, 293 M 23, 974 P2d 1124, 56 St. Rep. 13 (1999).

Failure to Consider "Just" Factors Together — Reversible Error: The District Court erred in granting a defense motion to preclude the state from using evidence of any incidents that occurred prior to the alleged incident that formed the basis of a prosecution for incest. The trial court considered only one of the four factors applicable in a determination of this type under St. v. Just, 184 M 262, 602 P2d 957, 36 St. Rep. 1649 (1979). While failure of questioned evidence to meet only one element of the Just test is not sufficient to refuse its admission, a decision to admit the evidence should not be made lightly. St. v. T.W., 220 M 280, 715 P2d 428, 43 St. Rep. 368 (1986).

Meaning of "Remote" Under "Just" Test: The term "remote" under the test of St. v. Just, 184 M 262, 602 P2d 957, 36 St. Rep. 1649 (1979), means more than mere lapse of time. Place and circumstances also must be considered. Thus, in this case, while the actual length of time between the two incidents was 4 years, the opportunity for an encounter between defendant and the victim did not reoccur during that 4-year period. Further, if the alleged second incident did occur, it occurred at the first opportunity, making the actual time period between the two incidents less significant. St. v. T.W., 220 M 280, 715 P2d 428, 43 St. Rep. 368 (1986).

Evidence of Prior Acts — Remoteness Overcome by Pattern of Conduct: Although an isolated incident occurring 9 years previously was too remote to be admissible, evidence showing that defendant on several occasions committed or attempted to commit sexual acts with young girls for a period of 9 years up to the time of the alleged offense was sufficient to establish a common scheme or plan and rendered the evidence admissible. St. v. Tecca, 220 M 168, 714 P2d 136, 43 St. Rep. 264 (1986), followed in St. v. Long, 223 M 502, 726 P2d 1364, 43 St. Rep. 1948 (1986), St. v. Gambrel, 246 M 84, 803 P2d 1071, 47 St. Rep. 2270 (1990), St. v. McKnight, 250 M 457, 820 P2d 1279, 48 St. Rep. 981 (1991), and in St. v. Romero, 261 M 221, 861 P2d 929, 50 St. Rep. 1296 (1993).

Cautionary Instruction — Evidence of Other Crimes: Before allowing testimony of a prosecution witness who claimed she had been sexually assaulted by defendant, the District Court instructed the jury they could not consider evidence of defendant's other crimes as proof he is a person of bad character or has a disposition to commit crimes, but could consider evidence to prove characteristic method, plan, or scheme or to show existence of purpose or knowledge, an element of the crime charged. The instruction was based on St. v. Van Natta, 200 M 312, 651 P2d 57, 39 St. Rep. 1771 (1982), except the District Court substituted words "purpose or knowledge" for word "intent" found in Van Natta. The cautionary instruction was proper concerning the

admission of evidence of other crimes. St. v. Norris, 212 M 427, 689 P2d 243, 41 St. Rep. 1841 (1984).

Common Scheme — Homicide Trial — Prior Similar Acts: In a homicide trial following the shooting of recently divorced ex-wife's boyfriend, ex-wife testified that defendant had often, during the period of from 1 to 3 ½ years prior to the homicide, pointed guns at her, held a knife to her throat, strangled her, and slapped her. That testimony was admissible under State's theory of prior acts showing a common scheme, plan, or design, i.e., the threat and possible carrying out of violence to intimidate her and those associated with her. The testimony met the tests of similarity to the act charged; nearness in time; and tendency to establish a common scheme, plan, or design. Probative value was not substantially outweighed by prejudice to defendant, and the State gave defendant notice of its intent to introduce the evidence and why. The judge's failure to admonish the jury that the testimony was admitted only for the State's stated purpose was not reversible error because defendant did not object to the failure. Once the State has given notice, the remaining procedures are mandatory only upon defendant's request and/or objection. He cannot consciously plant errors by remaining silent and then objecting on appeal. St. v. Stroud, 210 M 58, 683 P2d 459, 41 St. Rep. 919 (1984), followed with regard to failure to object in St. v. Krantz, 241 M 501, 788 P2d 298, 47 St. Rep. 454 (1990).

Notice Required: Defendant was charged with slashing his ex-wife's tires. During the trial, evidence was introduced that the wife had had a total of 36 tires slashed since her divorce from defendant. Additionally, men she had dated testified to having their tires slashed during the dating period. Defense counsel challenged this evidence of prior conduct because the defense had not received notice that the State would introduce such evidence. The State said that there was no prejudice as defendant was aware the State intended to introduce such evidence. The Supreme Court said prejudice was found in the fact that defendant did not know exactly what acts or crimes he would have to be prepared to defend against at trial, nor did he know the form of such testimony. The case was remanded for retrial. St. v. Brown, 209 M 502, 680 P2d 582, 41 St. Rep. 852 (1984), distinguished in St. v. Krantz, 241 M 501, 788 P2d 298, 47 St. Rep. 454 (1990).

Other Crimes — Evidence of Policy of Persistent Child Abuse: The River of Life Tabernacle Church established a policy of disciplining the children of the church members. This disciplining led to the death of victim, one of the children of the church. The defendant was a major participant in the systematic series of acts which led to victim's death. Evidence was admitted concerning the church's policy of persistent child abuse carried out in large part by the defendant. The defendant objected to the admission of this evidence on the grounds that it was evidence of other crimes and should not have been admitted. The court held that the jury is entitled to view the death of victim in the context of prior events and that the beatings of victim and other children were not isolated events but part of a continuous series of beatings inflicted by the defendant and others over a period of months. St. v. Riley, 199 M 413, 649 P2d 1273, 39 St. Rep. 1491 (1982), clarified, with regard to the applicability of the corpus delicti rule, in St. v. Hansen, 1999 MT 253, 296 M 282, 989 P2d 338, 56 St. Rep. 997 (1999).

Evidence of Much Greater Amount of Marijuana Than Defendant Charged With: County Sheriffs saw defendant place a garbage bag in his truck and drive away from residence that was under surveillance for suspicion of drug-related activity in house. The officers followed defendant, and although he eluded them briefly, they caught up with him and searched his vehicle. Since the officers did not find a garbage bag in the truck, they retraced the truck's route and discovered a garbage bag similar to the bag seen in defendant's possession earlier. The bag contained about 10 pounds of marijuana. Later the officers obtained a warrant to search the house and a vehicle parked in front of it. This search resulted in the seizure of 80 pounds of marijuana, scales for weighing it, and bags for packaging it. The occupant of the house was arrested. During defendant's trial, much evidence concerning the search of the residence was admitted under the state's theory that it was relevant to prove a common scheme or plan. The Supreme Court reversed defendant's conviction of possession of dangerous drugs with intent to sell because of prosecutor's failure to comply with rule for determining admissibility of evidence of other crimes or evidence of a common scheme or plan. The court also stated that the evidence may have been inadmissible under this rule. St. v. Stemple, 198 M 409, 646 P2d 539, 39 St. Rep. 1085 (1982).

Child Beating Death — Common Design — Other Acts: Defendants were members of a religious sect that practiced violent child discipline techniques. While caring for a child at different times, each of four defendants engaged in incidences of child beating, eventually leading to the child's death. It was not error to admit evidence of the acts by church members other than defendants and acts by the defendants against children other than the victim to show the common design toward disciplining children by beatings arising out of the church policy. The

evidence also provided proof of defendants' motive, intent, and plan. St. v. Powers, 198 M 289, 645 P2d 1357, 39 St. Rep. 989 (1982).

Evidence of Other Crimes — Sexual Assault — Similarity: Defendant was convicted of intimidation for trying to force the victim to engage in sex with him. The District Court admitted evidence of a previous sexual assault committed by the defendant in a similar manner. State v. Just, 184 M 262, 602 P2d 957 (1979), established the substantive and procedural requirements to be met before such evidence may be admitted. In order for evidence of other crimes to be admissible, a court must first determine: (1) whether the previous crimes are sufficiently similar; (2) whether they are near enough in time; (3) whether the evidence is offered for one of the purposes permitted by Rule 404(b), M.R.Ev.; and (4) whether the probative value of the evidence is substantially outweighed by its inherently prejudicial nature. The testimony admitted described a sexual assault committed by defendant in a manner very similar to the crime charged. The incident had occurred 9 months before. The evidence was presented to prove motive, intent, or common scheme or plan. The evidence was highly probative and outweighed its prejudicial nature. It was properly admitted. St. v. Wurtz, 195 M 226, 636 P2d 246, 38 St. Rep. 1808 (1981).

Common Scheme or Plan Evidence Admissible: Evidence presented by the prosecution concerning two television thefts by the defendants from two different motels introduced in order to link the defendants to a third theft from a third motel has probative value tending to prove common scheme and is not so inherently prejudicial that it is inadmissible and a denial of a fair trial to defendants. The evidence has the effect of helping to prove through circumstantial evidence the commission of the crime and the connection of the defendants with the common scheme. Prejudicial evidence is not always inadmissible evidence. St. v. Strain, 190 M 44, 618 P2d 331, 37 St. Rep. 1763 (1980).

Evidence of Other Crimes — Remoteness: Evidence that defendant charged with sexual intercourse without consent had committed a similar act 2 ½ years before was too remote to fall within the exception to the general rule that evidence of other crimes is not admissible. St. v. Hansen, 187 M 91, 608 P2d 1083, 37 St. Rep. 657 (1980).

Evidence of Other Crimes — Tendency to Establish Common Scheme: Evidence that the defendant, charged with sexual intercourse without consent, had 2 ½ years earlier raped another woman after picking her up in a bar and driving her to a remote area did not tend to establish a common scheme, plan, or system. On the first occasion, the defendant and the victim were alone when he allegedly committed the act and in the crime charged the defendant and the victim were in the company of a third party. St. v. Hansen, 187 M 91, 608 P2d 1083, 37 St. Rep. 657 (1980).

Admissibility of Evidence of Prior Crimes or Acts — Common Design: The court did not commit error in admitting prosecutrix's uncorroborated testimony of prior uncharged sexual assaults by prosecutrix's stepfather for the limited purpose of showing plan, scheme, or design, as there was no showing of substantial prejudice to the defendant by admitting such evidence. St. v. Just, 184 M 262, 602 P2d 957, 36 St. Rep. 1649 (1979), following St. v. Jensen, 153 M 233, 455 P2d 631 (1969), followed in St. v. Tecca, 220 M 168, 714 P2d 136, 43 St. Rep. 264 (1986), and in St. v. McKnight, 250 M 457, 820 P2d 1279, 48 St. Rep. 981 (1991). See also St. v. Doll, 214 M 390, 692 P2d 473, 42 St. Rep. 40 (1985).

Admissibility of Evidence of Prior Crimes or Acts — Procedure to Be Followed: To introduce evidence of prior uncharged offenses for the limited purposes allowed, the potential for prejudice to the defendant requires the prospective application of a three-part procedure in addition to any other requirements: (1) the defendant must be given notice of planned introduction and its purpose, following the form and procedure in 46-18-503 (renumbered 46-13-108); (2) the court must give a cautionary instruction on the purpose of the evidence; and (3) the court must charge the jury that the defendant is not being tried and may not be convicted for any other offense. St. v. Just, 184 M 262, 602 P2d 957, 36 St. Rep. 1649 (1979), discussed in St. v. Mix, 239 M 351, 781 P2d 751, 46 St. Rep. 1740 (1989), followed in St. v. Norris, 212 M 427, 689 P2d 243, 41 St. Rep. 1841 (1984), St. v. Tecca, 220 M 168, 714 P2d 136, 43 St. Rep. 264 (1986), St. v. T.W., 220 M 280, 715 P2d 428, 43 St. Rep. 368 (1986), St. v. St. Goddard, 226 M 158, 734 P2d 680, 44 St. Rep. 551 (1987), St. v. Gilpin, 232 M 56, 756 P2d 445, 45 St. Rep. 863 (1988), St. v. Eiler, 234 M 38, 762 P2d 210, 45 St. Rep. 1710 (1988), St. v. Hall, 234 M 57, 761 P2d 1283, 45 St. Rep. 1726 (1988), St. v. Heinrich, 242 M 110, 788 P2d 1346, 47 St. Rep. 314 (1990), St. v. McKnight, 250 M 457, 820 P2d 1279, 48 St. Rep. 981 (1991), and St. v. Weldy, 273 M 68, 902 P2d 1, 52 St. Rep. 729 (1995). Just was distinguished in St. v. Laster, 232 M 152, 724 P2d 721, 43 St. Rep. 1614 (1986), and clarified, with regard to the applicability of the corpus delicti rule, in St. v. Hansen, 1999 MT 253, 296 M 282, 989 P2d 338, 56 St. Rep. 997 (1999). See also St. v. Doll, 214 M 390, 692 P2d 473, 42 St. Rep. 40 (1985).

ACT OR CRIME INSEPARABLE FROM CRIME CHARGED

Discussion of Intent to Kill Persons Other Than Those Assaulted Admissible as Part of Res Gestae, Transaction, or Corpus Delicti: Before Hayworth participated in shooting Bradford and Kunesh, Hayworth and another defendant discussed killing two men known as Tray and Big Rich. Hayworth tried to prevent testimony of his discussion with the other defendant from being given, but the District Court denied Hayworth's motion in limine and allowed the testimony. The Supreme Court held that the evidence of Hayworth's conversation about killing Tray and Big Rich was admissible, whether as part of the transaction, res gestae, or corpus delicti. St. v. Hayworth, 1998 MT 158, 289 M 433, 964 P2d 1, 55 St. Rep. 631 (1998).

Evidence of Use of Illegal Weapon Admissible in Deliberate Homicide Case — Just Warning Not Required: Defendant in a deliberate homicide case contended that the court erroneously allowed the state to present evidence that the shotgun used in the shootings had been illegally altered, without providing a Just notice or modified Just notice. However, the state was entitled to introduce evidence of the act of owning an illegal shotgun because it was inextricably related to the crime. A Just notice was not required because the evidence was part of the corpus delicti. St. v. Byers, 261 M 17, 861 P2d 860, 50 St. Rep. 1162 (1993).

Evidence of Prior Drug Sale Not Part of Corpus Delicti and Therefore Inadmissible: Based on the testimony of witness Grotjohn, defendant Cameron was convicted of the sale of dangerous drugs (now criminal distribution of dangerous drugs). At trial, the District Court allowed the state to introduce evidence of a sale of cocaine by Cameron to Grotjohn on May 3 and a subsequent sale on May 4. However, Cameron was charged with only one count of sale of a dangerous drug on May 4. The Supreme Court held that the drug sale on May 3 was not so inextricably or inseparably linked to the sale on May 4 that the May 3 sale should be considered part of the corpus delicti. The evidence of the May 3 sale was not necessary to explain the subsequent sale and offense. Following St. v. Trombley, 190 M 218, 620 P2d 367 (1980), and St. v. Christensen, 244 M 312, 797 P2d 893 (1990), and overruling in part St. v. Frates, 160 M 431, 503 P2d 47 (1972), the Supreme Court held evidence of the May 3 drug sale to be inadmissible and reversed the defendant's conviction. St. v. Cameron, 255 M 14, 839 P2d 1281, 49 St. Rep. 861 (1992), clarified, with regard to the applicability of the corpus delicti rule, in St. v. Hansen, 1999 MT 253, 296 M 282, 989 P2d 338, 56 St. Rep. 997 (1999).

Admissibility of Evidence Inseparable From Crime Charged: Evidence of acts that are inextricably or inseparably linked with the crime charged is admissible without regard to the rules governing "other crimes" evidence. St. v. Romero, 224 M 431, 730 P2d 1157, 43 St. Rep. 2309 (1986), citing St. v. Riley, 199 M 413, 649 P2d 1273, 39 St. Rep. 1491 (1982), followed in St. v. Ungaretti, 239 M 314, 779 P2d 923, 46 St. Rep. 1710 (1989), St. v. Davis, 253 M 50, 830 P2d 1309, 49 St. Rep. 342 (1992), St. v. Hage, 258 M 498, 853 P2d 1251, 50 St. Rep. 631 (1993), St. v. Langford, 267 M 95, 882 P2d 490, 51 St. Rep. 962 (1994), and St. v. Hayworth, 1998 MT 158, 289 M 433, 964 P2d 1, 55 St. Rep. 631 (1998), and clarified, with regard to the applicability of the corpus delicti rule, in St. v. Hansen, 1999 MT 253, 296 M 282, 989 P2d 338, 56 St. Rep. 997 (1999).

State Allowed to Present Entire Corpus Delicti: Defendant was tried and convicted of attempted deliberate homicide. During the course of the trial, the State introduced evidence that defendant openly talked of his plan, that he called and visited the home of the intended victim, that he possessed dynamite, that the intended victim's wife gave him a gun, and that he followed the intended victim's vehicle intending to harm him. Defendant's attorney made continuous objections to the introduction of the evidence without the "other crimes" procedures mandated in St. v. Just, 184 M 262, 602 P2d 957, 36 St. Rep. 1649 (1979), being followed. The Supreme Court held that each act, whether criminal or not, was inseparably related to the act charged. The State was entitled to present the entire corpus delicti of the crime charged. The court, however, encouraged trial courts to apply the safeguards of Just liberally. St. v. Gillham, 206 M 169, 670 P2d 544, 40 St. Rep. 1576 (1983), followed in St. v. Canon, 212 M 157, 687 P2d 705, 41 St. Rep. 1659 (1984), St. v. Ungaretti, 239 M 314, 779 P2d 923, 46 St. Rep. 1710 (1989), and in St. v. Wolfe, 250 M 400, 821 P2d 339, 48 St. Rep. 1001 (1991), distinguished in St. v. Laster, 232 M 152, 724 P2d 721, 43 St. Rep. 1614 (1986), and clarified, with regard to the applicability of the corpus delicti rule, in St. v. Hansen, 1999 MT 253, 296 M 282, 989 P2d 338, 56 St. Rep. 997 (1999). See also St. v. Dawson, 233 M 345, 761 P2d 352, 45 St. Rep. 1542 (1988), and St. v. Monaco, 277 M 221, 921 P2d 863, 53 St. Rep. 604 (1996). Monaco was followed in St. v. Hayworth, 1998 MT 158, 289 M 433, 964 P2d 1, 55 St. Rep. 631 (1998).

Other Crimes — Evidence of Policy of Persistent Child Abuse: The River of Life Tabernacle Church established a policy of disciplining the children of the church members. This disciplining led to the death of victim, one of the children of the church. The defendant was a major

participant in the systematic series of acts which led to victim's death. Evidence was admitted concerning the church's policy of persistent child abuse carried out in large part by the defendant. The defendant objected to the admission of this evidence on the grounds that it was evidence of other crimes and should not have been admitted. The court held that the jury is entitled to view the death of victim in the context of prior events and that the beatings of victim and other children were not isolated events but part of a continuous series of beatings inflicted by the defendant and others over a period of months. St. v. Riley, 199 M 413, 649 P2d 1273, 39 St. Rep. 1491 (1982), clarified, with regard to the applicability of the corpus delicti rule, in St. v. Hansen, 1999 MT 253, 296 M 282, 989 P2d 338, 56 St. Rep. 997 (1999).

Evidence of Inseparably Related Crime Not Inadmissible Evidence of "Other Crimes": A defendant appealed his conviction for theft of a truck. The sole issue on appeal was whether the trial court erred in denying the defendant's motion to prohibit reference at trial to his use of the truckowner's credit cards which were stored in the truck. Use of "other crimes" evidence requires notice to the defendant. The reviewing court, however, said that the evidence of the defendant's possession and use of the credit cards was not "other crimes" evidence. Because the wallet with the credit cards was in the truck when the truck was stolen, the evidence of the defendant's possession and use of a credit card was inseparably related to the truck theft. The acts of misconduct were simultaneous. The use of the credit card evidence was not unfair surprise or an unrelated issue. So, although the general rule is that when a defendant is tried for one offense he should be convicted, if at all, by evidence which shows that he is guilty of that offense alone, the evidence of the possession of the victim's credit cards was not "wholly independent" or "other crimes" evidence. Accordingly, the evidence was admissible under the facts of this case and no error was committed by the trial court. St. v. Trombley, 190 M 218, 620 P2d 367, 37 St. Rep. 1871 (1980), followed in St. v. Smith, 206 M 99, 670 P2d 96, 40 St. Rep. 1533 (1983), and distinguished in St. v. Laster, 232 M 152, 724 P2d 721, 43 St. Rep. 1614 (1986).

Admission of Evidence of Prior Relationship Between Defendant and Victim's Girlfriend and Threats by Defendant Against Her: The defendant in a deliberate homicide case claimed on appeal that the trial court erred in admitting into evidence acts and statements of the defendant which occurred prior to the shooting. The evidence concerned the former romantic relationship of the victim's girlfriend with the accused, the ill feelings of the defendant toward the victim that developed after the defendant's relationship with the woman was replaced with the victim's relationship with her, and the ensuing threats made by the defendant toward the woman. Because the State had to prove that the defendant purposely or knowingly caused the victim's death, the evidence of the defendant's intent was relevant in general and specifically because the defendant here alleged that he shot the victim in self-defense. Although threats against a person other than the victim are not admissible generally, when the circumstances are such that the threat tends to show hostility toward the deceased, they are relevant. Although evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith it may be admissible for other purposes such as proof of motive or intent or where such evidence forms a part of a single chain of facts so intimately connected that the whole must be considered in order to interpret its several parts. Further, the challenged testimony was crucial to prove defendant's mental state at the time of the shooting, and as a result, the probative value outweighed its prejudicial effect. St. v. Bashor, 188 M 397, 614 P2d 470, 37 St. Rep. 1098 (1980), followed in St. v. Matson, 227 M 36, 736 P2d 971, 44 St. Rep. 874 (1987).

Law Review Articles

The Modified Just Rule: A New Standard for the Admissibility of Evidence of Other Crimes, Wrongs or Acts Under Rules 403 and 404(b) of the Montana Rules of Evidence, Cameron, 53 Mont. L. Rev. 133 (1992).

Admitting the Accused's Criminal History: The Trouble With Rule 404(b), Reed, 78 Temp. L. Rev. 201 (2005).

How Do Jurors React to "Propensity" Evidence? A Report on a Survey, Leach, 27 Am. J. Trial Advoc. 559 (2004).

Testimony on Credibility: A Case Analysis, Slovenko, 32 J. Psychiatry & L. 243 (2004).

Prosecutorial Use of Other Acts of Domestic Violence for Propensity Purposes: A Brief Look at Its Past, Present, and Future, Kovach, 2003 U. Ill. L. Rev. 1115 (2003).

Rule 404(b)'s "Other Acts" Character Flaw, Bowie, 54 S.C.L. Rev. 495 (2002).

Collateral References

Evidence *key* 106, 152, 155(2).

32 C.J.S. Evidence §§422 through 432.

29 Am. Jur. 2d Evidence §§364 through 376, 435 through 437, 558.

Admissibility of evidence of prior physical acts of spousal abuse committed by defendant accused of murdering spouse or former spouse. 24 ALR 5th 465.

Admissibility of evidence of battered child syndrome on issue of self-defense. 22 ALR 5th 787.

Admissibility of evidence of commission of similar crime by one other than accused. 22 ALR 5th 1.

Admissibility of evidence of pertinent trait under Rule 404(a) of the Uniform Rules of Evidence. 56 ALR 4th 402, §21.

Right to impeach witness in criminal case by inquiry or evidence as to witness' criminal activity for which witness was arrested or charged, but not convicted—modern state cases. 28 ALR 4th 505.

Admissibility of evidence as to other offense as affected by defendant's acquittal of that offense. 25 ALR 4th 934.

Right to impeach witness in criminal case by inquiry or evidence as to witness' criminal activity not having resulted in arrest or charge—modern state cases. 24 ALR 4th 333.

Cross-examination of character witness for accused with reference to particular acts or crimes—modern state rules. 13 ALR 4th 796.

Admissibility and effect, on issue of party's credibility or merits of his case, of evidence of attempts to intimidate or influence witness in civil action. 4 ALR 4th 829.

Admissibility of evidence that defendant escaped or attempted to escape while being detained for offense in addition to that or those presently being prosecuted. 3 ALR 4th 1085.

Admissibility in rape case, of evidence that accused raped or attempted to rape person other than prosecutrix. 2 ALR 4th 330, superseded by 86 ALR 5th 59, 87 ALR 5th 181, and 88 ALR 5th 429.

Constitutionality of "rape shield" statute restricting use of evidence of victim's sexual experiences. 1 ALR 4th 283.

Use of unrelated traffic offense conviction to impeach general credibility of witness in state civil case. 88 ALR 3d 74.

Admissibility of testimony as to reputation of party or witness at place of employment or occupation. 82 ALR 3d 525.

Admissibility of evidence of other offenses in rebuttal of defense of entrapment. 61 ALR 3d 293.

Admissibility of evidence of uncommunicated threats on issue of self-defense in prosecution for assault. 98 ALR 2d 195.

Admissibility of evidence of uncommunicated threats on issue of self-defense in prosecution for homicide. 98 ALR 2d 6.

Admissibility, in prosecution for illegal sale of narcotics, of evidence of other sales. 93 ALR 2d 1097.

Admissibility on behalf of accused of evidence of similar acts or transactions tending to rebut fraudulent intent. 90 ALR 2d 903.

Admissibility of evidence of accused's good reputation as affected by remoteness of time to which it relates. 87 ALR 2d 968.

Admissibility, in prosecution for criminal burning of property, or for maintaining fire hazard, of evidence of other fires. 87 ALR 2d 891.

Admissibility to establish fraudulent purpose or intent, in prosecution for obtaining or attempting to obtain money or property by false pretenses, of evidence of similar attempts on other occasions. 78 ALR 2d 1359.

Admissibility, in prosecution for sexual offense, of evidence of other similar offenses. 77 ALR 2d 841, §§15, 16 superseded by 2 ALR 4th 330. 2 ALR 4th 330 superseded by 86 ALR 5th 59, 87 ALR 5th 181, and 88 ALR 5th 429.

Admissibility, in civil case involving usury issue, of evidence of other assertedly usurious transactions. 67 ALR 2d 232.

Admissibility, in civil assault and battery action, of similar acts or assaults against other persons. 66 ALR 2d 806.

Admissibility, in prosecution for gambling or gaming offense, or evidence of other acts of gambling. 64 ALR 2d 823.

Admissibility, in subornation of perjury prosecution, of evidence of alleged perjurer's plea of guilty to charge of perjury. 63 ALR 2d 825.

Admissibility, in robbery prosecution, of evidence of other robberies. 42 ALR 2d 854.

Admissibility, in prosecution for illegal sale of intoxicating liquor, of other sales. 40 ALR 2d 817.

Admissibility, in forgery prosecution, of other acts of forgery. 34 ALR 2d 777.

Right of prosecution, in homicide case, to introduce evidence in rebuttal to show good, quiet, and peaceable character of deceased. 34 ALR 2d 451.

Cross-examination of automobile driver in civil action with respect to arrest or conviction for previous traffic offenses. 20 ALR 2d 1217, §3 superseded by 88 ALR 3d 74.

Admissibility, in civil motor vehicle accident case, of evidence that driver was or was not involved in previous accidents. 20 ALR 2d 1210.

Admissibility, in prosecution for bribery or accepting bribes, of evidence tending to show the commission of other bribery or acceptance of bribe. 20 ALR 2d 1012.

Admissibility and effect of evidence or comment on party's military service or lack thereof. 9 ALR 2d 606.

Discoverability and admissibility of plaintiff's past sexual behavior in Title VII sexual harrassment action. 73 ALR Fed. 748.

Admissibility of evidence of other crimes, wrongs, or acts under Rule 404(b) of Federal Rules of Evidence, in civil cases. 64 ALR Fed. 648.

When is evidence of trait of accused's character "pertinent" for purposes of admissibility under Rule 404(a)(1) of the Federal Rules of Evidence. 49 ALR Fed. 478.

Admissibility, under Rule 404(b) of Federal Rules of Evidence, of evidence of other crimes, wrongs, or acts not similar to offense charged. 41 ALR Fed. 497.

1 Wigmore §§55 through 63, 192 through 218; 2 Wigmore §§300 through 373.

Rule 405. Methods of proving character.

Commission Comments

This rule deals only with the methods which may be used to prove character evidence. Rule 404 deals with the admissibility of character evidence and is the only rule under which character evidence may be admitted. When character evidence is admissible, it is to be proven by methods specified by this rule.

(a) Reputation or opinion. This subdivision is identical to Federal and Uniform Rules (1974) Rule 405(a). The subdivision deals with two of the three allowable methods of proof of character evidence, reputation and opinion. It should be noted that reputation is what the general community thinks a person's character is, while character is the trait the person actually possesses, and the two may not always coincide. The Commission believes that because of the potential inaccuracy of proof of character through reputation and because a person may not actually have a "reputation" as such in today's society and therefore testimony given by witnesses as to character may really only be an opinion, opinion evidence is allowed under this subdivision to prove character.

Existing Montana law has generally allowed evidence of character to be proved by reputation. An example allowing evidence of the good character of the accused to rebut evidence that he committed a crime is State v. Moorman, 133 Mont. 148, 153, 321 P2d 236 (1957). In that case, the court stated the rule in these terms: "The rule is well settled that, when a defendant in a criminal case calls witnesses to testify that he possesses such a general reputation in the community...". [sic] It should also be noted that two older cases, State v. Shafer, 22 Mont. 17, 18, 55 P 526 (1898) and Matusevitz v. Hughes, 26 Mont. 212, 217, 68 P 467 (1902), have both held that when witnesses testify that they are in a position to know and hear what the reputation of a person is, but that they have never heard the character questioned or talked about, this is admissible because "if one lives such a life as not to excite adverse criticism of good or bad people, it cannot be said that this person has aught else than a reputation for good character". Matusevitz v. Hughes, *supra*.

Existing Montana law impliedly allows opinion evidence to prove character. Wilson v. Wilson, 128 Mont. 151, 517, 278 P2d 219 (1954) held admissible opinion testimony by a witness as to the fitness of one of the parties to have custody of her children. This subdivision expands the rule of this case to all character evidence.

The final sentence of this subdivision, in contrast to the first two methods of proof, provides that inquiry is allowable into relevant specific instances of conduct on cross-examination. This sentence codified the rule of Michelson v. United States, 335 U.S. 469 (1948), also followed in Montana in State v. Jones, 48 Mont. 505, 516, 139 P 441 (1914); State v. Popa, 56 Mont. 587, 590, 185 P 1114 (1919) and State v. Moorman, *supra*. These cases held the prosecution could rebut the accused's evidence of good character by cross-examining as to the witnesses' "knowledge of disparaging rumors or common reports affecting this reputation.... The prosecution has the right to cross-examine the witnesses to ascertain the sufficiency of grounds upon which they base their

statements". State v. Moorman, *supra*. Therefore this last sentence is consistent with Montana case law.

(b) Specific instances of conduct. This subdivision is identical to Federal and Uniform Rules (1974) Rule 405(b) except that "or where the character of the victim relates to the reasonableness of force used by the accused in self defense", is added to make the rule consistent with Montana law. This method of proof is the most persuasive of the three contained in the rule and is also the most likely "to arouse undue prejudice, to confuse and distract, to engender time-consuming side issues and to create risk of unfair surprise". McCormick, Handbook of the Law of Evidence 443 (2d ed. 1972). As a result of the effect of this method of proof, it is generally restricted to situations where character is in issue, when such proof is central to the outcome of the case.

Existing Montana law has dealt with this method of proof only in criminal cases involving the violent character of the victim offered by the accused to show that the amount of force used by the accused to defend himself was reasonable. State v. Shadwell, 22 Mont. 559, 572, 57 P 281 (1899) and appeal after second trial, 26 Mont. 52, 55, 66 P 508 (1901) both held that prior threats and conduct were admissible to establish the state of mind of the accused. In State v. Felker, 27 Mont. 451, 457, 71 P 668 (1903) evidence of a prior assault by the victim upon another person, known by the accused, was held admissible to show the good faith motive of the accused. In State v. Hanlon, 38 Mont. 557, 570, 100 P. 1035 (1909) threats by the victim against the accused were held admissible to "show a disposition to violence, and, this disposition being known to the defendant, it may well be regarded as having aroused fears and as having impelled him to act upon them...". As a final example, State v. Jennings, 96 Mont. 80, 89, 28 P2d 448 (1934) held that the accused "ought to be allowed to prove every fact and circumstance known to him, and connected with the deceased, which was fairly calculated to create an apprehension for his own safety". It can be noted that while the character of the victim has been important to the outcome of these cases, it has not necessarily been "at issue" and therefore would not necessarily be included under the Federal Rule. The additional language making this subdivision apply to these cases is meant to solve this problem and make the subdivision entirely consistent with existing Montana law.

COMMISSION COMMENT TO JUNE 1990 AMENDMENT

The revision establishes gender neutral format only. No substantive change.

Compiler's Comments

1990 Amendment: Substituted gender neutral language for gender specific language. Amendment effective June 7, 1990.

Case Notes

Failure of Defendant to Establish Knowledge of Victim's Past as Element of Justifiable Use of Force — Evidence of Victim's Violent History Inadmissible: At Montgomery's negligent homicide trial, Montgomery relied on a justifiable use of force defense. Anticipating that Montgomery would seek to introduce evidence of the victim's prior acts of violence and reputation for violence, the state requested and was granted a motion in limine prohibiting use of the victim's criminal history or reputation. Following conviction, Montgomery appealed on grounds that the victim's character evidence should not have been prohibited. However, trial testimony showed that Montgomery's fear of the victim was based on the victim's behavior just before the shooting, and Montgomery failed to establish that knowledge of the victim's past led him to use lethal force. Thus, evidence of the victim's alleged violent past was irrelevant and inadmissible, and the motion in limine was properly granted. St. v. Montgomery, 2005 MT 120, 327 M 138, 112 P3d 1014 (2005).

Only Defendant Allowed to "Open the Door" to Rebuttal Character Evidence: Gowan was charged with two felony counts of criminal sale of dangerous drugs. The state indicated that it would not rely on Gowan's prior acts or convictions. The trial court ruled that although direct evidence of a prior conviction was not admissible, the state would be allowed to ask Gowan, if he chose to testify, only if he had lied under oath in the past. At trial, Gowan's girlfriend testified, but not as a character witness. On direct examination, she offered no character testimony, but on cross-examination, she testified as to Gowan's honesty. The trial court concluded that she had opened the door to character evidence, even though the testimony was in response to cross-examination, and allowed the state to inquire whether she was aware of Gowan's perjury conviction, probation, and a suit against him for failure to deliver a vehicle title. Gowan was convicted, contending on appeal that the trial court erred in holding that the defense witness's gratuitous statement in response to cross-examination opened the door for rebuttal character evidence. The Supreme Court concluded that although a defendant can open the door with

statements made during either direct or cross-examination and a defense witness can open the door on direct examination, a defense witness cannot inadvertently open the door to character evidence on cross-examination. Under Rule 404(a)(1), M.R.Ev., only the accused can open the door for the prosecution to introduce rebuttal character evidence. The state argued that once the statement was made, it was necessary to counter its effect on the jury and that, as a general rule, a wide latitude should be permitted in cross-examination of an adverse witness. However, the right to a full cross-examination of a defendant's character traits, once placed at issue, is not limitless. Unless and until the accused places character at issue, the door is closed to the state to enter evidence of the defendant's character because the dangers of prejudice, confusion, and time consumption outweigh the probative value. Inquiry into the defendant's character is not rejected because character is irrelevant, but rather because it weighs too much with the jury members as to overpersuade them to prejudge a person with a bad general record and deny the opportunity to defend against a particular charge. In this case, rather than introducing rebuttal character evidence, the state should have requested that the witness confine her answers to the questions asked and that her statement be stricken from the record. Because only a defendant can open the door to rebuttal character evidence, the trial court erred in holding that the defense witness could do so in a statement made during cross-examination, something defendant had no control over. The conviction was reversed, and the case remanded for a new trial. St. v. Gowan, 2000 MT 277, 302 M 127, 13 P3d 376, 57 St. Rep. 1155 (2000), distinguishing St. v. Austad, 197 M 70, 641 P2d 1373 (1982).

Justifiable Use of Force Not Raised at Trial — Character Evidence of Victim Inadmissible: Nelson was charged with partner assault after striking his wife several times in the face and breaking her jaw. At trial, he sought to introduce evidence of his wife's prior convictions for assault to show that he used reasonable force against her. On appeal, the Supreme Court noted that Nelson had not relied on the defense of justifiable use of force, claiming instead that the contact was accidental, and that evidence of his wife's prior convictions lacked relevance because Nelson never asserted that he knew of the convictions when he struck her. Nelson's mere mention of self-defense in his notice of intent to rely on the defense of self-defense, in his trial brief, and in response to the city's motion in limine did not place the matter at issue in the trial. Thus, evidence of his wife's prior convictions was not relevant to the defense of accident upon which Nelson relied and was properly disallowed. Red Lodge v. Nelson, 1999 MT 246, 296 M 190, 989 P2d 300, 56 St. Rep. 955 (1999).

Evidence of Victim's Character and Prior Violent Act Inadmissible as Element of Self-Defense: Sattler claimed that his homicide of Martinson was in self-defense and sought to introduce evidence of a prior act of violence that was committed by Martinson 8 years before his death as proof of Martinson's aggressiveness and Sattler's need to use force in his defense. However, nothing in 45-3-102 relates directly to the question of the identity of the aggressor as an essential element of the justifiable use of force defense. Further, evidence of the prior act did not support any claim that the force used against Martinson was reasonable based on Sattler's knowledge of Martinson's history of violence. Also, the act was remote in time, and the lapse of time between the prior act and Martinson's death rendered the probity of the act minimal at best. Refusing to admit the evidence would not have resulted in prejudicial and reversible error or affected Sattler's substantial rights in light of the other evidence of record. Thus, reversal was not warranted. St. v. Sattler, 1998 MT 57, 288 M 79, 956 P2d 54, 55 St. Rep. 230 (1998). See also St. v. Benton, 251 M 401, 825 P2d 565 (1992).

Character Not Put Into Issue by Defendant — Evidence as to Reputation Reversible Error: When the defendant did not put his character or community reputation into issue so as to open the door and allow the state to present character evidence in its case in chief, it was improper to admit hearsay, opinion, and reputation evidence of the defendant's bad character as relating to his disposition to commit the crime with which he was charged. Admission of the evidence constituted reversible error. St. v. Gommenginger, 242 M 265, 790 P2d 455, 47 St. Rep. 681 (1990), distinguished in St. v. Smith, 1998 MT 257, 291 M 236, 967 P2d 424, 55 St. Rep. 1058 (1998). However, see St. v. Bower, 254 M 1, 833 P2d 1106, 49 St. Rep. 586 (1992), in which even though admission of character testimony offered by the prosecution was error, conviction was affirmed because the testimony was not prejudicial and the error was therefore harmless. Bower was followed in St. v. Carter, 285 M 449, 948 P2d 1173, 54 St. Rep. 1235 (1997).

Cross-Examination of Character Witness — Reference to Prior Acts: Defendant's character witness was a private investigator who testified that defendant was truthful and had no prior criminal record. On cross-examination, the witness volunteered that he checked out a charge against defendant in another state and that "it came back negative". On appeal, defendant asserted that the cross-examination was improper under Rule 404(b), M.R.Ev., and constituted

grounds for mistrial. The court disagreed, holding that defendant put his character at issue and that it was a proper subject for cross-examination by the state under Rule 404(a), M.R.Ev. Defendant attempted to prove his reputation under Rule 405, M.R.Ev., by testimony of a private investigator. The District Court did not err in allowing cross-examination on the issue of defendant's purported lack of prior crimes. St. v. D.B.S., 216 M 234, 700 P2d 630, 42 St. Rep. 770 (1985).

Homicide Trial — Claim of Nonviolent Character — Prior Assaults Admissible to Rebut: In defendant's homicide trial for killing his recently divorced ex-wife's boyfriend, testimony by certain persons about defendant's prior assaults on his ex-wife was properly admitted to rebut defendant's claims on the witness stand that he was peace-loving and nonviolent. St. v. Stroud, 210 M 58, 683 P2d 459, 41 St. Rep. 919 (1984).

Character Witness — Scope of Cross-Examination: Defendant was charged with eight counts of sexual intercourse without consent with his stepdaughter. At trial defendant called character witnesses. Simpson had hired defendant to work on his ranch. Simpson testified at length as to defendant's truthfulness and peacefulness. On cross-examination the State inquired whether Simpson was aware of defendant's conviction of armed robbery, his attempt to hijack a plane in Vietnam, and his violent escapes from a prison cell block in Vietnam and from jail in Great Falls. On appeal the Supreme Court said that Montana follows the modern trend to accept both reputation and opinion evidence regarding character. The court relied on the critical factors set out in Michelson v. U.S., 335 US 469, 93 L Ed 168, 69 S Ct 213 (1948): (1) the trial court ascertained the prior crime was an actual event; (2) the court instructed the jury to consider the inquiry only for the limited purpose of evaluating a witness' testimony; and (3) there was no specific objection made by the defense attorney. The court said Rule 405, M.R.Ev., extends beyond Michelson to allow inquiry on cross-examination into relevant, specific instances of conduct. The court found the cross-examination of Simpson was within the scope of the direct examination, consisted of inquiry into relevant, specific instances of conduct, and was proper to impeach the witness' opinion testimony. St. v. Clark, 209 M 473, 682 P2d 1339, 41 St. Rep. 833 (1984), distinguished in St. v. Eklund, 264 M 420, 872 P2d 323, 51 St. Rep. 335 (1994).

Imputing Criminal Record — Unrelated to Relevant Character — Denial of Fair Trial: Defendant was convicted of the felony theft of an air compressor. On appeal, defendant contended that the suggestion by the prosecution on cross-examination that he had an FBI criminal record was prejudicial. The Supreme Court held that imputing to a defendant by implication a criminal record unrelated to any trait of character involved in the offense charged denied the defendant a fair trial. St. v. Kramp, 200 M 383, 651 P2d 614, 39 St. Rep. 1819 (1982).

Character of Victim — Right to Witness and Confrontation — Sexual Intercourse Without Consent: While the sixth amendment guarantees a criminal the right to testimony of witnesses in his favor, it does not guarantee him the right to any and all witnesses, regardless of their competency or knowledge. There is the competing interest of the fairness and reliability of the trial. Here, in a sexual intercourse without consent case, the defendant was precluded by these rules from calling witnesses to establish the victim's sexual views and from cross-examining the victim concerning a quote on her jacket ("Liquor in the front, poker in the back"). Since the victim's character is not in issue and her sexual views are not probative of truthfulness, and it is clearly within the judge's discretion to exclude this evidence if it is irrelevant or too prejudicial, the Supreme Court found no merit in defendant's argument that he was denied his right to confront witnesses. St. v. Higley, 190 M 412, 621 P2d 1043, 37 St. Rep. 1942 (1980), followed in State ex rel. Mazurek v. District Court, 277 M 349, 922 P2d 474, 53 St. Rep. 678 (1996).

Evidence of Party's Companion's Criminal Record — Inadmissible: After a jury found plaintiff not guilty of shoplifting, she brought a false arrest suit against Buttrey Food, Inc. In the false arrest suit, Buttrey was allowed to introduce evidence of plaintiff's companion's reputation and past criminal record for shoplifting. On appeal, the Supreme Court said that the right to detain and arrest by a merchant depends on reasonable cause for belief that shoplifting has occurred and not merely on the ground that one of the persons has a reputation for shoplifting. The evidence should have been excluded. Duran v. Buttrey Food, Inc., 189 M 381, 616 P2d 327, 37 St. Rep. 1545 (1980), overruled on other grounds in St. v. Long, 216 M 65, 700 P2d 153 (1985).

Exclusion of Testimony: Testimony concerning threats to members of defendant's family made by the victim of the defendant's assault prior to the assault may be excluded if the testimony is repetitious and likely to distract and mislead the jury from the issues actually in controversy. The exclusion of such testimony is within the court's discretion. St. v. Breitenstein, 180 M 503, 591 P2d 233, 36 St. Rep. 403 (1979).

Character Evidence to Demonstrate Motive in Testifying: The point of Rule 608, M.R.Ev., for the purposes of this appeal is that reference to specific instances of a witness's conduct for the

purpose of proving his character for truthfulness or untruthfulness is never permitted on direct examination. This rule, in conjunction with Rules 403 and 405, M.R.Ev., supports the trial court limitation on impeachment evidence, which defendant argues should have been permitted to establish a prosecution witness's personal habits for marijuana use to demonstrate a profit motive in obtaining a conviction. St. v. McClean, 179 M 178, 587 P2d 20, 35 St. Rep. 1790 (1978).

Collateral References

Evidence *key* 106, 322(3).

32 C.J.S. Evidence §§433 through 437.

29 Am. Jur. 2d Evidence §368, et seq.

3 Am. Jur. POF Proof of Character and Reputation, Generally, pp. 175 through 186.

Constitutionality of "rape shield" statute restricting use of evidence of victim's sexual experiences. 1 ALR 4th 283.

Prejudicial effect of prosecutor's comment on character or reputation of accused, where accused has presented character witnesses. 70 ALR 2d 559.

Admissibility of evidence showing plaintiff's antecedent intemperate habits, in personal injury motor vehicle accident action. 46 ALR 2d 103.

Opinion evidence as to character of accused under Rule 405(a) of Federal Rules of Evidence. 64 ALR Fed. 244.

1 Wigmore §§202 through 213; 3 Wigmore §988; 4 Wigmore §1111; 5 Wigmore §§1608 through 1621; 7 Wigmore §§1980 through 1986.

Rule 406. Habit; routine practice.

Commission Comments

(a) Habit and routine practice defined. This subdivision is original and therefore entirely different than either Federal or Uniform Rules (1974) Rule 406. The Commission feels that a definition of these terms is properly part of the rule for two reasons: First, habit and character evidence are oppositely treated, that is, habit evidence is admissible while character evidence is generally not admissible. Second, the importance because of the opposite treatment, is often not clear and has led to confusion. The Commission intends by this definition subdivision to clarify the terms necessary to apply correctly the rule allowing habit evidence to be admissible.

Existing Montana law does not define these terms, although similar terms are defined in Section 87A-1-205, R.C.M. 1947 [30-1-205], course of dealing and usage of trade. Subdivision (b) of this rule allows habit and routine practice to be used to prove conduct and so will not always relate to the construction of contracts associated with the terms in that statute or associated with custom and usage under Section 93-401-27(12), R.C.M. 1947 [superseded].

(b) Admissibility. This subdivision is based upon Federal and Uniform Rules (1974) Rule 406 except that certain words and phrases have been deleted as unnecessary because of the definition subdivision; other key phrases have been kept to allow uniform interpretation. The subdivision basically allows evidence of habit or routine practice to be admitted to prove conduct.

Existing Montana law is consistent with this subdivision. Prosser v. Montana Central Ry., 17 Mont. 372, 382, 43 P 81 (1895) allowed evidence of the habit of brakemen of mounting a moving train to show what an experienced and prudent brakeman would do under the same circumstances. Neary v. N. Pac. Ry., 37 Mont. 461, 478, 97 P 944 (1908) recognized the rule of Prosser, *supra,* but excluded evidence of how conductors checked trains in a railroad yard because it was not relevant to the case. A later case dealing with habit evidence, Garrison v. Trowbridge, 119 Mont. 505, 510, 177 P2d 464 (1947) held "where habits and customs are admissible the fact of such habits and customs and not the witnesses' conclusions as to the probable future consequences of such is all the court may allow in evidence". Hartse v. Korneychuk, 131 Mont. 530, 533, 312 P2d 795 (1957) recognized that habit evidence can be admissible to prove conduct. The case of Mulville v. Pac. Mut. Life Ins. Co. of California, 19 Mont. 95, 100, 47 P 651 (1897) held that "there was no error in excluding evidence as to the deceased having made a practice of jumping on the train while in motion", citing a Pennsylvania case finding this type of evidence insufficient to warrant an inference that the conduct had been the same as the alleged practice. If that case stands for the proposition that habit evidence is inadmissible to prove conduct, it is overruled by this subdivision; however, the case can also be interpreted as excluding habit evidence because other evidence failed to establish the existence of the habit.

It should be noted that Section 87A-1-205(6), R.C.M. 1947 [30-1-205], requires that in order for evidence of usage of trade to be offered, notice is required to be given to the other party to prevent unfair surprise; this rule is not meant to supersede that provision, given that it applies under this rule.

(c) Method of proof. This subdivision is identical to Uniform Rule (1974) 406(b) which is identical to a subdivision in the version of the Federal Rules submitted to Congress, but deleted by Congress. The Commission adopts this subdivision to provide guidance as to permissible methods of proof of habit or routine practice. A problem which may arise with specific instances of conduct is that in laying the foundation to prove habit by this method, the proponent may be able to infer all that is necessary for the jury to conclude a particular habit existed, even though the court subsequently rules an insufficient number of instances have been shown. This problem should be solved by having such foundation made in the absence of the jury under Rule 103. Note that use of opinion evidence is intended to be governed by Rule 701.

This subdivision is generally consistent with existing Montana law. Montana cases and statutes do not deal with opinions and proof of habit and routine practice and this represents an expansion. Cases dealing with habit have allowed proof by specific instances of conduct. Prosser v. Montana Central Ry., *supra*, 17 Mont. at 382, and Garrison v. Trowbridge, *supra*, 119 Mont. at 510.

Case Notes

Evidence of Prior Corporal Punishment Properly Excluded: When Huerta was tried on charges of assault of a juvenile, he attempted to introduce testimony of 26 witnesses who would testify that the child's mother had the habit of severely punishing the child. In an effort to reduce delay caused by redundant testimony, the District Court required Huerta to summarize the testimony of all of the witnesses by affidavits. The District Court held that the testimony would constitute "character assassination" and excluded the evidence. Citing St. v. Sigler, 210 M 248, 688 P2d 749 (1984), the Supreme Court held that the evidence that was excluded by the District Court was not inadmissible evidence of character but was evidence of habit that was relevant and therefore admissible under this rule. However, the Supreme Court also pointed out that Rule 403, M.R.Ev., allows the trial court to exclude relevant evidence if it finds that the value of the evidence will be outweighed by prejudice, will confuse the issues, or will mislead the jury. After reviewing the record, the Supreme Court concluded that Huerta was able to sufficiently present his defense without the excluded testimony and, for that reason, that the District Court did not abuse its discretion in excluding the evidence. St. v. Huerta, 285 M 245, 947 P2d 483, 54 St. Rep. 1133 (1997).

Allegation of Uncounseled Waiver of Right to Attorney — Burden of Proof — Testimony of Routine of City Judge Held to Create Triable Issue of Fact: Olson moved to dismiss a felony DUI charge based upon his affidavit that in his previous DUI convictions, he was not represented by counsel and was not told that he could have a court-appointed attorney. In response to Olson's affidavit, the state presented the testimony of the city judge who convicted Olson on one of the previous DUI charges. The judge testified that although he had no specific recollection of Olson's case, he always asks defendants whether they understand their rights and always reads their rights from a prepared text that includes an advisement of the right to counsel. The Supreme Court held that pursuant to this rule, this testimony is substantive evidence that creates a triable issue of fact. Therefore, the Supreme Court held that the District Court erred when it held that this testimony was insufficient as a matter of law to create a triable issue of fact. St. v. Olson, 283 M 27, 938 P2d 1321, 54 St. Rep. 475 (1997), followed in St. v. Couture, 1998 MT 137, 289 M 215, 959 P2d 948, 55 St. Rep. 548 (1998), and St. v. Moga, 1999 MT 283, 297 M 1, 989 P2d 856, 56 St. Rep. 1143 (1999). Olson was followed, with a different result, in St. v. Ailport, 1998 MT 315, 292 M 172, 970 P2d 1044, 55 St. Rep. 1292 (1998).

Blood Alcohol Test Admissible When Good Medical Practice Followed: In a negligence action against the state brought by the guardian of a person who was incapacitated in a motorcycle accident, the trial court admitted into evidence the results of a blood alcohol test performed on the motorcycle operator after the accident. The primary issue raised by the plaintiff on appeal concerns whether an adequate foundation was established for admittance of the test results. In a 4-to-3 decision, the Supreme Court held the results were admissible, as the testing procedure comported with good medical practice for admissibility in a civil case. The court rejected the more stringent rule which requires that each of a list of facts be established as foundation for admissibility of blood alcohol test results. The three dissenting justices found that a proper foundation would include, at a minimum, evidence that the persons engaged in the test were qualified, the machine and its components were in proper condition, and the test was properly conducted. Bartel v. St., 217 M 380, 704 P2d 1067, 42 St. Rep. 1266 (1985).

Credibility of Rebuttal Witness Tested — Testimony Admissible: The defendant was tried and convicted of sexual intercourse without consent and aggravated kidnapping. Testimony of a defense witness raised an issue as to habitual routing of the defendant. The State was allowed to present rebuttal testimony where credibility of a rebuttal witness was questioned by defense,

and the jury had ample opportunity to consider credibility. St. v. Norris, 212 M 427, 689 P2d 243, 41 St. Rep. 1841 (1984).

Deliberate Homicide — Prior Acts of Discipline Toward Child Admissible: Defendant was charged with and convicted of the deliberate homicide of the 19-month-old child of the woman with whom he was living. On appeal, defendant attacked the testimony of witnesses relating to other crimes, wrongs, or acts by him toward the child on the grounds that the elements required in St. v. Just, 184 M 262, 602 P2d 957 (1979), were not met. The Supreme Court said, when a battered child is the victim, the pattern of conduct exhibited by the defendant-caretaker toward the child victim is within the scope of the issues before the court. The only available link between the specific nature of the child's injuries and the caretaker may be the evidence of prior abusive conduct by the caretaker. Under Rule 406, M.R.Ev., the acts habitually performed by defendant in response to his perceived need for discipline of the child were admissible. As a matter of habit, his discipline of the child was excessively harsh. There was no error in allowing witnesses to testify to the disciplinary acts administered by defendant to the child. St. v. Sigler, 210 M 248, 688 P2d 749, 41 St. Rep. 1039 (1984), followed in St. v. Murray, 228 M 125, 741 P2d 759, 44 St. Rep. 1394 (1987), and St. v. Huerta, 285 M 245, 947 P2d 483, 54 St. Rep. 1133 (1997).

Collateral References

Evidence *key* 138, 139.

32 C.J.S. Evidence §§579 through 582.

29 Am. Jur. 2d Evidence §§376, et seq., 390, 396.

Habit or routine practice evidence under Uniform Evidence Rule 406. 64 ALR 4th 567.

Propriety, in medical malpractice case, of admitting testimony regarding physician's usual custom or habit in order to establish nonliability. 10 ALR 4th 1243.

Admissibility of evidence showing plaintiff's antecedent intemperate habits, in personal injury motor vehicle accident action. 46 ALR 2d 103.

1 Wigmore §§92 through 99.

Rule 407. Subsequent remedial measures.

Commission Comments

This rule is identical to Federal and Uniform Rules (1974) Rule 407. The rule disallows evidence of subsequent remedial measures because of the public policy of encouraging, or at least not discouraging, changes or repairs for added safety. The rule allows use of this type of evidence for other purposes, if those other purposes are controverted, or for impeachment.

Existing Montana law recognizes the rule excluding subsequent remedial measures, but all the case law on the subject allows this type of evidence under one of the other purposes for which it may be admitted. May v. City of Anaconda, 26 Mont. 140, 144, 66 P 759 (1901) allowed evidence that a rock, which caused plaintiff's accident and injuries, had been removed from a certain street to prove that the city had assumed control of that street and was under the obligation to keep it in repair. Pullen v. City of Butte, 45 Mont. 46, 53, 121 P 878 (1912) allowed evidence of repairs of a sidewalk to show conditions existing at the time of the accident. Titus v. Anaconda Copper Mining Co., 47 Mont. 583, 588, 133 P 677 (1913) and Teesdale v. Anschutz Drilling Co., 138 Mont. 427, 440, 357 P2d 4 (1960) also allowed evidence of subsequent repairs to show conditions existing at the time of the accident. Other cases have recognized the rule but have not found it necessary to apply it. Hackley v. Waldorf-Hoerner Paper Co. 149 Mont. 286, 296, 425 P2d 716 (1967) and Morrison v. City of Butte, 150 Mont. 106, 115, 431 P2d 79 (1967).

It should be noted that under Teesdale, *supra*, Montana recognizes that admitting evidence for another purpose allows a limiting instruction under the limited admissibility rule also contained in Rule 105. Further, admission of evidence of subsequent repairs for another purpose should be made under the considerations of Rule 403, particularly its prejudicial effects.

Case Notes

Admissibility of Evidence to Rebut Affirmative Defense — "Plain Visibility" of Oncoming Train: Mickelson was injured when the fire truck that he was driving was struck by a Montana Rail Link (MRL) train and sought damages. In basing its defense on Mickelson's comparative negligence in failing to see the train, MRL was allowed to allege and represent to the jury that the train was plainly visible, in part because of its yellow blinking light, thereby triggering Mickelson's alleged duty to stop for the train. Mickelson sought to refute that contention by offering testimony that the train's lighting configuration did not make the train visible to approaching motorists, but the evidence was held inadmissible on grounds that MRL met federal requirements regarding lighting and thus could not be held liable for its particular lighting configuration. However, Mickelson's evidence was not offered to impose liability upon MRL for

failing to change its lighting configuration, but rather to demonstrate that, contrary to MRL's experts, the lighting configuration did not make the train so plainly visible that Mickelson was comparatively negligent for failing to see it. Under Pitasi v. Stratton Corp., 968 F2d 1558 (2nd Cir. 1992), evidence that is not admissible to prove culpability may nevertheless be introduced to rebut an affirmative defense. By denying Mickelson the right to rebut MRL's evidence in support of its contention that Mickelson was comparatively negligent, the trial court essentially directed a verdict in favor of MRL on the comparative negligence issue, which was an abuse of the court's discretion, constituting reversible error. Mickelson v. Mont. Rail Link, Inc., 2000 MT 111, 299 M 348, 999 P2d 985, 57 St. Rep. 446 (2000), distinguishing Marshall v. Burlington N., Inc., 720 F2d 1149 (9th Cir. 1983), and Herold v. Burlington N., Inc., 761 F2d 1241 (8th Cir. 1985).

Admissibility of Probative Evidence Refuting Expert Testimony: Rieger was injured when a light fixture dislodged from the ceiling, striking him. In light of expert testimony that the sheetrock at the accident scene was defective, Rieger should have been allowed to offer evidence that other light fixtures were loose and were subsequently repaired. The evidence was probative and tended to refute the expert testimony that the sheetrock at the accident scene was defective and was the sole cause of the accident. Rieger v. Coldwell, 254 M 507, 839 P2d 1257, 49 St. Rep. 768 (1992).

Evidence of Postaccident Changes in Product Warning Label Properly Excluded: At the time of an accident involving inhalation of a toxic substance, the warning label on a paint product suggested the use of vapor/particulate masks not containing fresh air supplies. Plaintiff contended that for purposes of impeachment, he should have been allowed to introduce evidence that shortly after the accident, defendant changed the label to require the use of fresh air respirators when the paint was used. The Supreme Court found no error in exclusion of evidence of the postaccident label changes in light of the fact that at the time of the accident, plaintiff was wearing no mask whatsoever. Scott v. E.I. DuPont De Nemours & Co., 240 M 282, 783 P2d 938, 46 St. Rep. 2126 (1989).

Motion In Limine — Denial of Offer of Proof on Question Going to Issues of Fact — Reversible Error: Several months after an accident at a bridge, the state improved the bridge and approach, then made a motion in limine, which was granted, that the District Court hold inadmissible any evidence relating to the subsequent improvement project. At trial, a Highway Department (now Department of Transportation) engineer was asked if the state had ever planned to change the bridge and approach prior to the accident. The question was objected to, and plaintiff's counsel made an offer of proof that the engineer would answer affirmatively and thereafter counsel would ask why the improvements had not been made prior to the accident. The court ruled that the question violated the motion in limine and overruled the offer of proof. On appeal, the Supreme Court reversed, holding that the District Court erred in denying the offer of proof and in not permitting the witness to answer because the question went to two other issues of fact important in the case: notice of hazardous condition, if it was hazardous, and time and opportunity to act. Buck v. St., 222 M 423, 723 P2d 210, 43 St. Rep. 1384 (1986).

Applicability to Strict Liability Theory: In a strict liability action under a manufacturing defect theory, the issue is whether the manufactured product left the factory in a flawed condition because it did not conform to original design specifications. Consequently, original design modification is without probative value and irrelevant because the safeness of the original design is not an issue. Under the manufacturing defect theory of strict liability, evidence of subsequent change is inadmissible unless admitted for some other purpose. In a strict liability action under a design defect theory, the question is whether the design specifications were partly or totally defective. A design is defective if at the time of manufacture an alternative design would have been safer and the design was both technologically feasible and a market reality. The timeframe under scrutiny is that of the manufacturer. Evidence of subsequent design modification is not probative of whether a product was defectively designed at the time of manufacture. Such evidence may be admitted to show technological feasibility where the manufacturer has controverted technological feasibility of an alternative design. Rule 407, M.R.Ev., is applicable to strict liability actions under both manufacturing and design defect theories, making evidence of subsequent design changes generally inadmissible. Rix v. Gen. Motors Corp., 222 M 318, 723 P2d 195, 43 St. Rep. 1296 (1986), followed in Krueger v. Gen. Motors Corp., 240 M 266, 783 P2d 1340, 46 St. Rep. 2114 (1989).

Postaccident Installation of Signals: In a negligence action concerning a train-truck collision, the trial court excluded evidence of the railroad later placing electric signal devices at the crossing where the accident occurred. In this case, experts testified for the railroad that the crossing was not extrahazardous. The fact that automatic signals were installed on the crossing after the accident would have been relevant for the purpose of impeachment as well as to show

feasibility. It was prejudicial error to exclude this evidence. Runkle v. Burlington N., 188 M 286, 613 P2d 982, 37 St. Rep. 995 (1980).

Evidence of Alteration of Accident Scene After Accident — Admissible for Some Purposes: Evidence of subsequent repairs or improvements by a defendant altering the scene of an accident may not be admitted in evidence to show negligence on the part of the defendant. The evidence that the state constructed an additional guardrail at the scene of the accident was offered for another purpose. The evidence demonstrates the feasibility and ability to construct the guardrail in contradiction to the state's contentions. Cech v. St., 184 M 522, 604 P2d 97, 36 St. Rep. 2185 (1979) (earlier opinion, 183 M 75, 598 P2d 584, 36 St. Rep. 1348 (1979), was reversed on rehearing).

Impeachment of Witness' Testimony as to Repair Feasibility: Plaintiffs' rebuttal testimony offered for impeachment of one of defendants' central witnesses on the crucial issue of practicability or feasibility of repairs, an issue raised by defendants in their case in chief, should have been allowed under the exception to the general rule of excluding evidence of subsequent repairs when, as here, the evidence was not offered as proof of negligence. Lawlor v. County of Flathead, 177 M 508, 582 P2d 751 (1978).

Law Review Articles

Montana Supreme Court Survey—Civil Procedure and Evidence, Young & McLean, 41 Mont. L. Rev. 293 (1980).

Collateral References

Evidence *key* 219; Negligence *key* 131.

31A C.J.S. Evidence §291.

29 Am. Jur. 2d Evidence §§463, 464, 472, 474.

Products liability: admissibility of evidence of postinjury warning measures undertaken by defendant. 38 ALR 4th 583.

Admissibility of evidence of subsequent repairs or other remedial measures in products liability cases. 74 ALR 3d 1001, §16 superseded by 38 ALR 4th 583.

Admissibility of evidence of repairs, change of conditions, or precautions taken after accident. 64 ALR 2d 1296, superseded by 15 ALR 5th 119.

Admissibility of evidence of subsequent remedial measures under Rule 407 of Federal Rules of Evidence. 50 ALR Fed. 935, superseded by 158 ALR Fed. 609.

2 Wigmore §§282, 283.

Rule 408. Compromise and offers to compromise.

Commission Comments

This rule is identical to Federal Rule 408. Uniform Rules (1974) Rule 408 is the same except that it does not include the third sentence of the rule. Congress added this third sentence to insure that evidence will not be made inadmissible merely because it is disclosed during compromise negotiations if that evidence is otherwise discoverable; that is, a party should not be able to keep otherwise discoverable evidence from being admissible by presenting it during compromise negotiations. The broad purpose of the rule is to insure that frank and open negotiations will take place without fear that what is said during these negotiations will be used against the parties during the trial; the policy behind this purpose is that favoring compromises and settlements of disputes.

Existing Montana law is generally consistent with this rule. Section 93-2201-5, R.C.M. 1947 [superseded], states "(a)n offer of compromise is not an admission that anything is due". Case law using this statute has held that evidence of an offer of compromise is therefore inadmissible at trial of that dispute. Huffine v. Lincoln, 53 Mont. 474, 480, 164 P 888 (1917) and Continental Oil Co. v. Bell, 94 Mont. 123, 135, 21 P2d 65 (1933). The policy behind the rule was expressed in Black v. Martin, 88 Mont. 256, 269, 292 P 577 (1930) and has been expressed in recent statutes, R.C.M. 1947 Sections 93-2201-7 through 93-2201-10 [26-1-701 through 26-1-706]. Section 93-2201-7, R.C.M. 1947 [26-1-701], expresses the policy of the rule, and Section 93-2201-9, R.C.M. 1947 [26-1-704], states, among other things, that the fact of voluntary partial payment shall not be construed as an admission that anything is due and that it is inadmissible as evidence.

Several cases have dealt with the question of what is an offer of compromise. Continental Oil Co. v. Bell, *supra*, held, contrary to the assertion that an offer was "merely a preliminary negotiation between parties", that "all offers are merely negotiations until accepted. The testimony disclosed an offer made in an attempt to effect a settlement and, therefore, was clearly inadmissible". However, Magelssen v. Atwell, 152 Mont. 409, 413, 451 P2d 103 (1969) held that

an offer to buy land made long before an action was brought to quiet title was admissible because there was no dispute at the time the letter was written. It would also seem logical that if there was no dispute because one of the parties had admitted liability and agreed to pay, such an offer would also be admissible.

The final consideration under this rule concerns the second sentence of this rule providing that "evidence of conduct or statements made in compromise negotiation is likewise not admissible". This sentence overrules the common law doctrine of allowing admissions of liability made during negotiations to be admissible while still excluding evidence of any offers of compromise. The common law doctrine is followed in Montana in Lenahan v. Casey, 46 Mont. 367, 379, 128 P 601 (1912). That case is expressly overruled by this rule because the Commission feels that it is contrary to the policy of the rule and can be unfairly applied to those who are unaware of it. It should be noted that the addition of the third sentence is meant to prevent the opposite abuse of this rule so that parties will not try to immunize their evidence from being admissible by presenting it during negotiations; the other party may otherwise discover this evidence and present it so long as no inference is made to compromise negotiations.

Case Notes

Use of Settlement Evidence Allowed to Show Bias of Witness, Not Liability: This rule does not allow for evidence of settlements in order to prove or disprove liability. Plaintiffs contended that the District Court improperly allowed settlement evidence when defendant cross-examined plaintiffs' contractor regarding a settlement between the contractor and plaintiffs. Citing Pula v. St., 2002 MT 9, 308 M 122, 40 P3d 364 (2002), the Supreme Court disagreed. The witness was not asked about the settlement in order to address issues of liability, but rather to illustrate the bias of the witness. Inquiry into the settlement, including the settlement amount, was pertinent to the credibility of the witness, and the District Court did not abuse its discretion in allowing the evidence. Tripp v. Jeld-Wen, Inc., 2005 MT 121, 327 M 146, 112 P3d 1018 (2005).

Refusal to Enforce Unsubstantiated Oral Agreement to Dismiss Claim for Prescriptive Easement — Parol Evidence Rule and Statute of Frauds Inapplicable: Defendant contended that the District Court erred in failing to estop plaintiff from asserting claims for a prescriptive easement across defendant's property because an agent of plaintiff orally agreed to dismiss the claims and defendant relied on the promise to defendant's detriment. The District Court held that the parol evidence rule and the statute of frauds prohibited admission of evidence of an oral agreement to dismiss the case because there were written temporary access agreements in place and that defendant did not offer sufficient evidence to meet either a fraud or estoppel exception to the parol evidence rule. The Supreme Court found that the trial court reached the correct result, albeit for the wrongs reasons, by automatically applying the parol evidence rule and the statute of frauds without determining whether either rule applied. Actually neither rule barred admission of the evidence in this case, so the trial court was free to consider the merits of the existence of an oral contract without defendant having to prove the elements of fraud or detrimental reliance. Nevertheless, the trial court found defendant's story of an oral agreement to be unsubstantiated and correctly refused to enforce an oral agreement based on the facts before it. Brimstone Min., Inc. v. Glaus, 2003 MT 236, 317 M 236, 77 P3d 175 (2003).

Improper Admission of Letter Offering Compromise — Reversible Error: Plaintiff sued for over $17,000 allegedly provided as loans to defendant. Defendant claimed that the money was owed by plaintiff, not a loan. In an effort to settle the dispute, plaintiff sent defendant a letter offering to compromise. At trial, defendant sought to introduce the letter, but plaintiff objected on grounds that the letter was inadmissible under this rule, which bars admission of offers of compromise. The District Court admitted the letter anyway, and plaintiff appealed on grounds that admitting the letter was an abuse of discretion. The Supreme Court agreed. The letter was an offer of compromise and, having been offered less than 3 months prior to the suit, fell within the purview of this rule. The letter did not meet any of the exceptions in the rule and thus was improperly admitted. Because the District Court relied heavily on the improperly admitted evidence in concluding that plaintiff presented contradictory testimony, the improper evidence resulted in substantial injustice and warranted reversal and a new trial. VonLutzow v. Leppek, 2003 MT 214, 317 M 109, 75 P3d 782 (2003), following Niles v. Big Sky Eyewear, 236 M 455, 771 P2d 114 (1989).

Evidence of Negotiation and Agreement Between Subdivider and City Offered for Purpose Other Than to Show Liability or Validity of Claim: In a suit by a developer over conditions that the City Council attached to its preliminary subdivision plat approval, this rule did not bar testimony regarding settlement negotiations and the resulting subdivision improvement agreement because under 76-3-608, the City Council was required to consult with the developer and give due weight and consideration to the expressed preference of the developer and was thus

required to negotiate. The Supreme Court also stated that Rule 408 excludes only evidence offered to prove liability or the validity of a claim or amount and does not require exclusion when the evidence is offered for another purpose and that, in this case, the evidence was offered to show the arbitrary and capricious nature of the City Council's decision. Thus, the evidence fell under the exception clause of the rule. Kiely Constr. v. Red Lodge, 2002 MT 241, 312 M 52, 57 P3d 836 (2002).

Consulting Physician Diagnosis Properly Admitted — Scope of Exclusion — Evidence Not Offered for Liability Purposes: In a claim against his employer, W.R. Grace & Co. (Grace), for injuries caused by asbestosis, Kaeding tried to exclude from evidence by a motion in limine a written diagnosis from a consulting physician that he, Kaeding, was suffering from asbestosis. Kaeding argued that the diagnosis should have been excluded under this rule. The Supreme Court held that by its plain language, this rule does not exclude otherwise admissible evidence only because that evidence is presented in the course of compromise negotiations. The Supreme Court also pointed out that this rule excludes only evidence that is offered to prove liability and that, in the instant case, the letter was offered only to prove notice of the injury, not to prove liability for the injury. Kaeding v. W.R. Grace & Co., 1998 MT 160, 289 M 343, 961 P2d 1256, 55 St. Rep. 640 (1998).

Mutual Mistake of Fact Sufficient to Set Aside Release in FELA Action: A release in an action under the Federal Employers' Liability Act (FELA), 45 U.S.C. 51 through 60, may be set aside on the basis of mutual mistake of fact in executing the release. A mutual mistake of fact is sufficient to avoid a release only when the mistake goes to the nature of the injury and the mistaken belief is held by both parties. In the present case, Bevacqua signed releases purporting to settle all injury claims, but was lulled into signing because of repeated assurances by doctors who examined him at the employer's request, assured him that nothing was wrong, and authorized him to return to work. Under FELA, this mutual mistake of fact was sufficient to set aside the releases. Bevacqua v. Union Pac. RR Co., 1998 MT 120, 289 M 36, 960 P2d 273, 55 St. Rep. 469 (1998), following Callen v. Pa. RR Co., 332 US 625, 92 L Ed 242, 68 S Ct 296 (1948), and Counts v. Burlington N. RR Co., 952 F2d 1136 (9th Cir. 1991).

Limited Admissibility of Settlement Agreement to Show Witness Bias: Although the introduction at trial of offers to compromise and settlement agreements is forbidden under this rule, settlements may be admitted for limited purposes, such as proving bias or prejudice of a witness, in accordance with Rule 607 M.R.Ev. In the present case, plaintiff's counsel questioned one of the settling parties extensively regarding a settlement agreement and whether the party would benefit under the agreement if defendants prevailed. The witness admitted that he would gain under the agreement. The cross-examination adequately brought out the witness's bias, and the jury had sufficient evidence of the nature and effect of the settlement agreement to judge the credibility of the testimony. Therefore, the trial court did not err in limiting the admission of the settlement agreement to show the bias of the witness. In re Estate of DeCock, 278 M 437, 925 P2d 488, 53 St. Rep. 992 (1996).

No Accord When Payment Stopped on Check — Evidence of Agreement Properly Excluded: In a dispute over the charges for the care and training of horses, the parties agreed that Watkins would accept $5,000 for his services. The Williamses gave Watkins two checks for $2,500, but they stopped payment on the second check and refused to tender the rest of the money on the basis that one of the horses had been mistreated. The jury returned a verdict in favor of Watkins for $20,191 for services. The Williamses argued that the lower court erred in initially excluding the accord and satisfaction affirmative defense. The Supreme Court ruled that there was no accord because of the Williamses' failure to pay the agreed-upon sum and that the District Court had been correct in excluding testimony concerning the agreement. Watkins v. Williams, 265 M 306, 877 P2d 19, 51 St. Rep. 489 (1994).

Settlement Documents Inadmissible — Not Statement Against Interest by Party Opponent: In negotiations over damages for loss of business opportunity caused by Montana Rail Link (MRL), an adjuster for Farmers Mutual sent counsel for MRL a letter and a spreadsheet showing business interruption losses. MRL tried to introduce the letter and spreadsheet at trial, but the District Court disallowed the exhibit. Citing Lenahan v. Casey, 46 M 367, 128 P 601 (1912), and Gamble-Skogmo, Inc. v. McNair, 98 F. Supp. 440 (D.C. Mont. 1951), the Supreme Court held that the letter and spreadsheet were properly excluded. The Supreme Court said that the documents constituted statements made in settlement negotiations and were not made as independent statements of fact constituting statements against interest as an exception from the hearsay rule. DeTienne Associates Ltd. Partnership v. Mont. Rail Link, Inc., 264 M 16, 869 P2d 258, 51 St. Rep. 125 (1994).

Admissibility of Release Form When Claim Not Disputed: An employer contended District Court error in allowing into evidence a release form presented to Kestell for his signature prior to receiving his first severance paycheck. However, at the time Kestell was asked to sign the document, his claim for severance pay was not in dispute. Because the document was offered to show that the employer did not intend to offer Kestell another position, rather than for one of the purposes prohibited by this rule, admitting it into evidence was not improper. Kestell v. Heritage Health Care Corp., 259 M 518, 858 P2d 3, 50 St. Rep. 919 (1993).

Repetitive Testimony Outside Scope of Negotiations Properly Excluded: The District Court did not err in refusing to admit evidence discovered during negotiations when the same evidence was presented through testimony on cross-examination, rendering it repetitive. Maguire v. St., 254 M 178, 835 P2d 755, 49 St. Rep. 688 (1992).

Settlement Offer Not Admission of Liability: The plaintiffs' complaint was dismissed for failure to state a claim. The plaintiffs attempted to introduce evidence that consisted of a memo from the insurance company regarding its desire to enter into settlement negotiations. The plaintiffs alleged that the memo was an admission of liability. The Supreme Court affirmed the lower court's ruling that the memo was not admissible under the Montana Rules of Evidence and that an offer of settlement does not constitute an admission of liability. Treutel v. Jacobs, 240 M 405, 784 P2d 915, 46 St. Rep. 2233 (1989).

Inadmissibility of Compromise Offers — Offer Made Prior to Filing: Defendants contended that because a compromise offer was made prior to the filing of suit, it was not part of compromise negotiations and the trial court improperly prohibited testimony on the offer at trial. Although this rule does not clarify whether litigation must be in progress before the rule takes effect, the offer was within the purview of the rule when the parties had hired attorneys, a draft of the complaint had been sent to defendant's attorney, and it was clear that plaintiff had a claim against defendant at the time the offer was made. Niles v. Big Sky Eyewear, 236 M 455, 771 P2d 114, 46 St. Rep. 504 (1989).

Evidence of Presence of Former Defendant Not Precluded: In a medical malpractice trial, defendant's counsel briefly brought to the jury's attention the fact that another doctor (whose dismissal from the suit had been voluntarily stipulated by the plaintiff) had previously been a defendant in the action. Plaintiff claimed on appeal that such mention was precluded by Rule 408, M.R.Ev., and infringed her right to a fair trial. The Supreme Court held that Rule 408 precludes admissibility only of evidence of compromise or offers to compromise and does not preclude mere mention that another had been charged in the initial complaint. Easterday v. Canty, 219 M 420, 712 P2d 1305, 43 St. Rep. 60 (1986).

Plaintiff's Refusal of Settlement — Not Relevant to Mitigation of Damages or to Defendant's Intent: The District Court properly excluded evidence of defendant's offer to compromise and settle plaintiff's claim. The court was not persuaded by defendant's argument that refusing a settlement offer is a failure to mitigate damages and that the offer showed defendant did not seek to act towards plaintiff in an oppressive or retaliatory fashion. Tribby v. NW. Bank of Great Falls, 217 M 196, 704 P2d 409, 42 St. Rep. 1133 (1985).

Sex Crime Complaint Amendment to Lesser Offense — Admissibility on Issue of Victim's Credibility: Defendant sought to introduce evidence that the State twice amended its original information to reduce charges of sexual intercourse or attempted sexual intercourse to sexual assault. Defendant contended the amendments reflected the alleged victims' changing stories and wished to attack their credibility through the amendments. The evidence was properly denied. The prosecutor had stated the amendments were for tactical reasons, not because of any decision by the alleged victims. Defendant's argument, that because the court judicially noticed the amendments evidence behind their having been made should have been admitted, was without merit because the court noticed them only for the purpose of ruling on the State's motion to exclude evidence of them and not for future evidentiary considerations. St. v. Anderson, 211 M 272, 686 P2d 193, 41 St. Rep. 1357 (1984).

Collateral References

Criminal Law *key* 408; Evidence *key* 213, 214, 219(3).

31A C.J.S. Evidence §§285 through 289.

29 Am. Jur. 2d Evidence §480.

Admissibility of admissions made in connection with offers or discussions of compromise. 15 ALR 3d 13.

Prejudicial effect of reference to settlement efforts or negotiations on voir dire examination of jurors. 67 ALR 2d 560.

Evidence involving compromise or offer of compromise as inadmissible under Rule 408 of Federal Rules of Evidence. 72 ALR Fed. 592.

2 Wigmore §283a; 4 Wigmore §§1061, 1062.

Rule 409. Payment of expenses.

Commission Comments

This rule is similar to Federal and Uniform Rules (1974) Rule 409, but changes have been made to avoid a potential problem under that rule, to provide a sounder policy basis for the Montana rule, and to make the Montana rule consistent with existing Montana law. The Federal and Uniform Rules (1974) Rule 409 states: "Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury". The potential problem under the Federal and Uniform rule is that an offer or promise to pay is often intertwined with an admission of liability, and since the Commission believes the latter should be admitted, having this as part of the rule is inappropriate. The policy basis of the Federal Rule, as shown by the Federal Advisory Committee Note to that rule (46 F.R.D. 161, 240 (1969)), is that such payments arise from humane impulses. The Commission believes that such offers or promises are seldom made from such impulses and that such a policy is unrealistic. However, the statement of policy contained in Section 93-2201-7, R.C.M. 1947 [26-1-701], and the policy implicit under Rule 408, that is, the encouragement of settlement of claims, is a valid policy for Rule 409.

This rule was drafted to be consistent with existing Montana law contained in Section 93-2201-9, R.C.M. 1947 [26-1-703, 26-1-704]. That section provides that payment of claims "...based on alleged liability of that person for injury to person, including death, or damage to property arising out of any occurrence..." is not to be construed "...as an admission of liability or fault..." nor is it to be admissible as evidence in a trial "...on the issue of liability, the extent of damages, or otherwise". The Federal and Uniform Rule (1974) only included payments for injury, not for property damage. This rule is intended to cover all types of payment arising out of alleged liability from either an injury or occurrence. Therefore this rule is entirely consistent with existing Montana policy and law.

Collateral References

29 Am. Jur. 2d Evidence §480.

Admissibility of evidence showing payment, or offer or promise of payment, of medical, hospital, and similar expenses of injured party by opposing party. 65 ALR 3d 932.

2 Wigmore §283a.

Rule 410. Offer to plead guilty; nolo contendere; withdrawn plea of guilty.

Commission Comments

This rule is identical to a version of Federal Rule 410 conditionally adopted by Congress. The condition was that the rule would be superseded by any amendment to the Federal Rules of Criminal Procedure inconsistent with the rule. Such an amendment was made in Rule 611(e)(6), Federal Rules of Criminal Procedure, which was later substituted for this version of the rule. The Commission prefers the superseded version of the rule because it allows use of statements whether or not made under oath, on the record, or in the presence of counsel and, most important, for impeachment purposes. The Uniform Rule 410 (1974) is similar to the first sentence of the rule but does not include a provision similar to the second sentence of the rule.

This rule allows an accused to offer to plead guilty or nolo contendere or to withdraw such pleas without either action being used against him in any subsequent trial. This is intended to aid the plea bargaining process, under similar policy considerations given to offers of compromise under Rule 408, and to allow highly prejudicial evidence to be excluded under considerations that the reasons for offering to plead or withdrawing pleas of guilty and nolo contendere would not be understood by a jury and would almost preclude a fair trial. The second sentence of this rule is added to insure that the accused does not abuse this rule and contradict earlier statements. See Harris v. New York, 401 U.S. 222 (1971). The trial court is required to insure that the statements were "voluntary and reliable" and if contradicted, the statements may be introduced for the limited purposes of impeachment or prosecution for perjury.

Existing Montana law has not specifically dealt with the problem of offers to plead or withdrawn pleas, although a plea of guilty that is not withdrawn is admissible in subsequent proceedings. Sikora v. Sikora, 160 Mont. 27, 33, 499 P2d 808 (1972). Therefore this rule is new to Montana law. It should be noted that Montana law does not allow pleas of nolo contendere; however, such a plea is included in the rule because it has been recognized by Montana courts in

a case where such a plea was entered in federal court and was relevant to a state case. State ex rel. McElliot v. Fousek, 91 Mont. 457, 461, 8 P2d 795 (1932).

Case Notes

Adequacy of Guilty Plea Colloquy — Defendant Informed of Possibility of Lesser Included Offense: The District Court did not affirmatively inquire whether defendant understood that by purposely or knowingly causing the victims' deaths, he may have committed either deliberate or mitigated deliberate homicide. However, the record demonstrated that defendant was informed of the possibility of the lesser included offense and had a full understanding of the precise kind of homicide to which he pleaded. The guilty plea colloquy was adequate. Bone v. St., 284 M 293, 944 P2d 734, 54 St. Rep. 890 (1997).

Evidence of Circumstances Surrounding Plea Allowable Upon Introduction of Impeachment Evidence: Kowalski attempted to impeach his daughter's claim of fear and undermine her credibility by introducing letters that she mailed to him after he pleaded guilty to felony assault (now assault with a weapon) of his daughter. The lower court ruled that if the letters were introduced, the door would be open for the state to explore the circumstances surrounding the communication and the facts underlying Kowalski's prior plea. Kowalski contended that the ruling denied him a fair trial by forcing him to choose between effectively cross-examining his daughter and exposing the jury to highly prejudicial statements made during pleading, in violation of this rule. The Supreme Court adopted the analysis set out in U.S. v. Martinez, 775 F2d 31 (2nd Cir. 1985), which allows the prosecution to introduce prejudicial evidence to rehabilitate the credibility of a witness during redirect examination. To suppress the circumstances surrounding the letters while allowing Kowalski to use the letters for impeachment purposes would deny the jury a proper evaluation of the evidence. St. v. Kowalski, 252 M 166, 827 P2d 1253, 49 St. Rep. 197 (1992).

Confession Based on Promised Leniency — Inadmissible: Accused pleaded guilty based on a plea agreement whereby the State would not seek an increased sentence under the persistent felony offender law. The judge in accepting the plea questioned the accused, and his answers were a confession. He withdrew the guilty plea, and at trial the confession was used to impeach him. The federal District Court held that where a confession (not a plea) is brought about by thoughts of promised leniency it may not be admitted into evidence after the plea has been withdrawn. Hansen v. Risley, 40 St. Rep. 2100 (D.C. Mont. 1983) (apparently not reported in Federal Supplement).

Guilty Plea Voluntary — Admissible for Impeachment: Defendant contended that his entry of a guilty plea was not admissible in a trial following a withdrawal of the guilty plea as evidence to impeach his testimony. The basis for his contention was that his guilty plea was not voluntary. The record shows that the trial court carefully and extensively questioned defendant on the voluntariness of the plea, his understanding of the charge, the consequences of the plea, and the factual basis for his plea. Further, the requirements of St. v. Azure, 175 M 189, 573 P2d 179 (1977), were met in this case. The defendant was sufficiently informed to enter a plea that was "voluntary with understanding of the charge". St. v. Hansen, 194 M 197, 633 P2d 1202, 38 St. Rep. 1541 (1981), reversed on fifth amendment grounds in Hansen v. Risley, 40 St. Rep. 2100 (D.C. Mont. 1983) (apparently not reported in Federal Supplement).

Collateral References

Criminal Law *key* 273.

24 C.J.S. Criminal Law §1915(2).

29A Am. Jur. 2d Evidence §§715, 783, 784.

Right of prosecutor to withdraw from plea bargain prior to entry of plea. 16 ALR 4th 1089.

Propriety and prejudicial effect of showing, in criminal case, withdrawn guilty plea. 86 ALR 2d 326.

What constitutes "rejection" of plea agreement under Rule 11(e)(4) of the Federal Rules of Criminal Procedure, allowing withdrawal of plea if court rejects agreement. 60 ALR Fed. 621.

Withdrawal of plea of guilty or nolo contendere under Rule 32(d) of Federal Rules of Criminal Procedure. 9 ALR Fed. 309; 6 ALR Fed. 665.

Validity of guilty pleas—U.S. Supreme Court cases. 25 L. Ed. 2d 1025.

4 Wigmore §1066.

Rule 411. Liability insurance.

Commission Comments

This rule is identical to Federal and Uniform Rules (1974) Rule 411. The primary reasons for exclusion of evidence of insurance are its irrelevance, prejudicial effect, and potential misuse by the jury.

Existing Montana law is generally consistent with this rule. Evidence of a party's liability insurance is inadmissible. Wilson v. Blair, 65 Mont. 155, 172, 211 P 289 (1922) and D'Hoodge v. McCann, 151 Mont. 353, 359, 433 P2d 477 (1968). Evidence that a party does not have insurance is also apparently inadmissible. Doheny v. Cloverdale, 104 Mont. 534, 555, 68 P2d 142 (1937).

Although not strictly a rule of evidence, Montana also follows the rule that: "Ordinarily injection of the fact that the defendant is protected by liability insurance into such a case, directly or indirectly, by evidence, arguments, or remarks constitutes reversible error". D'Hoodge v. McCann, *supra*. It is apparent that there are exceptions to the rule. First, while it is reversible error for one party to mention the other's liability insurance during voir dire (Wilson v. Thurston Co., 82 Mont. 492, 495, 267 P 801 (1928)), if the insured party mentions that it has insurance during voir dire, it is harmless error and that party cannot complain. Francis v. Heidel, 104 Mont. 480, 488, 68 P2d 583 (1937). Second, when an admission of liability contains reference to insurance, the entire admission is still allowed in evidence. Tanner v. Smith, 97 Mont. 229, 238, 33 P2d 547 (1934). Third, when the existence of insurance is injected in the case by a witness for the insured party through a "voluntary, unresponsive, and incidental answer", there is no reversible error. Meinecke v. Intermountain Transportation Co., 101 Mont. 315, 324, 55 P2d 680 (1936). Finally, the reversible error rule has been viewed by the Montana Supreme Court as a problem where "each case ... must generally speaking, stand on its own particular facts and incidents and be determined by the manner and circumstances in which the question of insurance was brought into the case". Francis v. Heidel, *supra*.

This case-by-case examination of whether circumstances are such that the injection of insurance constituted reversible error or grounds for mistrial has been followed in several cases. The cases indicate that some of the circumstances to be considered are the rule that it is for the trial court to determine sufficiency of grounds for mistrial and this determination will not be disturbed except upon a showing of an abuse of discretion; whether the substantial rights of the insured party are affected; and whether the judgment is excessive, when considering reversible error on appeal. Doheny v. Cloverdale *supra*; Adams v. Misener, 113 Mont. 559, 578, 131 P2d 472 (1942); Morehouse v. Ylvisaker, 152 Mont. 57, 63, 446 P2d 432 (1968); D'Hoodge v. McCann, *supra* at 360; and Klaus v. Hillberry, 157 Mont. 227, 283, 485 P2d 54 (1971).

The second sentence of this rule providing that insurance may be admissible for purposes other than to prove liability has not been dealt with in Montana. If admissibility is controlled by factors just mentioned above, the Commission believes that there is a legitimate use of evidence of insurance for purposes like those listed in the rule. Therefore, this second sentence would be new Montana law, but there is no intent to change the present Montana law on insurance in this rule.

COMMISSION COMMENT TO JUNE 1990 AMENDMENT

The revision establishes gender neutral format only. No substantive change.

Compiler's Comments

1990 Amendment: Substituted gender neutral language for gender specific language. Amendment effective June 7, 1990.

Case Notes

When Mention of Liability Insurance at Trial Constitutes Reversible Error — District Court Discretion to Determine Whether Reversal Warranted: One of the primary reasons for the general rule that evidence of liability insurance is not admissible under this rule is the prejudicial effect of such evidence. Thus, the fact of insurance injected into trial proceedings generally constitutes prejudicial reversible error when: (1) one party mentions another party's liability insurance during voir dire; (2) counsel repeatedly attempts to inject the insurance feature into the case with such force that the jury could scarcely miss the point; (3) evidence that a plaintiff does not have liability insurance is introduced; (4) evidence admissible under the exception to this rule for the purpose of proving bias or prejudice of a witness was introduced without foundational testimony to establish the purpose for which it was admitted; and (5) a District Court excludes admissible evidence under this rule when offered for the purpose of showing compliance with an underinsured motorist policy condition of settlement with a tortfeasor before looking to the underinsured motorist insurer for recovery. Nevertheless, the determination of whether the

mention of insurance constitutes reversible error depends on the facts and circumstances of each case, and the District Court has the responsibility of determining on a case-by-case basis whether any particular injection of insurance into a trial warrants reversal. In the present case, defense counsel erred by insinuating to the jury that plaintiffs were litigious, and plaintiffs' counsel erred by not objecting to the remarks. The District Court weighed the competing concerns, considered the errors made by both sides, and fashioned a remedy by allowing plaintiffs to respond to defense counsel's remarks without unnecessarily injecting insurance into the trial. Under these particular circumstances, the District Court did not abuse its discretion, and the admission of insurance evidence in this manner was not prejudicial. Jenks v. Bertelsen, 2004 MT 50, 320 M 139, 86 P3d 24 (2004).

Dismissal of Insurer Improper in Light of Dispute Over Amount of Damages Owing in Excess of Liability Limits: Following a vehicle accident, a couple sought recovery for injuries and loss of consortium and also alleged that the damages exceeded the limits of defendants' coverage, entitling them to recover from their own policy. The District Court bifurcated the claims and then sua sponte dismissed the insurer from the action without prejudice. The couple sought to reverse the dismissal order, and the Supreme Court obliged. The District Court held that because a jury had not determined the couple's damages and because the insurer had agreed to pay the amount of the verdict up to the policy limits, there was no dispute between the couple and the insurer. However, the Supreme Court noted that the couple and the insurer disagreed on the amount of damages in excess of the amount that was payable under the liability limits of the policy. This was a dispute that the couple was entitled to litigate, so dismissal of the insurer was improper, and the case was remanded for further proceedings. State ex rel. Gadbaw v. District Court, 2003 MT 127, 316 M 25, 75 P3d 1238 (2003), following Dill v. District Court, 1999 MT 85, 294 M 134, 979 P2d 188 (1999). See also Dias v. Healthy Mothers, Healthy Babies, Inc., 2002 MT 323, 313 M 172, 60 P3d 986 (2002).

Reference to Insurance During Voir Dire Not Necessarily Prejudicial: The restriction imposed by this rule prohibits evidence of insurance to prove liability, but specifically provides that such evidence may be admissible for other purposes. Whether or not a reference to insurance during voir dire violates this rule is a subjective determination that is left to the discretion of the District Court, and a new trial is not necessarily required simply because the word insurance is spoken during trial. The District Court is responsible for determining whether a reference to insurance is sufficiently prejudicial to warrant a new trial based on the circumstances and manner in which insurance is mentioned. In this case, use of the word "insurance" during voir dire was found to be a minor issue, and absent a showing of prejudice, a motion for a new trial based on use of the word was properly denied. Dias v. Healthy Mothers, Healthy Babies, Inc., 2002 MT 323, 313 M 172, 60 P3d 986 (2002), following Francis v. Heidel, 104 M 580, 68 P2d 583 (1937). See also Sioux v. Powell, 199 M 148, 647 P2d 861 (1982).

Admissibility of Evidence of Underinsured Motorist Policy and Liability Policy Issued by Same Insurer: Dill suffered damages after being hit as a pedestrian by a vehicle operated by Jardine. State Farm Mutual Automobile Insurance Company (State Farm) provided both liability insurance for Jardine and underinsured motorist coverage for Dill. State Farm maintained that the introduction of any evidence of insurance into the action would be reversible error. By its terms, this rule applies only to liability insurance and therefore does not preclude the admissibility of the underinsured motorist policy. Further, this rule prohibits the introduction of insurance only when it is offered to show negligence or liability. In this case, fault was not at issue. The issues were separate, and the rule was not violated by introduction of the underinsured motorist policy. As to the admissibility of the liability policy, it was offered to establish that Dill complied with the contract terms and was thus admissible to establish that compliance, but not to establish fault. Dill v. District Court, 1999 MT 85, 294 M 134, 979 P2d 188, 56 St. Rep. 350 (1999), followed in State ex rel. Gadbaw v. District Court, 2003 MT 127, 316 M 25, 75 P3d 1238 (2003).

Motor Vehicle Accident Trial — Inadvertent Mention by Plaintiff of Defendant's Insurance — No Error When No Immediate Objection and Jury Did Not Reach Damages Issue: Plaintiff sued defendant, whose vehicle struck plaintiff's from the rear while plaintiff was stopped at a traffic light. During trial, the defense counsel asked plaintiff about her conversation with defendant immediately after the accident, and her answer included a statement that defendant told her that he was insured. A jury verdict determined that both parties were negligent and that defendant's negligence was not the cause of plaintiff's injuries. Plaintiff moved for a new trial on the ground that she was prejudiced by the defense counsel inducing her to mention defendant's insurance. Denial of the motion was not an abuse of discretion because: (1) when the defense moved for a mistrial after the insurance was mentioned, plaintiff's counsel stated that the

mention of insurance was prompted by the defense counsel's questions and was innocuous and inadvertent, thus agreeing with the trial judge, who denied the new trial motion; (2) plaintiff did not object or request corrective action after the insurance was mentioned and, in fact, opposed the defense objection and thus waived any objection; and (3) even if refusal of plaintiff's later motion to strike the insurance statement and issue a cautionary instruction was error, the error was harmless because if the mention somehow influenced the jury's assessment of the case, it would have been on the issue of damages, an issue that the jury never reached because the jury found both parties negligent. Plaintiff argued that defendant built his case around the theory that plaintiff was a golddigger and that the mention of insurance prejudiced plaintiff by fitting into that theory. This argument was at best speculative because the jury never reached the issue of damages. Newbauer v. Hinebauch, 1998 MT 115, 288 M 482, 958 P2d 705, 55 St. Rep. 454 (1998).

New Trial Denied — Untimely Objection: At trial, Napier referred to his liability insurance during his own testimony and Cosner did not object. Cosner also did not object to closing statements that referred to liability insurance. Cosner then requested a new trial based on improper references to insurance. The District Court denied the motion, and the Supreme Court affirmed. Parties must make their objections known to the trial court at the time the objectionable conduct or evidence is introduced in order to preserve the issue for purposes of appeal. Cosner v. Napier, 249 M 253, 813 P2d 989, 48 St. Rep. 652 (1991).

No Prejudicial Mention of Insurance Coverage: The trial court is charged with determining if any particular mention of liability insurance is sufficiently prejudicial to warrant a new trial. This determination depends upon the circumstances and manner in which the subject of insurance is brought into the case. In this case, the court did not abuse its discretion when it denied plaintiffs' posttrial motion for a new trial because of the alleged interjection of insurance. In the first claim relating to an improper mention, a question was posed to demonstrate the witness's general lack of judgment and thereby undermine his credibility as a witness. It therefore falls within the exception to this rule. The other alleged improper references did not directly indicate to the jury that the plaintiff had insurance and therefore are without merit. Massman v. Helena, 237 M 234, 773 P2d 1206, 46 St. Rep. 764 (1989).

Admission of Tape Recorded Statement Without Foundational Testimony — Neither Cumulative Nor Harmless Error: A tape recorded statement made by decedent to an insurance claims representative, edited to remove evidence of insurance, was held clearly prejudicial and not merely harmless cumulative evidence because it was introduced to the jury as evidence without explanation about the circumstances under which it was taken and without information that the jury needed to put the statement into proper perspective and because the jury was not exposed to any foundational information reflecting biases or prejudices on the part of the adjuster in asking the questions or decedent in answering them. Heisler v. Boule, 226 M 332, 735 P2d 516, 44 St. Rep. 698 (1987).

Brief Questioning of Prospective Juror Regarding Insurance Employment — Not Error: Two brief questions to one prospective juror about his past work of selling insurance and a question as to whether this would bias his decision did not prejudice the defendant because there was no suggestion that the defendant had liability insurance and the questioning was done in good faith to allow counsel to look for bias or prejudice on the part of a prospective juror as set forth in the general rule of Haynes v. County of Missoula, 163 M 270, 517 P2d 370 (1973). Garza v. Peppard, 222 M 244, 722 P2d 610, 43 St. Rep. 1233 (1986).

Introduction of Insurance for Issue Other Than Showing Negligence or Liability — Joint Prosecution With Tort for Failure of Duty to Settle: This rule is not violated when an action against defendant is jointly prosecuted with an action against defendant's insurance company for failure of duty to settle under 33-18-201 because the issues of the actions are separate and because in prosecuting failure of duty to settle, insurance is introduced for purposes other than to show negligence or liability. Klaudt v. Flink, 202 M 247, 658 P2d 1065, 40 St. Rep. 64 (1983).

Evidence of Absence of Liability Insurance — Reversible Error: The truck the plaintiff used for hauling coal was damaged in a head-on collision with the defendant. The trial court gave the plaintiff permission to introduce evidence of his lack of collision insurance to show why he had not mitigated damages for his loss of earnings. However, at trial it was disclosed that the plaintiff had neither collision nor liability insurance. Because evidence of the absence of liability insurance can be as prejudicial as evidence of its existence, the case was remanded for a new trial. Sioux v. Powell, 199 M 148, 647 P2d 861, 39 St. Rep. 1224 (1982).

Law Review Articles

Trials: Questioning Jurors on Voir Dire Concerning Relationship to Insurance Companies, Graham, 29 Mont. L. Rev. 96 (1967).

Collateral References

Trial *key* 108 ½, 127.

88 C.J.S. Trial §§136 through 140, 317.

29 Am. Jur. 2d Evidence §§483 through 495.

Admissibility after enactment of Rule 411, Federal Rules of Evidence of liability insurance in negligence actions. 40 ALR Fed. 541.

2 Wigmore §282a.

Article V
Privileges

Article Commission Comments

Introductory Note. The Commission has taken a different approach with Article V, Privileges, than used with other articles contained in the Montana Rules of Evidence. In other articles the Commission has attempted to draft Montana rules that are identical to the Federal Rules (and the Uniform Rules of Evidence (1974) which are taken from them) as far as possible so that procedure in state and federal courts will be consistent. This is not possible in Article V because Congress, after reviewing the proposed Federal Rules on privileges, rejected the proposal and substituted a rule that applies the common law of privileges in federal civil and criminal cases and the state law of privileges in civil actions in which state law supplies the rule of decision. The Uniform Rules (1974), Article V, adopted the federal draft which Congress rejected; it has the effect of modifying and deleting privileges currently recognized in Montana and of adding other privileges currently not recognized in Montana. Whether this draft will be widely adopted by states and become uniform remains to be seen, but considering the widely different types of privileges recognized by the states, the outcome is not certain and will not be for many years.

In view of these developments, the Commission decided not to attempt to draft new rules of privilege but to continue the present Constitutional and statutory system with the recommendation that the legislature review all the privilege laws to determine whether they meet present-day needs. It took this action for the following reasons:

First, there will probably not be a great deal of uniformity among the Federal courts and various states with respect to privileges. As previously pointed out, the Federal Rules do not recognize specific privileges but require that Federal courts either apply the common law or state law, depending upon the case. The Uniform Rules (1974) adopted specific rules of privilege but they have not been widely adopted and contain substantial changes in recognition of particular privileges. In view of the widely different types of privileges currently recognized by the states, it does not appear that there will be much uniformity in this area, and so one of the goals of the Commission in drafting rules of evidence does not apply to privileges. Therefore, the Commission felt free to be more concerned with Montana law than uniformity when dealing with privileges.

Second, rules of privileges are not like other rules of evidence. Privileges have the effect of excluding relevant evidence because of the public policy of protecting confidential relationship, such as husband-wife, lawyer-client, and clergyman-penitent, Section 93-701-4, R.C.M. 1947 [Title 26, ch. 1, part 8]. To uphold the protection of these policies, rules of privilege should apply not only in court proceedings but also in any proceeding where testimony can be compelled by law. The Montana Rules of Evidence only apply in court proceedings (see proposed Rule 101(a)) and would not necessarily apply in administrative hearings or legislative investigations. Further, drafting rules of evidence governing privileges which would only apply in court proceedings would create the confusing situation of having two sets of rules governing privileges, one for proceedings out of court and one for use in court. The article on privileges meets these problems by not including those particular privileges created by statute as separate rules, but adopting them by reference to constitutions and statutes.

Finally, the effect of a privilege is to exclude relevant evidence which acts as a hinderance to ascertaining the truth, accurately adjudicating cases, and the constitutional right to a fair trial. In view of this, the Commission feels that it is inappropriate to change or expand privileges currently existing under Montana law; this type of decision, balancing the right to fair trial against the protection of certain relationships, is one properly left to elected representatives of the people [rather] than a Commission drafting rules of evidence. Therefore, the Commission did not expand, change, or delete any particular privileges presently existing under Montana law.

The article on privileges drafted by the Commission has five rules. The first follows Uniform Rule (1974) 501, setting out the elements of a privilege, but most important, incorporating by reference all privileges found in the constitution, statutes and rules of practice and procedure. This has the effect of cutting off any further recognition of privileges by case law, which requires the second rule. It is based on Uniform Rule (1974) 509 and allows the government the privilege

not to disclose the identity of an informer, which is currently recognized in Montana only through case law. The final three rules of this article generally apply to all privileges and are based on Uniform Rules (1974) 510 to 512. They relate to voluntary waiver, involuntary or erroneous disclosure, and comment and inference from a claim of privilege.

Part Law Review Articles

Balancing Fundamental Civil Liberties and the Need for Increased Homeland Security: The Attorney-Client Privilege After September 11th, Ruzenski, 19 St. John's J. Legal Commentary 467 (2005).

How Much Can I Refresh My Recollection? Preparing the Trial Witness While Preserving Privilege, Iwan & Samuelson, 55 Fed'n Def. & Corp. Couns. Q. 391 (2005).

Recent Developments Relating to the Attorney-Client Privilege, Hancock, 21 Corp. Couns. Q. 64 (2005).

The Scope of In-Firm Privilege, Chambliss, 80 Notre Dame L. Rev. 1721 (2005).

The Search and Seizure of Privileged Attorney-Client Communications, McArthur, 72 U. Chi. L. Rev. 729 (2005).

The Constitutional Fate of Mandatory Reporting Statutes and the Clergy-Communicant Privilege in a Post-Smith World, Pudelski, 98 Nw. U.L. Rev. 703 (2004).

Article Collateral References

Waiver of evidentiary privilege by inadvertent disclosure—state law. 51 ALR 5th 603.

Implied obligation not to use trade secrets or similar confidential information disclosed during unsuccessful negotiations for sale, license, or the like. 9 ALR 3d 665.

Right of one against whom testimony is offered to invoke privilege of communication between others. 2 ALR 2d 645.

8 Wigmore §§2192, 2197, 2285.

Rule 501. Privileges recognized only as provided.

Commission Comments

This rule is identical to Uniform Rule (1974) 501 except the opening clause is changed. The Uniform Rule read: "except as otherwise provided by constitution or statute or by these or other rules promulgated by the Supreme Court of this state...". The Commission chose to use language from the exception clause of Rule 402 rather than that of the Uniform Rule because of its clarity and simplicity and because there appears to be no difference in general meaning between it and the phrase used.

The Commission intends the adoption of the first clause of this rule to incorporate by reference any privilege found in the Constitutions of the United States and the state of Montana, Montana statute, or rules of practice and procedure adopted by the Supreme Court. Certainly included among those privileges are the following listed by way of example: the constitutional privilege against self-incrimination and statutory privileges recognized under R.C.M. 1947 Sections 66-3212(1) [26-1-807], 93-601-2 [26-1-902, 26-1-903], and 93-701-4 [Title 26, ch. 1, part 8].

The rule provides that only the privileges incorporated by reference shall be recognized and so has the effect of cutting off any further case law recognition of privileges. The final four clauses in this rule represent a delineation of the elements of a testimonial privilege and are intended to clarify privileges generally. This rule represents a new approach to the use of privileges in Montana courts.

Case Notes

Expert Testimony Beyond Scope Originally Allowed — Waiver of Objection When Witness Called by Defendant: Consistent with the holding in Buchanan v. Ky., 483 US 402, 97 L Ed 2d 336, 107 S Ct 2906 (1987), the District Court stated that it would allow testimony of a counselor for the limited purpose of the state's rebuttal if defendant placed his state of mind in issue through direct testimony or by calling his own psychologist as a witness. However, defendant called the counselor as a witness during presentation of his case, asking about communications between defendant and the counselor. To the extent that the counselor's testimony exceeded the purposes for which it was originally allowed, it was the fault of the defendant, who thereby waived any objection he might have otherwise asserted based on privilege or the constitutional right against self-incrimination. St. v. Goodwin, 249 M 1, 813 P2d 953, 48 St. Rep. 539 (1991), followed with regard to constitutionality of ordering a compelled evaluation for rebuttal purposes in St. v. Hess, 252 M 205, 828 P2d 382, 49 St. Rep. 217 (1992). See also Smith v. McCormick, 914 F2d 1153 (9th Cir. 1990).

Alcohol Abuse Program — Confidential Information — Use in Drunk Driving Prosecution or Arrest: Concerned that Magnuson was intoxicated, Kee attempted to keep him from driving away from the Kee ranch and, when the attempt failed, called the local Alcoholics Anonymous and talked of her fears to House, not knowing that Magnuson was in counseling with House under a federally funded program. Federal law provides that patients' records are confidential and that information received while performing any alcohol abuse prevention function cannot be used to initiate or substantiate any criminal prosecution. House called an undersheriff and told him Magnuson was intoxicated, was driving a Ford Bronco, that Tracy's Bar was his usual hangout, and that the undersheriff should watch out for Magnuson. While driving around, the undersheriff saw Magnuson driving erratically. When stopped, Magnuson smelled of alcohol, appeared drunk, and failed onsite sobriety tests. The information House gave the undersheriff was not tainted with the federal prohibition, and dismissal of a DUI charge on the grounds of taint would be reversed. House was not performing an alcohol abuse prevention function when he received the information from Kee, and thus the information he gave the undersheriff was not federally prohibited confidential records information. In addition, the information the undersheriff received from House was not used to initiate or substantiate any charge; the undersheriff's own observations were. St. v. Magnuson, 210 M 401, 682 P2d 1365, 41 St. Rep. 1121 (1984).

Management Consultant/Client Relationship: The relationship between a management consultant and his clients is not considered privileged under Montana law. Therefore, husband with such a position, who sought modification of child support payments granted wife pursuant to divorce, could not avoid wife's interrogatories seeking information as to his clients and income received from them on the ground it was privileged confidential information. Hughes v. Hughes, 205 M 69, 666 P2d 739, 40 St. Rep. 1102 (1983).

Collateral References

Witnesses *key* 206, 217.
98 C.J.S. Witnesses §297, et seq.
81 Am. Jur. 2d Witnesses §§273, 274, 278.
8 Wigmore §§2285 through 2396.

Rule 502. Identity of informer.

Commission Comments

This is the only rule contained in Article V which relates to a particular privilege. The privilege for the identity of an informer could not be incorporated by reference in Rule 501 because it has only been recognized by case law in Montana. Since Rule 501 also has the effect of cutting off any further recognition of privileges by case law, it is necessary to recognize this privilege in these rules if it is to survive. The Commission believes that this privilege is a necessary part of effective law enforcement and therefore has adopted it.

(a) Rule of privilege. This subdivision is identical to Uniform Rule (1974) 509(a) except that the phrase "to a law enforcement officer or member of a legislative committee or its staff conducting an investigation" has been deleted from the end of the subdivision. The Commission feels that listing specific governmental officers is unnecessary and unwise, since it is difficult to list all governmental officials to whom the privilege would apply and so avoids problems arising if any particular officer were omitted. The subdivision is phrased in general terms so the rule not only applies to criminal actions but violations of civil law and in civil cases as well.

This privilege is unique in that it belongs to the government, not to the communicating party, the informer; and that it covers only the identity of the informer, not the contents of his communications which are necessarily revealed as the basis for prosecution. Roviaro v. United States, 353 U.S. 53, 59 (1959). The privilege is limited by its underlying purpose: "...the furtherance and protection of the public interest in effective law enforcement". *Id.* The protection given the informer by the privilege is therefore incidental, for it is only meant to encourage citizens to communicate information about the commission of crimes *(Id.)* and is not for the sole benefit of the well-being of the informer.

The privilege has received recognition in Montana in State ex rel. Offerdahl v. District Court, 156 Mont. 432, 435, 481 P2d 338 (1971) and State v. Hull, 158 Mont. 6, 17, 47 P2d 314 (1971).

(b) Who may claim the privilege. This subdivision is identical to Uniform Rule (1974) 509(b). The subdivision simply establishes the principle that the privilege granted in subdivision (a) to public entities may be claimed by "an appropriate representative" of those public entities to whom information was given. The Commission recognizes that in the majority of cases the privilege will be claimed by the prosecuting attorney on behalf of the public entity, but this does not foreclose any other "authorized representative" from claiming the privilege.

(c) Exceptions and limitations. This subdivision is similar to Uniform Rule (1974) 509(c) except that in paragraph (1) "public entity" is substituted for "government" for the sake of consistency and in paragraph (2) substantial changes have been made which delete provisions for procedures for an in camera hearing, a sealed record of, and the presence of counsel at, the hearing. Also deleted were the test of determining when testimony of the informer would be required ("that there is a reasonable probability that the informer can give testimony"), and several alternatives the court could choose from if the testimony was found to be required by the court but the public entity chose not to reveal the identity of the informer. The Commission made these changes to provide a clearer, more practical, more flexible rule and allow the trial court to balance the interests of the public entity in keeping the identity secret against the interests of a party's right to prepare his case.

Paragraph (1) recognizes three means of waiving this privilege; first, if the public entity discloses the identity to "those who would have cause to resent the communication", a phrase from Roviaro, *supra* at 60; second, if the informer, by his own actions, reveals that he is the informer; and third, if the public entity has the informer testify in the case. It is obvious that if any of these three circumstances arise, then attempts to invoke the privilege or demand the identity of the informer are meaningless. In State v. Hull, *supra*, the Montana Supreme Court held that a lower court could not be found in error for refusing demands by the defendant to reveal the identity of an informer where it was obvious that the defendant knew the identity of that informer. Therefore, this paragraph is generally consistent with Montana law.

Paragraph (2) governs situations where the informer can supply testimony which is needed in a case and the public entity does not want the informer's identity revealed. The test was stated in Roviaro, *supra* at 62:

We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend upon the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.

Paragraph (2) allows the public entity to make a showing of facts relevant to the question of whether the informer should testify; the Commission believes that it is within the sound discretion of the court to conduct such a showing in a manner consistent with the objective of the privilege of keeping this identity secret. However, if the court finds that the informer should testify and the public entity elects not to allow his identity to be disclosed, the court can dismiss the charges to which the testimony would relate in criminal cases or take appropriate action in civil cases. The Commission believes that this balances the interest of the public entity against a party's right to prepare his defense and confront and cross-examine his accuser.

This situation has arisen in Montana in State ex rel. Offerdahl v. District Court, *supra*, which quoted the balancing test from Roviaro, and required that the identity of the informer be revealed in a criminal case. Therefore, this paragraph is consistent with Montana law; however, to the extent that this rule expands Roviaro to civil cases, it is new Montana law.

COMMISSION COMMENT TO JUNE 1990 AMENDMENT

The revision establishes gender neutral format only. No substantive change.

Compiler's Comments

1990 Amendment: Substituted gender neutral language for gender specific language. Amendment effective June 7, 1990.

Case Notes

Discovery of Identity of Confidential Informant Properly Denied: DuBray contended that the identity of a confidential informant should have been disclosed in discovery. Applying the balancing test in Roviaro v. U.S., 353 US 53 (1957), the Supreme Court found nothing to persuade that disclosure of the informant's identity was warranted. The informant did not testify at trial, and DuBray offered nothing concrete or substantive to establish that disclosure was necessary to properly prepare for trial, that the informant might possess exculpatory information, or that the informant may have been involved in the crime. Mere speculation about possible relevancy of the informant's testimony was insufficient to warrant disclosure of the informant's identity. St. v. DuBray, 2003 MT 255, 317 M 377, 77 P3d 247 (2003). See also St. v. McLeod, 227 M 482, 740 P2d 672 (1987).

Motion to Disclose Identity Denied:

The state may claim the privilege to refuse to disclose the identity of a confidential informant, subject to the balancing test in Roviaro v. U.S., 353 US 53 (1957). Under Roviaro, a defendant must show the need for disclosure and the need must be one that overrides the government's interest in preserving confidentiality. Here, Ayers did not meet the burden. The confidential information was based on third-hand knowledge, and the informant: (1) was neither present at the crime scene nor witness to any criminal activity, negating any hearsay exception; (2) had no continuous, active, or primary role in the alleged crime, negating the need for disclosure because of a possible entrapment defense; and (3) was not a material witness. Ayers was given the investigative report that summarized all relevant information provided by the informant. The report included the identity of all of the informant's sources, whom Ayers had the opportunity to call as witnesses. Denying disclosure of the informant's identity had little if any impact on Ayers' ability to prepare a defense, and denial of the disclosure motion was not error. St. v. Ayers, 2003 MT 114, 315 M 395, 68 P3d 768 (2003).

Defendant alleged that disclosure of the identity of the police informants was necessary to his defense because the informants had provided false information to the authorities regarding methamphetamine production and marijuana growing operations that were never found and because further examination would show the informants to be patently unreliable. However, the court properly refused to disclose the identities because: (1) although methamphetamine production articles described in the warrant application were not found, other articles consistent with methamphetamine production were found; (2) the warrant application stated the that informant believed marijuana was being grown, not that the informant had seen the marijuana; and (3) it was in the public interest not to disclose the identity of another informant who was still being used in a separate police investigation. Mere speculation or conjecture about the relevance of the informants' testimony was inadequate. Because defendant failed to demonstrate the falsity of the information, refusal to disclose their identities was proper. St. v. Crowder, 248 M 169, 810 P2d 299, 48 St. Rep. 376 (1991).

Defendant's motion to disclose the identity of the state's confidential informants was properly denied because, under the applicable test that balances the public's interest against the defendant's right to prepare her defense and to confront and examine her accusers, she did not demonstrate that the need for disclosure outweighs the government's interest. Defendant's contention that the state must first disclose the relevance of the informants' testimony misconstrues the balancing test under which the burden is on the defendant to show the need for disclosure. The record is bare regarding defendant's basis for making the motion for disclosure. St. v. Babella, 237 M 311, 772 P2d 875, 46 St. Rep. 827 (1989), followed in St. v. Campbell, 254 M 425, 838 P2d 427, 49 St. Rep. 838 (1992).

Defendant's motion to disclose the identity of the state's confidential informant was properly denied when the informant's information was not used as a basis for probable cause to arrest and the informant took no active part in the alleged crime but simply supplied information. There was no evidence that disclosure outweighed the public interest in protecting the flow of information or that the informant's testimony would be relevant to any issue in the case. Further, defendant failed to substantiate the claim that his constitutional rights were infringed by nondisclosure or that the informant would be exposed to no risk upon disclosure. St. v. Coates, 233 M 303, 759 P2d 999, 45 St. Rep. 1508 (1988).

Failure to Disclose Drug Crime Informant Upheld: The possibility that a confidential police informant might have been an exculpatory witness was an insufficient basis for requiring disclosure of the informant's identity to the person charged with possession of marijuana with intent to sell. Moreover, the state had a strong interest in protecting the flow of information regarding the drug trade in the county and showed that the flow could be impaired without the future services of the informant and that the informant might be placed in danger by disclosure. Disclosure was properly denied. St. v. Sarbaum, 270 M 176, 890 P2d 1284, 52 St. Rep. 133 (1995).

Test for Disclosure of Identity of Informer: There is no fixed rule as to when an informant's identity must be disclosed. It depends on a balancing of the public interest in protecting the flow of information against the charged person's right to prepare a defense and on the circumstances of the case, taking into account the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors. St. v. Sarbaum, 270 M 176, 890 P2d 1284, 52 St. Rep. 133 (1995).

Discretion of Court Whether Disclosure of Informant Necessary for Witness Believability: In weighing a defendant's needs against the public's interest in the flow of information from informants, trial courts should take into consideration the crime charged, possible defenses, the possible significance of the informant's testimony, and other relevant factors in balancing the

conflicting interests. It should rest entirely with the judge who hears the motion to suppress to decide whether he needs disclosure of identities and locations of informants in order to decide whether an officer is a believable witness. St. v. Seaman, 236 M 466, 771 P2d 950, 46 St. Rep. 512 (1989), distinguishing St. v. Chapman, 209 M 57, 679 P2d 1210 (1984). See also Roviaro v. U.S., 353 US 53, 1 L Ed 2d 639, 77 S Ct 623 (1957).

Nondisclosure of Informant Proper: Defendant appeals from his conviction for criminal sale (now criminal distribution) of dangerous drugs, asserting that nondisclosure of the identity of a confidential informant was prejudicial. The court held that defendant did not meet the burden of showing that the informant would have been a material witness whose testimony might result in exoneration or that failure to disclose the identity of the informant would infringe defendant's constitutional rights. St. v. McLeod, 227 M 482, 740 P2d 672, 44 St. Rep. 1251 (1987).

Disclosure of Informant's Identity and Whereabouts — Balancing Test Required: Defendant was charged with sale of dangerous drugs (now criminal distribution of dangerous drugs). Defendant contended that he had been entrapped because a paid informant had used persistent and harassing techniques to get him to obtain drugs for him over a period of a month and a half. The informant left town after defendant's arrest. Defendant did not know the whereabouts or true identity of the informant. The District Court refused defendant's request to require the State to disclose the identity and whereabouts of the informant. On appeal, the Supreme Court relied on the balancing test set forth in Offerdahl v. District Court, 156 M 432, 481 P2d 338 (1971), to determine whether the defendant's interest in preparing his defense outweighed the government's interest in protecting the flow of information from the informant. The court found that the informant's identity should have been disclosed because his testimony was relevant to the issue of entrapment and because, based on the facts in this case, the balance weighed heavily in defendant's favor. St. v. Chapman, 209 M 57, 679 P2d 1210, 41 St. Rep. 550 (1984), distinguished in St. v. Coates, 233 M 303, 759 P2d 999, 45 St. Rep. 1508 (1988).

Disclosure of Informant's Identity — Validity of Affidavit in Support of Search Warrant: A defendant in a drug offense case moved to quash a search warrant and to produce the name of the informant whose statements were used in the affidavit in support of the search warrant. Defendant alleged that either the informant had made false statements or the informant had made an illegal entry into defendant's home. In a proceeding for Writ of Supervisory Control, the Supreme Court set forth the procedure to be used to challenge the validity of an affidavit on the basis of deliberate falsehood or of reckless disregard for the truth. First, the defendant must make a substantial preliminary showing that his rights have been violated. Second, if defendant makes the requisite preliminary showing, then the affidavit must be examined to determine if sufficient information remains after excising the challenged material to support a finding of probable cause. Only if the remaining content is insufficient is defendant entitled to an evidentiary hearing. Finally, at the hearing defendant must establish by a preponderance of the evidence that the affidavit was based on an illegal entry, false information, or insufficient probable cause. If defendant is successful, that evidence will be suppressed. Defendant is not entitled to disclosure of the informant's identity until he has made a substantial preliminary showing that the entry was illegal or the information was false. St. v. Sykes, 194 M 14, 663 P2d 691, 40 St. Rep. 690 (1983), overruled on other grounds in St. v. Long, 216 M 65, 700 P2d 153 (1985).

Collateral References

98 C.J.S. Witnesses §365.

33 Am. Jur. POF2d Need for Disclosure of Identity of Informant, pp. 549 through 610.

Contingent fee informant testimony in state prosecutions. 57 ALR 4th 643.

Exclusion of public from state criminal trial in order to preserve confidentiality of undercover witness. 54 ALR 4th 1156, superseded by 100 ALR 5th 171.

Prosecutor's privilege against disclosure of identity of informer. 76 ALR 2d 262.

Federal constitutional right to confront witnesses—Supreme Court cases. 23 L. Ed. 2d 853.

8 Wigmore §2374.

Rule 503. Waiver of privilege by voluntary disclosure.

Commission Comments

This rule and the two following, Rules 503 to 505, generally apply to all privileges, that is, to the privileges incorporated in these rules by reference in Rule 501. The Commission has adopted them to clarify the use of privileges in Montana courts.

(a) General Rule. This subdivision is identical to Uniform Rule (1974) 510. It codifies the common-law rule that where the holder of a privilege ceases to treat a matter as privileged, the privilege terminates. This subdivision is consistent with existing Montana law. Ludwig v.

Montana Bank and Trust Company, 109 Mont. 477, 500, 98 P2d 379 (1939). It should be noted that Montana law requires an objection to testimony that is privileged or the privilege is waived. Wilson v. Wilson, 64 Mont. 533, 544, 210 P 896 (1922); Lewis v. Bowman, 113 Mont. 68, 75, 121 P2d 162 (1942); and State v. Palen, 119 Mont. 600, 603, 178 P2d 62 (1947).

It should be noted that in determining whether the holder of a privilege has in fact waived it, the intention of the holder is not the only factor to be considered. Once conduct reaches a certain point, fairness requires an objective finding of waiver, despite any subjective intentions of the holder; further, once the particular point is reached, consistency requires a finding that such conduct will constitute a waiver, also despite any intention of the waiver. 8 Wigmore, Evidence 636, Section 2327 (McNaughton Rev. 1961). This subdivision deviates from the common law in allowing part of a communication to be disclosed, up to a "substantial part". Another deviation from the common law that should be noted is that the holder of a privilege need not be aware that he is waiving a privilege when he does so; that is, knowledge is not a required element for waiver. These two departures from the common law are intended to provide more flexibility in determining whether there is a waiver in accord with Wigmore's criteria of fairness and consistency. There is no Montana law specifically declaring what is a waiver of a privilege in terms which would indicate whether the two departures from the common law are inconsistent with Montana law; therefore, to this extent, this will be new Montana law.

(b) Joint holders. This subdivision is based on West's Annotated California Evidence Code, Section 912(b), except that references to specific privileges in that section have been deleted. This subdivision was adopted to govern a situation not covered by the Uniform Rule (1974); when two or more persons are holders of a privilege and one of them waives the privilege, the rule provides that the privilege is not waived by the other holders. The result under this subdivision is consistent with the policy underlying the next rule, Rule 504, in that the holder of a privilege is not made to suffer the consequences of a waiver over which he had no control. The joint holder situation has not arisen in any Montana cases and therefore would be new Montana law.

COMMISSION COMMENT TO JUNE 1990 AMENDMENT

The revision establishes gender neutral format only. No substantive change.

Compiler's Comments

1990 Amendment: Substituted gender neutral language for gender specific language. Amendment effective June 7, 1990.

Case Notes

Abrogation of Attorney-Client Privilege by Compelled Discovery — Remand: Palmer brought a bad faith suit against Farmers Insurance Exchange (Farmers) after receiving privileged material from a Farmers' attorney. The District Court, apparently confusing the attorney-client privilege with the work-product doctrine, ordered production of the Farmers' files and all confidential attorney-client communications between Farmers and its attorneys. At no time did Farmers voluntarily relinquish the attorney-client privilege. In abrogating Farmers' attorney-client privilege by ordering production of privileged material and admitting it into evidence, the District Court misconstrued the law and materially affected Farmers' substantial rights, preventing Farmers from having a fair trial. The District Court decision was vacated and remanded for a new trial, allowing Farmers to reassert its attorney-client privilege. Palmer v. Farmers Ins. Exch., 261 M 91, 861 P2d 895, 50 St. Rep. 1210 (1993).

Records of Hospital Medical Staff Committee Held Privileged — No Waiver Found in Administrator's Affidavit: Plaintiff sought to discover documents from a hospital medical staff committee supporting his theory that because of conditions placed upon the staff privileges of a physician previously suspended for performing his hospital duties while intoxicated, the relationship between the hospital and the physician changed from independent contractor to principal and agent. On appeal from a District Court order quashing a deposition subpoena and giving summary judgment to the defendant, the Supreme Court affirmed that the members of the hospital's medical staff committee were immune from subpoena. The Supreme Court held that 50-16-203 applies to all members of the hospital's committee, to the hospital itself, and to patients whose files are reviewed by a committee and that even if the hospital had waived its privilege, it could not waive the privilege personal to the members of the committee. The Supreme Court also held that there was no issue as to the discoverable nature of the hospital administrator's files because there was no evidence in the record of any attempt to subpoena his files. Sistok v. Kalispell Regional Hosp., 251 M 39, 823 P2d 251, 48 St. Rep. 1151 (1991).

No Waiver of Privilege Regarding Report Contained in Claim File: Plaintiffs contended that Montana Power Company (MPC) waived its claim of privilege regarding a report contained within a claim file because MPC produced all portions of the file except the report. However,

release of other materials in the file did not constitute waiver when the only significant portion of the file was the report. Day v. Mont. Power Co., 242 M 195, 789 P2d 1224, 47 St. Rep. 626 (1990).

Collateral References

Witnesses *key* 219(3).

98 C.J.S. Witnesses §§378 through 389.

81 Am. Jur. 2d Witnesses §§334 through 342, 416, et seq.

Waiver of evidentiary privilege by inadvertent disclosure—state law. 51 ALR 5th 603.

What persons or entities may assert or waive corporation's attorney-client privilege—modern cases. 28 ALR 5th 1.

Presence of child at communication between husband and wife as destroying confidentiality of otherwise privileged communication between them. 39 ALR 4th 480.

Assertion of privilege in pretrial discovery proceedings as precluding waiver of privilege at trial. 36 ALR 3d 1367.

Power of trustee in bankruptcy to waive privilege of communications available to bankrupt. 31 ALR 3d 557.

Who may waive privilege of confidential communication to physician by person since deceased. 97 ALR 2d 393.

Party's waiver of privilege as to communications with counsel by taking stand and testifying. 51 ALR 2d 521.

8 Wigmore §§2242, 2327 through 2329, 2374, 2389 and 2390.

Rule 504. Privileged matter disclosed under compulsion or without opportunity to claim the privilege.

Commission Comments

This rule is identical to Uniform Rule (1974) 511. The rule is intended to provide a remedy for the holder of a privilege when the subject matter of the privilege has been wrongfully disclosed. The remedy provided is that the privilege may be subsequently claimed and the disclosed subject matter made inadmissible.

The intent of "(a) compelled erroneously" is to allow a holder to disclose privileged matters when ordered to do so by a judge. The Commission rejects the common-law rule that the holder of a privilege must exhaust all legal remedies and risk incarceration in order not only to uphold his claim of privilege but also prevent the privilege from being waived. Therefore, when the original order compelling the holder to disclose privileged matter is reversed, the rule allows the holder to reassert the privilege.

The intent of (b), a disclosure made without the opportunity to claim the privilege, is to allow the holder to assert the privilege where a person other than the holder has knowledge of privileged matter and discloses it under circumstances which do not allow the holder to assert the privilege. Examples of such persons would be an attorney's secretary, or an eavesdropper who, without the knowledge of the holder of the privilege, heard a privileged communication. The Commission intends the adoption of this rule to overrule the common-law "eavesdropper" rule which allows such a person to disclose privileged communications even though a claim of privilege is asserted.

There are no Montana cases in either of these areas, but to the extent that this rule overrules common law, this would be a change in Montana law.

Case Notes

Abrogation of Attorney-Client Privilege by Compelled Discovery — Remand: Palmer brought a bad faith suit against Farmers Insurance Exchange (Farmers) after receiving privileged material from a Farmers' attorney. The District Court, apparently confusing the attorney-client privilege with the work-product doctrine, ordered production of the Farmers' files and all confidential attorney-client communications between Farmers and its attorneys. At no time did Farmers voluntarily relinquish the attorney-client privilege. In abrogating Farmers' attorney-client privilege by ordering production of privileged material and admitting it into evidence, the District Court misconstrued the law and materially affected Farmers' substantial rights, preventing Farmers from having a fair trial. The District Court decision was vacated and remanded for a new trial, allowing Farmers to reassert its attorney-client privilege. Palmer v. Farmers Ins. Exch., 261 M 91, 861 P2d 895, 50 St. Rep. 1210 (1993).

Collateral References

Witnesses *key* 305(1), (2).

32 C.J.S. Evidence §456.

8 Wigmore §2270.

Rule 505. Comment upon or inference from claim of privilege.

Commission Comments

This rule is identical to Uniform Rule (1974) 512(a) except that "court" is substituted for "judge". The change is to keep the use of "court" consistent throughout the rules. Uniform Rule (1974) 512 also contained a subdivision (b) providing that proceedings shall be conducted to keep the making of claims of privilege from the knowledge of the jury and a subdivision (c) providing the parties a right to an instruction that no inference be drawn from any claim of privilege. The Commission did not adopt these subdivisions because it feels that they are not necessary. Enforcement of Rule 505 and proper conduct of trial will obtain the same result. Also see Rule 103(c).

A claim of privilege, made before a jury, often results in prejudicial feelings towards the holder of the privilege, and when the holder is one of the parties, the claim is prejudicial to his case. If comment can be made upon a claim of privilege or an inference be drawn therefrom, the holder of a privilege will either feel intimidated into waiving his privilege or be penalized for invoking it; either of these results destroy the effectiveness of privileges. This rule is intended to solve this problem, for the Commission intends this rule to maximize the effect of privileges by preventing comment or inference and thereby keeping the jury unaware of claims of privilege.

It is not clear whether Montana law allows comment or inference from a claim of privilege. Certainly a judge cannot comment on the evidence (Suhr v. Sears Roebuck Co., 152 Mont. 344, 350, 450 P2d 87 (1969)), and comment by a judge as to privilege or a claim of privilege would also appear improper. Batchoff v. Craney, 119 Mont. 157, 166, 172 P2d 308 (1946). Comment by counsel as to a claim of privilege appears to have arisen in only two Montana cases, neither of which is conclusive. In State v. Belland, 59 Mont. 540, 549, 197 P 841 (1921), the prosecution made repeated efforts to get a defendant's wife to testify as to illicit relations between her husband and a co-defendant; the court held these attempts "cannot be justified" and reversed the case for this and other prejudicial errors. In State v. Sloane, 22 Mont. 293, 297, 56 P 364 (1899), the defendant's wife was on a list of witnesses and the defendant's successful efforts to have her taken off the list were finally made in front of the jury; the court held there was no prejudicial error.

However, two statutes dealing with evidence generally could be inconsistent with this rule: Section 93-1301-7, R.C.M. 1974 [26-1-602] provides the disputable presumption (5) "that evidence willfully suppressed would be adverse, if produced" and (6) provides "that higher evidence would be adverse from inferior, being produced". Section 93-2001-1(7), R.C.M. 1974 [26-1-303], allows the court to instruct the jury "that if weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust". It would appear that the provisions of Section 93-701-4, R.C.M. 1947 [Title 26, ch. 1, part 8], providing "...it is the policy of the law to encourage confidence and preserve it inviolate..." and then listing the various privileges, and the provisions of this rule should be read as exceptions to the general statutes. This rule would be new Montana law.

Collateral References

Evidence *key* 75, et seq.

31A C.J.S. Evidence §156(5).

Propriety and prejudicial effect of comment or instruction by court with respect to party's refusal to permit introduction of privileged testimony. 34 ALR 3d 775.

Inferences arising from refusal of witness other than accused to answer question on the ground that answer would tend to incriminate him. 24 ALR 2d 895.

8 Wigmore §§2243, 2322, 2386.

Article VI
Witnesses

Part Law Review Articles

Know Your Testimonial Objections: The Window for Objecting During Testimony Is Small. When the Time Comes, Make Sure You Know What Follows "Objection Your Honor!", Lipson, 41 Trial 70 (2005).

"But Judge, I Got It From the Net!"—The Admissibility of Internet Evidence, Posner, 31 Colo. Law. 91 (2002).

Rule 601. Competency in general; disqualification.

Commission Comments

(a) General rule of competency. This subdivision is identical to Uniform Rules of Evidence (1974), Rule 601 which in turn is identical to the first sentence of Federal Rule 601. The second sentence of the Federal Rule is inappropriate, for it concerns the law of competency to be applied in federal courts in civil cases in which state law supplies the rule of decision.

The effect of this rule is to abolish all incompetencies of witnesses except as provided in rules which follow. This is consistent with the approach taken in Section 93-701-2, R.C.M. 1947 [superseded]:

All persons, without exception, otherwise than is specified in the next two sections, who, having organs of sense, can perceive, and perceiving, can make known their perceptions to others, may be witnesses. Therefore, neither parties nor other persons who have an interest in the event of an action or proceeding are excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious beliefs....

The next two sections referred to in this statute are 93-701-3, R.C.M. 1947 [superseded], concerned with incompetencies of witnesses, and 93-701-4, R.C.M. 1947 [Title 26, ch. 1. part 8], concerned with testimonial privileges. Privileges are covered in Article V, and with one exception, the grounds of incompetency listed in Section 93-701-3, R.C.M. 1947 [superseded], are covered in Rule 601(b).

The ground of incompetency found in Section 93-701-3, R.C.M. 1947 [superseded], not covered by these rules, is commonly known as the Dead Man's Statute. Therefore, this rule has the effect of abolishing the Dead Man's Statute in Montana.

Montana Dead Man's Statutes provide that a claimant may not testify "to facts of direct transactions or oral communications" between himself and the deceased if the claim is against a deceased's estate under Section 93-701-3, subdivision 3, R.C.M. 1947 [superseded], or between himself and a deceased officer of a corporation or a deceased agent if the claim is against either the deceased officer's corporation or the deceased agent's principal under Section 93-701-3, subdivision 4, R.C.M. 1947 [superseded]. The statute also provides that it does not apply when evidence of the claim is introduced by the estate or "when it appears to the court that without the testimony of the witness injustice will be done".

The purposes of the statute, as explained by Montana cases, are quite clear: First, the prevention of undue advantage by the living claimant, since he can testify where the deceased or personal representative cannot; and second, the removal of temptation for perjury by the claimant where there can be no denial by the deceased. Leffek v. Luedeman, 95 Mont. 457, 462, 27 P2d 511 (1933); Johnson v. Mommoth Lode, 136 Mont. 420, 422, 348 P2d 267 (1960); Novak v. Novak, 141 Mont. 312, 316, 377 P2d 368 (1963); and Hansen v. Kiernan, 159 Mont. 448, 454, 499 P2d 787 (1972).

However, the cases are not clear in applying the exception which allows the claimant to testify when the court determines the interest of justice requires it. Early cases considering the exception allowed the court to exercise its discretion and admit the testimony of the claimant with little or no corroboration if it appeared that to exclude it would deny a meritorious case. Roy v. King's Estate, 55 Mont. 567, 573, 179 P 821 (1919); Harwood v. Scott, 57 Mont. 83, 88, 186 P 693 (1920); Anderson v. Wirkman, 67 Mont. 176, 179, 215 P 224 (1932); and Averill Machinery Co. v. Taylor, 70 Mont. 70, 80, 223 P 918 (1924). A rule evolved from later cases requiring a foundation to be laid corroborating the claim before the testimony from the claimant could be heard. Wunderlich v. Hult, 86 Mont. 260, 269, and concurring opinion at 274, 283 P 423 (1929); Langston v. Currie, 95 Mont. 57, 70 P2d 160 (1933); Phelps v. Union Central Life Ins. Co., 105 Mont. 195, 203, 71 P2d 997 (1937); Rowe v. Eggum, 107 Mont. 378, 388, 87 P2d 199 (1938); and Sharp v. Sharp, 115 Mont. 35, 38, 139 P2d 235 (1943). The apparent reason for this rule is that the court cannot determine whether an injustice will occur unless it knows that the claim has merit and so cannot admit testimony by the claimant under the exception until this is shown by the foundation. Johnson v. Mommoth Lode, *supra* at 423.

The uncertainty of application of this exception arises because the Montana Supreme Court "has never laid down a well defined line of demarcation between a sufficient and insufficient foundation. The application of the statute must vary with the circumstances presented to the district court". Sharp v. Sharp, *supra* at 38. The test proposed by that case was whether the record discloses testimony from "which it is reasonable to conclude that there is credibility in plaintiff's claim". *Id.* at 40. However, later cases have inconsistent results. In Ahlquist v. Pinski, 120 Mont. 355, 358, 185 P2d 499 (1947) the court held that it was proper to admit the testimony of the claimant even when the foundation was "insufficient standing alone to establish plaintiff's claim but that it was sufficient to justify the court in concluding as it did that without plaintiff's

testimony injustice would be done". In Novak v. Novak, *supra,* the court found the testimony of a claimant's wife to be sufficient foundation to admit his testimony. Yet, in Bauer v. Monroe, 117 Mont. 306, 320, 158 P2d 485 (1945), error was found because the court did not find sufficient foundation from the testimony of the wife of the claimant and several other witnesses as to the existence of an oral contract, even though (as pointed out in the dissent at 326) the deceased's actions were consistent with the allegation of the contract's existence. And, in Cox v. Williamson, 124 Mont. 512, 519, 227 P2d 614 (1951), the court held that testimony by the claimant was erroneously admitted because the foundation consisted of the testimony of one witness, a friend of the claimant; but (as pointed out in the dissent at 527) the competency of the witness should not depend upon the strength of the corroborating evidence.

The Commission believes that the Dead Man's Statute in Montana should be abolished for several reasons. The first is uncertainty. When the inconsistent application of the statutory exception (just discussed) is combined with what the Commission believes is the practice of trial courts in admitting the claimant's testimony using this exception (despite inconsistent case law), the result is an unfair burden of uncertainty to parties involved in cases covered by the Dead Man's Statutes. All that is really left of the Statutes in Montana is an occasional arbitrary application. The Commission feels that this uncertainty cannot be reduced by any alternative to the Dead Man's Statute.

The second reason is the false premise upon which the statute and case law rests. As previously noted, Montana cases state one of the purposes of the Dead Man's Statutes is the removal of the temptation for perjury. Cases that demand a foundation before allowing a claimant to testify are really calling for corroboration because of a fear of possible perjury. Therefore, one premise supporting the Dead Man's Statute is that the interest of claimants winning their case makes it probable that they will commit perjury. This is also the basis of the common law incompetency that disqualified parties for interest which was rejected as a ground of incompetency long ago, for certainly all parties to a case have such an interest; yet the Dead Man's Statute is the only area which blocks a party's testimony. Also, the statute does not disqualify many persons having an interest in the outcome of the litigation, such as the spouse of the claimant or other close relative.

Further, the statutes do not fulfill the purpose of preventing perjury. They only block testimony as to direct transactions or oral communications and not in other areas where perjury or false evidence is fabricated just as easily. The statute does not forbid the dishonest claimant, not concerned with committing perjury, from enlisting the aid of a third person to give false testimony in areas where the claimant is forbidden to do so by the statute.

Finally, the Commission feels that a fear of perjury is not properly handled by making a witness incompetent in certain areas; cross-examination and deliberations by the trier of fact are capable of exposing and dealing with false testimony in every other instance and there is no reason they are not capable of dealing with a claimant's false testimony. It should be noted that a declaration against a deceased's interests, even when given by the adversary party, has long been admissible as a hearsay exception (Sections 93-401-9 and 93-401-10, R.C.M. 1947 [both superseded]) and that the practice is to regard such testimony as the weakest type and to accordingly give a cautionary instruction.

The third reason is that the public policies of the Dead Man's Statute are invalid and should be rejected. As previously noted, another reason supporting the existence of these statutes is that without the statute, claimants would have an unfair advantage over deceased persons or their personal representatives. While this advantage certainly does exist, it has not been a strong enough reason to apply a rule of incompetency where claims are made against persons' estates when the person is not able to testify because of physical or mental incapacity; nor has the incompetency of the Dead Man's Statutes been applied to the hearsay exceptions allowing the deceased's statements against interest because of this disadvantage.

Further, the result of the Dead Man's Statute is two very poor policies. The first allows a concern for the possible injustice of a dishonest claimant taking advantage of a deceased person and his estate to overcome the certain injustice when an honest claimant is prevented from proving his claim against an estate. The law should be more concerned with the satisfaction of surviving claimants than of deceased persons. The second allows the concern over this advantage of claimants to suppress the truth in cases involving claims against estates. This is perhaps the greatest danger of the Dead Man's Statutes and certainly contrary to the policy of Rule 102 providing the purpose of the Montana Rules of Evidence "to secure fairness in administration...and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined". Finally, it should be noted that with the abolition of the Dead Man's Statutes, the advantage of the claimant can be lessened

under provisions like Rule 106 which provides that when part of an act, declaration, conversation, writing, or recorded statement is introduced (in this case by the claimant), the adverse party (in this case the estate) can introduce any other part of the act, declaration, conversation, writing, or recorded statement.

(b) Disqualification of witnesses. This subdivision is based on Maine Rules of Evidence, Rule 601(b), which in turn is similar to California Evidence Code Section 701. The Federal Rules of Evidence do not include such a provision, apparently on several grounds: that standards "...have proved elusive in actual application..."; that "...few witnesses are disqualified on that ground..."; that "discretion is regularly exercised in favor of allowing testimony..."; that "a witness wholly without capacity is difficult to imagine..."; and that "the question is one particularly suited to the jury as one of weight and credibility". Advisory Committee's Note to Federal Rule 601, 46 F.R.D. 161, 285 (1969). The Commission feels that such a provision is necessary in Montana courts, that there is no other rule which explicitly gives the court the authority to exclude witnesses on this ground, and most important, that the rule expresses existing Montana law.

It should be noted that both Maine Rule 601(b) and California Evidence Code Section 701 refer to "proposed witness" while this rule only uses "witness". The Commission preferred to drop "proposed" to take into account the situation where a witness previously thought by all concerned to be mentally capable is unable to testify coherently; in this situation the court would be allowed to exclude witnesses. However, this rule is not intended to abrogate the universal rule observed in Montana that a party must object to a witness' incompetency before that witness testifies or waive the right to so object. State v. Newman, 66 Mont. 180, 185, 213 P 805 (1923); State v. Palen, 119 Mont. 600, 603, 178 P2d 862 (1947) and cases cited therein; and State v. Cockrell, 131 Mont. 254, 262, 309 P2d 316 (1947).

This subdivision is consistent with Section 93-701-3, subdivisions 1 and 2, R.C.M. 1947 [superseded], and case law interpreting them. That statute provides "The following persons cannot be witnesses: 1. Those who are of unsound mind... 2. Children under ten years of age who appear incapable of receiving just impressions of the facts...,or of relating them truly". Cases interpreting the first subdivision have not prevented such persons from testifying but instead have imposed a standard that if the person is capable of giving a correct account of the event and appreciating the oath, he will be allowed to testify. State v. Berberick, 38 Mont. 423, 442, 100 P 209 (1909); Martin v. Hoover, 60 Mont. 202, 207, 199 P 694 (1921); State v. Cockrell, *supra,* and State v. Schleining, 146 Mont. 1, 8, 13, 403 P2d 625 (1965). If a person meets this standard, the credibility of his testimony is left to the trier of fact. Martin v. Hoover, *supra.* Cases interpreting the second subdivision have been concerned with the child's understanding of his duty to tell the truth and left this and the ability of the child to testify correctly to the discretion of the court. State v. Cadotte, 17 Mont. 315, 316, 42 P 857 (1895) and State v. Shambo, 133 Mont. 305, 308, 322 P2d 657 (1958).

COMMISSION COMMENT TO JUNE 1990 AMENDMENT

The revision establishes gender neutral format only. No substantive change.

Compiler's Comments

1990 Amendment: Substituted gender neutral language for gender specific language. Amendment effective June 7, 1990.

Case Notes

No Reasonable Grounds to Believe Defendant DUI — Sole Testimony of Defendant Sufficient to Prove No DUI Occurred: Eustance drove to the airport to pick up his daughter and grandson who were arriving on a flight. Because of hip pain, it was more comfortable to wait in his car. Eustance parked in the lot of a nearby car rental agency and fell asleep. Eustance was later awakened by a Deputy Sheriff who requested that Eustance perform field sobriety tests and a breath test, but Eustance refused to perform both tests, so his license was seized and suspended. At a hearing on a petition for reinstatement of his license, Eustance was the only witness. He testified that he had been operating his vehicle in a safe and legal manner prior to arrest, that his ability to drive was not impaired, and that he did not believe there was reasonable suspicion or probable cause to justify his arrest. The District Court agreed and granted the petition reinstating the license. On appeal, the state cited Hunter v. St., 264 M 84, 869 P2d 787 (1994), contending that Eustance had not met the burden of establishing that suspension of the license was improper because without the deputy's testimony, Eustance's own testimony was self-serving and insufficient to meet the burden. The Supreme Court disagreed. The testimony of one witness is sufficient to prove any fact. Nowhere in Hunter was it held that a petitioner in a

license reinstatement hearing cannot meet the burden of proof without testimony from the arresting officer or that a petitioner's testimony, without more, is insufficient to meet the burden of proof. Thus, the District Court was entitled to accept Eustance's uncontradicted testimony as true. Absent evidence supporting the state's position, Eustance met the burden of proof and his license was properly reinstated. Eustance v. St., 2005 MT 34, 326 M 77, 107 P3d 478 (2005).

No Prejudice by Inability to Depose or Call Child Accident Victim as Witness: A 3-year-old child fell through the second story railing at the Montana State University-Bozeman library and suffered brain injuries. The state sought to depose the child and call him as a witness in the ensuing trial, but the District Court concluded that because of the child's age, little probative information could be gained by forcing him to testify and that such testimony would be traumatic and unduly burdensome, so testimony at deposition and trial was denied. On appeal, the Supreme Court affirmed. Although there is no minimum age requirement regarding child testimony, nevertheless, child witnesses need protection against the potential emotional and psychological injuries that may occur with regular litigation procedures. Any information that the child could have provided was available from other witnesses and was thus needlessly cumulative and subject to exclusion under Rule 403, M.R.Ev. The state was not prejudiced by its inability to call the child as a witness, and the District Court did not abuse its discretion in protecting the child from having to testify at deposition and trial. Henricksen v. St., 2004 MT 20, 319 M 307, 84 P3d 38 (2004).

Mere Loss of Potential Witness Not Sufficiently Prejudicial to Implicate Due Process Rights: The mere loss of a potential witness does not constitute actual and substantial prejudice sufficient to implicate a defendant's due process rights, and defendant's bare speculation that a lost witness's testimony would have been exculpatory is insufficient to prove actual prejudice. However, in the present case, the testimony of two doctors who would have provided a key discussion on the mechanics of a workers' compensation incident, in the context of defendant Taylor's overall history and symptoms, but for their deaths during a lengthy preindictment period, was critically important to Taylor's defense. Without the doctors' testimony, Taylor was actually and substantially prejudiced in his ability to defend himself, warranting dismissal of the information. St. v. Taylor, 1998 MT 121, 289 M 63, 960 P2d 773, 55 St. Rep. 481 (1998).

Uncorroborated Testimony of Child Victim of Sexual Assault Held Sufficient for Conviction — No Requirement for Consistency With Other Evidence — Rogers, D.B.S., and Medina Overruled: Olson was convicted of sexual assault of a child and appealed his conviction. The Supreme Court noted that it had held in St. v. Rogers, 213 M 302, 692 P2d 2 (1984), St. v. D.B.S., 216 M 234, 700 P2d 630 (1985), and St. v. Medina, 245 M 25, 798 P2d 1032 (1990), that a conviction for sexual assault may be based entirely upon the uncorroborated testimony of the victim only if the victim's testimony is consistent with other evidence. However, the Supreme Court also noted that it had held in St. v. Howie, 228 M 497, 744 P2d 156 (1987), that a sexual assault conviction may be based entirely upon the victim's uncorroborated testimony without requiring that the victim's testimony be consistent with other evidence. After reviewing the foregoing opinions, the Supreme Court held that the decisions in Rogers, D.B.S., and Medina were incorrectly decided and, for that reason, overruled those three cases to the extent that they were different from the holding in Howie. As that decision applied to the case before it, the Supreme Court held that Olson's conviction could be based entirely upon the testimony of the child victim and that whether the child victim's testimony is consistent with other evidence affects the weight and credibility of the child's testimony. St. v. Olson, 286 M 364, 951 P2d 571, 54 St. Rep. 1449 (1997).

Disqualification of Witness Not Warranted by Inconsistencies in Testimony: Defendant claimed that an undercover officer was incompetent to testify as a witness and should have been disqualified based on inconsistencies in the officer's testimony and the officer's apparent disregard for the law. The Supreme Court held that defendant failed to demonstrate reversible error in claiming witness incompetence because there is no authority requiring a court to disqualify a witness, sua sponte, after the witness has testified, simply because of inconsistencies in the testimony. Under St. v. Phelps, 215 M 217, 696 P2d 447 (1985), the competence of a witness is unaffected by inconsistencies in perception but rather is determined by the capacity of expression and appreciation of the duty to tell the truth. It is axiomatic that inconsistencies in a witness's testimony go to the matter of credibility, not competence to testify. Further, a witness's appreciation of the duty to tell the truth is not necessarily diminished by prior violations of the law because a willingness to break the law does not automatically translate into willingness to give false testimony. St. v. Haskins, 269 M 202, 887 P2d 1189, 51 St. Rep. 1474 (1994).

Trial Court's Improper Questioning of Witness in Front of Jury Not Reversible Error: Kelly, convicted of kidnapping and unlawful sexual intercourse, argued that the trial court erred in

questioning the minor victim as to competency in front of the jury. The Supreme Court held that no objection had been made during the trial and that the objection was therefore waived. The Supreme Court also held that although the trial court erred in questioning the child in front of the jury because a witness is presumed competent, there was other direct and corroborative evidence of Kelly's guilt. St. v. Kelly, 265 M 298, 876 P2d 641, 51 St. Rep. 522 (1994).

Inconsistent Testimony of Witness Not Sufficient to Support Argument of Incompetency: The defendant argued that the inconsistency in testimony brought out during cross-examination supported his argument that the 5-year-old witnesses were incompetent to testify against him. The Supreme Court held that inconsistent testimony only went to the credibility of the witnesses and that the lower court had not abused its discretion in finding the children competent to testify. St. v. Howard, 247 M 370, 806 P2d 1038, 48 St. Rep. 232 (1991).

Competency of Four-Year-Old Victim of Sexual Assault: Witness competency is within the discretion of the trial court. The District Court did not abuse its discretion in determining that a 4-year-old victim of sexual assault was a competent witness when it methodically and carefully determined in a competency hearing before the trial that the victim was capable of expressing herself and that she appreciated the duty to tell the truth. St. v. Walters, 247 M 84, 806 P2d 497, 48 St. Rep. 102 (1991).

Competency of Child Unable to Remember Address or Specific Dates: The defendant in a rape case argued that the 7-year-old victim was incompetent to testify because she could not remember her address or specific dates. The Supreme Court affirmed the lower court's decision to allow the testimony, stating that the child's failure to remember certain things did not render her incapable of testifying as to instances of sexual abuse by the defendant. The court held that any inconsistencies within the child's testimony went to her credibility, not her competency. St. v. Newman, 242 M 315, 790 P2d 971, 47 St. Rep. 711 (1990).

Five- and Six-Year-Old Children Competent to Testify Regarding Sexual Abuse: Both a 5-year-old and a 6-year-old child were properly adjudged competent to testify as to incidents of sexual abuse upon a finding that, despite the parent's claims of inconsistencies regarding particular incidents or conversations, the children knew the difference between a truth and a lie and understood that they needed to be truthful on the stand. In re R.A.D. & J.D., 231 M 143, 753 P2d 862, 45 St. Rep. 496 (1988).

Competency of Five-Year-Old Witness and Six-Year-Old Victim of Sexual Assault: A 5-year-old child and a 6-year-old child were found competent in their testimony against a 14-year-old boy charged with sexual assault. Juvenile witnesses may be shown to be competent through their capacity of expression and appreciation to tell the truth. In re J.W.K., 223 M 1, 724 P2d 164, 43 St. Rep. 1483 (1986).

Sufficient Proof of Existence, Cause, and Permanency of Physical Injury: In a tort suit for damages for a back injury, plaintiff was competent to testify as to his past and present condition and his testimony was sufficient for the jury to determine whether there was an injury. However, the testimony was not sufficient to prove permanency or cause of the injury when his testimony was disputed and permanency and cause were not apparent from the injury itself. Since the trial court gave the issue of permanency to the jury with insufficient proof, error occurred and a new trial on the issue of damages was ordered. Cain v. Stevenson, 218 M 101, 706 P2d 128, 42 St. Rep. 1428 (1985), followed in St. v. Bower, 254 M 1, 833 P2d 1106, 49 St. Rep. 586 (1992), and in Moralli v. Lake County, 255 M 23, 839 P2d 1287, 49 St. Rep. 872 (1992).

Four-Year-Old Incest Victim — Competency to Testify: Defendant filed a motion in limine to suppress testimony based on incompetency of 4-year-old incest victim to testify. A hearing on the motion was held. The District Court thoroughly questioned victim. Counsel examined the child. The District Court concluded victim was competent to testify and made findings of fact in support. Citing St. v. Rogers, 213 M 302, 692 P2d 2, 41 St. Rep. 2131 (1984), in which the court found a 4-year-old sexual assault victim competent to testify, the Supreme Court upheld the lower court ruling as being a determination left largely to the discretion of the trial court. Rule 601, M.R.Ev., which defines the competency of a witness, has no age requirements. The record clearly shows that the victim was capable of expressing herself and appreciated the duty to tell the truth. St. v. D.B.S., 216 M 234, 700 P2d 630, 42 St. Rep. 770 (1985), followed in St. v. Eiler, 234 M 38, 762 P2d 210, 45 St. Rep. 1710 (1988). See also St. v. Donnelly, 244 M 371, 798 P2d 89, 47 St. Rep. 1600 (1990), St. v. Imlay, 249 M 82, 813 P2d 979, 48 St. Rep. 588 (1991), which overruled Donnelly with regard to augmentation of sentence for failure to admit guilt, and St. v. Olson, 286 M 364, 951 P2d 571, 54 St. Rep. 1449 (1997).

Competency of Five-Year-Old Victim of Deviate Sexual Conduct: The 5-year-old male victim of deviate sexual conduct was held to be a competent witness despite his perception at trial that he was in a police station and that the judge was a karate expert. Competence is determined by

capacity of expression and appreciation of the duty to tell the truth. There was no error committed by the District Court in admitting his testimony and allowing the jury to measure its weight. St. v. Phelps, 215 M 217, 696 P2d 447, 42 St. Rep. 305 (1985).

Competency of Child Victim: Defendant was charged with felony assault (now assault with a weapon) and sexual intercourse without consent. The alleged victim was a 4-year-old who had been left in his care for several days. At trial, defendant questioned the competency of the child as a witness. The child, prior to testifying, illustrated to the judge and jury that she knew the difference between the truth and a lie. She also illustrated that she knew the importance of telling the truth. Her testimony was basically consistent with reports she had given a physician, a police officer, and a social worker. Whether a child is a competent witness is largely within the discretion of the trial court. There was no abuse of discretion in allowing the child to testify. St. v. Rogers, 213 M 302, 692 P2d 2, 41 St. Rep. 2131 (1984), followed in St. v. Olson, 286 M 364, 951 P2d 571, 54 St. Rep. 1449 (1997).

Failure to Object to Judge Qualifying Ten-Year-Old Sexual Crime Victim as Witness in View of Jury — Not "Plain Error" — Mass of Damaging Evidence Precluding Any Prejudice: In the presence of the jury, the District Court Judge questioned the 10-year-old victim of a sexual crime and an aggravated assault about whether she was aware of the consequences of taking an oath and testifying. Defense counsel did not object. Although it would have been better to have conducted the questioning away from the jury and the questions should have been framed differently, any mistake did not warrant the application of the "plain error" rule of 46-20-702 [now 46-20-701(2)] because the defendant was not prejudiced by the manner of qualifying the victim in light of all of the independent and highly damaging evidence against him. St. v. Smith, 208 M 66, 676 P2d 185, 41 St. Rep. 176 (1984).

Previous Determination of Unfitness to Proceed: A 1976 psychiatric report performed by Warm Springs State Hospital declared an arson defendant unfit to proceed because of mental disease or defect. In a subsequent unrelated proceeding in which this person was to testify merely as a witness, the 1976 psychiatric report did not require a conclusion that he was incompetent to testify as a witness. St. v. Stephens, 198 M 140, 645 P2d 387, 39 St. Rep. 822 (1982), followed in St. v. Arlington, 265 M 127, 875 P2d 307, 51 St. Rep. 417 (1994).

Competency in Criminal Matter Not Determinative in Civil Matter: The Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) filed a petition in District Court alleging that J. H. was a youth in need of care. The boy, his mother, and a social worker all testified that the father sexually abused the boy. The youth was found to be an abused and neglected child. The father claimed that since he was declared unfit to proceed in a collateral criminal action he was also unfit to proceed in the civil action. The Supreme Court found nothing in the record to indicate the father was declared unfit to proceed in anything except the criminal action. He had the burden of proving his incompetence. With no affirmative showing of incompetence to proceed in the civil action, the court presumed the father competent. In re J. H., 196 M 482, 640 P2d 445, 39 St. Rep. 267 (1982).

Prosecutor as Witness: Defendant, convicted of aggravated assault, claimed that a Deputy County Attorney was an incompetent trial witness and that another Deputy County Attorney should not have aided in the prosecution of the case. The Supreme Court found no misconduct. The Deputy County Attorney who testified did not act as prosecutor in the case in any way. The other Deputy County Attorney never testified before the jury. A prosecutor is competent to testify in a case he is prosecuting. A prosecutor need not disqualify himself as a witness when he does not participate as trial counsel. Ordinarily, a prosecutor should withdraw from a case when he testifies for the prosecution, but that rule does not apply when the defense calls the prosecutor as a witness, as happened here. No prosecutorial misconduct was found. St. v. Mercer, 191 M 418, 625 P2d 44, 38 St. Rep. 312 (1981).

Statement by Deceased Agent of Defendant — Admissibility: The statement of a corporate agent made to plaintiff within the scope and term of the agency is admissible as testimony by plaintiff when offered against the defendant, although the corporate agent died before trial. McNulty v. Bewley Corp., 182 M 260, 596 P2d 474, 36 St. Rep. 1110 (1979).

No Presumption of Incompetency: There is no presumption that a witness is incompetent and the burden is on the party asserting the incompetency to prove it, which defendant did not do. St. v. Coleman, 177 M 1, 579 P2d 732, 35 St. Rep. 560 (1978).

Law Review Articles

The Child Victim as a Witness in Sexual Abuse Cases, McGrath & Clemens, 46 Mont. L. Rev. 229 (1985).

The Molested Child Witness and the Constitution: Should the Bill of Rights Be Transformed Into the Bill of Preferences?, King, 53 Ohio St. L.J. 49 (1992).

Testimonial Competence and Credibility, Weihofen, 34 Geo. Wash. L. Rev. 53 (1965).
The Child as a Witness, Stafford, 37 Wash. L. Rev. 303 (1962).

Collateral References

Witnesses *key* 39 through 45.

98 C.J.S. Witnesses §§92, 108 through 115, 132 through 143.

29 Am. Jur. 2d Evidence §305; 32 Am. Jur. 2d Federal Practice and Procedure §422; 81 Am. Jur. 2d Witnesses §§160, 161, 163, 164, 269.

Competency of one spouse to testify against other in prosecution for offense against third party as affected by fact that offense against spouse was involved in same transaction. 74 ALR 4th 277.

Closed-circuit television witness examination. 61 ALR 4th 1155.

Witness: child competency statutes. 60 ALR 4th 369.

Dead man's statutes as affected by Rule 601 of the Uniform Rules of Evidence and similar state rules. 50 ALR 4th 1238.

Competency of nonexpert witness to testify, in criminal case, based upon personal observation, as to whether person was under the influence of drugs. 21 ALR 4th 905.

Admissibility of testimony regarding spontaneous declarations made by one incompetent to testify at trial. 15 ALR 4th 1043.

Disqualification for bias of one offered as interpreter of testimony. 6 ALR 4th 158.

Use of drugs as affecting competency or credibility of witness. 65 ALR 3d 705.

Prosecuting attorney as a witness in criminal case. 54 ALR 3d 100.

Taking deposition or serving interrogatories in civil case as waiver of incompetency of witness. 23 ALR 3d 389.

Statute excluding testimony of one person because of death of another as applied to testimony in respect of loss or destroyed instrument. 18 ALR 3d 606.

Competency of interested witness to testify to signature or handwriting of deceased. 13 ALR 3d 404.

Person performing services as competent to testify as to their value. 5 ALR 3d 947.

Husband or wife as competent witness for or against cooffender with spouse. 90 ALR 2d 648.

Competency of young child as witness in civil case. 81 ALR 2d 386.

Admissibility of testator's declarations upon issue of genuineness or due execution of purported will. 62 ALR 2d 855.

Alleged incompetent as witness in lunacy inquisition. 22 ALR 2d 756.

Admissibility in federal criminal trial of testimony of informer hired under contingent fee arrangement. 13 ALR Fed. 905.

Attorney as witness for client in federal case. 9 ALR Fed. 500.

2 Wigmore §§483 through 531, 575 through 620.

Rule 602. Lack of personal knowledge.

Commission Comments

This rule is identical to Federal and Uniform Rules (1974) Rule 602. The Commission adopts it because it is universally recognized and a sensible requirement.

The rule is consistent with existing Montana statutory and case law. Section 93-401-2, R.C.M. 1947 [superseded], provides: "A witness can testify to those facts only which he knows of his own personal knowledge; that is, which are derived from his own perceptions..." and goes on to list exceptions for opinion and hearsay evidence. Also, Section 93-701-2, R.C.M. 1947 [superseded], provides, in part, much the same requirement: "All persons, without exception,...who, having organs of sense, can perceive, and perceiving, can make known their perceptions to others, may be witnesses".

Cases interpreting Section 93-401-2, R.C.M. 1947 [superseded], have followed its requirement for personal knowledge and generally not allowed testimony as to opinions, inferences, or conclusions (Watson v. Colusa-Parrot Mining and Smelting Co., 31 Mont. 513, 521, 79 P 14 (1904)); but, as long as the witness is so testifying, it does not matter "however clumsily he may express himself". State v. Vanella, 40 Mont. 326, 348, 106 P 364 (1910). The foundation requirement of the rule, allowing the testimony of the witness himself or other evidence to establish that he is testifying from his own personal knowledge, can be inferred from these cases.

The exceptions stated in Section 93-401-2, R.C.M. 1947 [superseded], opinions and hearsay, are intended to apply to this rule. The reference to Rule 703, contained in the rules as an exception, is therefore consistent with existing Montana law. The exception contained in the statute allowing a witness to testify to a hearsay statement is not a violation of the personal knowledge rule, for the witness does have personal knowledge of the making of the statement but

not personal knowledge of its contents. See State v. Crean, 43 Mont. 47, 59, 114 P 603 (1911) and Wilson v. Davis, 110 Mont. 356, 366, 103 P2d 149 (1940).

COMMISSION COMMENT TO JUNE 1990 AMENDMENT

The revision establishes gender neutral format only. No substantive change.

Compiler's Comments

1990 Amendment: Substituted gender neutral language for gender specific language. Amendment effective June 7, 1990.

Case Notes

Foundational Requirements of Knowledge of Intoxication by Lay Witness — Opinion Testimony Properly Admitted: Kucera, an off-duty firefighter, watched Carter stagger from a tavern, cross the street, get in a car, and drive away. Carter, appearing intoxicated, was followed by Kucera in Kucera's own car and was observed driving through a stop sign, at which time Kucera reported Carter to the police via portable radio, resulting in Carter's subsequent arrest for DUI. At trial, Kucera answered three questions pertaining to his opinion as to whether Carter was intoxicated. Carter asserted that Kucera's statements about his impression, concern, and feeling that Carter was intoxicated did not meet the standard of testifying from personal knowledge required by this rule. However, as a lay witness, Kucera's opinions or inferences were rationally based on his perception and personal knowledge. The state established that Kucera knew the objective signs of intoxication, had much experience being around people in varying states of intoxication, and had observed Carter for some time before alerting police. Because the state complied with the foundational requirements of Rule 701, M.R.Ev., and this rule, Kucera's lay witness opinion testimony was properly admitted. St. v. Carter, 285 M 449, 948 P2d 1173, 54 St. Rep. 1235 (1997).

Children's Attitude Regarding Discussion of Sexual Abuse Within Personal Knowledge of School Counselor: Henrich was charged with sexual abuse of his two daughters. The girls' school counselor testified regarding his counseling session with the girls. When asked how open children were discussing sexual abuse with a counselor, Henrich's defense counsel objected to the question, stating that the counselor was not qualified to render an opinion on the subject. The Supreme Court noted that the counselor could testify regarding matters that were within his own knowledge. The counselor had testified that he previously counseled students who were victims of abuse and that those students usually kept the facts within their own families. The Supreme Court held that the counselor could therefore testify on the issue based upon his personal knowledge. St. v. Henrich, 268 M 258, 886 P2d 402, 51 St. Rep. 1275 (1994).

Lay Witness's Explanation of Voluminous Documents Admissible Under Rules 602 and 701 and as Summary Under Rule 1006: Cowles brought an action against Sheeline to quiet title to a Montana mining claim. The District Court awarded both Cowles and Sheeline 50% of the shares in the mining company, based in part on the testimony of Don Cowles, Jr. Sheeline argued that Cowles's testimony concerning the number of shares issued by the mining company should not have been permitted because Cowles was not an expert. The Supreme Court found that the record indicated that Cowles did not testify as an expert but only as to his interpretation of his typewritten copy of his father's handwritten notes from the company stock book and as to Cowles's summaries of exhibits already in evidence. These summaries were helpful in explaining many pages of documents to the District Court. The Supreme Court concluded that Cowles's testimony was admissible under Rules 602, 701, and 1006, M.R.Ev. Cowles v. Sheeline, 259 M 1, 855 P2d 93, 50 St. Rep. 653 (1993).

Personal Participation in Tax Proceeding Resulting in Property Value Reduction Not Considered Hearsay: Lindey's contended that Goodover's testimony of a reduction in the taxable value of his property constituted inadmissible hearsay evidence. However, Goodover's testimony established his personal participation in the tax reduction proceeding and his firsthand knowledge of the reduction in taxable value. Testimony reflecting personal information was admissible. Goodover v. Lindey's Inc., 255 M 430, 843 P2d 765, 49 St. Rep. 1059 (1992).

Testimony May Contain Hearsay Within Hearsay: The trial court excluded the plaintiff's testimony that a third party had told him that the defendant had made statements pressuring the third party not to award a subcontract to the plaintiff. The trial court excluded the evidence because the plaintiff did not have personal knowledge of the statements allegedly made by the defendant to the third party. The Supreme Court overruled, stating that the lower court misconceived the nature of the personal knowledge requirement in the hearsay context. When A testifies that B told him of an event, A usually has personal knowledge only of B's report. It is B who has personal knowledge of the event. The hearsay rules require that the declarant, B, not

the witness, A, has such personal knowledge. Phillip R. Morrow, Inc. v. FBS Ins. Mont.-Hoiness Labar, Inc., 236 M 394, 770 P2d 859, 46 St. Rep. 455 (1989).

Testimony of Psychologist on Suicide Victim's State of Mind — When Psychologist Never Interviewed Decedent: When a psychologist had performed a psychological autopsy on the decedent after his suicide, the Workers' Compensation Court admitted, over the employer's objection, the psychologist's testimony on the causal connection between decedent's injury and his suicide. On appeal, the Supreme Court affirmed, ruling that the fact that decedent had never been interviewed by the psychologist did not render the psychologist's testimony inadmissible. Campbell v. Federated Mut. Ins., 211 M 68, 684 P2d 1101, 41 St. Rep. 1218 (1984).

Chain of Evidence — Bicycle Ridden by Motor Vehicle Homicide Victims: Defendant purposely hit and killed, with auto he was driving, two persons riding a bicycle. Testimony indicated that investigating officer picked up the bicycle at the scene and that it appeared to be in reasonably the same condition at trial as it was in when he picked it up. There was no indication at trial that it had been tampered with or was in worse condition than when officer picked it up. It was properly admitted in evidence over objection that there was insufficient evidence that it was in the same condition at trial as it was at the scene of the incident and that no chain of evidence establishing to whom it belonged and its condition prior to and after the incident was shown. St. v. Woods, 203 M 401, 662 P2d 579, 40 St. Rep. 533 (1983).

Sexual Relations of Defendant With Women Other Than Witness: In a prosecution for sexual intercourse without consent, it was improper to ask a witness who had had sexual relations with the defendant whether other women became upset with defendant because he failed to carry on relationships with them. St. v. Dickens, 198 M 482, 647 P2d 338, 39 St. Rep. 1137 (1982).

Police Officer — Foundation for Testimony: Defendant was charged with intimidation. He had threatened the victim, who took his license plate number and reported it to the police. At the trial an officer testified that a license check had been run and that the car was registered to the defendant. Defendant objected that no foundation had been laid to establish that the officer had personally made the license check and that the testimony was hearsay. The Supreme Court agreed, saying the State should have introduced a certified copy of the car's registration record. The Supreme Court also held that the evidence of ownership was a small part of the case against defendant and that the admission of the testimony did not affect defendant's substantial rights. The error was disregarded. St. v. Wurtz, 195 M 226, 636 P2d 246, 38 St. Rep. 1808 (1981).

Right to Compulsory Process — Evidence Properly Excluded for Lack of Foundation: Defendant charged with larceny by bailee was not denied the right to compulsory process even though the trial court excluded his offered testimony that money he retained out of his client's workers' compensation settlement was an offset for a fee the client owed him for other services. Defendant attempted to introduce this evidence through the testimony of a former Deputy County Attorney when it could only have been established by the testimony of the client or the defendant. In the absence of proper foundation testimony, the evidence was properly excluded. St. v. Bretz, 185 M 253, 605 P2d 974, 36 St. Rep. 1037 (1979).

Testimony as to Procedures Followed in Certain Circumstances: In determining whether defendant had acted as an attorney in a suit brought against a corporation, the testimony of a staff attorney of the corporation that the corporation's policy was to immediately notify its insurance carrier by mail of any claims against the corporation, and that no such letter appeared in their files regarding defendant's suit, was admissible even though the staff attorney had not been employed by the corporation when the alleged suit was filed. St. v. Bretz, 185 M 253, 605 P2d 974, 36 St. Rep. 1037 (1979).

Collateral References

Witnesses *key* 37.
98 C.J.S. Witnesses §§93 through 96.
81 Am. Jur. 2d Witnesses §§174, 175.
2 Wigmore §§650 through 670.

Rule 603. Oath or affirmation.

Commission Comments

This rule is identical to Federal and Uniform Rules (1974) Rule 603 and recognizes that an appeal to the witness' sense of accountability or an attempt to impress a witness to tell the truth should be flexible to accommodate "religious adults, atheists, conscientious objectors, mental defectives, and children". Advisory Committee's Note to Federal Rule 603, 46 F.R.D. 161, 287 (1969). The rule is consistent with Montana law in that it also provides a flexible approach to oath or affirmation. Section 93-401-3, R.C.M. 1947 [superseded], requires an oath or affirmation; Rule 43(d) M.R.Civ.P. allows a solemn affirmation in lieu of an oath; and Sections 93-2401-2

through 93-2401-5, R.C.M. 1947 [1-6-102 through 1-6-104], provide various forms of oaths and affirmations.

COMMISSION COMMENT TO JUNE 1990 AMENDMENT

The revision establishes gender neutral format only. No substantive change.

Compiler's Comments

1990 Amendment: Substituted gender neutral language for gender specific language. Amendment effective June 7, 1990.

Case Notes

Failure to Object to Judge Qualifying Ten-Year-Old Sexual Crime Victim as Witness in View of Jury — Not "Plain Error" — Mass of Damaging Evidence Precluding Any Prejudice: In the presence of the jury, the District Court Judge questioned the 10-year-old victim of a sexual crime and an aggravated assault about whether she was aware of the consequences of taking an oath and testifying. Defense counsel did not object. Although it would have been better to have conducted the questioning away from the jury and the questions should have been framed differently, any mistake did not warrant the application of the "plain error" rule of 46-20-702 (renumbered 46-20-701(2)) because the defendant was not prejudiced by the manner of qualifying the victim in light of all of the independent and highly damaging evidence against him. St. v. Smith, 208 M 66, 676 P2d 185, 41 St. Rep. 176 (1984).

Collateral References

98 C.J.S. Witnesses §§102 through 104, 394.

81 Am. Jur. 2d Witnesses §§161, 162, 683 through 687.

6 Wigmore §§1815 through 1829.

Rule 604. Interpreters.

Commission Comments

This rule is identical to Federal and Uniform Rules (1974) Rule 604. The rule is consistent with Section 93-701-6, R.C.M. 1947 [superseded], requiring an interpreter when a witness does not understand or speak the English language, and with Rule 43(f), M.R.Civ.P., allowing the court to appoint an interpreter at its discretion. The requirement of the rule that the interpreter be sworn by oath or affirmation is also found in Section 93-701-6, R.C.M. 1947 [superseded]. It can be noted that the only case construing that provision found that the necessity for an interpreter is a matter for the discretion of the court. State v. Inich, 55 Mont. 1, 10, 173 P 230 (1918). However, the requirement of the rule that the interpreter be qualified as an expert is not found in existing Montana law and so the rule is new to Montana law to that extent.

COMMISSION COMMENT TO JUNE 1990 AMENDMENT

The revision establishes gender neutral format only. No substantive change.

Compiler's Comments

1990 Amendment: Substituted gender neutral language for gender specific language. Amendment effective June 7, 1990.

Collateral References

88 C.J.S. Trials §96; 98 C.J.S. Witnesses §§398, 399.

81 Am. Jur. 2d Witnesses §§160, 161, 163, 164, 269.

Admissibility of testimony concerning extrajudicial statements made to, or in presence of, witness through an interpreter. 12 ALR 4th 1016.

Disqualification, for bias, of one offered as interpreter of testimony. 6 ALR 4th 158.

Right of accused to have evidence or court proceedings interpreted. 36 ALR 3d 276, superseded by 32 ALR 5th 149.

6 Wigmore §1824.

Rule 605. Competency of judge as witness.

Commission Comments

This rule is identical to Federal and Uniform Rules (1974) Rule 605. The rule is consistent with the sensible policy that a judge should not be allowed to be a witness because it is inconsistent with his role as an impartial arbiter. From this policy it can be seen that if a judge were to testify, it might show a partisan attitude toward one party, it certainly limits the ability of counsel to cross-examine or impeach the judge as a witness, it is certain that there is no one to rule on objections, it is possible that the jury might be unduly impressed with his testimony, and

finally, it is highly probable that the judge cannot weigh his own testimony in considering motions to dismiss or other motions concerned with the weight of the evidence.

This rule is inconsistent with Section 93-701-5, R.C.M. 1947 [superseded], providing in part: "The judge himself,...may be called as a witness by either party, but in such cases it is in the discretion of the court or judge to order the trial to be postponed or suspended, and to take place before another judge...". This statute has been noted but not applied in State ex rel. Breen v. District Court, 34 Mont. 107, 111, 85 P 870 (1906) where the court indicated that a district judge could be called as a witness in regard to the regularity of drawing a jury panel and still preside, but did not discuss the issue. The statute has been applied in In re Nelson, 103 Mont. 43, 55, 60 P2d 356 (1936), an unusual original proceeding in the Montana Supreme Court to hold a newspaper publisher in contempt. It was held proper to allow two justices of the Supreme Court to testify at an evidentiary hearing, particularly because testimony was undisputed. However, in State ex rel. Moser v. District Court, 116 Mont. 305, 316, 151 P2d 1002 (1944), the Supreme Court held the trial court committed an abuse of discretion and reversible error in testifying in a contempt proceeding where he was presiding, rather than follow the procedure found in the statute. In re Nelson, *supra*, is apparently the law when applied to the Supreme Court, State ex rel. Hall v. Niewoehner, 116 Mont. 437, 448, 155 P2d 205 (1944).

The Commission believes that the rule expresses the better policy and indicates the proper practice which is consistent with State ex rel. Moser v. District Court, *supra*; to this extent it is consistent with existing Montana law. The last sentence of the rule allowing an automatic objection is adopted as a practical feature; certainly if the judge did not disqualify himself if called as a witness, this rule would not preclude motions for mistrial.

Case Notes

Testimony at Administrative Hearing by Person Who Decides Appeal: Police officers at a disciplinary hearing before the Police Commission argued that because the city manager could veto or modify the Commission's decision, it was an inherent conflict of interest for him to testify against them at the hearing. On appeal, the District Court found no prejudice in the city manager's testimony, and the officers showed none on appeal to the Supreme Court. No rule prevented the testimony. The Supreme Court found no reversible error. Gentry v. Helena, 237 M 353, 773 P2d 309, 46 St. Rep. 862 (1989).

Collateral References

Witnesses *key* 68 through 70.
98 C.J.S. Witnesses §§191 through 195.
81 Am. Jur. 2d Witnesses §§264 through 267.
Disqualification of judge on ground of being a witness in the case. 22 ALR 3d 1198.
6 Wigmore §§1805 through 1909.

Rule 606. Competency of juror as witness.

Commission Comments

(a) At the trial. This subdivision is identical to Federal and Uniform Rules (1974) Rule 606(a) except that the phrase "be called or" is added to the first sentence. Federal and Uniform Rules (1974) Rule 606(a) only provide that a juror may not testify in the case in which he is sitting. The Commission agrees that a juror should not be allowed to testify under these circumstances because of practical limitations on cross-examination and the inability of any juror to objectively determine the weight of his or another juror's testimony. The Commission believes that when a party calls a juror prejudice arises against the objecting party which cannot be obviated by the objection contained in the second sentence of this subdivision. The addition which prevents calling a juror is made to meet this problem. The Commission feels that the provision for objection like the one in Rule 605 is still necessary for instances when the rule is not followed and is not intended to preclude motions for mistrial.

The subdivision is inconsistent with Section 93-701-5, R.C.M. 1947 [superseded], which allows a juror to be called as a witness by either party but allows, in the discretion of the judge, that the trial be postponed, be suspended, or take place before another jury. No case has considered the competency of a juror as a witness. Therefore, it is apparent that this subdivision is a change in Montana law to the extent that testimony by a juror is no longer a matter for the discretion of the court, but is absolutely prohibited.

(b) Inquiry into validity of verdict or indictment. This subdivision is based on Federal and Uniform Rules, Rule 606(b). The Uniform Rule is drafted in a slightly different manner than the Federal Rule, for the exceptions are placed at the end of the subdivision. This format is used for the sake of clarity because another exception had to be added to make subdivision consistent

with Montana law. There is no intent to change the substantive content of the Federal Rule except for this addition.

The Advisory Committee Note to Federal Rule 606(b), 56 F.R.D. 183, 265 (1972), indicates the policies to be considered in this area:

The values sought to be promoted by excluding the evidence include freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment.... On the other hand, simply putting verdicts beyond effective reach can only promote irregularity and injustice. The rule offers an accommodation between these competing considerations.

The Commission adopts this subdivision in the belief that it is consistent with existing Montana law and also meets these policy considerations.

Section 93-5603(2), R.C.M. 1947 [25-11-102], provides that a new trial may be granted for misconduct of the jury and whenever any one or more of the jurors have been induced to assent to any general or special verdict or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors...

Early Montana cases considering this section and the question of a juror impeaching his verdict indicated that the practice of allowing it "...should not be tolerated further than the statute permits". State v. Beesskove, 34 Mont. 41, 51, 85 P 376 (1906). In other words, the statute provided the only exception to the common-law rule forbidding a juror to impeach his own verdict. This interpretation was followed in many cases, even where the jurors may have been bribed (Sutton v. Lowry, 39 Mont. 462, 470, 104 P 545 (1909)) or intoxicated (Snyder v. Town of Chinook, 48 Mont. 484, 489, 138 P 1090 (1914)), or a friend of the plaintiff, prejudiced for that party, and familiar with the facts of the case (Hough v. Schiskowsky, 95 Mont, 28, 30, 43 P2d 247 (1935)), or mistaken as to the evidence in the case and the instructions as to the law. Johnson v. Green, 153 Mont. 251, 255, 56 P2d 290 (1969).

However, there are Montana cases which indicate that there is more than the statutory exception to the rule forbidding a juror to impeach his verdict. In Putro v. Baker and Mattox Electric, Inc., 147 Mont. 139, 143, 410 P2d 717 (1965), the jury read and considered a newspaper article which contained highly prejudicial information, inadmissible as evidence, during deliberations. Jurors were allowed to testify to this fact, and the case was reversed and remanded for new trial on the basis of the testimony. In Goff v. Kinzle, 148 Mont. 61, 65, 417 P2d 105 (1966), the court allowed testimony by jurors that the jury foreman had gone to the scene of the accident the night before deliberations began, conducted his own investigation, and reported the information to the jury during deliberations. In Schmoyer v. Bourdeau, 148 Mont. 340, 342, 420 P2d 316 (1966), the court spoke of the competing policies in this area, but in a slightly different light than considered by the Advisory Committee Note, *supra*:

Two equally basic rights of jury trial collide here; the first is the right to have a fair and impartial trial, free from misconduct of the jury in material matters...the second is the right to have a jury deliberate in camera, free and secure from frivolous and recurrent invasions of that privacy by disappointed litigants.

The court concluded that the narrow interpretation of the statute not allowing jury misconduct to be the subject of testimony by other jurors would not be a fair construction. A summary of these and other cases is found in Charlie v. Foos, 160 Mont. 403, 407, 503 P2d 733 (1972) which stated, "matters which are inherent in the jury process and not concerned with matters which relate to outside influence upon the jury..." could not be the subject of testimony. It is implicit in this statement that outside influence can be testified to by jurors. Finally, this case indicated that Goff v. Kinzle, *supra*, (where the jury foreman conducted his own investigation) was not an outside influence case, but one concerned with a jury reaching its decision based on information other than evidence received in the case and arguments in open court; in other words, extraneous prejudicial information.

The Commission feels that this subdivision is entirely consistent with Montana law. The rule of competency expressed in the first paragraph is consistent with the rule expressed in the cases not allowing testimony on matters inherent in the verdict. The policy considerations made by the Advisory Committee, *supra*, have also been considered in a Montana case. The exceptions expressed in the first two categories are consistent with those found in Montana case law, and the final exception is based on a Montana statute. Therefore, the subdivision represents no change in Montana law.

COMMISSION COMMENT TO JUNE 1990 AMENDMENT

The revision establishes gender neutral format only. No substantive change.

Compiler's Comments

1990 Amendment: Substituted gender neutral language for gender specific language. Amendment effective June 7, 1990.

Case Notes

Exceptions as to Admissibility of Juror Affidavit Inapplicable — New Trial Denied: In a letter written by a juror following Hoffman's aggravated assault trial, the juror stated an initial desire to acquit Hoffman, but returned a guilty plea to avoid a hung jury. The juror indicated that Hoffman would have been convicted of a lesser offense if a lesser included offense instruction had been given. Hoffman contended on appeal that in light of the juror's statement, the guilty verdict was not unanimous, resulting in a denial of due process. The Supreme Court noted that under this rule, juror testimony is generally inadmissible except if the evidence is used to determine whether the jury was influenced by extraneous, prejudicial information or outside influence or whether a particular juror reached a specific determination by chance. In this case, none of the exceptions applied, and the District Court did not err in denying Hoffman's motion for a new trial. St. v. Hoffman, 2003 MT 26, 314 M 155, 64 P3d 1013 (2003). See also Sandman v. Farmers Ins. Exch., 1998 MT 286, 291 M 456, 969 P2d 277 (1998).

New Trial — General Rule Prohibiting Admission of Juror Testimony — Exception for Extraneous Prejudicial Information: Following Lawlor's conviction for felony DUI, Lawlor moved for a new trial, alleging that during deliberations a juror improperly offered to other jurors an opinion relating to Lawlor's prior DUI convictions, references to which had been precluded by a motion in limine. The District Court denied the new trial motion, and Lawlor appealed. This rule 606 generally forbids the admission of juror testimony for purposes of ordering a new trial, but one exception hinges on whether extraneous prejudicial information was improperly brought to the jury's attention. Examples of impermissible extraneous information and external influence include: (1) telephoning a relative with regard to previous litigation by the plaintiff; (2) visiting the scene of an accident; (3) conducting experiments and informing the jury of the findings; (4) receiving evidence outside of court; (5) bringing a newspaper article into the jury room and showing it to the jury; (6) the jury's use of demonstrative evidence and experimentation with evidence; (7) pressure from other jurors; and (8) knowledge and information shared from one juror to another. In this case, comments by the juror in question derived from that juror's general knowledge of the criminal justice system when the juror mentioned that felony DUI cases are tried in District Court. The comment was internal and not an external influence subject to the exception in this rule, so the District Court properly denied Lawlor's motion for a new trial based on the juror affidavit. St. v. Lawlor, 2002 MT 235, 311 M 493, 56 P3d 863 (2002). See also St. v. Kelman, 276 M 253, 915 P2d 854 (1996).

Jurors' Notes to Court During Deliberations Not Grounds for Mistrial: During deliberations, the jury sent several notes and questions to the court regarding one of the jurors, who was felt to be obstructing deliberations. Defendant's motion for mistrial based on breakdown in the deliberative process was denied. Following conviction, the juror in question prepared an affidavit alleging that he was unaware of the notes and would not have voted for a guilty verdict had he known about them. The District Court struck the affidavit, finding no juror misconduct, in effect denying defendant's motion for a new trial. The Supreme Court held that the notes constituted an entirely internal process and did not introduce an extraneous or outside element into deliberations, signal a breakdown in deliberations, or have any bearing on defendant's guilt or innocence. Even assuming that the notes had somehow affected the juror's vote, introduction of such testimony is prohibited under subsection (b) of this rule, and the affidavit was properly stricken. St. v. Hocevar, 2000 MT 157, 300 M 167, 7 P3d 329, 57 St. Rep. 625 (2000).

Jury Poll Indicating Lack of Unanimity of Verdict in Criminal Case — Error in Failing to Direct Further Deliberation or Discharge Jury: Following Pyatt's jury trial for felony stalking, the jury was polled in open court as to whether each juror agreed with the verdict. One juror said no, stating that he went along with the verdict because he was outnumbered. Recognizing that a unanimous verdict was required, the court then inquired whether the juror had voted yes in the jury room, and the juror said that he voted in favor of the majority in the end, so his vote was yes. The remainder of the jury also voted yes, so the court ruled that the verdict was unanimous, and Pyatt was convicted and sentenced to the Department of Corrections for 5 years. In polling a jury, the court is to inquire into the jurors' present states of mind as of the time of the poll. To fulfill the jury poll's purpose of safeguarding a defendant's right to a unanimous verdict, the jury poll must afford a juror an opportunity to make an unambiguous reply as to that juror's present state of mind. Here, the juror's response indicated disagreement with the verdict, and the court's further conversation was inappropriate. No juror should surrender an honest opinion as to the weight or effect of evidence or the innocence or guilt of a defendant because the majority of the jury feels

otherwise or to return a unanimous verdict or prevent a mistrial. Once the juror indicated disagreement with the verdict, the court should have either directed the jury to deliberate further or discharged the jury, and failure to do so constituted reversible error. St. v. Pyatt, 2000 MT 136, 300 M 25, 1 P3d 953, 57 St. Rep. 555 (2000), following St. v. Holloway, 740 P2d 711 (N. Mex. App. 1987).

Judge's Answer to Jury Question Held Not External Influence — Juror Affidavits Not Proper — Motions to Change Verdict Denied: In a civil suit, the special verdict form contained question #5 that read: "Do you find by clear and convincing evidence that Defendants acted either fraudulently and or with malice?" This question was taken nearly verbatim from plaintiff's proposed verdict form except that the proposed form contained a slash ("/") between the "and" and "or" in the question. Plaintiff did not object to this clerical error at or prior to the time that the form was submitted to the jury. During jury deliberations, the jury submitted a question to the judge stating: "Do we have to differencateate [sic] Between [sic] fraud and malice in #5." The judge answered "No" to the jury question, and neither plaintiff nor defendants objected to the answer at the time. After the trial, plaintiff filed alternative posttrial motions requesting the court to order that the answer to question #5 be "Yes", to set aside the jury verdict on question #5, and to either enter judgment against defendant on the issue of punitive damages as a matter of law or to grant a new trial on the issue of punitive damages. The motions were based on affidavits of eight jurors alleging mistake or confusion based on the court's "No" answer. The District Court denied the motions. The Supreme Court upheld the denial, determining that plaintiff waived her claims of error by failing to object to the special verdict form submitted to the jury; that based on the "invited error rule", plaintiff participated in the error by submitting the conjunctive-disjunctive question; and that the affidavits were not proper because the jury had not been subject to external influences. Sandman v. Farmers Ins. Exch., 1998 MT 286, 291 M 456, 969 P2d 277, 55 St. Rep. 1165 (1998), cited in St. v. Marker, 2000 MT 303, 302 M 380, 15 P3d 373, 57 St. Rep. 1282 (2000).

Juror's Affidavit of Juror Misconduct — Inadmissible Under Ahmann Exception — No Evidence of External Influence — Right to Fair and Impartial Jury Not Violated: Berg argued that he was entitled to a new trial because of jury misconduct and attached to his motion the affidavit of juror Flinders stating that juror Carroll said at one point during the trial, in regard to witness testimony: "That's it; that's all I need to hear; it's all over." The affidavit also stated that juror Carroll pointed to another juror and said in regard to the juror, "That's one we'll have to convince." The Supreme Court noted that although affidavits are usually used to prove juror misconduct under 25-11-102(2), they may also, under the exception rationale used in Ahmann v. Am. Fed. Sav. & Loan Ass'n, 235 M 184, 766 P2d 853 (1988), be used pursuant to 25-11-102(1) when the only two people with knowledge of the infraction are a juror and another person. However, the Supreme Court found that the Ahmann exception did not apply when the communication was between jurors. The Supreme Court also discussed the applicability of subsection (b) of this rule and determined that the comments made by juror Carroll were not an external influence upon the jury and therefore did not fall within the exception to the general prohibition against use of juror affidavits to impeach a jury contained in subsection (b) of this rule. Regarding Berg's final argument that the jury misconduct violated the District Court's instructions and Berg's right to a fair and impartial jury, the Supreme Court reviewed California case law raised by Berg and concluded that it was inapplicable in Montana. State ex rel. St. Comp. Mut. Ins. Fund v. Berg, 279 M 161, 927 P2d 975, 53 St. Rep. 1098 (1996).

Statement by Juror During Deliberation Held Not External Influence: Kelman, a part owner of a casino, was tried and convicted of violating 45-7-208. Following his conviction, Kelman moved for a new trial because of juror misconduct, in that a juror said during deliberation that Kelman owned a strip bar in another city. The District Court denied the motion. Relying upon St. v. DeMers, 234 M 273, 762 P2d 860 (1988), and St. v. Hage, 258 M 498, 852 P2d 1251 (1993), the Supreme Court held that the statement by the juror, whether mistaken or not, was an internal influence upon the jury's deliberations and fell within the prohibition of subsection (b) of this rule. St. v. Kelman, 276 M 253, 915 P2d 854, 53 St. Rep. 372 (1996).

Impeachment of Verdict With Juror Testimony That .357 Magnum Handgun Cannot Be Rapidly Fired — Defense Claim That Victim Shot Himself: The trial court properly refused to allow defendant to impeach the verdict with juror testimony that one juror told the others that he knew that a .357 magnum handgun could not be fired rapidly. Defendant argued that this allowed the jury to conclude that defendant's theory that the victim shot himself was inherently incredible. This rule does not allow inquiry into the internal mechanisms of a jury's decisionmaking process. St. v. Moore, 268 M 20, 885 P2d 457, 51 St. Rep. 1151 (1994).

Judge's Failure to Inform Defense of Juror Contact With Defendant: It was not error for the judge to fail to immediately notify the defense counsel after the bailiff told the judge that a juror had told the bailiff that, during the trial, she served defendant coffee at a cafe in which she was a waitress. Defendant was given a hearing on the matter after trial and could not show prejudice. St. v. Moore, 268 M 20, 885 P2d 457, 51 St. Rep. 1151 (1994).

Juror Dream Involving Defendant and Related to Other Jurors: A juror told other jurors that she had a dream in which they found defendant guilty and in which he had a gun and shot his counsel, grabbed her, and ran off with her. Judicial inquiry into the dream is prohibited by this rule. St. v. Moore, 268 M 20, 885 P2d 457, 51 St. Rep. 1151 (1994).

Use of Juror Affidavits to Impeach Verdict — Limited to Showing of External Influences: Appellants sought a new trial on the grounds that posttrial juror affidavits proved that not all of the potential jurors were being truthful during voir dire, resulting in denial of the right to a fair trial. However, under subsection (b) of this rule, the use of juror affidavits to impeach a jury verdict is limited to showing external influences on the jury. Absent the presence of any exceptions listed in Rule 606, M.R.Ev., it was not an abuse of discretion for the trial court to deny a motion for new trial on grounds of juror misconduct. Estate of Spicher v. Miller, 260 M 504, 861 P2d 183, 50 St. Rep. 1180 (1993).

Juror's Affidavit Inadmissible to Prove Internal Influence on Jury — Motion to Strike Properly Granted: Hage was convicted of deliberate homicide. Following his conviction, he moved for a new trial on the basis of a juror's affidavit tending to show that: (1) some jurors "acted out" roles in the jury room; (2) one juror felt pressured by others to decide the case; (3) one juror informed others that he had personal knowledge that a telephone log was kept of calls from the jail; (4) the jurors used a blowup of a detective's crime scene sketch; and (5) some jurors intermingled with spectators during breaks in the trial. Citing Harry v. Elderkin, 196 M 1, 637 P2d 809 (1981), the Supreme Court held that none of the five allegations raised in the affidavit fell within the three exceptions in this rule because they were evidence of internal as opposed to external influences on the jury's deliberative process and that the District Court therefore did not abuse its discretion in denying the use of the juror's affidavit. St. v. Hage, 258 M 498, 853 P2d 1251, 50 St. Rep. 631 (1993), followed in McGillen v. Plum Creek Timber Co., 1998 MT 193, 290 M 264, 964 P2d 18, 55 St. Rep. 808 (1998).

Spouse's Affidavit Concerning Posttrial Conversation With Juror — Insufficient to Trigger Evidentiary Hearing on Motion for New Trial: The District Court did not err in denying the defendant's motion for a new trial without holding an evidentiary hearing when the only evidence presented by the defendant was the defendant's spouse's affidavit recounting implications by a juror in posttrial conversation. St. v. Hatfield, 256 M 340, 846 P2d 1025, 50 St. Rep. 101 (1993).

Juror's Independent Research as Misconduct Warranting New Trial: Defendant presented expert testimony regarding the theory of kinematics and motion theory in relation to the location of a highway construction flasher board at the time of an automobile accident. The jury foreman, who had taken physics in college, went to a local library to research the theories presented at trial and related to at least one juror that it clarified the expert testimony. The location of the flasher board was at the heart of the case, and the juror's independent alleged confirmation constituted misconduct that resulted in probable prejudice to plaintiff's case. The juror was in effect made a witness as to any jurors to whom he mentioned his research. A new trial was warranted. Brockie v. Omo Constr., Inc., 255 M 495, 844 P2d 61, 49 St. Rep. 1092 (1992).

Improper Use of Juror Affidavits on Jury's Internal Processes to Impeach Verdict: Juror affidavits regarding the internal mechanisms and processes the jury used to deliberate and reach a verdict may not be used to impeach the verdict. O'Leyar v. Callender, 255 M 277, 843 P2d 304, 49 St. Rep. 1008 (1992), followed in Greytak v. RegO Co., 257 M 147, 848 P2d 483, 50 St. Rep. 204 (1993).

Use of Juror Affidavits in Attempt to Prove Irregularity or Accident Improper: In moving for a new trial, plaintiffs submitted juror affidavits as evidence that the jury was misled in its duties, asserting that constituted an irregularity or accident preventing plaintiffs from receiving a fair trial. However, this tactic was an attempt to use juror affidavits to impeach the jury's own verdict. If a motion for a new trial is to be granted, an irregularity or accident in jury proceedings must exist independent of juror affidavits. Use of juror affidavits to prove irregularity or accident is clearly improper. The alleged misunderstanding of the jurors in this case did not fit any of the exceptions enumerated in subsection (b) of this rule. Motion for a new trial was properly denied. Boyd v. St. Medical Oxygen & Supply, Inc., 246 M 247, 805 P2d 1282, 47 St. Rep. 1923 (1990), followed in St. v. Marker, 2000 MT 303, 302 M 380, 15 P3d 373, 57 St. Rep. 1282 (2000).

Verdict Rendered in Twenty-Five Minutes — No Error: Defendant claimed that the fact that less than 25 minutes elapsed between the time a case was submitted to the jury and the time the jury brought in a verdict demonstrated that the jury failed to consider or read the jury instructions, consider the evidence, or follow its charge. However, in light of overwhelming substantial evidence and a lack of error of law in the record, the verdict was affirmed. St. v. Seaman, 236 M 466, 771 P2d 950, 46 St. Rep. 512 (1989).

Irregularities in Jury Proceedings — Juror Affidavit — New Trial Denied: To support their motion for a new trial in District Court, plaintiffs submitted an affidavit of one juror, alleging that certain statements made by the bailiff during jury deliberations misled the jury and prevented clarification of the issue of proximate cause. Juror affidavits are admissible to show grounds upon which a new trial may be granted when a juror has personal knowledge of an alleged irregularity in the proceedings and the only other individual who has personal knowledge of the facts surrounding the irregularity is the individual who committed the alleged infraction. Only the facts upon which the alleged irregularities are based are admissible. Any allegations regarding the inner workings of the jury deliberations are inadmissible. The Supreme Court will not overrule the District Court's refusal to grant a new trial unless the evidence is clear and convincing that the trial court erred. Ahmann v. Am. Fed. S&L Ass'n, 235 M 184, 766 P2d 853, 45 St. Rep. 2305 (1988), overruled as to standard of review in Allers v. Riley, 273 M 1, 901 P2d 600, 52 St. Rep. 920 (1995), and distinguished in State ex rel. St. Comp. Mut. Ins. Fund v. Berg, 279 M 161, 927 P2d 975, 53 St. Rep. 1098 (1996).

Alleged Juror Misconduct Not Sufficient for Rule Exceptions: The following factors did not constitute juror misconduct sufficient to qualify as exceptions under this rule, which governs the admissibility of juror testimony to impeach a verdict: (1) jury confusion over the statutory definition of deliberate homicide; (2) a juror's physical, mental, and emotional condition; (3) a juror's possession of knowledge about the human body; and (4) a juror's donning of the victim's shirt to see how the garment might fit, depending on the position of the body. St. v. DeMers, 234 M 273, 762 P2d 860, 45 St. Rep. 1901 (1988).

No Showing That Extraneous Material Prejudiced Other Jurors: During the jury deliberations following defendant's trial on the charge of leaving the scene of an accident involving personal injuries, in violation of 61-7-103, one juror told the others that because defendant had been drunk while driving, he should be convicted on the basis of that charge alone. The same juror also passed out a letter to the jury addressing a jury's duty to resist judicial instructions and acquit defendants in tax resistance cases. Defendant was convicted and on appeal claimed that the juror's actions constituted "extraneous prejudicial influence" within the meaning of this rule. The Supreme Court held there was no evidence that the juror's actions had a prejudicial effect on the jury and refused to reverse the conviction on this issue. However, the conviction was reversed on the ground that the juror's actions denied defendant a trial before a fair and impartial jury and therefore violated his right to due process. St. v. Stafford, 208 M 324, 678 P2d 644, 41 St. Rep. 377 (1984).

Effect of Illness on Juror's Vote: Diabetic jury foreman was incompetent to testify concerning the effect of her illness on her mental processes during deliberation. Thus her condition could not be used as basis for new trial. The effect of fatigue or illness on jury deliberations is inherent in the verdict and cannot be used to impeach the verdict. St. v. Maxwell, 198 M 498, 647 P2d 348, 39 St. Rep. 1149 (1982), followed in St. v. DeMers, 234 M 273, 762 P2d 860, 45 St. Rep. 1901 (1988).

Jury Discussion Concerning Defendant's Medical Condition Not to Be Disclosed: In prosecution for sexual intercourse without consent, part of defendant's case was based on his medical condition, retrograde ejaculation. The jury's discussion of the effect of retrograde ejaculation, the contents of which was allegedly in conflict with medical testimony, is inadmissible under this rule and may not be used as grounds for a new trial. St. v. Maxwell, 198 M 498, 647 P2d 348, 39 St. Rep. 1149 (1982).

Jury Misconduct Not Grounds for New Trial Unless Material: A new trial will be ordered because of alleged jury misconduct only if the alleged misconduct affects a material matter in dispute and prejudices the complaining party. St. v. Maxwell, 198 M 498, 647 P2d 348, 39 St. Rep. 1149 (1982).

New Trial — Use of Juror Affidavit: Plaintiff, mother and mother-in-law of defendants, broke her ankle by falling into a trench on a construction project in defendants' backyard. The jury found damages of $15,000, but found plaintiff 85% negligent. The District Court granted plaintiff's motion for a new trial based on irregularity in the jury proceedings, and defendant appealed. Plaintiff's motion was supported by an affidavit of the jury foreman stating the jury did not understand the instructions on contributory negligence, comparative negligence, and mitigation of damages. Cases on use of juror affidavits in granting a new trial involve either

external or internal influence on the jury. This case falls into the internal influence category. The District Court abused its discretion in granting a new trial on the basis of a juror affidavit purporting to impeach the verdict by delving into the thought processes of the jurors. Harry v. Elderkin, 196 M 1, 637 P2d 809, 38 St. Rep. 2076 (1981), followed in Geiger v. Sherrodd, Inc., 262 M 505, 866 P2d 1106, 50 St. Rep. 1661 (1993), St. v. Brogan, 272 M 156, 900 P2d 284, 52 St. Rep. 636 (1995), and McGillen v. Plum Creek Timber Co., 1998 MT 193, 290 M 264, 964 P2d 18, 55 St. Rep. 808 (1998).

Law Review Articles

New Trial: Use of Affidavits From Jurors to Impeach the Verdict, Cromley, 28 Mont. L. Rev. 137 (1966).

Collateral References

New Trial *key* 141 through 143; Witnesses *key* 73.

66 C.J.S. New Trial §§204 through 216; 98 C.J.S. Witnesses §199.

58 Am. Jur. 2d New Trial §§170 through 172, 188, 189, 195, 239, 240, 252; 81 Am. Jur. 2d Witnesses §268.

Cure of prejudice resulting from statement by prospective juror during voir dire, in presence of other prospective jurors, as to defendant's guilt. 50 ALR 4th 969.

Trial jurors as witnesses in same state court or related case. 86 ALR 3d 781.

Admissibility, in civil case, of juror's affidavit or testimony relating to juror's misconduct outside jury room. 32 ALR 3d 1356.

Prejudicial effect, in criminal case, of communications between witnesses and jurors. 9 ALR 3d 1275.

Use of intoxicating liquor by jurors: criminal cases. 7 ALR 3d 1040.

Use of intoxicating liquor by jurors: civil cases. 6 ALR 3d 934.

Admissibility and effect, in criminal case, of evidence as to juror's statements, during deliberations, as to facts not introduced into evidence. 58 ALR 2d 556.

Competency of jurors' statements or affidavits to show that they never agreed to purported verdict. 40 ALR 2d 1119.

Admissibility, in civil case, of jurors affidavit or testimony to show bias, prejudice, or disqualification of a juror not disclosed on voir dire examination. 40 ALR 2d 971.

Admissibility in civil case of affidavit or testimony of juror in support of verdict attacked on ground of bias or disqualification of juror. 30 ALR 2d 914.

Competency of juror as witness, under Rule 606(b) of Federal Rules of Evidence, upon inquiry into validity of verdict or indictment. 65 ALR Fed. 835.

6 Wigmore §§1801, 1910; 8 Wigmore §§2345 through 2356.

Rule 607. Who may impeach; party not bound by testimony.

Commission Comments

Subdivisions (a) and (b). Subdivision (a) is identical to Federal and Uniform Rules (1974) Rule 607. Its effect is to abolish the traditional common-law rule, recognized in Section 93-1901-8, R.C.M. 1947 [superseded], that a party may not impeach his own witness. A corollary to the traditional rule, that a party is bound by the testimony of his witnesses, is also necessarily and logically abolished in subdivision (b).

The Commission believes that the traditional rule is based on two invalid policies: first, that a party vouches for the credibility of his own witnesses, and second, a party could coerce his witnesses if it were not for the traditional rule. Yet a party does not vouch for his witnesses because, except for expert and character witnesses, a party's witnesses are not chosen but are those persons who happen to be present and see the event which is the basis of the case. The second policy is concerned with the situation where a party's witness decides to change his story, testify unfavorably, and is prevented from doing so by the party's threat of impeachment. Yet, the policy falsely assumes that whenever a witness changes his testimony, it will be from falsehood to truth, that the party coerces the witness by threatening impeachment, and that the truth is thereby suppressed. Certainly witnesses could be changing their testimony from truth to falsehood and so the coercion, if there is any, could be supporting, not suppressing, the truth. The second policy is also invalid because the exceptions to the common law allowing a party to impeach his own witness under certain circumstances ignore the problem of coercion when its potential is just as great. Therefore, the Commission believes that the traditional common-law rule that a party cannot impeach his own witness is based on invalid policies and should be abolished.

This rule is inconsistent with Section 93-1901-8, R.C.M. 1947 [superseded], which provides:

The party producing a witness is not allowed to impeach his credit by evidence of bad character, but he may contradict him by other evidence, and may also show that he has made at other time statements inconsistent with his present testimony, as provided in Section 93-1901-12, R.C.M. 1947 [superseded].

All of the cases construing and using the statute have been concerned with its exceptions. The first exception contained in the statute allows a party to contradict his witness by other evidence; that is, when a witness testifies to a particular fact, other witnesses may later contradict it. The second exception allows a party to show that his witness has made prior inconsistent statements; that is, when a witness testifies to a particular fact, the party may ask the witness about contradictory statements and present evidence of them. A requirement exists, both at common law and under Montana cases, that before one's own witness could be impeached by prior inconsistent statement, the party had to show surprise at the change and that the change had caused prejudice to his case. State v. Bloor, 20 Mont. 574, 584, 52 P 611 (1898); State v. Willette, 46 Mont. 326, 330, 127 P 1013 (1912); and State v. Kinghorn, 109 Mont. 22, 36, 93 P2d 964 (1939). These requirements have also been applied to impeachment by contradiction. Dick v. King, 73 Mont. 456, 459, 236 P 1093 (1925). However, the requirements have been liberally construed so that the surprise does not have to take place while the witness is on the stand, but may occur before testimony is given. State v. Clark, 87 Mont. 416, 420, 288 P 196 (1930) and State v. Kinghorn, *supra*.

Subdivision (a) is consistent with Rule 43(b) M.R.Civ.P., allowing a party to impeach and not be bound by the testimony of a hostile witness or adverse party. It is also consistent with Rule 26(d)(1), M.R.Civ.P., allowing impeachment of any witness with his deposition.

Therefore, under existing Montana law, a party can impeach his own witness by contradiction or prior inconsistent statement when he shows surprise and prejudice or when the witness is hostile or the adverse party. As a practical consideration, it is likely that a party can impeach his own witness as the need arises under existing Montana law. The effect of this rule is simply to remove these artificial requirements by abolishing the traditional rule. This also somewhat broadens the methods of impeaching one's own witness.

The corollary to the traditional rule not allowing impeachment of one's own witness, that a party is bound by the testimony of his witness, is contained in Montana case law. Tebay Land and Livestock Co. v. Hastie, 64 Mont. 590, 517, 210 P 605 (1922); Sommerville v. Greenhood, 65 Mont. 101, 120, 210 P 1048 (1922); and Welch v. Nepstad, 135 Mont. 65, 75, 337 P2d 14 (1959). The rule expressed by these cases is inconsistent with the idea that a party may impeach his own witness, for a party cannot be bound by testimony he has impeached. Therefore, to the extent that these cases are inconsistent with subdivision (b) of this rule, they are expressly superseded.

At this point it should be noted that the only means of impeachment covered by rules are character evidence under Rule 608, a prohibition of use of evidence of conviction of a crime under Rule 609, and a prohibition of use of religious beliefs under Rule 610. The Commission intends the broad language of Rule 607, allowing the credibility of a witness to be attacked, to mean that impeachment is only limited by the ingenuity of counsel to show any reason to disbelieve a witness' testimony and by consideration of relevancy under Rules 401 and 403.

The traditional methods of impeachment, not otherwise mentioned in these rules, are intended to be preserved by this rule. They may include, but are not limited to, evidence of the following:

(1) Bias for or against any party involved in the case. Frank v. Symons, 35 Mont. 56, 60, 88 P 561 (1907); State v. Wakely, 43 Mont. 427, 436, 117 P 95 (1911); State v. Whitworth, 47 Mont. 424, 430, 133 P 364 (1913); State v. Ritz, 65 Mont. 180, 188, 211 P 298 (1922); State v. London, 131 Mont. 410, 430, 310 P2d 571 (1957); and State v. Carns, 136 Mont. 126, 137, 345 P2d 735 (1959).

(2) Interest in the outcome of the litigation. Frank v. Symons, 35 Mont. 56, 61, 88 P 56, 61, 88 P 561 (1907); State v. Mott, 72 Mont. 306, 314, 233 P 602 (1925); and Currie v. Langston, 93 Mont. 570, 581, 16 P2d 708 (1932).

(3) Motive to testify falsely, such as bribery (State v. London, *supra* at 432), or pending criminal charges, State v. Ritz, *supra*, and State v. Ponthier, 136 Mont. 198, 205, 346 P2d 974 (1959).

(4) Lack of capacity of the witness to perceive, to recollect, or to communicate any matter about which he testifies. State v. Spotted Hawk, 22 Mont. 33, 64, 55 P 1026 (1898); State v. Trueman, 34 Mont. 249, 252, 85 P 1024 (1906); State v. Ritz, *supra* at 187; Herzig v. Sandberg, 54 Mont. 538, 540, 172 P2d 132 (1918); State v. White, 146 Mont. 226, 237, 405 P2d 761 (1965); and State Highway Comm'n v. Bennett, 162 Mont. 386, 391, 513 P2d 5 (1973).

(5) Contradiction of the existence or nonexistence of any fact about which the witness testifies. Sections 93-1901-8, R.C.M. 1947 [superseded], on one's own witness and cases cited in this Note; Section 93-1901-11, R.C.M. 1947 [superseded], "A witness may be impeached by the party against whom he was called, by contradictory evidence..."; Seder v. Peter Kiewit Sons' Co., 156 Mont. 322, 332, 479 P2d 448 (1971); and State v. Deschner, 158 Mont. 188, 195, 489 P2d 1290 (1971).

(6) Prior inconsistent statements. See Rule 613.

The limitation of impeachment by considerations of relevancy is a change in Montana law to the extent that it abolishes the collateral matters rule. This rule is concerned with the practice of cross-examining a witness as to matters not brought out on direct examination (which are irrelevant) for the purpose of contradicting the witness as to that matter. State v. McConville, 64 Mont. 302, 307, 209 P 987 (1922); and State v. Mott, 72 Mont. 306, 311, 233 P 602 (1925). The rule is well settled that impeachment as to collateral matters is not allowed. Bullard v. Smith, 28 Mont. 387, 401, 72 P 761 (1903); State v. Collett, 118 Mont. 473, 477, 167 P2d 584 (1946); and State v. Deeds, 126 Mont. 38, 41, 243 P2d 314 (1952). The test relied on to determine what is a collateral matter, which has been construed as consistent with Section 93-401-25, R.C.M. 1947 [superseded], is: "Could the fact,...have been shown in evidence for any purpose independently of the contradiction?" State ex rel. Bourquin v. Morris, 67 Mont. 40, 44, 214 P 332 (1924). The latest statement of the test is very similar, requiring that the fact used for contradiction be provable as part of the cross-examining party's case in chief. Holland v. Biggs, 166 Mont. 278, 282, 532 P2d 411 (1975).

The many cases considering collateral matters indicate that it is a troublesome doctrine. The Commission believes that the limitation of impeachment by Rule 401, defining relevant evidence as including impeaching evidence, and Rule 403, allowing the court to exclude relevant evidence if its probative value is outweighed by prejudice, confusion or waste of time, will allow the same result to be reached through a more flexible means than currently used with the collateral matters rule. Therefore, Section 93-401-25, R.C.M. 1947 [superseded], (to the extent that it is concerned with collateral matters) and case law stating the collateral matters rule are abolished in favor of the relevancy approach.

COMMISSION COMMENT TO JUNE 1990 AMENDMENT

The revision establishes gender neutral format only. No substantive change.

Compiler's Comments

1990 Amendment: Substituted gender neutral language for gender specific language. Amendment effective June 7, 1990.

Case Notes

No Prejudice to Defendant When Assistance of Counsel Not Deficient: Following conviction for deliberate homicide, Sellner filed a petition for postconviction relief based on ineffective assistance of counsel, contending that counsel was deficient in: (1) failing to investigate and present a case for justifiable use of force; (2) abandoning an attempted mitigated deliberate homicide defense; (3) pursuing a defense based on a civil suit filed against defendant; (4) failing to offer a "failure to agree" instruction to the jury; and (5) making other errors. The Supreme Court applied the Strickland test to determine whether counsel's performance was deficient and prejudicial, addressing each argument in turn, and concluded that Sellner's contentions of deficient counsel were unfounded. Absent a showing of deficient counsel, Sellner could not show prejudice, and the denial of the petition for postconviction relief was affirmed. Sellner v. St., 2004 MT 205, 322 M 310, 95 P3d 708 (2004), following St. v. Hubbel, 2001 MT 31, 304 M 184, 20 P3d 111 (2001).

Stipulation Precluding Need to Bring Evidence of Insurance Settlement Before Jury: Dill suffered damages after being hit as a pedestrian by a vehicle operated by Jardine. State Farm Mutual Automobile Insurance Company (State Farm) provided both liability insurance for Jardine and underinsured motorist coverage for Dill. Dill maintained that State Farm's settlement of the underlying liability claim against Jardine was admissible as relevant under Rules 401 and 402, M.R.Ev., and as impeachment evidence pursuant to Rule 801(d)(2), M.R.Ev., and this rule. However, it was not necessary to bring evidence of the settlement before the jury in light of the fact that State Farm stipulated that it had paid Dill the liability policy limit on behalf of Jardine and would pay any jury verdict that exceeded that amount up to the policy limit under the underinsured motorist policy. Simple knowledge that the policy limits were paid was sufficient. Dill v. District Court, 1999 MT 85, 294 M 134, 979 P2d 188, 56 St. Rep. 350 (1999).

Limited Admissibility of Settlement Agreement to Show Witness Bias: Although the introduction at trial of offers to compromise and settlement agreements is forbidden under Rule 408, M.R.Ev., settlements may be admitted for limited purposes, such as proving bias or prejudice of a witness, in accordance with this rule. In the present case, plaintiff's counsel questioned one of the settling parties extensively regarding a settlement agreement and whether the party would benefit under the agreement if defendants prevailed. The witness admitted that he would gain under the agreement. The cross-examination adequately brought out the witness's bias, and the jury had sufficient evidence of the nature and effect of the settlement agreement to judge the credibility of the testimony. Therefore, the trial court did not err in limiting the admission of the settlement agreement to show the bias of the witness. In re Estate of DeCock, 278 M 437, 925 P2d 488, 53 St. Rep. 992 (1996).

Cross-Examination of Witness Regarding Civil Action Against Defendant Allowable: In a case of first impression, the Supreme Court adopted the majority view from other jurisdictions that the proper approach to the question of whether a defendant may cross-examine a witness regarding a contemplated civil action against the defendant is to allow the cross-examination. Nevertheless, in the present case, the evidence of aggravated assault by defendant was so overwhelming that the failure of the trial court to allow cross-examination regarding a contemplated civil action would not have materially affected the jury's verdict and was thus harmless error. St. v. Arlington, 265 M 127, 875 P2d 307, 51 St. Rep. 417 (1994), discussed and distinguished in St. v. Milton, 280 M 142, 930 P2d 28, 53 St. Rep. 1337 (1996). See also St. v. Underwood, 281 NW 2d 337 (1979), St. v. Ferguson, 450 NE 2d 265 (1983), and Wooten v. St., 464 S 2d 640 (1985).

Exclusion of Witness's Earlier Crimes — Impeachment by Showing Bias — Criminal History in Offer of Proof: Hone, a witness to an assault, was on parole from a homicide conviction at the time of the assault. It was not error for the District Court to grant a motion in limine to prevent defense counsel from using that conviction for impeachment under an offer of proof, supposedly showing bias, that "he, Hone, would personally see to it that [defendant] served time in prison because a year at the pen had done him, Hone, a lot of good". There was no record that there was an offer to restrict the testimony to the admissible portion. Sloan v. St., 236 M 100, 768 P2d 1365, 46 St. Rep. 214 (1989), followed in St. v. Haskins, 255 M 202, 841 P2d 542, 49 St. Rep. 922 (1992).

Evidence of Witness' Misrepresentations and Omissions Improperly Excluded — "Collateral Matters" Rule Incorrectly Applied: The District Court excluded evidence of a witness' misrepresentations and omissions after holding that the evidence constituted impeachment on collateral matters. The Supreme Court found the exclusion of evidence improper on two issues: the issue of the credibility of the witness and the issue of punitive damages. Further, the Supreme Court noted that the rule on collateral matters was abolished in favor of the relevancy approach contained in this rule. Cooper v. Rosston, 232 M 186, 756 P2d 1125, 45 St. Rep. 978 (1988), followed in St. v. Kowalski, 252 M 166, 827 P2d 1253, 49 St. Rep. 197 (1992).

Objection Sustained on Defendant's Cross-Examination of Expert Regarding Motive and Bias: The District Court did not err in sustaining the state's objection to defendant's cross-examination of an expert witness pertaining to the expert's bias and hostile feelings because the cross-examination went beyond the state's direct examination and was irrelevant, having no bearing on the expert's testimony as a coroner. Furthermore, the sustained objection did not prevent the defendant from pursuing a related line of inquiry, the defendant could have called the coroner during his case in chief, and the defendant failed to make any timely offer of proof in accordance with Rule 103(a), M.R.Ev., instead raising the issue for the first time on appeal. St. v. Atlas, 224 M 92, 728 P2d 421, 43 St. Rep. 2042 (1986).

Applicability of False Exculpatory Statement Not Related to Crime Charged: Defendant claimed that a false voluntary statement he gave to a deputy sheriff prior to the time he was a suspect in the homicide should not have been admitted. He argued that since the statement was not made regarding the homicide, it showed no consciousness of guilt and unlawful intent. The Supreme Court found that the suspicious circumstances about which he gave a false explanation tended to connect him to the homicide regardless of the reason for the statement. The court cited its decision in St. v. Goltz, 197 M 361, 642 P2d 1079 (1982), that a false exculpatory statement may be used as evidence of consciousness of guilt and unlawful intent. St. v. Grant, 221 M 122, 717 P2d 562, 43 St. Rep. 685 (1986).

Admission of Letter From Defendant to Witness Not Error: The trial court did not err in admitting a note written in jail by the defendant to a witness during the trial. The defendant gave the note to a deputy, saying he assumed the deputy would have to read it before delivering the note. The deputy read the note, then turned it over to the prosecutor who offered it in evidence to impeach the witness. Although the defendant contended that the deputy's passing of

the note to the prosecutor constituted an illegal search, the defendant handed the unsealed note to the deputy. The contents were visible, and the note was not placed in the U.S. mail. Therefore, no search occurred. The letter was properly admitted to impeach the witness. St. v. Doll, 214 M 390, 692 P2d 473, 42 St. Rep. 40 (1985).

False Exculpatory Statements: The defendant in a criminal action falsely assured her employer that the money she is accused of stealing was deposited in her personal checking account. The statements made by the defendant are admissible to impeach the defendant and also to prove consciousness of guilt and unlawful intent. Her statements are not admissions but false exculpatory statements which are admissible. St. v. Goltz, 197 M 361, 642 P2d 1079, 39 St. Rep. 613 (1982).

Proposed Jury Instructions — Definition of "Impeach" — Consideration of Instructions as a Whole: A defendant was convicted of sexual intercourse without consent and sexual assault. On appeal, he alleged error in the failure to give a jury instruction on the definition of "impeach". The Supreme Court held that the definition was not necessary because the jury was fully instructed on that aspect of the law and defense counsel had not been precluded from arguing his theory of the case. Another alleged error was in the failure to give an instruction outlining certain types of evidence that could serve to impeach a witness' testimony. The Supreme Court said that although it would not have been error to give such a specific instruction, it was unnecessary. The instructions given contained the substance of this omitted instruction. The instructions as a whole were considered in determining adequacy. St. v. Camitsch, 192 M 124, 626 P2d 1250, 38 St. Rep. 563 (1981).

Impeaching of One's Own Witness: Under existing Montana law, a party can impeach his own witness by contradiction or prior inconsistent statement when he shows surprise and prejudice or where the witness is hostile. As a practical consideration, it is likely that a party can impeach his own witness as the need arises. The corollary to the tradition rule not allowing impeachment of one's own witness, that a party is bound by the testimony of his witness, is contained in Montana case law, and to the extent those cases are inconsistent with subsection (b) of this rule, they are expressly superseded. (Superseding Tebay Land & Livestock Co. v. Hastie, 64 M 509, 210 P 605 (1922); Sommerville v. Greenhood, 65 M 101, 210 P 1048 (1922); and Welch v. Nepstad, 135 M 65, 337 P2d 14 (1959).) St. v. Hart, 191 M 375, 625 P2d 21, 38 St. Rep. 133 (1981); St. v. Fitzpatrick, 186 M 187, 606 P2d 1343, 37 St. Rep. 194 (1980). See also St. v. Pease, 222 M 455, 724 P2d 153, 43 St. Rep. 1417 (1986).

Impeachment of Witness' Testimony as to Repair Feasibility: Plaintiffs' rebuttal testimony offered for impeachment of one of defendants' central witnesses on the crucial issue of practicability or feasibility of repairs, an issue raised by defendants in their case in chief, should have been allowed under the exception to the general rule of excluding evidence of subsequent repairs when, as here, the evidence was not offered as proof of negligence. Lawlor v. County of Flathead, 177 M 508, 582 P2d 751 (1978).

Law Review Articles

Montana Supreme Court Survey—Civil Procedure and Evidence, Dyrud, 42 Mont. L. Rev. 343 (1981).

Surprise! That damaging turncoat witness is still with us: An analysis of Federal Rules of Evidence 607, 801(d)(1)(A) and 403, Ordover, 5 Hofstra L. Rev. 65 (1976).

Substantive Use of Prior Inconsistent Statements Under the Federal Rules of Evidence, Blakely, 64 Ky. L. J. 3 (1975-1976).

Collateral References

Witnesses *key* 320 through 325.

98 C.J.S. Witnesses §§575, 681, 683.

81 Am. Jur. 2d Witnesses §§946, 950, 953.

Impeachment or cross-examination of prosecuting witness in sexual offense trial by showing that similar charges were made against other persons. 71 ALR 4th 469.

Admissibility of impeached witness' prior consistent statement—modern state civil cases. 59 ALR 4th 1000.

Admissibility of impeached witness' prior consistent statement—modern state criminal cases. 58 ALR 4th 1014.

Impeachment of defense witness in criminal case by showing witness' prior silence or failure or refusal to testify. 20 ALR 4th 245.

Admissibility of affidavit to impeach witness. 14 ALR 4th 828.

Propriety, under Federal Rule of Evidence 607, of impeachment of party's own witness. 89 ALR Fed. 13.

3 Wigmore §§896 through 918.

Rule 608. Evidence of character and conduct of witness.

Commission Comments

(a) Opinion and reputation evidence of character. This subdivision is identical to Federal and Uniform Rules (1974) Rule 608(a). This subdivision is a continuation of Rules 404 and 405 on the admissibility and methods of proof of character evidence. Rule 404(a)(3) contains a cross reference to Article VI and allows evidence of character to be admissible under this rule as an exception to the general rule that character evidence is inadmissible to prove conduct. Rule 405(a) provides, "in all cases in which evidence of character...is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion".

Montana law has long recognized that character evidence is admissible for the purpose of impeachment, but has generally restricted the method of proof to reputation evidence. Section 93-1901-11, R.C.M. 1947 [superseded], provides in part, "A witness may be impeached by the party against whom he was called...by evidence that his general reputation for truth, honesty, or integrity is bad...". Case law has also allowed reputation for truth and veracity to be admissible for impeachment purposes. Territory v. Paul, 2 Mont. 314, 316 (1875); State v. McMillan, 20 Mont. 407, 410, 51 P 827 (1897); and Farleigh v. Kelly, 28 Mont. 421, 431, 72 P 756 (1903). Note that State v. Laverdure, 140 Mont. 236, 241, 370 P2d 489 (1962) held that it was reversible error to deny the defendant an opportunity to impeach the prosecution's chief witness by evidence that his reputation for truth and honesty was bad.

This subdivision's use of character for truthfulness or untruthfulness focuses the relevancy of character evidence. It does represent a change in the phrase contained in Section 93-1901-11, R.C.M. 1947 [superseded], "general reputation for truth, honesty, or integrity...".

Proof of character evidence in the form of opinion testimony for impeachment purposes has never arisen under Montana case law, probably because of the language of the statute referring to reputation. The subdivision expands Montana law in this area by allowing character evidence for truthfulness or untruthfulness to be proved by opinion testimony. The Commission feels this is a sensible addition to Montana law for the reasons stated in the Commission Comments to Rule 405(a) allowing opinion evidence to prove character evidence generally.

The last clause of the subdivision incorporates the rule found in Section 93-1901-13, R.C.M. 1947 [superseded], providing in part: "Evidence of the good character of a party is not admissible in civil action, nor a witness in any action, until the character of such party has been impeached...". Case law also supports this rule. In re William's Estate, 52 Mont. 192, 203, 156 P 1087 (1916); State v. Diedtman, 58 Mont. 13, 19, 190 P 117 (1920) (error to allow support of a witness' character before it was impeached); and State v. Jackson, 71 Mont. 421, 432, 230 P 370 (1924) (reversible error for not allowing presentation of good character after the witness' character had been impeached). A question can arise with this rule concerning whether or not an attack has been made upon the character of the witness so as to allow the introduction of good character evidence. The only Montana case on this point broadly construed what an attack constitutes: In re William's Estate, *supra*, found that the introduction of a deposition showing the witness was currently serving a sentence in prison was clearly an attack upon his character and allowed supporting evidence.

(b) Specific instances of conduct. This subdivision is identical to Federal and Uniform Rules (1974) Rule 608(b) except that the phrase "other than conviction of crime as provided in Rule 609", was deleted because of a change in that rule making conviction of a crime inadmissible for purposes of impeachment.

This subdivision is inconsistent with Section 93-1901-11, R.C.M. 1947 [superseded], providing that a witness may be impeached by evidence that his "general reputation for truth, honesty and integrity is bad, but not by evidence of particular wrongful acts". The cases following this section indicate that specific wrongful acts were used for the cross-examination of witnesses that degraded their character, contrary to this section and Sections 93-2101-2, R.C.M. 1947 [26-2-302], and 93-2101-3, R.C.M. 1947 [26-2-401]. State v. Rogers, 31 Mont. 1, 6, 77 P 293 (1904); State v. Crowe, 39 Mont. 174, 177, 102 P 579 (1909); State v. Kanakaris, 54 Mont. 180, 184, 169 P 42 (1917); State v. Shannon, 95 Mont. 280, 288, 26 P2d 360 (1933). In Shannon, *supra*, the court indicated that asking questions on cross-examination which were related to the same offense for which the defendant was on trial was particularly harmful because this places before the jury assumptions which may not or could not be proven. In State v. Rivers, 133 Mont. 129, 134, 320 P2d 1004 (1958) the court found that cross-examination as to specific instances of misconduct was not only a violation of the statutory prohibition, but an invasion of a substantial right of the defendant; the questions asked the defendant related to the crime for which she was on trial.

There have been no Montana cases holding that a specific instance of conduct was improperly inquired into where the conduct was probative of truthfulness or untruthfulness. This is the standard imposed by the subdivision. The subdivision also contains the additional safeguard that the discretion of the court will determine whether a specific instance will be used at all. The court must consider the admissibility of this type of evidence, like any other impeaching evidence, under Rules 401 and 403. Also see Commission Comments to Rules 405(b) and 607. The Commission intends to change Montana law only to the extent that specific instances of conduct probative of truthfulness or untruthfulness and weighed by the trial court will be admissible. The Montana cases excluding specific instances of conduct would probably have the same result under this rule because they did not relate to these character traits.

There have been no Montana cases directly dealing with clause (2) of this subdivision, allowing impeachment of impeaching witnesses. However, in State v. Jackson, 71 Mont. 421, 433, 230 P 370 (1924), the court indicated through *dicta*, "It should be noted that no question arises here as to the impeachment of an impeaching witness.... Of course there must be a limit to such collateral inquiry, for in most instances testimony for and against the reputation of a witness for truth and veracity could be recruited *ad infinitum*".

The final paragraph of this subdivision provides the final safeguard against abuse under this rule. It states that an accused or any other witness does not waive his "privilege against self-incrimination when examined with respect to matters which relate only to credibility". This is not inconsistent with the longstanding rule in Montana that when a defendant testifies on his own behalf and denies he committed the crime, he waives his privilege against self-incrimination, and may be cross-examined as to the crime for which he is on trial. State v. Rogers, 31 Mont. 1, 7; State v. Smith, 57 Mont. 349, 359, 188 P 644 (1920); and State v. London, 131 Mont. 410, 436, 310 P2d 571 (1957). Nor is it inconsistent with the rule that when a defendant testifies on his own behalf he is subject to the same rules of impeachment as any other witness. State v. Schnepel, 23 Mont. 523, 525, 59 P 927 (1899); and State v. Inich, 55 Mont. 1, 13, 173 P 230 (1918). As indicated in State v. Rogers, *supra*, any witness is granted the right to be protected from questions which have a tendency to subject him to punishment for a felony, unless it relates to the fact in issue. Section 93-2101-2, R.C.M. 1947 [26-2-302]. Therefore this paragraph is consistent with Montana law.

COMMISSION COMMENT TO JUNE 1990 AMENDMENT

The revision establishes gender neutral format only. No substantive change.

Compiler's Comments

1990 Amendment: Substituted gender neutral language for gender specific language. Amendment effective June 7, 1990.

Case Notes

Exclusion of Assault Victim's Prior Assault Record — Probative Value Outweighed by Prejudicial Effect: Grixti was arrested for family member assault against his wife. At trial, Grixti sought to introduce evidence of the wife's prior family member assault against Grixti, but the trial court granted the state's motion in limine excluding evidence of the wife's prior assault. On appeal, the Supreme Court noted that evidence of a witness's prior crimes and wrongs is inadmissible to show action in conformity with the prior crime under Rule 403, M.R.Ev., but may be admissible under Rule 404, M.R.Ev., to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident and under this rule, to attack a witness's character if probative of truthfulness or untruthfulness. However, in this case, the trial court found that the potential prejudicial effect of the wife's prior arrest record likely outweighed any probative value regarding the wife's character for truthfulness or untruthfulness. The Supreme Court deferred to the trial court's discretion in making evidentiary character determinations and affirmed the grant of the motion in limine. St. v. Grixti, 2005 MT 296, 329 M 330, 124 P3d 177 (2005).

No Prejudice to Defendant When Assistance of Counsel Not Deficient: Following conviction for deliberate homicide, Sellner filed a petition for postconviction relief based on ineffective assistance of counsel, contending that counsel was deficient in: (1) failing to investigate and present a case for justifiable use of force; (2) abandoning an attempted mitigated deliberate homicide defense; (3) pursuing a defense based on a civil suit filed against defendant; (4) failing to offer a "failure to agree" instruction to the jury; and (5) making other errors. The Supreme Court applied the Strickland test to determine whether counsel's performance was deficient and prejudicial, addressing each argument in turn, and concluded that Sellner's contentions of deficient counsel were unfounded. Absent a showing of deficient counsel, Sellner could not show

prejudice, and the denial of the petition for postconviction relief was affirmed. Sellner v. St., 2004 MT 205, 322 M 310, 95 P3d 708 (2004), following St. v. Hubbel, 2001 MT 31, 304 M 184, 20 P3d 111 (2001).

Unsubstantiated Discovery Request for Criminal History of All State Witnesses Properly Denied: DuBray requested discovery of the criminal history records of each of the state's witnesses in a homicide trial, arguing that he was entitled to the records for impeachment purposes. The District Court denied the request, and the Supreme Court affirmed. Although information about a witness's prior convictions may be admissible under certain circumstances, a wholesale request for the production of records of all witnesses, absent an explanation or substantiation of the evidence sought or the potential use of the evidence, was unjustified and beyond the purpose of open discovery requirements in criminal cases. St. v. DuBray, 2003 MT 255, 317 M 377, 77 P3d 247 (2003).

Error in Not Excluding Results of Independent Blood Alcohol Test Taken After DUI Arrestee Released From Custody: When Krause was picked up for DUI, he refused to take a Breathalyzer test and his license was revoked. After booking, Krause was released from custody, went to the hospital, and requested a blood alcohol test. The state subsequently obtained the results of the blood test by investigative subpoena, and the District Court allowed admission of the test results at Krause's trial over his objection. Krause appealed on grounds that the test results should not have been admitted because they were not relevant to any issue in the case. Krause pointed out that the decision as to the validity of an arrest must be based on information that the officer had at the time and cannot be justified bolstered by information obtained after the fact. The state argued that the evidence of the blood test was introduced to substantiate the credibility of the arresting officer's observations and opinion, not to retrospectively validate the officer's belief that Krause had been driving under the influence. The Supreme Court agreed with Krause. The officer's character for truthfulness was not attacked, nor did evidence of Krause's blood test refer to the officer's character for truthfulness. Thus, there was no legitimate purpose for the introduction of the blood test evidence, and the District Court should have excluded it. St. v. Krause, 2002 MT 63, 309 M 174, 44 P3d 493 (2002).

"Were They Lying" Questions to Defendant Not Categorically Improper: Hart argued that the lower court erred in allowing the prosecutor to ask him if other witnesses had lied when they testified that Hart owned the cattle prod used in an alleged assault after he had testified that the prod belonged to the victim. The Supreme Court held that it was declining to follow the line of cases that held "were they lying" questions were always proper or the line of cases that held that they were always improper. The Supreme Court stated that the admissibility of "were they lying" questions was discretionary with the trial court. In the instant case, the questions were proper because the case came down to whether the jury believed the defendant or the victim and the other eyewitnesses. Therefore, the prosecutor's asking Hart if the other witnesses lied helped focus the jury's attention on the central issue of the case. St. v. Hart, 2000 MT 332, 303 M 71, 15 P3d 917, 57 St. Rep. 1398 (2000).

Cross-Examination Regarding Unrelated Incidents of Prior Sexual Abuse Properly Limited: The District Court did not err in limiting defendant's cross-examination of his ex-wife regarding two unrelated prior incidents of sexual abuse, one involving the ex-wife and the other involving her infant daughter. Defendant was allowed to present closing arguments concerning the ex-wife's motive, bias, or prejudice, based on evidence in the record. However, allowing cross-examination regarding the two prior unrelated incidents would have created unfair prejudice against the ex-wife and confused the issues for the jury. St. v. MacKinnon, 1998 MT 78, 288 M 329, 957 P2d 23, 55 St. Rep. 331 (1998).

Impeachment of Credibility With Evidence of Prior False Information Held Not to Violate Rule 609: At his trial on various charges involving sex with boys and girls, Martin sought to prevent the prosecutor from cross-examining his wife as to her conviction on a perjury charge by arguing that evidence of his wife's prior conviction was precluded by Rule 609, M.R.Ev. The Supreme Court distinguished St. v. Gollehon, 262 M 1, 864 P2d 249 (1993), and held that the District Court properly allowed the cross-examination by prohibiting the prosecution from inquiring whether Martin's wife had been convicted of a crime but allowing the prosecutor to inquire whether she had provided false alibi testimony. St. v. Martin, 279 M 185, 926 P2d 1380, 53 St. Rep. 1109 (1996), followed, although the error in restricting cross-examination was found to be harmless, in St. v. Maier, 1999 MT 51, 293 M 403, 977 P2d 298, 56 St. Rep. 208 (1999).

Failure to Offer Testimony of Past Conduct as Character Evidence — Issue Not Preserved for Appeal: Allen argued that the District Court erred when it sustained the state's objection to Allen's inquiry regarding a previous physical altercation between Allen and Evans. In order to properly preserve the issue for appeal, Allen should have offered the testimony as character

evidence under this rule, thereby affording the trial court an opportunity to evaluate the question pursuant to this rule. Because Allen failed to argue to the trial court that he be allowed to question Evans as to credibility, failing as well to raise the issue of admissibility, the merits of the argument could not be addressed for the first time on appeal. St. v. Allen, 278 M 326, 925 P2d 470, 53 St. Rep. 935 (1996), following Buhr v. Flathead County, 268 M 223, 886 P2d 381 (1994), and Marsh v. Overland, 274 M 21, 905 P2d 1088 (1995).

Evidence of Witnesses' Prior Crimes Inadmissible — No Violation of Right to Confront Witnesses: Gollehon contended that refusing to allow his questioning of the state's eyewitnesses, who happened to be state prison inmates, as to their prior crimes violated his constitutional right to confront the witnesses against him. However, proof of the witnesses' conduct would require examination of extrinsic evidence, which is inadmissible under this rule, and evidence of prior convictions, expressly prohibited under Rule 609, M.R.Ev. Balancing the probative value of the evidence with its potential prejudicial effect, the Supreme Court held that Gollehon's right to confrontation was not violated by the trial court's refusal to allow cross-examination of the witnesses' past criminal conduct. St. v. Gollehon, 262 M 1, 864 P2d 249, 50 St. Rep. 1250 (1993), distinguished in St. v. Martin, 279 M 185, 926 P2d 1380, 53 St. Rep. 1109 (1996).

Evidence of Other Crimes by Defendant Inadmissible to Bolster Credibility of Witness: Based on the testimony of witness Grotjohn, defendant Cameron was convicted of the sale of dangerous drugs (now criminal distribution of dangerous drugs). In order to explain Grotjohn's behavior as a witness at trial, the state introduced evidence over defendant's objection of a gun threat made by Cameron against Grotjohn. The Supreme Court held that the evidence of the gun threat was inadmissible because Grotjohn's reputation for truthfulness was not attacked at trial. The evidence of the threat was also inadmissible because under the rule in St. v. Just, 184 M 262, 602 P2d 957 (1979), as modified by St. v. Matt, 249 M 136, 814 P2d 52 (1991), the state failed to give written notice of the evidence to be admitted and the purpose of the evidence. Moreover, there was no similarity between the gun threat and the charged crime of sale of dangerous drugs (now criminal distribution of dangerous drugs). The District Court therefore committed reversible error in admitting the evidence of the gun threat. St. v. Cameron, 255 M 14, 839 P2d 1281, 49 St. Rep. 861 (1992), clarified, with regard to the applicability of the corpus delicti rule, in St. v. Hansen, 1999 MT 253, 296 M 282, 989 P2d 338, 56 St. Rep. 997 (1999).

Character Evidence Based Solely on Witness's Testimony Concerning Material Fact in Conflict With Defendant's Testimony Inadmissible: As set out in St. v. Webb, 252 M 248, 828 P2d 1351, 49 St. Rep. 236 (1992), character evidence regarding a witness is not admissible solely on the basis that the witness has testified concerning a material fact and that the testimony conflicts with that of defendant. St. v. Lyons, 254 M 360, 838 P2d 397, 49 St. Rep. 730 (1992).

Opinion Evidence of Witness Credibility Allowed Only After Character Attacked: The state contended that a drug informant's character for truthfulness was attacked on numerous occasions by defendant's questions regarding informant's use of drugs, rendering admissible during rebuttal the testimony by a Sheriff's detective as to informant's character. However, the defense did not offer opinion or reputation evidence or otherwise attack informant's veracity as part of its own case. Citing St. v. Deach, 699 P2d 811 (Wash. Ct. App. 1985), and U.S. v. Jackson, 588 F2d 1046 (5th Cir. 1979), the Supreme Court noted that even though defense witnesses disputed informant's testimony and offered conflicting testimony, neither contradictory testimony nor extensive cross-examination constituted an attack on informant's character for veracity. To hold otherwise would result in admitting opinion testimony regarding veracity in virtually every case. The state, having opened the door to informant's veracity, was then allowed to put the full weight of the detective's drug enforcement experience behind his opinion testimony regarding informant's credibility. Admission of the testimony constituted reversible error. St. v. Webb, 252 M 248, 828 P2d 1351, 49 St. Rep. 236 (1992).

Extrinsic Evidence of Witness's Conduct Not Allowed: Defendant sought to introduce evidence of a witness's character through the statements of other witnesses instead of during cross-examination. The District Court properly held that proof of a specific instance of a witness's conduct is not allowed through the introduction of extrinsic evidence. St. v. Kowalski, 252 M 166, 827 P2d 1253, 49 St. Rep. 197 (1992).

Report of Earlier Abuse Irrelevant and Inadmissible: In a trial for sexual intercourse without consent, the District Court erred on relevancy grounds by allowing a social worker to testify about an earlier report of abuse involving defendant's wife and son. St. v. Hensley, 250 M 478, 821 P2d 1029, 48 St. Rep. 1018 (1991).

Admissibility of Extrinsic Evidence Regarding Informant's Drug Use as Relevant to Motive for False Testimony: A trial court's discretion in exercising control and excluding evidence of a witness's bias or motive to testify falsely becomes operative only after the constitutionally

required threshold level of inquiry has been afforded the defendant. Therefore, subject to the limitations of Rules 403 and 611, M.R.Ev., a defendant should be afforded latitude in cross-examination and be allowed to introduce extrinsic evidence regarding an informant's alleged habitual drug use as relevant to the informant's motive to testify falsely, if denied by the informant. St. v. Gommenginger, 242 M 265, 790 P2d 455, 47 St. Rep. 681 (1990), followed in St. v. Haskins, 255 M 202, 841 P2d 542, 49 St. Rep. 922 (1992), and St. v. Milton, 280 M 142, 930 P2d 28, 53 St. Rep. 1337 (1996). However, see St. v. Allen, 276 M 298, 916 P2d 112, 53 St. Rep. 403 (1996).

Inconsistent Statement by Victim — Character Not Automatically at Issue: An inconsistent statement in a victim's account of a sexual assault does not automatically put her character in issue and thus does not open the door for evidence of any past misconduct. St. v. Courville, 236 M 253, 769 P2d 44, 46 St. Rep. 338 (1989).

Exclusion of Evidence of Victim's Later Crimes Proper — Balance of Prejudice and Probative Value: The District Court properly excluded evidence, under Rules 608 and 609, M.R.Ev., of pending or resolved criminal charges against the victim of an assault unless the state alluded to the victim's good character, truthfulness, or veracity. As noted in Cooper v. Rosston, 232 M 186, 756 P2d 1125, 45 St. Rep. 978 (1988), evidence bearing on the issue of the credibility of a witness, in order to be admissible, must be more probative than prejudicial, and the District Court must balance prejudice and probative value pursuant to Rules 401 and 403, M.R.Ev. St. v. Hammer, 233 M 101, 759 P2d 979, 45 St. Rep. 1326 (1988).

Defendant Portrayed as Loving Husband — Videotaped Testimony Concerning Extramarital Affair Admissible: The District Court did not err in allowing videotaped testimony of defendant's former lover concerning an extramarital affair when defendant himself opened the door on the relevance of character evidence by portraying himself as a loving husband. The videotaped testimony was relevant to rebuttal and motive. St. v. Atlas, 224 M 92, 728 P2d 421, 43 St. Rep. 2042 (1986).

Bench Warrants for Arrest of Witness — Properly Excluded: The District Court did not abuse its discretion in excluding copies of bench warrants for the arrest of a witness when it allowed inquiry into a specific instance of conduct, the witness' failure to appear on the warrants, and would have admitted the exhibits if the witness had denied his failure to appear. St. v. Short, 217 M 40, 702 P2d 979, 42 St. Rep. 1026 (1985).

Cross-Examination — Pending Charges Against Witness — Trial Court Discretion: When a prosecution witness admitted under cross-examination that he had failed to appear on bench warrants from the State of Washington and that the Washington charges involved an allegation that he had stolen defendant's property, the witness asserted his privilege against self-incrimination. The District Court's limiting of the extent of the cross-examination on the pending charges did not violate defendant's right to confront witnesses and was not an abuse of the trial court's discretion. The privilege against self-incrimination is not waived by testifying for the prosecution. St. v. Short, 217 M 40, 702 P2d 979, 42 St. Rep. 1026 (1985).

Extrinsic Evidence of Witness' Conduct — Credibility: The defendant was tried and convicted of sexual intercourse without consent and aggravated kidnapping. The defense was not allowed to cross-examine prosecution witness concerning her own specific acts of conduct except to show the defendant did not initiate his contacts with the present victim through a common scheme, design, or plan. Evidence of witness' extrinsic acts is not allowable to attack the witness' credibility. St. v. Norris, 212 M 427, 689 P2d 243, 41 St. Rep. 1841 (1984).

Sex Crime Victim's Past Sexual Conduct and False Accusations — Admissibility — Veracity of Victim: Although there is a compelling interest in favor of preserving the integrity of a sex crime trial and preventing it from becoming a trial of the alleged victim and a general policy against sordid probes into a victim's sexual past, evidence on an alleged victim's past sexual conduct is admissible on the issue of veracity. To limit or bar cross-examination when there is evidence of prior false accusations by the alleged victim restricts the constitutional right to confront witnesses. The evidence is admissible only if the prior accusations were proven false or admitted to be false. If the prior charge was not adjudicated, the evidence is inadmissible. A separate hearing on the issue should be held outside the jury's presence. The evidence is properly barred when its only value is to prejudice the alleged victim's character and reputation. St. v. Anderson, 211 M 272, 686 P2d 193, 41 St. Rep. 1357 (1984), modifying St. v. McSloy, 127 M 265, 261 P2d 663 (1953), and followed in St. v. Steffes, 269 M 214, 887 P2d 1196, 51 St. Rep. 1463 (1994). Anderson was discussed in St. v. Van Pelt, 247 M 99, 805 P2d 549, 48 St. Rep. 109 (1991), and State ex rel. Mazurek v. District Court, 277 M 349, 922 P2d 474, 53 St. Rep. 678 (1996).

Other Similar Conduct of Witness — Impeachment: At trial of defendant convicted of aggravated assault arising from fight outside a bar, it was reversible error for the court to allow

the prosecutor to interrogate one of defendant's witnesses as to past instances of misconduct of the witness at the bar, unconnected to the assault, for the purpose of impeaching the witness. St. v. White, 202 M 491, 658 P2d 1111, 40 St. Rep. 235 (1983), followed in Unmack v. Deaconess Medical Center, 1998 MT 262, 291 M 280, 967 P2d 783, 55 St. Rep. 1080 (1998), ruling that admission of character evidence regarding a physician witness who was also a licensed attorney concerning disciplinary action taken against the witness as an attorney was improper and clearly prejudicial because attorney character evidence was not probative and had no relevance as to credibility as an expert medical witness.

Impeachment by Reference to Remaining Silent: Defendant charged with burglary told his second attorney on the date set for trial that he had an alibi and intended to rely on it. In his direct testimony, defendant testified concerning his alibi and that he said nothing to the police during and after his arrest and never confessed to the crime. The State, on cross-examination, repeatedly asked why he had not raised his alibi defense earlier. Defendant's direct testimony opened the door to the impeachment inquiry, and the prosecutor's questions were proper and did not violate his right against self-incrimination. Defendant could not cloak himself on direct examination with seeming innocence because of his silence following arrest and at the same time be immune from impeachment when, to attack his credibility, the same kind of silence could be shown to speak to his guilt. St. v. White, 200 M 123, 650 P2d 765, 39 St. Rep. 1619 (1982), distinguished in St. v. Furlong, 213 M 251, 690 P2d 986, 41 St. Rep. 2096 (1984).

Miranda Violation — Use of Evidence for Impeachment: Evidence inadmissible in the prosecution's case in chief due to Miranda violations is not barred for all other purposes and may be used for impeachment of accused. If the police willfully violate Miranda thinking that the evidence can still be used for impeachment, the case, like those involving coercion or duress, may be handled by the application of the traditional standards for evaluating voluntariness and trustworthiness. St. v. Cartwright, 200 M 91, 650 P2d 758, 39 St. Rep. 1598 (1982), following St. v. Smith, 168 M 93, 541 P2d 351 (1975); St. v. Buckley, 171 M 238, 557 P2d 283 (1976).

Burglary Defendant's Credibility — Past Criminal Conduct: In an attempt to evoke testimony from the witness (an attorney) that he had seen the burglary defendant on the evening of the crime, the prosecutor asked the witness if he had ever defended the defendant. The question was interrupted by defense counsel, and no answer was given. Because the prosecution presented ample evidence of the defendant's guilt, the question was not reversible error. St. v. Welling, 199 M 135, 647 P2d 852, 39 St. Rep. 1215 (1982).

Character of Victim — Right to Witness and Confrontation — Sexual Intercourse Without Consent: While the sixth amendment guarantees a criminal the right to testimony of witnesses in his favor, it does not guarantee him the right to any and all witnesses, regardless of their competency or knowledge. There is the competing interest of the fairness and reliability of the trial. Here, in a sexual intercourse without consent case, the defendant was precluded by these rules from calling witnesses to establish the victim's sexual views and from cross-examining the victim concerning a quote on her jacket ("Liquor in the front, poker in the back"). Since the victim's character is not in issue and her sexual views are not probative of the truthfulness, and it is clearly within the judge's discretion to exclude this evidence if it is irrelevant or too prejudicial, the Supreme Court found no merit in defendant's argument that he was denied his right to confront witnesses. St. v. Higley, 190 M 412, 621 P2d 1043, 37 St. Rep. 1942 (1980), followed in State ex rel. Mazurek v. District Court, 277 M 349, 922 P2d 474, 53 St. Rep. 678 (1996).

Evidence of Drug Use of Witnesses Inadmissible as Too Remote and Without Foundation: The defendant appealed her conviction for deliberate homicide and aggravated assault in part by contending that it was error to prohibit the defense from referring to the use of marijuana by the victims in the hours before the shootings. In St. v. Gleim, 17 M 17, 41 P 998 (1895), Montana has endorsed the majority rule requiring a showing that the witness was under the influence of drugs at the time the events about which he testified occurred before evidence of the witness' drug use is admissible. Implicit in the formulation of the Gleim rule is a recognition of the remoteness concept. The question of remoteness is directed to the discretion of the trial court. While remoteness is a matter that generally goes to the credibility of the evidence rather than to its admissibility, evidence can be excluded if it is so remote that it has no evidentiary value. Given the defendant's failure to lay a proper foundation that the witnesses were under the influence of drugs at the time of the material events in this case, exclusion of the evidence was justified both under the Gleim rule and under the remoteness doctrine. St. v. Sorenson, 190 M 155, 619 P2d 1185, 37 St. Rep. 1834 (1980).

Character Evidence to Demonstrate Motive in Testifying: The point of Rule 608, M.R.Ev., for the purposes of this appeal is that reference to specific instances of a witness's conduct for the

purpose of proving his character for truthfulness or untruthfulness is never permitted on direct examination. This rule, in conjunction with Rules 403 and 405, M.R.Ev., supports the trial court limitation on impeachment evidence, which defendant argues should have been permitted to establish a prosecution witness's personal habits for marijuana use to demonstrate a profit motive in obtaining a conviction. St. v. McClean, 179 M 178, 587 P2d 20, 35 St. Rep. 1790 (1978).

Intimidation of Witnesses: When protection was immediately provided for two witnesses upon discovery that they were being intimidated and the jury had all the facts before it to weigh those witnesses' credibility, the District Court sufficiently guarded the defendant's rights and a mistrial was not warranted. St. v. Booke, 178 M 225, 583 P2d 405, 35 St. Rep. 1249 (1978), followed in St. v. Ferguson, 2005 MT 343, 330 M 103, 126 P3d 463 (2005).

Law Review Articles

Expert Testimony in Child Sexual Abuse Cases in Montana: A Proposal for Change, Harrison, 54 Mont. L. Rev. 297 (1993).

Montana Supreme Court Survey—Civil Procedure and Evidence, Dyrud, 42 Mont. L. Rev. 343 (1981).

How Do Jurors React to "Propensity" Evidence? A Report on a Survey, Leach, 27 Am. J. Trial Advoc. 559 (2004).

Testimony on Credibility: A Case Analysis, Slovenko, 32 J. Psychiatry & L. 243 (2004).

On the Horns of an Evidentiary Dilemma: The Intersection of Federal Rules of Evidence 806 and 608(b), Hornstein, 56 Ark. L. Rev. 543 (2003).

Character and Credibility: A Proposal to Realign Federal Rules of Evidence 608 and 609, Okun, 37 Vill. L. Rev. 533 (1992).

Collateral References

Witnesses *key* 344, 349.

98 C.J.S. Witnesses §§586 through 613.

29 Am. Jur. 2d Evidence §368, et seq.; 81 Am. Jur. 2d Witnesses §§167, 190, 194, 823, 861, 864, 935, 959, 960, 971, 1006, 1007.

Impeachment or cross-examination of prosecuting witness in sexual offense trial by showing that similar charges were made against other persons. 71 ALR 4th 469.

Propriety and prejudicial effect of questions or comments as to witness' religious beliefs or standards designed to enhance credibility. 27 ALR 4th 1167.

Right to impeach witness in criminal case by inquiry or evidence as to witness' criminal activity not having resulted in arrest or charge—modern state cases. 24 ALR 4th 333.

Cross-examination of character witness for accused with reference to particular acts or crimes—modern state rules. 13 ALR 4th 796.

Constitutionality of "rape shield" statute restricting use of evidence of victim's sexual experiences. 1 ALR 4th 283.

Admissibility, in disputed paternity proceedings, of evidence to rebut mother's claim of prior chastity. 59 ALR 3d 659.

Necessity and admissibility of expert testimony as to credibility of witness. 20 ALR 3d 684.

Impeachment of witness with respect to intoxication. 8 ALR 3d 749.

Admissibility of evidence as to other's character or reputation for turbulence on question of self-defense by one charged with assault or homicide. 1 ALR 3d 571.

Impeachment of witness by evidence or inquiry as to arrest, accusation, or prosecution. 20 ALR 2d 1421.

Admissibility and effect of evidence or comment on party's military service or lack thereof. 9 ALR 2d 606.

Attacking or supporting credibility of witness by evidence in form of opinion or reputation, under Rule 608(a) of Federal Rules of Evidence. 52 ALR Fed. 440.

3 Wigmore §§920 through 930, 977 through 988; 4 Wigmore §§1100 through 1119; 5 Wigmore §§1608 through 1621; 7 Wigmore §§1980 through 1986; 8 Wigmore §§2275 through 2277.

Rule 609. Impeachment by evidence of conviction of crime.

Commission Comments

This rule is unlike either the Federal or Uniform Rules (1974) Rule 609 in that they provide that evidence of conviction of a crime is admissible for the purpose of attacking credibility. Each of those rules provide substantial limitations upon the admissibility of this type of evidence: the discretion of the court; a time limit; and a pardon, annulment, or certificate of rehabilitation making such evidence inadmissible. Federal and Uniform Rules (1974) Rule 609(a), (b), and (c). The latter subdivision also provides an "other equivalent procedure" and makes conviction

inadmissible; while Montana does not have a certificate of rehabilitation, Article II, Section 28, 1972 Constitution of Montana, and Section 95-2227(3), R.C.M. 1947 [46-18-801], both provide that when a person is no longer under state supervision, his full rights of citizenship are restored. Adoption of this provision would mean that only those persons serving a sentence in prison, suspended sentence or on parole could be impeached by this method, and would severely limit the usefulness of the rule.

However, the Commission rejects the rule allowing impeachment by evidence of conviction of a crime, not only because of these Constitutional and statutory provisions but also and most importantly because of its low probative value in relation to credibility. The Commission does not accept as valid the theory that a person's willingness to break the law can automatically be translated into willingness to give false testimony. Advisory Committee Note to Federal Rule 609, 46 F.R.D. 161, 297, (1969). The Commission does believe that conviction of certain crimes is probative of credibility; however, it is the specific act of misconduct underlying the conviction which is really relevant, not whether it has led to a conviction. Allowing conviction of crime to be proved for the purpose of impeachment merely because it is a convenient method of proving the act of misconduct (Advisory Committee Note, *Id.*) is not acceptable to the Commission, particularly in light of Rule 608(b) allowing acts of misconduct to be admissible if they relate to credibility.

This rule is inconsistent with existing Montana law. Section 93-1901-11, R.C.M. 1947 [superseded], provides the methods of impeachment and includes, "...it may be shown by the examination of the witness, or the record of the judgment, that he has been convicted of a felony". It is also admissible under Section 93-2101-2, R.C.M. 1947 [26-2-302]. Section 93-1901-11, R.C.M. 1947 [superseded], was interpreted in State v. Coloff, 125 Mont. 31, 35, 231 P2d 343 (1951) to mean that the cross-examiner may ask the question, "Have you ever been convicted of a felony?" If the witness answers "Yes", then the inquiry is closed; if the witness answers "No", then proof may be made of conviction through the record of judgment. Montana also recognizes the rule that the witness may explain the felony conviction in an attempt to support his credibility. State v. McClellan, 23 Mont. 532, 538, 59 P 924 (1899); Osnes Livestock Co. v. Warren, 103 Mont. 284, 301, 62 P2d 206 (1936); and State v. Tully, 148 Mont. 166, 169, 418 P2d 549 (1966).

The Commission feels that, in addition to the reasons for rejecting the rule stated above, the present Montana practice can lead to one of two undesirable results. First, the mere fact that a witness can be asked whether he has been convicted of a felony can, in many instances, cause severe embarrassment on the part of the witness. This is particularly uncalled for where the conviction has no relation to credibility, such as manslaughter caused by an automobile accident. This could cause many witnesses to decide not to testify at all or, when the witness is a party, not to present or defend his side of the case at all. The fact that the witness can explain his conviction can simply add to the embarrassment and is no help. Second, when the witness answers that he has been convicted of a crime, no further inquiry is permitted. This can lead to confusion by jury members who see no connection between conviction of a crime and the case or to undue prejudice, particularly when the witness is a defendant testifying in his own behalf.

COMMISSION COMMENT TO JUNE 1990 AMENDMENT

The revision establishes gender neutral format only. No substantive change.

Compiler's Comments

1990 Amendment: Substituted gender neutral language for gender specific language. Amendment effective June 7, 1990.

Case Notes

Unsubstantiated Discovery Request for Criminal History of All State Witnesses Properly Denied: DuBray requested discovery of the criminal history records of each of the state's witnesses in a homicide trial, arguing that he was entitled to the records for impeachment purposes. The District Court denied the request, and the Supreme Court affirmed. Although information about a witness's prior convictions may be admissible under certain circumstances, a wholesale request for the production of records of all witnesses, absent an explanation or substantiation of the evidence sought or the potential use of the evidence, was unjustified and beyond the purpose of open discovery requirements in criminal cases. St. v. DuBray, 2003 MT 255, 317 M 377, 77 P3d 247 (2003).

Evidence of Prior DUI Conviction Not Related to Crime Charged — Harmless Error: In a trial for fourth offense DUI, Bingman contended that the trial court erred in admitting testimony related to Bingman's two most recent DUI convictions. However, as in St. v. Austad, 197 M 70,

641 P2d 1373 (1982), the evidence here was admitted for the purpose of proving not that Bingman had committed the DUI charged, but rather that Bingman had lied under oath. Bingman's own testimony opened the door to evidence of the past convictions and provided the jury with self-serving statements that Bingman knew to be untrue, but that were intended to place Bingman in a better light with the jury. As such, the testimony was not the sort of evidence contemplated by this rule, which prohibits the admission of evidence that a witness has been convicted of a crime for the purpose of attacking the witness's credibility. There was no reasonable possibility that the jury would have acquitted Bingman had he lied under oath only once instead of twice. Evidence of Bingman's prior convictions under these circumstances constituted harmless error and did not contribute to Bingman's conviction. St. v. Bingman, 2002 MT 350, 313 M 376, 61 P3d 153 (2002).

Impeachment of Credibility With Evidence of Prior False Information Held Not to Violate This Rule: At his trial on various charges involving sex with boys and girls, Martin sought to prevent the prosecutor from cross-examining his wife as to her conviction on a perjury charge by arguing that evidence of his wife's prior conviction was precluded by this rule. The Supreme Court distinguished St. v. Gollehon, 262 M 1, 864 P2d 249 (1993), and held that the District Court properly allowed the cross-examination by prohibiting the prosecution from inquiring whether Martin's wife had been convicted of a crime but allowing the prosecutor to inquire whether she had provided false alibi testimony. St. v. Martin, 279 M 185, 926 P2d 1380, 53 St. Rep. 1109 (1996), followed, although the error in restricting cross-examination was found to be harmless, in St. v. Maier, 1999 MT 51, 293 M 403, 977 P2d 298, 56 St. Rep. 208 (1999).

Evidence of Defense Witness's Prior Criminal History Not Admissible — Conviction Overturned: In a prosecution for accountability for aggravated kidnapping, the District Court allowed the state to cross-examine the defendant's witness as to the witness's prior criminal history. The Supreme Court found this to be reversible error on the grounds that there is a reasonable possibility that the inherently prejudicial and inadmissible evidence of the witness's criminal history might have contributed to the defendant's conviction. St. v. Bristow, 267 M 170, 882 P2d 1041, 51 St. Rep. 1010 (1994).

Evidence of Witnesses' Prior Crimes Inadmissible — No Violation of Right to Confront Witnesses: Gollehon contended that refusing to allow his questioning of the state's eyewitnesses, who happened to be state prison inmates, as to their prior crimes violated his constitutional right to confront the witnesses against him. However, proof of the witnesses' conduct would require examination of extrinsic evidence, which is inadmissible under Rule 608, M.R.Ev., and evidence of prior convictions, expressly prohibited under this rule. Balancing the probative value of the evidence with its potential prejudicial effect, the Supreme Court held that Gollehon's right to confrontation was not violated by the trial court's refusal to allow cross-examination of the witnesses' past criminal conduct. St. v. Gollehon, 262 M 1, 864 P2d 249, 50 St. Rep. 1250 (1993), followed in In re Seizure of $23,691.00, 273 M 474, 905 P2d 148, 52 St. Rep. 1063 (1995).

One Objection Sustained — No Violation of Right to Confront Witnesses: The trial court sustained one objection on relevancy grounds to the question of whether the state's chief witness against the defendant had ever been in prison. On appeal, the defendant claimed that sustaining the objection prevented any cross-examination to impeach the witness's credibility or to establish his bias, motives, or proclivity toward dishonesty and that this violated the defendant's right to confront the witnesses against him. The Supreme Court held that the District Court did not improperly restrict the defendant's right of cross-examination because the trial record disclosed no other restrictions or limitations on counsel's ability to cross-examine. St. v. Hatfield, 256 M 340, 846 P2d 1025, 50 St. Rep. 101 (1993).

Disclosure by Defense Witness of Other Crimes — Improper Prosecutorial Inquiry: A defense witness was impeached on cross-examination when asked if he had been convicted of a crime and what crime he had committed. The prosecutor's inquiry was clearly improper under this rule, and none of the exceptions in Rule 404(b), M.R.Ev., applied. The conviction was reversed and the case remanded for a new trial. St. v. Shaw, 237 M 451, 775 P2d 207, 46 St. Rep. 942 (1989).

Exclusion of Witness's Earlier Crimes — Impeachment by Showing Bias — Criminal History in Offer of Proof: Hone, a witness to an assault, was on parole from a homicide conviction at the time of the assault. It was not error for the District Court to grant a motion in limine to prevent defense counsel from using that conviction for impeachment under an offer of proof, supposedly showing bias, that "he, Hone, would personally see to it that [defendant] served time in prison because a year at the pen had done him, Hone, a lot of good". There was no record that there was an offer to restrict the testimony to the admissible portion. Sloan v. St., 236 M 100, 768 P2d 1365, 46 St. Rep. 214 (1989), followed in St. v. Dahms, 252 M 1, 825 P2d 1214, 49 St. Rep. 106 (1992), and in St. v. Haskins, 255 M 202, 841 P2d 542, 49 St. Rep. 922 (1992).

Exclusion of Evidence of Victim's Later Crimes Proper — Balance of Prejudice and Probative Value: The District Court properly excluded evidence, under Rules 608 and 609, M.R.Ev., of pending or resolved criminal charges against the victim of an assault unless the state alluded to the victim's good character, truthfulness, or veracity. As noted in Cooper v. Rosston, 232 M 186, 756 P2d 1125, 45 St. Rep. 978 (1988), evidence bearing on the issue of the credibility of a witness, in order to be admissible, must be more probative than prejudicial, and the District Court must balance prejudice and probative value pursuant to Rules 401 and 403, M.R.Ev. St. v. Hammer, 233 M 101, 759 P2d 979, 45 St. Rep. 1326 (1988), followed in St. v. Kowalski, 252 M 166, 827 P2d 1253, 49 St. Rep. 197 (1992).

Knowledge of Term of Art Shown Through Testimony — Evidence of Prior Crimes Admissible: When a defendant understands the intricacy of proving a legal term of art and attempts through his own testimony to subvert proof of this element, he has clearly shown knowledge. A defendant who said he was not familiar with the term "under the influence" at the time of arrest and did not believe he was under the influence when arrested, opened the door to evidence of previous DUI convictions, which evidence was then properly admitted under the knowledge exception of Rule 404(b), M.R.Ev. St. v. Kinney, 230 M 281, 750 P2d 436, 45 St. Rep. 205 (1988).

Admissibility of Character and Other Crimes Evidence When Defendant "Opens Door" on Cross-Examination: Where defendant on cross-examination stated he was not the kind of person who could commit the crime of which he was accused, evidence of character was admissible because defendant opened the door to rebuttal evidence by his statement. When defendant on cross-examination further stated he had never committed a burglary, evidence of prior burglary conviction was admissible for the same reason. St. v. Austad, 197 M 70, 641 P2d 1373, 39 St. Rep. 356 (1982).

Admissibility of Mug Shots: Defendant was identified as the perpetrator of a burglary by identification of mug shots by the two victims of the burglary and a next-door neighbor. The identifications were made from a mug shot book. The viewings were conducted separately and within a few days of the burglary. The parties did not discuss the identifications with each other. Defendant contended that the mug shots should not have been allowed to be introduced because they implied that he had committed prior criminal acts. The mug shots were booking photographs and merely indicated that defendant had been booked on prior occasions. The photographs were used for identification. No evidence was adduced indicating that defendant had ever been convicted of any crime. The photographs were relevant for purposes of identification. The judge also gave a cautionary instruction regarding the photographs. This instruction dealt with possible prejudicial effect, and it was within the discretion of the trial judge to admit the photographs. St. v. Stokes, 195 M 321, 637 P2d 498, 38 St. Rep. 1889 (1981).

Permissible Use of Records of Juvenile Crimes — Impeachment: Before his trial on charges of sexual intercourse without consent and sexual assault, the defendant filed a motion to allow his counsel to inspect the Youth Court records of any complaining witnesses on the grounds that the records might have a bearing on the competency and veracity of those witnesses. The motion was denied, and the judge said he would examine the records to determine if any of the girls should be examined by a psychologist before testifying. The Supreme Court found that the judge's ruling denying the defendant's motion to inspect denied him the right to confront the witnesses against him. However, a review of the juvenile records convinced the Supreme Court that the error here was harmless. It declined to adopt a rule allowing evidence of prior juvenile convictions to be used as evidence to attack the general credibility of a witness. The permissible use of those juvenile records was confined to demonstrating, by cross-examination, a witness' bias, prejudice, or motive. It was within the discretion of the trial judge to determine competency, and his findings would not be overturned absent an abuse of discretion. St. v. Camitsch, 192 M 124, 626 P2d 1250, 38 St. Rep. 563 (1981).

One Proceeding With Two Hearings — Failure to Object Again — Waiver of Error: In a child abuse and neglect proceeding to terminate parental rights when the father of the youngest child was to have his rights determined a month after a hearing involving the termination of both parents' rights to the two older children, the father of the youngest child waived his right to complain of error on appeal because he failed to object to questions by the judge at the second hearing involving a prior felony conviction, even though objection was made and overruled in the first hearing. In re T.J.D., J.L.D., & R.J.W., 189 M 147, 615 P2d 212, 37 St. Rep. 1385 (1980).

Prior Felony Conviction — Factor to Be Considered in Parental Termination Proceedings: Although a criminal background does not disqualify one from having custody of his children, it is a factor and should be considered in child abuse and neglect proceedings under 41-3-102. Although the crime itself may not be relevant to the proceeding, the conduct of the father on

parole may be; thus the admission of a prior felony conviction at such a hearing was not error. In re T.J.D., J.L.D., & R.J.W., 189 M 147, 615 P2d 212, 37 St. Rep. 1385 (1980).

Effective Assistance of Counsel — Failure to Object to Inquiry of Witness's Criminal Record: Failure of defense counsel to object to an inquiry into a defense witness's prior criminal record did not appear in a case involving at least a dozen witnesses and several days of testimony as if it prejudiced the defendant. St. v. Rose, 187 M 74, 608 P2d 1074, 37 St. Rep. 642 (1980).

Inquiry by Defense Into Qualifications to Be Deputy Sheriff — Electronic Surveillance: A Deputy Sheriff serving as an undercover officer in a neighboring county was a public employee with an official duty to maintain contact with persons involved in the drug scene and could lawfully use electronic surveillance against defendant as allowed by 45-8-213 and St. v. Brackman, 178 M 105, 582 P2d 1216 (1978), and this rule prohibited raising an inquiry before the jury into the Deputy Sheriff's prior criminal record and qualifications to be a Deputy Sheriff. St. v. Hanley, 186 M 410, 608 P2d 104, 37 St. Rep. 427 (1980).

Erroneous Jury Instruction: While an instruction that provided in part that a witness can be impeached by evidence that he has previously been convicted of a felony was improper, under the facts of a given case the instruction may not be prejudicial. St. v. Sullivan, 182 M 66, 595 P2d 372, 36 St. Rep. 936 (1979).

Law Review Articles

Evidence of Other Crimes in Montana, Roscoe, 30 Mont. L. Rev. 235 (1969).

Character and Credibility: A Proposal to Realign Federal Rules of Evidence 608 and 609, Okun, 37 Vill. L. Rev. 533 (1992).

Impeaching the Defendant by His Prior Convictions and the Proposed Federal Rules of Evidence: A Half Step Forward and Three Steps Backward, Spector, 1 Loyola U.L.J. 247 (1970).

Collateral References

Witnesses *key* 345.

98 C.J.S. Witnesses §§598 through 600, 606, 617.

81 Am. Jur. 2d Witnesses §§876, 883 through 887, 938, 939, 967.

Propriety of using prior conviction for drug dealing to impeach witness in criminal trial. 37 ALR 5th 319.

Requirement that defendant in state court testify in order to preserve alleged trial error in rulings on admissibility of prior conviction impeachment evidence under Uniform Rule of Evidence 609, or similar provision or holding—post-Luce cases. 80 ALR 4th 1028.

Right to impeach witness in criminal case by inquiry or evidence as to witness' criminal activity for which witness was arrested or charged, but not convicted—modern state cases. 28 ALR 4th 505.

Cross-examination of character witness for accused with reference to particular acts or crimes—modern state rules. 13 ALR 4th 796.

Use of unrelated traffic offense conviction to impeach general credibility of witness in state civil case. 88 ALR 3d 74.

Impeachment of witness by showing conviction of contempt. 49 ALR 2d 845.

Cross-examination of automobile driver in civil action with respect to arrest or conviction for previous traffic offenses. 20 ALR 2d 1217, §3 superseded by 88 ALR 3d 74.

3 Wigmore §§980 through 987.

Rule 610. Religious beliefs or opinions.

Commission Comments

This rule is identical to Federal and Uniform Rules (1974) Rule 610. As indicated in Section 93-701-2, R.C.M. 1947 [superseded], persons were formerly not allowed to testify at common law if they did not profess a belief in God. This rule was grounded on the notion that if the witness did not believe in punishment after death for testifying falsely, he was not considered trustworthy. The abandonment of this rule of disqualification has led to a rule in some jurisdictions allowing impeachment on the grounds of religious beliefs. Although there is no Montana law on this subject, the Commission believes that the abandonment of the rule of disqualification should also mean abandonment of the rule of impeachment because there "...is no basis for believing that the lack of faith in God's avenging wrath is today an indication of greater than average untruthfulness". McCormick, Handbook on the Law of Evidence, 102 (2d ed. 1972).

The Advisory Committee's Note to the Federal Rule, 46 F.R.D. 161, 302 (1969), indicates that impeachment for religious beliefs should be allowed in "an inquiry for the purpose of showing interest or bias...". The Commission agrees with this interpretation of the rule.

COMMISSION COMMENT TO JUNE 1990 AMENDMENT

The revision establishes gender neutral format only. No substantive change.

Compiler's Comments

1990 Amendment: Substituted gender neutral language for gender specific language. Amendment effective June 7, 1990.

Collateral References

Witnesses *key* 340(2).

98 C.J.S. Witnesses §604.

81 Am. Jur. 2d Witnesses §923.

Propriety and prejudicial effect of questions or comments as to witness' religious beliefs or standards designed to enhance credibility. 27 ALR 4th 1167.

3 Wigmore §936.

Rule 611. Mode and order of interrogation and presentation; re-examination and recall; confrontation.

Commission Comments

(a) Control by court. This subdivision is identical to Federal and Uniform Rules (1974) Rule 611(a). It expresses the common law rule which allowed the trial court to control the mode and order of presentation of evidence as well as restating goals found in Rules 102, concerning the effective ascertainment of the truth, and 403, concerning undue delay, waste of time, or cumulative evidence. The rule states for the first time the goal that witnesses are to be protected from harassment or undue embarrassment. It should be noted that mode of interrogation refers to the allowable form of examination, that is, whether the discretion of the court will allow questions which ask for a general or specific answer; and order of presentation refers to the alteration of the normal order of presentation of evidence by the parties at the discretion of the court.

This rule is consistent with existing Montana law. Section 93-5101, R.C.M. 1947 [25-7-301], provides the order of trial and as an exception states, "when the jury has been sworn, the trial shall proceed in the following order, unless the court, for good cause and special reason, otherwise directs...". The fourth subdivision of that statute allows the court "for good reasons, in the furtherance of justice", to permit parties to offer evidence of their original case during rebutting evidence. Cases interpreting this subdivision of this statute indicate that allowing a variance from the normal order of proof is a matter of discretion with the trial court. First National Bank of Saco v. Vagg, 65 Mont. 34, 41, 212 P 509 (1922); Puutio v. Roman, 76 Mont. 105, 116, 245 P 523 (1926); Howe v. Messimer, 84 Mont. 304, 311, 295 P 281 (1929).

Section 93-1901-1, R.C.M. 1947 [superseded], provides: "The order of proof must be regulated by the sound discretion of the court...". No cases have construed this particular provision. Section 93-1901-3, R.C.M. 1947 [superseded], states:

The court must exercise a reasonable control over the mode of interrogation, so as to make it as rapid, as distinct, as little annoying to the witness, and as effective for the extraction of the truth as may be;... The court, however may stop the production of further evidence upon a particular point when the evidence upon it is already so full as to preclude reasonable doubt.

Of the four cases which have interpreted this statute, three were concerned with the exclusion of questions which have been asked and answered several times. State v. McConville, 64 Mont. 302, 306, 209 P 987 (1922); State v. Cassill, 70 Mont. 433, 452, 227 P 49 (1924); and State v. McSloy, 127 Mont. 265, 271, 261 P2d 663 (1953). The final case citing this statute, State v. Keller, 126 Mont. 142, 146, 246 P2d 817 (1952), indicates that this statute as well as Section 93-401-24, R.C.M. 1947 [superseded], represent the rule that cross-examination should be limited to pertinent questions.

Two sections of the criminal code also provide that the discretion of the court may control the order of trial: Section 95-1910, R.C.M. 1947 [46-16-401], is a parallel provision to Section 93-5101, R.C.M. 1947 [25-7-301], on order of trial, and Section 95-1911, R.C.M. 1947 [46-16-402], allows this order to be varied from in the discretion of the court.

There is also a line of cases in Montana which establishes the rule independent of any statute that the order of trial is within the sound discretion of the trial court. Griswold v. Boley, 1 Mont. 545, 558 (1872); Noyes v. Clifford, 37 Mont. 138, 142, 94 P 842 (1908); Coleman v. Higgins, 137 Mont. 222, 236, 351 P2d 901 (1960).

The first two goals stated in the subdivision are consistent with Rules 102 and 403, respectively. See the Commission Comments to those rules. The third goal is consistent with statutes and cases concerning the protection of witnesses from harassment or embarrassment.

Section 93-2101-2, R.C.M. 1947 [26-2-302], provides that while a witness is bound to answer all pertinent questions, "...he need not give an answer which will have a tendency to subject him to punishment for a felony; nor need to give an answer which will have a direct tendency to degrade his character...". Section 93-2101-3, R.C.M. 1947 [26-2-401], provides, "it is the right of a witness to be protected from irrelevant, improper or insulting questions, and from harsh or insulting demeanor;... to be examined only as to matters legal and pertinent to the issue". Rules 26(c) and 30(b), M.R.Civ.P., similarly allow the court to limit discovery to protect parties and deponents from annoyance, embarrassment, or oppression.

Cases which have interpreted Sections 93-2101-2, R.C.M. 1947 [26-2-302], and 93-2101-3, R.C.M. 1947 [26-2-401], have indicated that witnesses should be protected and in some instances have found reversible error for allowing degrading questions. State v. Rogers, 31 Mont. 1, 7, 77 P 293 (1904) (reversible error); State v. Trueman, 34 Mont. 249, 256, 85 P 1024 (1906) (reversible error); State v. Crowe, 39 Mont. 174, 179, 102 P 579 (1909) (improper questions); State v. Biggs, 45 Mont. 400, 404, 123 P 410 (1912) (proper protection provided); Lukert v. Eldridge, 49 Mont. 46, 50, 139 P 999 (1914); State ex rel. Bacorn v. District Court, 73 Mont. 297, 302, 236 P 533 (1925); and State ex rel. Woodard v. District Court, 120 Mont. 585, 590, 189 P2d 998 (1948).

(b) Scope of cross-examination. The first paragraph of this subdivision is identical to Federal and Uniform Rules (1974) Rule 611(b). The Commission added the second paragraph to ensure that if the court allows the scope of cross-examination to be exceeded, the evidence thereby brought out may be used as proof in the case and to overrule a line of older Montana cases which would not allow such evidence to be used in the cross-examiner's case.

The intent of the Commission in adopting the Federal Rule is to retain the traditional rule of scope of cross-examination for the purpose of maintaining the usual order of proof, but to allow the trial court to vary that order if good reasons occur during the trial. Two such reasons would be to save time for the court and witnesses by allowing complete questioning of a witness when he first testifies, rather than recalling by the cross-examining party, and to achieve a more orderly presentation of evidence where circumstances dictate.

It is important to note that the Commission intends the adoption of Rules 607 and 611 to abolish the doctrine of sponsorship of witnesses. In order to accomplish this end, five particular rules establishing the doctrine have been dealt with: First, the rule that a party may not impeach his own witness has been abolished by Rule 607(a). Second, the rule that a party is bound by the testimony of any witness has been abolished by Rule 607(b). See Commission Comment to Rule 607. Third, existing Montana law concerning the scope of cross-examination has been clarified by the adoption of Rule 611(b)(1), noted above, which allows the court the discretion to permit parties to exceed the scope of normal cross-examination. Fourth, the rule not allowing a party to prove his case on cross-examination has been abolished by Rule 611(b)(2). And fifth, an interpretation of Section 93-1901-7, R.C.M. 1947 [superseded], that if a party exceeds the scope of cross-examination, he makes that witness his own, is bound by his testimony, and therefore cannot impeach him (State v. Smith, 57 Mont. 349, 363, 188 P 644 (1920) and State v. Richardson, 63 Mont. 322, 329, 207 P 124 (1922)), is necessarily abolished by the combination of Rules 607 and 611.

The first sentence of the first paragraph of this subdivision is consistent with existing Montana law. Section 93-1901-7, R.C.M. 1947 [superseded], provides the scope of cross-examination: "the opposite party may cross-examine the witness as to any facts stated in his direct examination or connected therewith...". This section was enacted in 1895, and up to that point the leading case of scope cross-examination was Territory v. Rehberg, 6 Mont. 467, 470, 13 P 132 (1887) which stated the rule that the scope of cross-examination was to be limited to matters stated in the direct examination. The leading case interpreting the statute after its enactment is Kipp v. Silverman, 25 Mont. 296, 306, 64 P 884 (1901), which stated:

We deem it sufficient in this connection to say that the statute...permits a wide range for cross-examination, and the courts should incline to extend, rather than to restrict the right. Properly understood, the right extends, not only to all facts stated by the witness in his original examination, but to all other facts connected with them, whether directly or indirectly, which tend to enlighten the jury on the question in controversy.

Another leading case construing Section 93-1901-7, R.C.M. 1947 [superseded], Cobban v. Hecklen, 27 Mont. 245, 263, 78 P 805 (1902), indicates that cross-examination should not be unduly restricted, for "the purpose of trial issues of fact is to bring out the whole truth, and to that end the right of cross-examination must be liberally interpreted and freely exercised". The court also indicated that this section "...radically changes the common-law rule in respect of cross-examination...". Many Montana cases have followed this particular interpretation of

Section 93-1901-7, R.C.M. 1947 [superseded]. The latest case stating this rule is State Highway Comm'n v. Bennett, 162 Mont. 386, 391, 513 P2d 5 (1973) where the court stated that the statute:

...permits a wide range of cross-examination. The right of cross-examination may not be unduly restricted and may extend not only to facts stated by the witness in direct examination, but to all other facts connected with them which tends to enlighten the jury on the question in controversy.

In addition, there is a rule in criminal cases that when the defendant takes the stand and denies the commission of the crime for which he is on trial, "...a wide latitude of cross-examination is permissible, owing to the general nature of the defendant's statement" State v. Rogers, 31 Mont. 1, 7, 77 P 293 (1904), and State v. Smith, 57 Mont. 349, 359, 188 P 644 (1920).

The second sentence of the first paragraph of this subdivision allows the court, in its discretion, to extend the scope of cross-examination beyond matters covered on direct. It is not clear if this particular provision is consistent with existing Montana law. There are cases which established the principle that "...it is the duty of the trial court to exercise a sound legal discretion in controlling the cross-examination of witness...". State v. Howard, 30 Mont. 518, 527, 77 P 50 (1904); State v. Biggs, 45 Mont. 400, 404, 123 P 410 (1912); and Conway v. Monidah Trust, 51 Mont. 113, 116, 149 P 711 (1915). These cases are consistent with the existing Montana law which allows the trial court discretion in varying from the normal order of proof. See Commission Comments to Rule 611(a). However, there are cases which hold that despite the liberal rule announced by the Kipp and Cobban cases, cross-examination should not be allowed as to any matter not connected with the subject matter of the direct examination. Borden v. Lynch, 34 Mont. 503, 509, 87 P 609 (1906); State v. McConville, 64 Mont. 302, 305, 209 P 987 (1922); Spurgeon v. Imperial Elevator Co., 91 Mont. 432, 436, 43 P2d 891 (1935); and McCutcheon v. Larson, 134 Mont. 511, 514, 333 P2d 1013 (1959). Therefore, to the extent that this particular provision allows the trial court discretion to permit the cross-examiner to exceed the scope of cross-examination, these and like cases are expressly overruled. The Commission feels that this matter is one for the discretion of the court in its capacity to determine the order of proof and probably is consistent with the practice in many district courts of this state.

The second paragraph of this subdivision is inconsistent with existing Montana case law. This provision necessarily overrules many Montana cases, for if the cross-examiner is allowed to go beyond matters covered on direct examination, he should be allowed to use any evidence developed during such an examination.

Cases which have stated the rule that a party may not make out his case on cross-examination are as follows: Fredericks v. Clark, 3 Mont. 258, 261 (1878) (defendant may not make out his defense on cross-examination of plaintiff's witnesses); Davis v. Morgan, 19 Mont. 141, 144, 47 P 793 (1896); Harrington v. Butte and Boston Mining Co., 19 Mont. 411, 417, 48 P 758 (1897) (defendant may not make out his case on cross-examination); Brophy v. Downey, 26 Mont. 252, 255, 67 P 312 (1901); Shandy v. McDonald, 38 Mont. 393, 398, 100 P 203 (1909); Allen v. Deer Creek Coal Co., 43 Mont. 269, 282, 115 P 673 (1911) (holding it proper to deny an offer of proof on cross-examination which tended to show mitigation of damages); Pelican v. Mut. Life Ins. Co., 44 Mont. 277, 285, 119 P 778 (1911) (defendant may not establish an affirmative defense on cross-examination); Hanson Sheep Co. v. Farmers and Traders State Bank, 53 Mont. 324, 340, 163 P 1151 (1917); State v. Wyman, 56 Mont. 600, 612, 186 P 1 (1919); State v. Smith, 57 Mont. 349, 361, 188 P 644 (1920); Mutual Oil Co. v. Hamilton, 73 Mont. 385, 391, 236 P 545 (1925); State v. Shannon, 95 Mont. 280, 288, 26 P2d 360 (1933); Vonault v. O'Rourke, 97 Mont. 92, 110, 33 P2d 535 (1934); and McGonigle v. Prudential Ins. Co., 100 Mont. 203, 219, 46 P2d 687 (1935) (stating, "this court has consistently adhered to the rule that a party under the guise of cross-examination make out his case by witnesses for the other side".) To the extent that these cases state a rule contrary to paragraph (2) of this subdivision, they are expressly superseded.

(c) Leading questions. This subdivision is identical to Federal Rule 611(c). It recognizes the traditional view that leading questions, that is, questions which suggest the desired answer, are generally undesirable on direct examination, for the witness "...may acquiesce in a false suggestion". McCormick, Handbook on the Law of Evidence 8 (2d ed. 1972).

The exception found in the first sentence, allowing leading questions to develop a witness' testimony, is intended to recognize situations where leading questions can be used. Advisory Committee's Note to Federal Rule 611(c), 56 F.R.D. 183, 275 (1972). Among those recognized are "the witness who is hostile, unwilling, or biased; the child witness or an adult with communication problems; the witness whose recollection is exhausted; and undisputed preliminary matters". *Id.* citing 3 Wigmore Evidence, Sections 774-778 (Chadbourn Rev. 1970). The subdivision also recognizes that leading questions should ordinarily be allowed on

cross-examination because the purpose of cross-examination is to discredit testimony and this is where leading questions are most effective. The use of the word "ordinarily" in the second sentence is intended to allow a court to deny use of leading questions when cross-examination is in form only, such as cross-examination of a party by his counsel after being called as an adverse witness or of a friendly witness. The use of leading questions is ultimately a question for the trial court under Rule 611(a).

Except for its final sentence, this subdivision is consistent with existing Montana law. Section 93-1901-5, R.C.M. 1947 [26-1-101], provides:

A question which suggests to the witness by the answer which the examining party desires is denominated a leading or suggestive question. On a direct examination, leading questions are not allowed, except in the sound discretion of the court, under special circumstances making it appear that the interest of justice requires it.

Cases in Montana indicate that a trial court has the discretion to allow leading questions, in accordance with the statute. State v. Spotted Hawk, 22 Mont. 33, 64, 55 P 1026 (1898); Hefferlin v. Karlman, 29 Mont. 139, 144, 174 P 201 (1903); and State v. Collett, 118 Mont. 473, 477, 167 P2d 584 (1946). The cases have also indicated that allowing leading questions where improper is a technical error and will only rarely be grounds for a new trial. Hefferlin v. Karlman, *supra*; State v. Kanakaris, 54 Mont. 180, 183, 169 P 482 (1917); and State v. Collett, *supra*. The cases have also recognized some of the exceptions to the rule generally disallowing leading questions on direct examination. In State v. Spotted Hawk, *supra*, the Supreme Court found that when witnesses were illiterate or unable to speak English, examination should be allowed by leading questions, a view affirmed in State v. Collett, *supra* at 478. In Hefferlin v. Karlman, *supra,* the court held it was within the sound discretion of the trial court to permit leading questions to establish a foundation, for it was a preliminary matter. Finally, in State v. Karri, 84 Mont. 130, 136, 276 P 247 (1929), the court held it was proper for the prosecution to ask a leading question which contained specific words which established an element of the crime.

The last sentence of this subdivision indicates that certain parties and witnesses may be "automatically regarded and treated as hostile". Advisory Committee's Note, 56 F.R.D. *supra* at 276. This is an expansion of Montana law. Rule 43(b), M.R.Civ.P., provides in its first sentence "a party may interrogate any unwilling or hostile witness by leading questions". The rule goes on to indicate that certain categories of witnesses may be treated as if they were adverse party and so cross-examined and impeached; however, a foundation is usually required to show that the witness is in fact hostile. In Salvail v. Great N. Ry., 156 Mont. 12, 22, 473 P2d 549 (1970), the Supreme Court indicated that Montana Rule 43(b) is wider than the same Federal Rule because the adjective "managing", which modified agent in the Federal Rule, was deleted from the Montana Rule in accordance with the broader superseded Section 93-1901-9, R.C.M. 1947 [superseded]. Therefore, Montana has more broadly construed who is a hostile witness and the expansion under Rule 611(c) follows this previously established trend.

(d) Reexamination and recall. This subdivision is original and therefore entirely different from the Federal or Uniform Rules (1974) Rule 611. It is based on 93-1901-10, R.C.M. 1947 [superseded], the first two sentences simply rewording that statute. It should be noted that the word "concluded" in the second sentence is intended to mean that all the parties have had a chance to call and examine the witness. The final sentence is included to ensure that rebuttal, as defined by Section 93-5101, R.C.M. 1947 [25-7-301], will be allowed as a matter of right and that witnesses may be called for this purpose even after their examination has been concluded.

Case law supports the rule that the scope of reexamination is a matter within the sound discretion of the trial court. State v. Simanton, 100 Mont. 292, 310, 49 P2d 981 (1935), and State v. Heaston, 109 Mont. 303, 316, 97 P2d 330 (1939)[, and Cline v. Durden, 246 M 154, 803 P2d 1077, 47 St. Rep. 2306 (1990)]. The rule has also been established that reexamination should be allowed to as to new matters brought out during cross-examination. Croft v. Thurston, 84 Mont. 510, 514, 276 P 950 (1929); State v. Board, 135 Mont. 139, 145, 337 P2d 924 (1959); and State v. Crockett, 148 Mont. 402, 409, 421 P2d 722 (1967). Case law also supports the rule that it is within the discretion of the trial court to allow a witness to be recalled after the examination of the witness has been concluded. State v. Mumford, 69 Mont. 424, 433, 222 P 447 (1924); State v. Carns, 136 Mont. 126, 137, 345 P2d 735 (1959) (finding an abuse of discretion); and Clark v. Wegner, 147 Mont. 521, 530, 415 P2d 723 (1966) (also finding an abuse of discretion).

(e) Confrontation. This subdivision is original and therefore not part of either the Federal or Uniform Rules (1974). It is based on West's Ann. Cal. Ev. Code, Section 711, and Section 93-401-3, R.C.M. 1947 [superseded]. The rule is adopted, not only to include this fundamental concept in the rules but also to ensure that it remains in effect, because Rule 603, oath of affirmation, superseded Section 93-401-3, R.C.M. 1947 [superseded], which provides: "A witness

can be heard only upon oath or affirmation, and upon a trial he can be heard only in the presence and subject to the examination of all the parties, if they choose to attend and examine". That which has not been superseded by Rule 603 is superseded by this subdivision.

The exception clause is included at the beginning of the subdivision to govern situations, for example, where a witness or deponent may give testimony out of the presence of a party, later joined in the action, or where reports are submitted in evidence as exception to the hearsay rule, but in apparent violation of the subdivision. The intent of the Commission in adopting this subdivision is to carry forward the effect of Section 93-401-3, R.C.M. 1947 [superseded], subject to subsequently enacted exceptions.

COMMISSION COMMENT TO JUNE 1990 AMENDMENT

The revision establishes gender neutral format only. No substantive change.

Compiler's Comments

1990 Amendment: Substituted gender neutral language for gender specific language. Amendment effective June 7, 1990.

Case Notes

Standard of Review of Witness Reexamination — Abuse of Discretion: A District Court has wide discretion in determining the scope and extent of reexamination regarding matters brought out on cross-examination. The Supreme Court reviews a District Court's action in allowing the prosecution to reexamine its witness following its previous direct examination, the defense's cross-examination, the state's redirect examination, and the defense's recross-examination for abuse of discretion. In the present case, Long failed to cite any authority that it was error to allow the prosecutor to ask further questions of a prosecution witness, and allowing the state to reopen redirect examination was a proper exercise of the District Court's discretion. St. v. Long, 2005 MT 130, 327 M 238, 113 P3d 290 (2005). See also St. v. Shaw, 255 M 298, 843 P2d 316 (1992), and St. v. Veis, 1998 MT 162, 289 M 450, 962 P2d 1153 (1998).

Limitation on Cross-Examination, Closing Arguments, and Calling of Witnesses Within Discretion of Trial Court: Acting pro se, defendant was allowed considerable leeway by the trial court in cross-examination, closing arguments, and calling witnesses, and the court restricted defendant in each area only when defendant went "over the line". Defendant was convicted and on appeal contended that the trial court's restrictions were an abuse of discretion. The Supreme Court examined the record and affirmed, noting the trial court's broad discretion in conducting a trial in a speedy and fair manner and holding that each restriction was within the trial court's discretion under evidentiary rules. St. v. Insua, 2004 MT 14, 319 M 254, 84 P3d 11 (2004).

Rebuttal Testimony Offered to Refute Defendant's Theory of Child Incest Victim's Conduct Properly Allowed: During the state's case in chief, a child incest victim's mother testified that on one occasion when the child was visiting her father, the child had called and requested to be picked up early because her father had scared her and that the touching of the child by the father had begun when the child called to be picked up. During the defendant's case in chief, Gardner offered a different explanation as to why the child was frightened that day. The District Court then allowed rebuttal testimony from the mother and a friend regarding the child's demeanor after being picked up. Gardner asserted that it was error to allow the rebuttal testimony because it did not contain any facts to rebut Gardner's explanation. The Supreme Court held that the District Court did not err in allowing the rebuttal testimony because it could be viewed as tending to contradict or disprove the alternate theory and evidence offered by Gardner, so allowing the testimony was within the trial court's discretion. St. v. Gardner, 2003 MT 338, 318 M 436, 80 P3d 1262 (2003).

No Constitutional Violation in Admission of Telephonic Testimony at Revocation Hearing — No Abuse of Discretion Upon Good Cause: To accommodate counsel, the state moved to allow the admission of telephonic testimony from two law enforcement officers who could not attend Megard's sentence revocation hearing in person. Megard objected, relying on this rule and In re Marriage of Bonamarte, 263 M 170, 866 P2d 1132 (1994). The District Court held that neither the rule nor Bonamarte applied and that Megard's fundamental rights would be adequately protected, so the motion was granted. On appeal, Megard also contended that allowing the telephonic testimony violated his due process right and the right to confront witnesses. The Supreme Court affirmed. The District Court was familiar with the witnesses. Allowing telephonic testimony did not impede the ability to judge a witness's credibility in relation to other witnesses, who corroborated the testimony, because knowledge of a witness's identity and credentials may constitute a special circumstance under which telephonic testimony is allowed. Although telephonic testimony is generally not allowed in trials absent special circumstances or

the parties' consent, evidentiary rules do not apply to revocation proceedings. Because a revocation hearing is not a criminal trial, Megard had no constitutional right to confront witnesses at the hearing. Further, Megard's due process rights were not violated because his counsel actually cross-examined the witnesses, and good cause existed for the District Court to admit the telephonic testimony to address scheduling conflicts. Even if error occurred, it was harmless, given Megard's failure to establish prejudice pursuant to St. v. Pedersen, 2003 MT 315, 318 M 262, 80 P3d 79 (2003). St. v. Megard, 2004 MT 67, 320 M 323, 87 P3d 448 (2004).

Limitation on Cross-Examination Not Violative of Right to Confront Witnesses: Nelson was charged with five felony offenses, and as a result of a plea bargain, Nelson's accomplice testified for the state at trial. During cross-examination, the District Court prevented questioning about charges allegedly filed against the accomplice in another county. Nelson contended that restricting the scope of cross-examination violated his constitutional right to confront witnesses. The Supreme Court disagreed. Limiting the scope of cross-examination does not necessarily violate the right to confront an adverse witness. A District Court has discretion to exercise reasonable control over the mode and order of interrogating witnesses, and may limit the scope of cross-examination to those issues that the court determines to be relevant to the trial. The determination of relevance and admissibility is left to the sound discretion of the trial judge and will not be overturned absent a showing of abuse of that discretion. Nelson was afforded the constitutionally required level of inquiry, and the District Court did not violate the confrontation clause or abuse its discretion by limiting Nelson's questioning of the adverse witness concerning unrelated alleged but unsubstantiated charges in another county. St. v. Nelson, 2002 MT 122, 310 M 71, 48 P3d 739 (2002), distinguishing Alford v. U.S., 282 US 687 (1931), and Davis v. Alaska, 415 US 308 (1974).

Objection to Medical Testimony Regarding Effects of Personality Disorder on Parenting Sustained — Cross-Examination Properly Limited: A medical expert who evaluated a mother regarding her parenting ability was asked about opinions that could be made based on the evaluation. The expert responded that it would require an explanation of personality and cognitive features and limitations. The guardian ad litem contended that inquiry should be allowed on cross-examination into the effects of a personality disorder on parenting. The mother objected, and the District Court sustained as beyond the scope of direct examination. The Supreme Court affirmed. The District Court did not abuse its discretion in limiting the latitude of cross-examination because the expert testimony in this case centered on the expert's observations and because the expert had not diagnosed the mother with a personality disorder. In re B.B., 2001 MT 285, 307 M 379, 37 P3d 715 (2001).

Admission of Inadmissible Hearsay — Denial of Due Process Right: Allowing an employer to submit hearsay statements of witnesses with personal knowledge of alleged work misconduct without requiring that the witnesses testify in person at the eligibility hearing denied claimant of the right to confront and cross-examine the witnesses and was a violation of the constitutional right to due process, warranting reversal and remand. Bean v. Bd. of Labor Appeals, 1998 MT 222, 290 M 496, 965 P2d 256, 55 St. Rep. 927 (1998), distinguishing Richardson v. Perales, 402 US 389 (1971). See also In re Marriage of Bonamarte, 263 M 170, 866 P2d 1132 (1994).

Refusal to Allow Telephone Testimony Upheld — Credibility of Witness Critical — Untimely Request: After several previous continuances in a hearing date and after Toni and Kevin failed to comply with a treatment plan prepared by the Department of Family Services (DFS) (now Department of Public Health and Human Services), DFS petitioned the District Court to terminate the parental rights of Toni and Kevin. After DFS presented its testimony on the petition, Toni and Kevin's attorney requested that they be allowed to testify by telephone since they could not pay the expenses to travel to Montana to appear in person at the hearing. The District Court denied the motion and was upheld by the Supreme Court. Citing Bonamarte v. Bonamarte, 263 M 170, 866 P2d 1132 (1994), the Supreme Court held that inability to pay the costs of travel to Montana did not constitute the "exigent circumstances" exception referred to in Bonamarte to the general rule that testimony must be given live and in person. The Supreme Court noted that it was important for the District Court to observe the demeanor of Toni and Kevin while they testified and also held that the District Court did not abuse its discretion in holding that the request to testify by telephone was untimely because it was not made until after the conclusion of the state's case, when the District Court could not make other arrangements. In re B.C., 283 M 423, 942 P2d 106, 54 St. Rep. 690 (1997).

Written Questions From Jurors Allowed if Safeguards Implemented — No Abuse of Discretion: Defendant appealed from felony theft and burglary convictions, alleging that the court abused its discretion by permitting jurors to submit written questions to be asked of witnesses, including the defendant, at the conclusion of the defendant's testimony. After

reviewing decisions from other jurisdictions, the Supreme Court upheld the District Court decision allowing juror questioning, ruling that the practice of juror questioning is within the sound discretion of the court if minimal safeguards are implemented to ensure: (1) that questions are factual, not adversarial or argumentative, and are allowed only to clarify information already presented; (2) that questions are submitted to the court in writing; (3) that both counsel are given an opportunity to object to the questions outside the presence of the jury; (4) that the trial judge read the questions to the witness; and (5) that both counsel are allowed to ask followup questions. St. v. Graves, 274 M 264, 907 P2d 963, 52 St. Rep. 1221 (1995).

Plaintiff Cannot Object to Admission of Evidence for Which Plaintiff Opened Door: Hando suffered physical damages while involved in painting activities at work. She subsequently settled with her employer and sued PPG, the manufacturer of the paint. Hando alleged that the District Court erred in allowing PPG to introduce evidence indicating that any damages that she suffered were the result of her employer's negligence when the statute states that the negligence of an employer may not be considered when the employer has tort immunity under the Workers' Compensation Act. The Supreme Court held that Hando had opened the door to the evidence by testifying on direct examination about the procedures used by her employer and therefore had participated and acquiesced in the introduction of evidence concerning negligence on the part of her employer. Hando v. PPG Indus., Inc., 272 M 146, 900 P2d 281, 52 St. Rep. 670 (1995), following Pedersen v. Nordahl, 261 M 284, 862 P2d 411 (1993).

Request for "in Person" Hearing Improperly Denied — Administrative Rule Contrary to Statute and Rules of Evidence Invalid: Charles disputed the amount of child support payments intended to be withheld by an income withholding proceeding and requested that he be given an "in person" hearing, rather than a telephone conference hearing, pursuant to 40-5-414. His request was denied by the administrative hearings officer pursuant to ARM 46.30.607(1) (now repealed). The Supreme Court held that the request for the "in person" hearing was improperly denied because 2-4-612(2) makes the Montana Rules of Evidence applicable to administrative hearings and subsection (e) of this rule provides that a witness can be heard only in the presence of other parties. Citing In re Marriage of Bonamarte, 263 M 170, 866 P2d 1132 (1994), the Supreme Court held that this rule requires the physical presence of a witness in the courtroom. The Supreme Court also noted that 40-5-414 requires a live hearing if a party requests it and that the administrative rule adopted by the Child Support Enforcement Division, providing for a live hearing only upon approval of the hearings officer, was void because it was contrary to statute and this rule. Taylor v. Taylor, 272 M 30, 899 P2d 523, 52 St. Rep. 567 (1995).

Improper Restriction of Cross-Examination — No Injury: The District Court incorrectly limited defense counsel's questions on cross-examination to questions based upon facts that had already been established in the record. The rules do not contain that restriction. However, the error did not require reversal in this case because all the information sought to be disclosed was actually presented in an alternative cross-examination format, and as a result, there was no prejudice or adverse consequence to the defendant's substantial rights. St. v. Wing, 264 M 215, 870 P2d 1368, 51 St. Rep. 223 (1994).

Testimony by Telephone a Violation of Rule: Judith, a resident of New Jersey, brought an action for dissolution of marriage in Montana, where her husband lived. Judith did not attend the trial in Montana because she could not afford the travel expenses and because she was afraid of her husband. The District Court allowed her to testify by telephone. Her husband claimed that he was denied the right to confront witnesses against him. Citing Coy v. Iowa, 487 US 1012, 101 L Ed 2d 857, 108 S Ct 2798 (1988), the Supreme Court held that the integrity of the factfinding process is undermined when the parties cannot confront one another and when the trier of fact is not allowed to observe the demeanor of the witness. The Supreme Court said that the reasons given by Judith for not returning to Montana do not outweigh the necessity for the trier of fact to determine credibility. Other alternatives, such as written or videotaped deposition, also existed. The Supreme Court held that while it was not adopting a per se rule to prevent telephone testimony in all cases, the District Court did abuse its discretion in this case. In re Marriage of Bonamarte, 263 M 170, 866 P2d 1132, 51 St. Rep. 1 (1994), followed in Taylor v. Taylor, 272 M 30, 899 P2d 523, 52 St. Rep. 567 (1995), and In re B.C., 283 M 423, 942 P2d 106, 54 St. Rep. 690 (1997).

Court to Control Evidence — Successful Motion in Limine as Preventing Later Defense Evidence on Same Issue: Little was convicted of sexual intercourse without consent and sexual assault on his two minor stepdaughters. His successful motion in limine prevented the state from introducing evidence of any sexual offenses against his two stepdaughters other than the four offenses charged and those contained in a Just notice. For this reason, there was no evidence in the record regarding a sexual assault occurring on a motorcycle. Defendant then sought to

introduce expert testimony that the assault occurring on the motorcycle could not have taken place but was prevented from doing so by the District Court. The Supreme Court held that the evidence was properly excluded because without any evidence in the record concerning the alleged motorcycle incident, it would have been improper to allow Little to introduce evidence that it did not occur. St. v. Little, 260 M 460, 861 P2d 154, 50 St. Rep. 1124 (1993).

Redirect Examination as to Other Crimes Following Cross-Examination as to Whether Search Took Place: During cross-examination of a recalled prosecution witness in a prosecution for conspiracy to sell dangerous drugs, a detective was asked if defendant's house was searched and answered that they had no reason to do it. On redirect examination, it was error for the judge to allow, over objections, questions and answers regarding other evidence of defendant's prior involvement with drugs. The testimony exceeded the scope of the cross-examination and violated defendant's right to notice that the information would be brought out at trial. St. v. Shaw, 255 M 298, 843 P2d 316, 49 St. Rep. 1012 (1992).

Refusing to Allow Doctor to Use Lab Slides of Removed Tissue in Giving Opinion on Depth of Surgery: In a medical malpractice case, defendant's expert was asked on cross-examination for his opinion on the depth of defendant doctor's laser surgery. The expert asked if he could use certain slides of the removed tissue to answer the question, and the judge said, "Just answer the question." The judge's statement was not improper. O'Leyar v. Callender, 255 M 277, 843 P2d 304, 49 St. Rep. 1008 (1992).

Time for Allowing Defendant's Attorney to Examine Him After Plaintiff Examines Him as Adverse Witness: The judge did not err when he precluded examination of defendant by his attorney directly after defendant was examined as an adverse witness by plaintiff's attorney. The judge may use his discretion to rearrange the order of the trial. The defendant was called as a witness the next day and given a full opportunity to provide testimony and evidence to support his case and to counter plaintiff's case. O'Leyar v. Callender, 255 M 277, 843 P2d 304, 49 St. Rep. 1008 (1992).

Disclosure of Rebuttal Witness Not Required: The law does not require the advance disclosure of rebuttal witnesses. Valley Properties Ltd. Partnership v. Steadman's Hardware, Inc., 251 M 242, 824 P2d 250, 49 St. Rep. 13 (1992), citing Massman v. Helena, 237 M 234, 773 P2d 1206 (1989). See also Lutz v. Nat'l Crane Corp., 267 M 368, 884 P2d 455, 51 St. Rep. 810 (1994).

Admissibility of Extrinsic Evidence Regarding Informant's Drug Use as Relevant to Motive for False Testimony: A trial court's discretion in exercising control and excluding evidence of a witness's bias or motive to testify falsely becomes operative only after the constitutionally required threshold level of inquiry has been afforded the defendant. Therefore, subject to the limitations of Rules 403 and 611, M.R.Ev., a defendant should be afforded latitude in cross-examination and be allowed to introduce extrinsic evidence regarding an informant's alleged habitual drug use as relevant to the informant's motive to testify falsely, if denied by the informant. St. v. Gommenginger, 242 M 265, 790 P2d 455, 47 St. Rep. 681 (1990), followed in St. v. Haskins, 255 M 202, 841 P2d 542, 49 St. Rep. 922 (1992), and St. v. Milton, 280 M 142, 930 P2d 28, 53 St. Rep. 1337 (1996).

No Error for Refusal to Allow Rebuttal Testimony: In a case involving the destruction of a building by fire, the trial court did not err in refusing to allow a retired firefighter to give his expert opinion on behalf of the plaintiffs during rebuttal testimony concerning the alleged negligent firefighting methods employed by the defendant city firefighters. The proposed testimony related to the issue of whether the city negligently fought the fire and was not a new matter raised by the defense; it was one of the main issues raised by the plaintiffs in their complaint. Having failed during their case in chief to meet the burden of proving that the defendant negligently fought the fire, the plaintiffs cannot then assert that the city's alleged negligent firefighting was a new issue first raised by the defense and open to rebuttal testimony. Massman v. Helena, 237 M 234, 773 P2d 1206, 46 St. Rep. 764 (1989).

Introduction of Evidence of Other Crimes Prior to Case in Chief — Court Discretion to Allow Chronological Presentation of Evidence: Defendant claimed the District Court improperly allowed introduction of evidence of other crimes, wrongs, and acts before the prosecution presented evidence of the crime charged. The state gave sufficient notice that it intended to introduce evidence of five burglaries or attempted burglaries, in chronological order, attributed to defendant. To cure any defect, the state filed a sealed affidavit with the court 1 week before trial, setting out what this evidence would prove. The court carefully apprised the jury of what crime was charged and admonished the jury as to the limited purposes of the prior crimes and acts evidence. The Just rules for admissibility having been met and an offer of proof having been received by the court for the chronological presentation of evidence, it was within the court's

discretion to allow the sequence and order of presentation. St. v. Keefe, 232 M 258, 759 P2d 128, 45 St. Rep. 1034 (1988).

Names of Anonymous Phone Callers Not Disclosed — Tips Not Essential Evidence — Right to Confront Witnesses Not Abused: The District Court allowed evidence and argument on the contents of two anonymous tips reporting defendant's speeding car, but the names of those giving the tips to police were not disclosed at trial. The defendant's right to confront witnesses was not impinged because the tips were corroborated by two investigating officers and were used in conjunction with evidence of the vehicle's excessive speed to effectuate a justifiable stop. The tips were not the essential evidence upon which defendant was convicted. St. v. Shaffer, 227 M 221, 738 P2d 491, 44 St. Rep. 1029 (1987), distinguishing Moore v. U.S., 429 US 20, 50 L Ed 2d 25, 97 S Ct 29.

Expert Opinion on Truthfulness of Children's Testimony: Expert testimony by a psychologist on the reliability and truthfulness of child victims in sexual assault cases aided the trier of fact, and its admission on cross-examination was not an abuse of discretion. In re J.W.K., 223 M 1, 724 P2d 164, 43 St. Rep. 1483 (1986).

Child's Testimony From Prosecutor's Lap: Defendant was charged with felony assault (now assault with a weapon) and sexual intercourse without consent. The alleged victim was a 4-year-old who had been left in his care for several days. After the court determined that the child was a competent witness, it allowed the child to testify while sitting on the prosecutor's lap. Defense counsel was offered the opportunity to hold the child during cross-examination but declined. Defendant contended that this method of testifying was prejudicial and prevented him from conducting an adequate cross-examination, although he cited no specific instances. The Supreme Court held that pursuant to Rule 611, M.R.Ev., the trial court was within its discretion in allowing this method of testifying. That posture assisted in directing the child's attention to the questioning and provided comfort to her during a difficult and unfamiliar experience. St. v. Rogers, 213 M 302, 692 P2d 2, 41 St. Rep. 2131 (1984).

Hostility of Crime Victim on Prosecution's Witness List Testifying for Defendant: Sex offense victim was listed, but not called, as a prosecution witness. She was called as a witness in defendant's case in chief. The trial court properly ruled that she could not be examined as a hostile witness unless her cross-examination testimony showed hostility toward defendant. Hostility was not shown merely because she was listed as a prosecution witness. That listing was irrelevant, since her testimony absolved defendant. St. v. Anderson, 211 M 272, 686 P2d 193, 41 St. Rep. 1357 (1984).

Criminal Defendant Impeached on Cross-Examination — Not Violation of Privilege Against Self-Incrimination: A defendant in a criminal case who takes the stand and testifies in his own behalf may have his credibility impeached and his testimony assailed like that of any other witness, and his waiver of the privilege against self-incrimination is determined by the scope of relevant cross-examination. St. v. Wilson, 194 M 530, 634 P2d 172, 38 St. Rep. 1040 (1981).

Credibility of Witnesses — Threat to Kill as Motive to Testify Falsely: The plaintiff allegedly assaulted and threatened to kill the witness if he did not testify favorably to plaintiff's case at trial. Testimony concerning the assault was admitted over the objection that it was irrelevant. The Supreme Court stated that although the evidence is irrelevant to the issue in dispute at trial it is admissible if it is otherwise relevant to the credibility of the witness. The fear of plaintiff carrying out the threat could provide a motive for the witness to give false testimony, and therefore evidence of the assault was relevant and properly admitted to show a motive to testify falsely. Cissel v. W. Plumbing & Heating, 188 M 149, 612 P2d 206, 37 St. Rep. 966 (1980). See also St. v. Flores, 1998 MT 328, 292 M 255, 974 P2d 124, 55 St. Rep. 1329 (1998).

Requiring Testimony in Question and Answer Form — Criminal Defendant Testifying — Pro Se: It is not error to require a defendant to testify in question and answer form in order to give the State an opportunity to object and avoid the introduction of inadmissible evidence, even where defendant has knowingly and intelligently waived assistance of counsel and is representing himself. St. v. Harvey, 184 M 423, 603 P2d 661, 36 St. Rep. 2035 (1979).

Leading Questions to Child: The court did not err in asking a child leading questions during an in-chambers interview. Leading questions may be asked if necessary to develop testimony, and whether or not they will be allowed is a matter for the trial court's discretion. One of the exceptions to the prohibition against leading questions is when the witness is a child, and here, where the child was rather withdrawn, the asking of leading questions was not an abuse of discretion. In re Bailey v. Bailey, 184 M 418, 603 P2d 259, 36 St. Rep. 2162 (1979), followed in St. v. Howie, 228 M 497, 744 P2d 156, 44 St. Rep. 1711 (1987), St. v. Eiler, 234 M 38, 762 P2d 210, 45 St. Rep. 1710 (1988), and in St. v. Hibbs, 239 M 308, 780 P2d 182, 46 St. Rep. 1705 (1989).

Collateral References

Trial *key* 38; Witnesses *key* 227, 240, 269.

88 C.J.S. Trial §147; 98 C.J.S. Witnesses §§394, 471 through 476.

31A Am. Jur. 2d Expert and Opinion Evidence §§32, 33, 37, 45, 58; 75 Am. Jur. 2d Trial §§274, 275, 321 through 342, 354 through 375, 433, 434; 81 Am. Jur. 2d Witnesses §§780, 781, 816, 822, 842, 845, 851, 866, 869, 870, 894, 897, 899, 900, 933, 934, 936, 938, 953, 976, 977.

Propriety and prejudicial effect of third party accompanying or rendering support to witness during testimony. 82 ALR 4th 1038.

Construction and application of provision of Rule 611(b) of Federal Rules of Evidence that cross-examination should be limited to subject matter of direct examination. 45 ALR Fed. 639.

3 Wigmore §§766 through 788; 6 Wigmore §§1883 through 1897.

Rule 612. Writings used to refresh memory.

Commission Comments

This rule is identical to Federal Rule 612 except that a qualifying clause making the rule subject to the Jenks Act, 18 U.S. Code Section 3500, is deleted, for the Jenks Act governs only Federal criminal proceedings and so has no application to Montana law.

At the outset, it is important to distinguish between writings used to refresh the memory of a witness, which are governed by this rule, and writings denominated as recorded recollection, which are governed as a hearsay exception under Rule 803(5). A writing used to refresh memory is one that is meant to help a witness who has a memory of the subject of his testimony, but who needs a stimulus in order that his memory be revived. The witness can then testify independently of the writing, and it is his memory or recollection which is used as evidence and not the writing. A recorded recollection is a writing made by or for the witness about a subject of which the witness retains no independent recollection; the recorded recollection is allowed to be read to the trier of fact as an exception to the hearsay rule, but it does not have the effect of reviving the memory of the witness, and so it is the writing as a recorded recollection which constitutes the evidence. This distinction represents the common law approach to each of the doctrines.

The distinction is noted in Montana in Marron v. Great N. Ry., 46 Mont. 593, 601, 129 P 1055 (1913), but the case went on to construe Section 93-1901-6, R.C.M. 1947 [superseded], as requiring a foundation to be supplied before either type of writing can be used. That foundation required that the writing must have been made by the witness or under his direction, at a time when the event occurred or when the facts were fresh in the witness' memory, and that the witness must have known the writing to correctly state the facts. Marron v. Great N. Ry., *supra* at 602. This is inconsistent with the common-law doctrine of writing used to refresh memory. The common-law doctrine has been revived by later Montana cases which are also consistent with the approach taken in Rule 612. Therefore, to the extent that the statute and Marron v. Great N. Ry., *supra*, are inconsistent with the common law and Rule 612, they are superseded.

These later cases have held that witnesses may refresh their memory without the foundation, for this is a matter depending upon the circumstances of the case and the discretion of the court. State v. Gallagher, 151 Mont. 501, 504, 445 P2d 45 (1968). The foundation is a matter addressed to the trial court, and it is within the trial court's discretion to permit the witness to refresh his memory. State v. Watkins, 156 Mont. 456, 462, 481 P2d 689 (1971). The latest case dealing with this topic, State v. LaFreniere, 163 Mont. 21, 25, 515 P2d 76 (1973), indicated that the writing used to refresh the witness' memory under the statute may include a copy of a police officer's report, and therefore the writing used to refresh memory need not be admissible in evidence. The decision also cited and quoted United States v. Riccardi, 174 F. 2d 883, 889 (3d Cir. 1949) as "the best rationale in interpreting [the statute] in not requiring the introduction of the memorandum or report into evidence...". [Brackets in commission comments.] Riccardi states that the witness testifying as to his present recollection is placing that in evidence, and not the writing; therefore, "it is pointless to require proof of the accuracy of the writing, for such proof can only amount to corroborative evidence". *Id.*

The purpose of Rule 612 is "to promote the search of credibility and memory". Advisory Committee's Note to Federal Rule 612, 56 F.R.D. 183, 277 (1972). It accomplishes its purpose by allowing an adverse party the right to have produced a writing used to refresh the memory of a witness whether the writing was used before testifying or while testifying. After the writing is produced, the adverse party may cross-examine the witness with the writing and introduce portions to the testimony of the witness. The rule also adopts provisions which are similar to those found in the Jenks Act: it allows the court to excise any portions not related to testimony, allows withheld writings to be made available to an appellate court, and provides sanctions for

failure to produce the writing. The Commission intends that the term "writing" as used in this rule is the same as defined in Rule 1001(1).

This rule is consistent with existing Montana law which provides in Section 93-1901-6, R.C.M. 1947 [superseded], "...but in such case the writing must be produced and may be seen by the adverse party, who may, if he chooses, cross-examine the witness upon it, and may read it to the jury". There are no cases in Montana which have specifically dealt with the right of the adverse party to gain access or to use the writing used to refresh memory. The right is mentioned in State v. Watkins, *supra* 156 Mont. at 462, and State v. LaFreniere, *supra* 163 Mont. at 25. Allowing a party to demand the production of a writing used to refresh a witness' memory before testifying is consistent with Montana law to the extent that such a writing would be discoverable in civil cases under Rule 34(a)(1) M.R.Civ.P., and in criminal cases under Section 95-1803(c), R.C.M. 1947 [46-15-301]. The sanctions for nonproduction found in the last sentence of the rule allow in civil cases any order justice requires; this would be consistent with the sanctions found in Rule 37(b), M.R.Civ.P. In criminal cases, Section 95-1803(c), R.C.M. 1947 [46-15-301], does not provide for mistrial for nonproduction of evidence, but it does allow testimony to be stricken. Other provisions of the rule are new to Montana law.

COMMISSION COMMENT TO JUNE 1990 AMENDMENT

The revision establishes gender neutral format only. No substantive change.

Compiler's Comments

1990 Amendment: Substituted gender neutral language for gender specific language. Amendment effective June 7, 1990.

Case Notes

Officer's Use of Arrest Report Allowed for Refreshing of Memory: At Harrington's DUI trial, he objected to the fact that during direct testimony, the arresting officer read a nonadmitted document, the arrest report, into evidence. On appeal, Harrington asserted that the testimony was inadmissible because the foundation required by Rule 803, M.R.Ev., was not met. However, this rule allows witnesses to use writings to refresh their memories while testifying, and the trial court did not abuse its discretion in allowing the officer to refer to the report to refresh his memory. Columbus v. Harrington, 2001 MT 258, 307 M 215, 36 P3d 937 (2001).

Refusal to Show File Used to Refresh Memory to Opposing Counsel — No Abuse of Discretion Found: At the trial of a declaratory judgment action brought to enforce an easement reserved by the Rankins as grantors, an attorney appearing as a witness for the Rankins was asked to compare the language of the original contract for deed that he had prepared with the language of a copy produced several days before trial by the Andersons, the grantees. The version produced by the Andersons did not contain language reserving the easement. The Andersons claimed that the original of the deed showing the reservation of the easement had been in the possession of the Rankins for a number of years and that the copy could have been altered. The witness was shown a copy of the original deed to refresh his recollection, and counsel for the grantee asked to review the entire "file" for purposes of cross-examination. The request was denied by the District Court. The Supreme Court held that the District Court did not abuse its discretion in refusing the request of counsel to review the file. Noting that the Andersons had recorded three separate documents over the years prior to the trial, all of which contained reference to the easement language, the District Court could have concluded that the "interests of justice" did not require inspection of the witness's copies of these documents. Reichle v. Anderson, 284 M 384, 943 P2d 1324, 54 St. Rep. 930 (1997).

Discovery — Depositions: In a suit against an insurance company, it was error for the court to deny a request to compel production of a recorded statement that was used by several of defendant's witnesses to refresh their memories prior to their depositions and testimony in court. However, it was harmless error in this case. Bartlett v. Allstate Ins. Co., 280 M 63, 929 P2d 227, 53 St. Rep. 1300 (1996).

Testimony of Witness Reading From Inadmissible Writing Allowed: The Williamses argued that the lower court erred in allowing Watkins to read from a document during his testimony when the document had already been held to be inadmissible. The Supreme Court ruled that the best evidence rule is inapplicable when the witness testifies about personal knowledge of a matter, regardless of whether the same information may be contained in an inadmissible writing, and that the witness could use the writing to refresh his memory. Watkins v. Williams, 265 M 306, 877 P2d 19, 51 St. Rep. 489 (1994).

Refusal to Grant Defense Access to Witness Statement Used to Refresh Memory Prior to Pretrial Hearing — No Abuse of Discretion: It was within the discretion of the District Court to

refuse to allow defense counsel to inspect a written statement used by a witness to refresh his memory prior to a pretrial hearing when there was nothing in the statement that would have aided the defense's cross-examination and the statement was subsequently provided to the defense after the hearing and prior to trial. It would have been nonsensical to allow the defense access to the statement at the same hearing at which defense access to the statement was at issue. St. v. Briner, 253 M 158, 831 P2d 1365, 49 St. Rep. 402 (1992).

Motion to Compel Production of Documents Reviewed by Expert Properly Denied: Defendant sought to compel the production of documents reviewed by plaintiff's expert witness in preparation for the expert's deposition, contending that because the expert took the documents to the deposition, the entire file should be made available as a deposition document and as subject matter for cross-examination. However, the trial court examined the documents in camera and concluded that two letters in the file were unrelated to the subject matter, were protected as attorney work product, and would not lead to further discovery. Therefore, denial of the motion to compel production was not an abuse of discretion. N. Mont. Hosp. v. Knight, 248 M 310, 811 P2d 1276, 48 St. Rep. 444 (1991).

Police Officer's Review of Interview Transcript Permissible — Best Evidence Rule Not Applicable: The District Court did not abuse its discretion in allowing a police officer to refresh his recollection by reviewing the transcript of an interview the officer had with the defendant. The fact that the police department had erased audio tapes of the interview is not material. The best evidence rule is inapplicable because the admissibility or inadmissibility of the writing does not affect the writing's availability for the use of refreshing a witness's memory. St. v. Walters, 247 M 84, 806 P2d 497, 48 St. Rep. 102 (1991).

Law Review Articles

Testimony: Memory and Memoranda, Maguire & Quick, 3 How. L. J. 1 (1957).

Collateral References

Witnesses *key* 253 through 260.

98 C.J.S. Witnesses §§435, 436.

29A Am. Jur. 2d Evidence §§1258 through 1263; 81 Am. Jur. 2d Witnesses §§742, 743, 748, 750, 765 through 769.

Refreshment of recollection by use of memoranda or other writings. 82 ALR 2d 473.

Use of writing to refresh witness' memory, as governed by Rule 612 of Federal Rules of Evidence. 73 ALR Fed. 423.

3 Wigmore §§758 through 765.

Rule 613. Prior statements of witnesses.

Commission Comments

(a) Examining witness concerning prior statement. This subdivision is identical to Federal and Uniform Rules (1974) Rule 613(a). It has the effect of abolishing the rule of Queen Caroline's Case which required that before a witness could be cross-examined about his own written statement, he had to be shown that statement. The rule has been criticized as a misapplication of the best evidence rule because, first, the cross-examiner is not attempting to prove the contents of the document, but actually hopes that the witness will deny its existence; and second, the best evidence rule is one requiring production of an original document "as proof of its contents to the judge and jury, not to the witness". McCormick, Handbook on the Law of Evidence 56 (2d ed. 1972). The rule has been characterized as a "useless impediment to cross-examination". Advisory Committee's Note to Rule 613(a), 56 F.R.D. 183, 278 (1972). Allowing a witness to view his own written statement before an attempt to impeach him with it is certainly an obstacle to effective cross-examination. Therefore, the Commission intends the adoption of this rule to allow effective cross-examination of witnesses by their own prior statements, whether written or not.

This rule does not defeat the provisions of Rule 1002, requiring the production of original to prove the contents of a document. The rule is also not inconsistent with Rule 26(b)(3), M.R.Civ.P., entitling a person to request the production of his own written statements, although its provisions must be temporarily suspended for effective cross-examination. Finally, the rule provides the safeguard that opposing counsel, upon request, shall be allowed to see the document "to protect against unwarranted insinuations that a statement has been made when the fact is to the contrary". Advisory Committee's Note, *supra* 56 F.R.D. at 278.

This subdivision is inconsistent with Section 93-1901-12, R.C.M. 1947 [superseded]. The section provides for impeachment by evidence of prior inconsistent statements and indicates in part: "If the statements be in writing, it must be shown to the witness before any questions may be put to him concerning them". There are no cases in Montana which are directly in point with

this part of the statute and what is covered in Rule 613(a). Cases concerned with impeachment of a witness by use of a writing hold that the witness must be allowed to explain the writing. Kennelly v. Savage, 18 Mont. 119, 123, 44 P 400 (1896); State v. Ritz, 65 Mont. 180, 188, 211 P 298 (1922); State v. Keays, 97 Mont. 404, 417, 34 P2d 855 (1934); and State v. Board, 135 Mont. 139, 143, 337 P2d 924 (1959). These cases would certainly be consistent with the provisions of subdivision (b) of this rule. Therefore, the change in Montana law found in this subdivision affects only part of a statute which has never been construed by any cases.

(b) Extrinsic evidence of prior inconsistent statement of witness. This subdivision is identical to Federal and Uniform Rules (1974) Rule 613(b). It is implicit in the rule that the impeachment of a witness by use of a prior inconsistent statement will be allowed. The usual requirement for a foundation commonly required with this method of impeachment has been modified. This subdivision allows the witness to explain and the opposite party to examine concerning the prior inconsistent statement, but "with no specification of any particular time or sequence". Advisory Committee's Note, *supra* 56 F.R.D. at 279. This is in accord with two of the three objectives for requiring a foundation; that is, that the witness in fairness to himself be allowed to explain or deny the apparent inconsistency and that to avoid unfair surprise to the opposite party, the opposite party be allowed an opportunity to examine the witness concerning the inconsistent statement. *Id.* A third objective is to save time, for if the witness denies or forgets that he has made the statement, no contradiction exists and therefore no evidence of the inconsistent statement could be admitted. Yet, savings of time is a poor reason not to allow the trier of fact to consider and have the witness explain any prior inconsistent statements he may have made. *Id.* The Advisory Committee's Note gives an example of when this subdivision would be most effective: "under this procedure, several collusive witnesses can be examined before disclosure of a joint prior inconsistent statement".

The final phrase in the first sentence allows the trial court the discretion to waive the foundational requirements, for instance when the witness is unavailable when the inconsistent statement is discovered. The exclusion of admissions of a party opponent from the operation of this rule, as provided in the final sentence of the subdivision, is in accord with the traditional view that in this situation there is little danger of unfair surprise and usually the party will have an explanation ready. McCormick, *supra* at 74.

This subdivision is inconsistent with Montana law to the extent that the foundation required for a prior inconsistent statement need not be laid before the witness may be impeached. Section 93-1901-12, R.C.M. 1947 [superseded], provides:

A witness may also be impeached by evidence that he has made at other times, statements inconsistent with his present testimony; but before this can be done, the statements must be related to him, with the circumstances of times, places, and persons present, and he must be asked whether he had made such statements, and if so, allowed to explain them....

A number of cases have held that it is improper to impeach a witness with a prior inconsistent statement unless the foundation is laid in accordance with the statute. State v. O'Brien, 18 Mont. 1, 9, 43 P 1091 (1896); Melzner v. Chicago, Milwaukee and St. Paul Ry., 51 Mont. 487, 493, 153 P 1019 (1915); and State v. McSloy, 127 Mont. 265, 273, 261 P2d 663 (1953). In addition, there are many cases which cite this statute and indicate that the proper foundation had been laid; among the more recent cases are: State v. Walker, 148 Mont. 216, 224, 419 P2d 300 (1966); Tigh v. College Park Realty, 149 Mont. 358, 364, 427 P2d 57 (1967); and State v. Smith, 168 Mont. 93, 541 P2d 351, 353, (1975).

There are some cases which have liberally construed or not strictly followed the foundation requirements. State v. Hurst, 23 Mont. 484, 495, 59 P 911 (1899); State v. Beesskove, 34 Mont. 41, 53, 85 P 376 (1906); State v. McGowan, 36 Mont. 422, 431, 93 P 552 (1908); Wise v. Stagg, 94 Mont. 321, 330, 22 P2d 308 (1933); State v. Curtis, 114 Mont. 232, 242, 135 P2d 361 (1943); and State v. Robinson, 109 Mont. 322, 328, 96 P2d 265 (1939). However, it is apparent that statutory and case law in Montana require that a foundation be laid before impeachment by prior inconsistent statement is allowed; to the extent that this subdivision does not require that the foundation be laid before impeachment occurs, this subdivision supersedes the statute and cases.

Another rule associated with the foundational requirement is that when the witness denies having made the prior inconsistent statement, it may not be introduced. State v. Burrell, 27 Mont. 283, 285, 70 P 982 (1902), cited what is now Section 93-1901-12, R.C.M. 1947 [superseded], and held that if a witness denies or says that he does not remember making the inconsistent statement, that ends the matter because the foundation cannot be laid and a witness may not be impeached with a statement he says he did not make. However, in State v. McGowan, 36 Mont. 422, 430, 93 P 552 (1908), a prior inconsistent statement was introduced after the witness had

denied making it. Two other cases hold that the witness' assertion that he did not remember making a statement does not affect its admissibility. Wingate v. Davis, 77 Mont. 572, 579, 252 P 307 (1926) and State v. Jolly, 112 Mont. 352, 355, 116 P2d 686 (1941). State v. Burrell, *supra*, is effectively overruled by this subdivision. There is no Montana law allowing a judge in his discretion to waive the requirements of foundation; therefore, this part of the subdivision is new to Montana law. Finally, the last sentence of this subdivision is consistent with existing Montana law excluding the requirements of a foundation when the statement is an admission by the party-opponent. State v. Allen, 34 Mont. 403, 410, 87 P 177 (1906) and Howe v. Messimer, 84 Mont. 304, 311, 275 P 281 (1929).

COMMISSION COMMENT TO JUNE 1990 AMENDMENT

The revision establishes gender neutral format only. No substantive change.

Compiler's Comments

1990 Amendment: Substituted gender neutral language for gender specific language. Amendment effective June 7, 1990.

Case Notes

Impeachment Inadmissible if Witness Denied Opportunity to Explain: Following the testimony and dismissal of a witness, counsel attempted to introduce extrinsic evidence regarding the witness's prior inconsistent statements for impeachment purposes. Upholding the District Court's refusal to allow introduction of the evidence, the Supreme Court ruled that because the defendants had failed to question the witness regarding the alleged statements and provided the witness no opportunity to explain or deny the prior inconsistent statements, impeachment testimony was inadmissible. Doig v. Cascaddan, 282 M 105, 935 P2d 268, 54 St. Rep. 263 (1997).

Out-of-Court Statement Consistent With Trial Testimony Properly Excluded as Hearsay: Defendant sought to introduce deposition testimony of the grandmother of a victim of sexual intercourse without consent in order to impeach the victim's trial testimony regarding defendant's motives for the sexual contact. However, because the victim's out-of-court statement to her grandmother was not inconsistent with her trial testimony, it was properly excluded as hearsay. St. v. Goodwin, 249 M 1, 813 P2d 953, 48 St. Rep. 539 (1991).

Motion In Limine — When Not Proper to Exclude Prior Inconsistent Statements: A motion in limine may not properly prevent the use of prior inconsistent statements for impeachment purposes under this rule. St. v. Lias, 218 M 124, 706 P2d 500, 42 St. Rep. 1453 (1985).

Language Excised to Uphold Constitutionality of Malpractice Panel Act: The phrase in 27-6-704(2), "No statement made by any person during a hearing before the panel may be used as impeaching evidence in court", must be severed from the act in order to uphold the constitutionality of the panel act. It is fundamental to our adversarial system that litigants retain the right to impeach the sworn testimony of a witness testifying against them. A litigant may not receive a full and fair hearing if he is unable to fully cross-examine in court the witnesses that testified in the prior hearing. Linder v. Smith, 193 M 20, 629 P2d 1187, 38 St. Rep. 912 (1981).

Reading of Plaintiff's Deposition Properly Refused: The method chosen by the cross-examiner violated Rule 613(b), M.R.Ev. The witness was not on the stand. The cross-examiner proposed to offer in evidence, in the absence of the witness, a deposition taken of the witness pretrial for the purpose of impeachment. Thus, the deposition itself was extrinsic evidence of a prior inconsistent statement. It was not admissible unless the witness had an opportunity to explain or deny the same, the opposite party was afforded an opportunity to explain or deny the same, and the opposite party was afforded an opportunity to interrogate her on the deposition. This foundational requirement not having been met by the cross-examiner, the District Court was correct in denying the admission into evidence of the deposition or any part of it under Rule 613(b), M.R.Ev., and Rule 32(b), M.R.Civ.P. Kopischke v. First Cont. Corp., 187 M 471, 610 P2d 668, 37 St. Rep. 437 (1980).

Law Review Articles

Montana Supreme Court Survey—Civil Procedure and Evidence, Dyrud, 42 Mont. L. Rev. 343 (1981).

Prior Inconsistent Statements and Collateral Matters, Saltzburg, 19 Crim. Just. 45 (2004).

Employing Inconsistent Statements for Impeachment and as Substantive Evidence: A Critical Review and Proposed Amendments of Federal Rules of Evidence 801(d)(1)(A), 613, and 607, Graham, 75 Mich. L. Rev. 1565 (1977).

Collateral References

Witnesses *key* 271(2), (4), 277(6).

98 C.J.S. Witnesses §491.

31A Am. Jur. 2d Expert and Opinion Evidence §31; 81 Am. Jur. 2d Witnesses §§55, 822, 897, 899 through 901, 911 through 919, 953, 957, 959, 960, 963, 976, 977.

21 Am. Jur. POF2d Prior Inconsistent Statements, Impeachment of Witness, pp. 101 through 145.

Admissibility of impeached witness' prior consistent statement—modern state civil cases. 59 ALR 4th 1000.

Admissibility of impeached witness' prior consistent statement—modern state criminal cases. 58 ALR 4th 1014.

Use or admissibility of prior inconsistent statements of witness as substantive evidence of facts to which they relate in criminal case—modern state cases. 30 ALR 4th 414.

Witness's refusal to testify on ground of self-incrimination as justifying reception of evidence of prior statements or admissions. 43 ALR 3d 1413.

Impeachment of accused as witness by use of involuntary or not properly qualified confession. 89 ALR 2d 478.

Propriety and prejudicial effect of showing, in criminal case, withdrawn guilty plea. 86 ALR 2d 326.

Admissibility of inculpatory statements made in presence of accused to which he refuses to answer on advice of counsel. 77 ALR 2d 463.

Right of counsel representing party at trial, but employed by his liability insurer, to cross-examine or impeach him for asserted contradictory statements. 48 ALR 2d 1239.

Admissibility of advertisements, brochures, catalogs, and the like as containing admissions by a litigant contrary to a position taken by him. 44 ALR 2d 1027.

Use of prior inconsistent statements for impeachment of testimony of witnesses under Rule 613, Federal Rules of Evidence. 40 ALR Fed. 629, superseded by 152 ALR Fed. 375.

3 Wigmore §§1017 through 1019, 1025 through 1039.

Rule 614. Calling and interrogation of witnesses by court.

Commission Comments

(a) Calling by the court. This subdivision is identical to Federal and Uniform Rules (1974) Rule 614(a). It adopts the traditional view that the trial court has the inherent authority to call witnesses. The usual reason for this practice is the tendency of a jury to associate an undesirable witness with one party or the other, and this problem is met by having the court call such a witness to obtain his knowledge of relevant facts. The Commission intends the adoption of this rule to carry with it certain limitations, so that the court does not interfere with the jury's function as trier of fact or undermine either party's presentation of evidence. There is no Montana law specifically addressed to the question of whether a court may call witnesses; therefore, this subdivision is new to Montana law.

(b) Interrogation by court. This subdivision is based upon New Mexico Rule 614(b), which in turn is based upon Federal and Uniform Rules (1974) Rule 614(b). The first clause of each of these rules is identical. However, the New Mexico Rule adds the final clause to which the Commission has added "express or" before "implied comment". The Commission added the clause from the New Mexico Rule to ensure that trial courts would not lose their impartiality or become involved in a case as an adversary. This subdivision also expresses the traditional view, founded on the same reasons stated in the Commission Comments to subdivision (a).

There are Montana cases concerning the trial court's interrogation of witnesses. State v. McConville, 64 Mont. 302, 308, 209 P 987 (1922); State v. Richardson, 69 Mont. 400, 403, 22 P 418 (1924); and Roman v. Albert, 81 Mont. 393, 403, 264 P 115 (1928). None of these cases found that the trial court had abused its discretion in interrogating witnesses. In State v. Richardson, *supra*, the Supreme Court clarified this following statement made in the McConville decision: "It is the right, even the duty of the judge to examine the witnesses for the purpose of eliciting the truth", by indicating:

But the right should be exercised with great care, and never unduly extended, and the questions put shall not betray bias or prejudice nor carry to the jury the impression that the judge has made up his mind as to fact inquired about or the merits of the case. The questions must be framed to make clear that which is not clear.... The judge should avoid officious interference.

There is no doubt that Montana follows the rule which does not allow the trial court to comment upon the evidence. State v. Fuller, 34 Mont. 12, 26, 85 P 369 (1906). Therefore, this subdivision is entirely consistent with existing law.

(c) Objections. This subdivision is identical to Federal and Uniform Rules (1974) Rule 614(c). It is comparable to the objection provision of Rules 605 and 606(a). The subdivision gives counsel the option of objecting at the time an objection occurs or at the next available opportunity when the jury is not present, to allow avoidance of embarrassment which might arise when counsel is objecting to questions by the court in the presence of the jury. Advisory Committee's Note to Federal Rule 614, 56 F.R.D. 183, 280 (1972). Cases in Montana dealing with the objection to court-imposed questions have held that the party must object at the time the question is made. State v. Richardson, *supra*; Roman v. Albert, *supra*; and Batchoff v. Craney, 119 Mont. 157, 167, 172 P2d 308 (1946). Therefore, to the extent that an objection is allowed out of the presence of the jury, this subdivision is a change in Montana law.

Case Notes

Exhibit Offered Into Evidence by Trial Judge — No Examination of Witness: The trial court in this criminal case offered a document into evidence. Counsel for the defendant argued that by ordering the admission, the court was commenting on the evidence in violation of this rule. However, the issue raised is not the examination of a witness but the actual admission of an exhibit by the court's own order. Although there is no provision under this rule or elsewhere in Montana law that directly permits the court to offer its own exhibit into evidence, if this were error, it was harmless because the document had been read into evidence in full by the prosecutor. St. v. Hibbs, 239 M 308, 780 P2d 182, 46 St. Rep. 1705 (1989).

Comment to Witness at End of Testimony That He Did Good — Not Comment on Credibility: The judge, during a conversation in the course of excusing a witness, said to him "You did good. You did good." While a court should refrain from comments on witness credibility, taken in context, the statement was not a comment on the witness's credibility. The defendant was not denied a fair trial by the comment. Sloan v. St., 236 M 100, 768 P2d 1365, 46 St. Rep. 214 (1989).

No Express or Implied Comment — No Objection Made: Defendant contended that the judge's questions to witnesses violated subsection (b) of this rule three times during trial, but the Supreme Court found that the questions could be viewed as a reflection of the judge's belief in what the witness stated and did not necessarily imply belief in the testimony. Nothing in the Montana Rules of Evidence prohibits a trial judge from asking questions to clarify testimony. Further, defense counsel failed to object to the questions at trial, precluding consideration of the issue on appeal. St. v. Martin, 226 M 463, 736 P2d 477, 44 St. Rep. 804 (1987). See also St. v. Scarborough, 2000 MT 301, 302 M 350, 14 P3d 1202, 57 St. Rep. 1268 (2000).

Failure to Object to Judge Qualifying Ten-Year-Old Sexual Crime Victim as Witness in View of Jury — Not "Plain Error" — Mass of Damaging Evidence Precluding Any Prejudice: In the presence of the jury, the District Court Judge questioned the 10-year-old victim of a sexual crime and an aggravated assault about whether she was aware of the consequences of taking an oath and testifying. Defense counsel did not object. Although it would have been better to have conducted the questioning away from the jury and the questions should have been framed differently, any mistake did not warrant the application of the "plain error" rule of 46-20-702 (now 46-20-701(2)) because the defendant was not prejudiced by the manner of qualifying the victim in light of all of the independent and highly damaging evidence against him. St. v. Smith, 208 M 66, 676 P2d 185, 41 St. Rep. 176 (1984).

Evidence — Witness Called by Judge: There was no merit to contention that due process was denied at suspended sentence revocation hearing when the judge called a witness to the stand to resolve a conflict in pertinent testimony, for a court may on its own motion call witnesses, and the asserted error was waived because it had not been objected to at the time. St. v. Sullivan, 197 M 395, 642 P2d 1008, 39 St. Rep. 412 (1982).

Witness Properly Called by the Court — Fair Trial Not Denied: In a prosecution for theft, the court did not err in itself calling a witness to verify the testimony of a prosecution witness. The authority of the court to call a witness is expressly granted to the District Court by the rules of evidence. This procedure avoids the possibility that the witness will be associated with one party or the other, and absent a showing of abused discretion or manifest prejudice. The trial court's decision should not be reversed. No abuse or prejudice was found. St. v. Hart, 191 M 375, 625 P2d 21, 38 St. Rep. 133 (1981).

Statements Not Comment on Evidence: The court's statements "purely his say-so" and "purely his concoction" were not in violation of subsection (b) of this rule because the statements were not directed at defendant's credibility but were intended to clarify that defendant's

testimony on where his wife was standing was based exclusively upon defendant's recollection. St. v. Bier, 181 M 27, 591 P2d 115, 36 St. Rep. 466 (1979).

Collateral References

Witnesses *key* 246.

98 C.J.S. Witnesses §§424 through 427.

29 Am. Jur. 2d Evidence §357; 81 Am. Jur. 2d Witnesses §§1 through 3, 6, 50 through 53, 56, 697 through 703.

Court's witnesses (other than expert) in state criminal prosecution. 16 ALR 4th 352.

Manner or extent of trial judge's examination of witnesses in civil cases. 6 ALR 4th 951.

Calling and interrogation of witnesses by court under Rule 614 of the Federal Rules of Evidence. 53 ALR Fed. 498.

2 Wigmore §784; 9 Wigmore §2484.

Rule 615. Exclusion of witnesses.

Commission Comments

This rule is identical to Federal and Uniform Rules (1974) Rule 615. It recognizes the time-honored view that excluding or sequestering witnesses is an effective "means of discouraging and exposing fabrication, inaccuracy, and collusion". Advisory Committee's Note to Federal Rule 615, 56 F.R.D. 183, 280 (1972). The rule allows witnesses to be excluded as a matter of right rather than as a matter of discretion with the trial court. The Commission believes that this is the better approach because it is simple, feasible, and a powerful weapon against perjury; it should not be left to the trial court to determine whether there is a need for exclusion when the trial court judge may be unfamiliar with the witnesses or the case; and finally, no rule should ever be allowed which does not permit a party to expose inaccurate testimony or even perjury. 6 Wigmore, Evidence, Section 1838 (3d ed. 1940).

This rule provides three categories of witnesses who may be exempted from an order of exclusion: the first, the parties; the second, a representative of a party not a natural person; and third, a person necessary for the presentation of evidence. This latter category may allow the court some discretion in determining which witnesses will be excluded.

Montana law has allowed the exclusion of witnesses, but is inconsistent with the rule in that it has been a matter of discretion with the court. Section 93-1901-2, R.C.M. 1947 [superseded], provides: "If either party requires it, the judge may exclude from the courtroom any witness of the adverse party, not at the time under examination, so that he may not hear the testimony of other witnesses". Several cases have found that exclusion of witnesses is a matter of discretion with the trial court. Finlen v. Heinze, 32 Mont. 354, 383, 80 P 918 (1905); State v. Walsh, 72 Mont. 110, 117, 232 P 194 (1924); Smith v. Armstrong, 121 Mont. 377, 385, 198 P2d 795 (1948); Thompson v. Yellowstone Livestock Comm'n, 133 Mont. 403, 419, 324 P2d 412 (1958); and State v. Radi, 168 Mont. 320, 542 P2d 1206, 1210, (1975)[; and St. v. Evans, 247 M 218, 806 P2d 512, 48 St. Rep. 170 (1991)]. In State v. McLeod, 131 Mont. 478, 491, 211 P2d 400 (1957), the court also indicated that exclusion of witnesses was a question of discretion of the trial court; "however, this is the first time it has been brought to our notice that a judge has refused absolutely the exclusion rule, especially where...the county attorney informed the court that he had no objection to the exclusion of the witnesses". *Supra* at 492. The decision indicated that the Supreme Court examined the record to ensure that no witnesses were influenced and found no prejudice. The court went on to indicate "...the better practice especially in felony cases is to apply the customary and universal rule of exclusion when proper and timely request, supported by particular and well-founded reasons, is made". *Id.* Therefore, to the extent that the rule provides exclusion as a right, it is inconsistent with Montana law, although the trend in Montana appears to be very close to providing a right.

There is no doubt that Section 93-1901-2, R.C.M. 1947 [superseded], applies to criminal cases. State v. McDonald, 51 Mont. 1, 7, 149 P 279 (1915) and State v. McLeod, *supra*. There is also a rule in criminal cases which has evolved since State v. Walsh, 72 Mont. 110, 117, 232 P 194 (1924), where the trial court was upheld for refusing, as a matter of discretion, to exclude two members of the sheriff's office from the courtroom. State v. Fitzpatrick, 149 Mont. 400, 403, 427 P2d 300 (1967), held that it was no error to exempt from an order of exclusion two members of the sheriff's office who were witnesses. In State v. Meidinger, 160 Mont. 310, 320, 502 P2d 58 (1972), the court indicated that "it has been a long and well-established rule in Montana..." that orders of exclusion do not apply to law enforcement personnel, citing State v. Walsh, *supra*, and State v. Fitzpatrick, *supra*. It indicated that the trial court, in exercising its discretion, was following the law. However, the latest case in this area, State v. Radi, *supra,* stated that police officers are exempted from an order of exclusion as a matter of discretion of the trial court. Therefore, to the

extent that law enforcement personnel can be included in the second or third categories of the rule, they may be exempted from orders of exclusion; however, the rule does not establish that law enforcement personnel are always exempted from such an order.

Finally, Montana case law has considered an area not included as part of this rule, the sanctions to be imposed for disobedience of such an order. The general rule appears to be that unless the party is aware of a witness' disobedience, the witness should be cited for contempt and the party should not be deprived of his testimony. See State v. McDonald, *supra*; State v. Johnson, 62 Mont. 503, 510, 205 P 661 (1922); Bickford v. Bickford, 94 Mont. 314, 320, 22 P2d 306 (1933); and State v. Love, 151 Mont. 190, 195, 440 P2d 275 (1968).

COMMISSION COMMENT TO JUNE 1990 AMENDMENT

The revision establishes gender neutral format only. No substantive change.

Compiler's Comments

1990 Amendment: Substituted gender neutral language for gender specific language. Amendment effective June 7, 1990.

Case Notes

Exclusion of Defense Expert From Listening to Testimony of Complaining Witnesses Not Abuse of Discretion: At Riggs's trial on sex charges involving children, the trial court allowed Riggs to present extensive expert testimony critical of the interviewing techniques employed in the investigation, but did not allow defendant's expert to listen to the testimony of the complaining witnesses, reasoning that to do so would be useful preparation only for credibility testimony that had been prohibited by the court. Given the general preference in this rule to exclude witnesses from the courtroom, the Supreme Court held that Riggs was not prejudiced by the exclusion of his expert from the courtroom and that the trial court did not abuse its discretion in doing so. St. v. Riggs, 2005 MT 124, 327 M 196, 113 P3d 281 (2005).

Allowing Investigating Officer Witness to Remain in Courtroom — Harmless Error: Defendant requested that all witnesses be excluded from the courtroom during trial, but the trial court allowed a police officer who investigated the crime and who was a state witness to remain in the room when all other witnesses were excluded. Although it was error to allow the officer to remain and hear the testimony of the other witnesses, the Supreme Court applied St. v. Van Kirk, 2001 MT 184, 306 M 215, 32 P3d 735 (2001), in determining that the trial error in this instance was harmless because the officer's presence did not prejudice defendant's case. St. v. Flowers, 2004 MT 37, 320 M 49, 86 P3d 3 (2004).

Failure to Exclude Testifying Witness From Courtroom — No Prejudice: Before the court received testimony, the state moved to exclude witnesses from the courtroom. The court granted the motion but allowed a Deputy Sheriff who was to testify to remain in the courtroom. Although the deputy should have been excluded as well, he was not an eyewitness. His only role was to describe what he had learned from the participants and eyewitnesses. His observations were documented in a report that was admitted as evidence, and if his testimony was not consistent with the report, he was subject to impeachment. In this case, failure to exclude the deputy from the courtroom was not reversible error because defendant was not prejudiced by the ruling. St. v. Claric, 271 M 141, 894 P2d 946, 52 St. Rep. 377 (1995). See also St. v. Osborne, 1999 MT 149, 295 M 54, 982 P2d 1045, 56 St. Rep. 589 (1999).

Exclusion Request Made After Sixteen Witnesses Testified — Untimely: Although this rule does not specify when a request for exclusion of witness must be made, the Supreme Court upheld the trial court's denial, for lack of timeliness, of a motion for sequestration made after 16 witnesses had already testified. Barmeyer v. Mont. Power Co., 202 M 185, 657 P2d 594, 40 St. Rep. 23 (1983).

Collateral References

Trial *key* 41(1).

88 C.J.S. Trial §155.

75 Am. Jur. 2d Trial §§240, 244.

Prejudicial effect of improper failure to exclude from courtroom or to sequester or separate state's witnesses in criminal case. 74 ALR 4th 705.

Counsel's reference, in presence of sequestered witness in state criminal trial, to testimony of another witness as ground for mistrial or reversal. 24 ALR 4th 488.

Propriety and prejudicial effect of permitting nonparty to be seated at counsel table. 87 ALR 3d 238.

Effect of witness's violation of order of exclusion. 14 ALR 3d 16.

Exclusion of expert witnesses during taking of testimony in civil case. 85 ALR 2d 478.

Exclusion of witnesses under Rule 615 of Federal Rules of Evidence. 48 ALR Fed. 484, superseded by 181 ALR Fed. 549.

6 Wigmore §§1837 through 1842.

Article VII
Opinions and
Expert Testimony

Article Case Notes

Error in Denial of Continuance so That New Psychosexual Evaluation Might Be Performed Without Polygraph Test: As part of a plea agreement in an incest case, Anderson was required to voluntarily submit to a psychosexual evaluation, which included a polygraph test. Results of the test were considered in the preparation of the presentence sexual offender evaluation. Anderson moved for a continuance of the sentencing hearing so that a new psychosexual evaluation could be performed without the use of a polygraph, but the continuance motion was denied. Noting that pursuant to St. v. Staat, 248 M 291, 811 P2d 1261 (1991), polygraph evidence may not be used in any proceeding in a Montana court, the Supreme Court reversed and ordered a new psychosexual evaluation performed without the use of a polygraph and the preparation of a new presentence sexual offender evaluation in light of the new psychosexual evaluation. St. v. Anderson, 1999 MT 58, 293 M 472, 977 P2d 315, 56 St. Rep. 243 (1999), followed in In re N.V., 2004 MT 80, 320 M 442, 87 P3d 510 (2004).

Introduction of Polygraph Results in Custody or Visitation Dispute Prohibited: As part of a modification of Robert's visitation rights, the District Court required that Robert undergo a sex offender evaluation. Robert argued that the results of a polygraph test taken as a part of the sex offender evaluation should not be introducible. Citing St. v. Staat, 248 M 291, 811 P2d 1261 (1991), and 37-62-302 (now repealed), the Supreme Court held that the results of a polygraph test taken as part of a court-ordered sex offender evaluation would not be admissible in subsequent proceedings in the case. In re Marriage of Njos/Allard, 270 M 54, 889 P2d 1192, 52 St. Rep. 74 (1995), followed in St. v. Anderson, 1999 MT 58, 293 M 472, 977 P2d 315, 56 St. Rep. 243 (1999).

Conflicting Testimony of Experts:

The credibility of expert witnesses and the weight to be given their testimony are matters for the District Court's determination in a nonjury trial. The Supreme Court will presume the findings and judgment of the District Court are correct when presented with the question of contradictory expert opinions. Fairview v. Deming, 238 M 496, 778 P2d 876, 46 St. Rep. 1446 (1989).

Defendant argued that the trial court should have believed its expert testimony rather than the expert testimony of the plaintiffs and therefore should not have denied its counterclaim. On appeal, the Supreme Court said that there was substantial credible evidence upon which the trial court could deny the counterclaim. Morrison-Maierle, Inc. v. Selsco, 186 M 180, 606 P2d 1085, 37 St. Rep. 299 (1980).

Witness Not Listed as Expert — No Foundation in Trial as Witness: A witness was not listed in interrogatories as an expert witness; the opposing party through depositions was satisfied that the witness did not have expertise in the subject area, and, at the time of trial, he was not questioned to provide a foundation to qualify him as an expert. The Supreme Court held that the District Court abused its discretion in allowing questioning on redirect examination that asked the witness his opinion on the cause of the accident. Such opinion on whether the machinery in question was defective or unreasonably unsafe was within the province and ordinary understanding of the jury. Tacke v. Vermeer Mfg. Co., 220 M 1, 713 P2d 527, 43 St. Rep. 123 (1986).

Weight of Expert's Testimony — Criminal Defense Witness: A defense witness who testified as to the drugged condition of the defendant for the purposes of negating requisite criminal mental state and whose testimony was not rebutted by the State is not necessarily entitled to more weight than the testimony of any other witness; thus, the evidence relating to the drug use of the defendant in the State's case in chief, although not made by experts, presented a question for the jury to decide. St. v. Doney, 194 M 22, 636 P2d 1377, 38 St. Rep. 1707 (1981).

Expert Evidence Necessary Where Laymen Have No Knowledge: A court and jury must be dependent on expert evidence regarding matters with respect to which a layperson can have no knowledge whatever. Shahrokhfar v. St. Farm Mut. Auto. Ins. Co., 194 M 76, 634 P2d 653, 38 St. Rep. 1669 (1981).

Expert Evidence Not Needed to Show Attorney Negligent: Insurer's agent, an attorney, filed an action against plaintiff for damages arising out of accident. Plaintiff was not involved in the accident and notified insurer that it had sued the wrong person; the litigation was pursued to default judgment against plaintiff, who refused to defend. The question whether insurer's attorney was negligent was well within the realm of knowledge of a layman. Nothing legally technical was involved in judging the attorney's conduct. Expert testimony on the matter of attorney's negligence was not required and would not have been helpful. The lower court did not err in failing to grant insurer's motion for directed verdict. Shahrokhfar v. St. Farm Mut. Auto. Ins. Co., 194 M 76, 634 P2d 653, 38 St. Rep. 1669 (1981).

Article Law Review Articles

Expert Testimony in Child Sexual Abuse Cases in Montana: A Proposal for Change, Harrison, 54 Mont. L. Rev. 297 (1993).

Montana Supreme Court Survey—Evidence, Jones, 43 Mont. L. Rev. 301 (1982).

Beyond Admissibility: A Practical Look at the Use of Eyewitness Expert Testimony in the Federal Courts, Overbeck, 80 N.Y.U. L. Rev. 1895 (2005).

How to Use Trial Experts Effectively: The Opponent's Expert, Curry, 15 Prac. Litigator 17 (2004).

Inherent Judicial Authority and the Expert Disqualification Doctrine, Coffey, 56 Fla. L. Rev. 195 (2004).

Loss of Enjoyment of Life Damages; Expert Testimony Is Crucial, Brookshire & Peterson, 28 Trial 60 (1992).

Opinion and Expert Evidence Under the Federal Rules, Garner, 36 La. L. Rev. 123 (1975).

Rule 701. Opinion testimony by lay witnesses.

Commission Comments

This rule is identical to Federal and Uniform Rules (1974) Rule 701. It has the effect of restating the lay opinion rule, not in terms of numerous exceptions but of safeguards which are easier to apply. It also allows limited expansion within these safeguards.

The traditional lay opinion rule, found in early American common law, prohibited lay witnesses from testifying as to their opinions. Yet the traditional rule has been criticized because of the difficulty of distinguishing "facts" which lay witnesses could testify to and "opinions" which they could not. See Territory v. Clayton, 8 Mont. 1, 12, 19 P 293 (1888) and Watson v. Colusa-Parrot Mining and Smelting Co., 31 Mont. 513, 521, 79 P 12 (1905). The impracticality of the traditional rule is obvious when the many sensible exceptions to it are considered. These exceptions are part of Montana case law, the most general of which allows a witness to give an opinion which is a "shorthand rendering of the facts". State v. Lucey, 24 Mont. 295, 302, 61 P 994, (1900); State v. Tighe, 27 Mont. 327, 341, 71 P 3 (1903); State v. Byrd, 41 Mont. 585, 592, 111 P 407 (1910); and State v. Collins, 88 Mont. 514, 523, 294 P 957 (1930).

Montana case law provided additional exceptions to the traditional rule, as the following statement indicates:

> ...all concede the admissibility of the opinions of nonprofessional men upon a great variety of unscientific questions arising every day, and in every judicial inquiry. These are questions of identity, handwriting, quantity, value, weight, measure, time, distance, velocity, form, size, age, strength, heat, cold, sickness, and health; questions also concerning various mental and moral aspects of humanity, such as disposition and temper, anger, fear, excitement, intoxication, veracity, general character, and particular phases of character, and other conditions and things, both moral and physical, too numerous to mention. State v. Trueman 34 Mont. 249, 253, 85 P 1024 (1906).

Other cases have allowed opinions in the following specific areas: the general health of another person (Fearon v. Mullen, 38 Mont. 45, 52, 98 P 650 (1908)); nervousness (State v. Lucey, *supra* 24 Mont. at 303); fright (State v. Byrd, *supra* 41 Mont. at 592); the nature of alcohol and intoxication (State v. Trueman, *supra* 34 Mont. at 252; State v. Sedlacek, 74 Mont. 201, 211, 239 P 1002 (1925), Meinecke v. Intermountain Transp. Co., 101 Mont. 315, 322, 55 P2d 680 (1936), and State v. Strobel, 130 Mont. 442, 446, 304 P2d 606 (1956)); the speed of an automobile (Herzig v. Sandberg, 54 Mont. 538, 540, 172 P 132 (1918); State v. Souhrada, 122 Mont. 377, 381, 204 P2d 792 (1949); and Cross v. Tretheway, 155 Mont. 337, 340, 471 P2d 538 (1970)); the fitness of a parent to have custody of children (Wilson v. Wilson, 128 Mont. 511, 517, 278 P2d 219 (1955)); the value of property (Klind v. Valley County Bank of Hinsdale, 69 Mont. 386, 394, 222 P 439 (1924); State v. Russell, 93 Mont. 334, 336, 18 P2d 611 (1933); Harding v. H.F. Johnson, Inc., 126 Mont. 70, 82, 244 P2d 111 (1952) and Futton v. Rocky Mountain Phosphates, 151 Mont. 54, 69,

438 P2d 674 (1968)); and finally, the value of the witness' own services. Matoole v. Sullivan, 55 Mont. 363, 367, 177 P 254 (1918).

Still other exceptions to the lay opinion rule can be found in Section 93-401-27(9), R.C.M. 1947 [superseded], which allows the opinion of a witness respecting the identity or handwriting of a person "when he has knowledge of the person or handwriting..." and (10) which allows "the opinion of a subscribing witness to a writing,...respecting the mental sanity of the signer; and the opinion of the intimate acquaintanceship respecting the mental sanity of a person, the reason for the opinion being given". It is not clear whether these two statutory provisions come within the scope of the rule.

The rule is intended to be consistent with the holdings of Montana case law exception. However, this rule changes existing Montana law to the extent that it operates by allowing lay opinions to be admitted using two safeguards rather than having the traditional rule riddled with necessary exceptions and without any such safeguards. The first safeguard, found in (a), requires the lay witness to base his opinion upon his personal knowledge in accord with the Rule 602. In addition, the opinion must be "rationally based on the perception of the witness", ensuring an opinion or inference that would ordinarily be the result of a particular perception. The second safeguard, found in (b), requires the opinion to be "helpful to a clear understanding of his testimony or the determination of a fact in issue". This safeguard expresses a policy found throughout Article VII and under this rule is intended to allow only those lay opinions which will assist the trier of fact in making its findings. It expresses the intention of the Federal drafters of "...putting the trier of fact in possession of an accurate reproduction of the event". Advisory Committee's Note to Federal Rule 701, 56 F.R.D. 183, 281 (1972). It also provides the court with a means of dealing with broad assertions which could conceivably be admitted under this rule, even though "...a detailed account carries more conviction..." and is subject to cross-examination and argument pointing up the weakness of such assertions. *Id.*

COMMISSION COMMENT TO JUNE 1990 AMENDMENT

The revision establishes gender neutral format only. No substantive change.

Compiler's Comments

1990 Amendment: Substituted gender neutral language for gender specific language. Amendment effective June 7, 1990.

Case Notes

Failure to Object to Firefighter's Lay Testimony Regarding Burn Patterns — Admissibility Affirmed: During Henderson's arson trial, the state sought to introduce testimony of a firefighter who was at the scene. Defense counsel objected that because the firefighter was not a qualified expert, the firefighter's opinion testimony should not be allowed. The trial court allowed counsel to voir dire the firefighter in the presence of the jury, and the firefighter responded by explaining how to find a point of origin of a fire, describing indications of arson, and discussing pour patterns. Defense counsel did not move to strike the testimony or move for a limiting instruction after the court allowed the firefighter to testify as a lay witness, nor did counsel register a continuing objection to ensuing testimony that was based in part on the voir dire responses. Following conviction, Henderson contended that the testimony amounted to impermissible expert testimony, but the Supreme Court affirmed. By eliciting the evidence on voir dire, Henderson waived the right to object on appeal. Additionally, even though the testimony went beyond personal observations made at the scene, given Henderson's failure to object to the voir dire testimony regarding pour patterns, the trial court did not err in allowing testimony concerning the firefighter's observation of pour patterns at the scene. St. v. Henderson, 2005 MT 333, 330 M 34, 125 P3d 1132 (2005).

Sufficient Foundation for Lay Testimony of Police Officers Based on Training and Experience: Frasure contended that two police officers were allowed to give expert testimony at Frasure's drug trial without the prosecution first laying a foundation establishing the officers' qualifications as experts, as required in Rule 702, M.R.Ev. The state contended that the testimony was actually admissible lay testimony under this rule. The Supreme Court found that the state had established that the officers had extensive training and experience in the methods used in the illicit drug trade and in the prices that illicit drugs generally garner and that this provided a sufficient foundation for the officers to provide testimony as to whether Frasure possessed drugs with the intent to sell. The testimony was rationally based on the officers' perceptions and helped give a clear understanding of whether Frasure had the necessary intent and was thus admissible as lay testimony. St. v. Frasure, 2004 MT 305, 323 M 479, 100 P3d 1013 (2004).

Proper Exclusion of Lay Testimony of Paramedics Regarding Resuscibility — Expert Testimony Required: Plaintiff requested that a medical team be sent to her home to attend to her husband who was in respiratory arrest, but the police dispatcher sent the medics to the wrong address. The husband subsequently died, and the wife brought a wrongful death and negligence action against the city. In their depositions, the paramedics testified that had they been correctly dispatched, they would have arrived at the home and begun resuscitation procedures several minutes earlier, enhancing the chances of survival. The city argued that the prospects for survival were a subject for expert testimony and that such testimony by the paramedics lacked foundation and was speculative. The District Court agreed and granted the city's motion in limine to exclude the testimony. On appeal, the Supreme Court affirmed. The paramedics' proposed testimony clearly extended beyond their observations at the scene or a description of their actions and into the realm of expert medical testimony. Absent a foundation establishing the expertise of the paramedics to give an expert opinion on resuscibility, their lay testimony was properly excluded. Christofferson v. Great Falls, 2003 MT 189, 316 M 469, 74 P3d 1021 (2003).

Abuse of Discretion in Allowing Testimony of Accident Reconstructionist Absent Foundation for Expert Opinion Testimony: Defendants presented an accident reconstructionist as an expert witness. However, the expert explained that the visibility test about which he testified required no specialized skill or knowledge to perform or analyze, so the foundational requirements for expert testimony in Rule 702, M.R.Ev., were not met. Further, because defendants never disclosed the expert as a fact witness during discovery or pretrial proceedings, testimony as a lay witness was also precluded under this rule. Thus, absent establishment of the necessary foundation for expert opinion testimony, the District Court erred in allowing the expert to testify on the visibility test. Perdue v. Gagnon Farms, Inc., 2003 MT 47, 314 M 303, 65 P3d 570 (2003).

Improper Admission of Testimony by Highway Patrol Officer Regarding Effect of Prescription Medication on Driving Ability — Harmless Error: During Nobach's DUI trial, the District Court allowed testimony from a highway patrol officer regarding the effect of prescription medications on Nobach's driving ability, without specifically determining whether the testimony would be considered expert or lay opinion. The officer opined that Nobach's ability to drive safely was diminished as a result of the consumption of drugs. Following conviction, Nobach appealed on grounds that the testimony was an expert opinion that was improperly allowed without the requisite foundation. The state contended that the testimony was a lay opinion, and cited St. v. Bradley, 262 M 194, 864 P2d 787 (1993), and St. v. Carter, 285 M 449, 948 P2d 1173 (1997), for the proposition that a lay witness may give an opinion regarding intoxication based on the witness's personal observations. The Supreme Court first distinguished Bradley and Carter because the type of intoxication in those cases involved alcohol, while in Nobach's case, the officer concluded that drugs were involved only when alcohol use was ruled out by the administration of a Breathalyzer test. The court was not convinced that lay people are sufficiently knowledgeable about common symptoms of drug consumption and its effect on driving ability to offer lay testimony on the subject based on personal observation. The officer's opinion testimony was thus considered expert testimony rather than lay testimony, requiring an adequate foundation under Rule 702, M.R.Ev. The officer's training and experience did not provide a sufficient foundation for admitting the expert testimony, so the District Court abused its discretion in allowing it. However, because the abuse was trial error rather than structural error, the error did not warrant automatic reversal. Rather, the question was whether the finder of fact was presented with admissible evidence that proved the same facts as the tainted evidence and, if so, whether the tainted evidence would have contributed to the conviction qualitatively by comparison. In this case, the state provided other expert testimony from a pharmacist that tended to prove the same facts as the officer's testimony, and because the officer's testimony would not have contributed to Nobach's conviction, the error was harmless and the conviction was affirmed. St. v. Nobach, 2002 MT 91, 309 M 342, 46 P3d 618 (2002).

Admissibility of Testimony of Police Officers Not Qualified as Experts: Onstad was assaulted on the job and sued the employer, Payless Shoesource (Payless), for failure to provide a safe workplace. In her case in chief, Onstad presented testimony by three police officers who investigated the assault, but the officers had not been qualified as witnesses prior to trial. Notwithstanding that Payless had, in its opening statement, raised issues about which the officers testified, including store security and the escalation of severity in a sexual deviant's actions, Payless objected to the testimony on grounds that the officers were unqualified lay witnesses testifying on issues that required expert opinions. On appeal, the Supreme Court held that the District Court did not abuse its discretion in allowing the officers to answer, pursuant to this rule, because their opinions sprang from their work and experience as police and involved matters about which they were qualified to testify through training and extensive experience.

Onstad v. Payless Shoesource, 2000 MT 230, 301 M 259, 9 P3d 38, 57 St. Rep. 943 (2000). See also Hislop v. Cady, 261 M 243, 862 P2d 388 (1993).

Witness Testimony Properly Disallowed as Irrelevant: McGillen sued for unlawful discharge from employment, arguing on appeal that the trial court erred by not allowing his witnesses to give opinions on whether McGillen's conduct constituted a violation of company policy and whether the firing was justified. The ultimate question before the jury was whether McGillen was wrongfully discharged, and the witnesses' personal opinions about whether they thought that McGillen's conduct violated company rules were irrelevant. The testimony was also properly excluded because McGillen admitted in his deposition that he had violated company rules. McGillen v. Plum Creek Timber Co., 1998 MT 193, 290 M 264, 964 P2d 18, 55 St. Rep. 808 (1998).

Admissibility of Ambulance Attendant's Testimony That Driver in Accident Acted Like Belligerent Drunk: Since defendant was charged with DUI, not with driving with an illegal blood alcohol content, the ambulance attendant's testimony that defendant's actions after the accident occurred were those of a belligerent drunk did not constitute an opinion of guilt, and it was not an abuse of discretion to allow admission of the testimony. St. v. Gregoroff, 287 M 1, 951 P2d 578, 54 St. Rep. 1469 (1997).

Foundational Requirements of Knowledge of Intoxication by Lay Witness — Opinion Testimony Properly Admitted: Kucera, an off-duty firefighter, watched Carter stagger from a tavern, cross the street, get in a car, and drive away. Carter, appearing intoxicated, was followed by Kucera in Kucera's own car and was observed driving through a stop sign, at which time Kucera reported Carter to the police via portable radio, resulting in Carter's subsequent arrest for DUI. At trial, Kucera answered three questions pertaining to his opinion as to whether Carter was intoxicated. Carter asserted that Kucera's statements about his impression, concern, and feeling that Carter was intoxicated did not meet the standard of testifying from personal knowledge required by Rule 602, M.R.Ev. However, as a lay witness, Kucera's opinions or inferences were rationally based on his perception and personal knowledge. The state established that Kucera knew the objective signs of intoxication, had much experience being around people in varying states of intoxication, and had observed Carter for some time before alerting police. Because the state complied with the foundational requirements of Rule 602, M.R.Ev., and this rule, Kucera's lay witness opinion testimony was properly admitted. St. v. Carter, 285 M 449, 948 P2d 1173, 54 St. Rep. 1235 (1997).

Victim's Deathbed Statements Admissible as to State of Mind of Victim — Cautionary Instruction Required: As Turner was dying, he made statements to several witness to the effect that Fuhrmann stabbed him "on purpose" and that the stabbing was "not an accident". The trial court admitted the statements into evidence. On appeal, Fuhrmann contended that the testimony by the witnesses was inadmissible hearsay because the statements regarding Fuhrmann's intent addressed Fuhrmann's, rather than Turner's, state of mind and thus did not fall within the hearsay exception in Rule 803(3), M.R.Ev. Following St. v. Magruder, 234 M 492, 765 P2d 716 (1988), and St. v. Losson, 262 M 342, 865 P2d 255 (1993), the Supreme Court concluded: (1) Turner's statements that Fuhrmann stabbed him "on purpose" and that the stabbing was "not an accident", if the statements were construed as providing evidence that Turner feared Fuhrmann, could only be construed as providing circumstantial evidence of Turner's fear and, under that construction, would not be considered as hearsay and would be admissible; (2) such statements must be offered only for the purpose of showing the declarant's state of mind and may not be offered for the truth of the matter asserted; and (3) to prevent any potential prejudicial effect on a defendant and to uphold the integrity of both the hearsay rule and the state of mind exception of Rule 803(3), M.R.Ev., a trial court must instruct the jury as to the limited purpose for which it may consider this type of testimony. Nevertheless, in Fuhrmann's case, failure by the court to offer a limiting instruction was harmless error given the overwhelming independent evidence of guilt. St. v. Fuhrmann, 278 M 396, 925 P2d 1162, 53 St. Rep. 966 (1996).

Officer Not Qualified as Expert — Testimony as Lay Witness Only: The Supreme Court ruled that without being qualified as an expert in accident reconstruction, a highway patrol officer could not testify as to his opinion on the cause of an accident but was limited to lay opinions based upon his own perceptions regarding a fact at issue. Hall v. Big Sky Lumber & Supply, Inc., 261 M 328, 863 P2d 389, 50 St. Rep. 1345 (1993).

Nonmember of Board of Directors Not Allowed to Testify as to Board's Judgment: A special verdict form required the jury to determine whether the board of directors of the Butte Water Company, in the board's judgment, had a basis to conclude that it was in the best interests of the company to fire Mannix, president of the company. Mannix attempted to introduce testimony by

a long-time employee of the company that it was not in the company's best interests to fire Mannix. The Supreme Court held that the testimony was inadmissible and irrelevant. The issue was whether the board had a basis to reach its conclusion not whether a lay witness thought that the firing was not in the company's best interests. Mannix v. Butte Water Co., 259 M 79, 854 P2d 834, 50 St. Rep. 691 (1993).

Lay Witness's Explanation of Voluminous Documents Admissible Under Rules 602 and 701 and as Summary Under Rule 1006: Cowles brought an action against Sheeline to quiet title to a Montana mining claim. The District Court awarded both Cowles and Sheeline 50% of the shares in the mining company, based in part on the testimony of Don Cowles, Jr. Sheeline argued that Cowles's testimony concerning the number of shares issued by the mining company should not have been permitted because Cowles was not an expert. The Supreme Court found that the record indicated that Cowles did not testify as an expert but only as to his interpretation of his typewritten copy of his father's handwritten notes from the company stock book and as to Cowles's summaries of exhibits already in evidence. These summaries were helpful in explaining many pages of documents to the District Court. The Supreme Court concluded that Cowles's testimony was admissible under Rules 602, 701, and 1006, M.R.Ev. Cowles v. Sheeline, 259 M 1, 855 P2d 93, 50 St. Rep. 653 (1993).

Clear and Convincing Evidence Required — Allegation in Complaint, Statements in Judgment, and Unqualified Expert Medical Opinion Insufficient: Because of allegations that alcohol was involved in a car accident, the District Court awarded $25,000 for punitive damages to Maulding as part of a default judgment against Hardman. The Supreme Court noted that the only evidence of the use of alcohol was an unsubstantiated allegation in the complaint and that the only rationale by the District Court was a statement in the judgment that "evidence showed" that the accident was caused by the use of alcohol. The Supreme Court also noted that at the hearing on the matter, Maulding's counsel was allowed to give unqualified expert medical opinion, which the District Court should not have accepted. For these reasons, the Supreme Court reversed the denial of a motion to set aside the default. Maulding v. Hardman, 257 M 18, 847 P2d 292, 50 St. Rep. 141 (1993).

Allowing Witness to Testify as Expert When Not Listed as Expert — No Error When Testimony Related to Personal Knowledge: Allowing a witness to testify as an expert, even though he was not listed as an expert in either discovery responses or the pretrial order, was not error when the witness's testimony was not expert testimony but rather related only to matters of which he had personal knowledge. Bache v. Gilden, 252 M 178, 827 P2d 817, 49 St. Rep. 203 (1992).

Social Worker With Only Sexual Abuse Treatment Experience Not Qualified as Expert — Reversible Error: In determining that the District Court improperly allowed into evidence opinion testimony by a social worker on whether the victim had been sexually abused, the Supreme Court held that allowing the testimony constituted reversible error because the social worker had no experience in treating children who had not been sexually abused and thus had no controlled standard that allowed her to arrive at the conclusion that abuse had occurred. St. v. Scheffelman, 250 M 334, 820 P2d 1293, 48 St. Rep. 1023 (1991), followed in St. v. Steffes, 269 M 214, 887 P2d 1196, 51 St. Rep. 1463 (1994), and St. v. Whitlow, 285 M 430, 949 P2d 239, 54 St. Rep. 1227 (1997).

Testimony of Nonexpert Witness Limited to Facts: A nonexpert witness is generally limited to testifying to matters of fact. It was error, albeit harmless absent prejudice to appellant, for a trial court to admit testimony of a college course instructor when the thrust of his testimony was not the fact that he taught the material but rather the material itself, which was to a large extent only his opinion. Walden v. St., 250 M 132, 818 P2d 1190, 48 St. Rep. 893 (1991), followed in Rocky Mtn. Enterprises, Inc. v. Pierce Flooring, 286 M 282, 951 P2d 1326, 54 St. Rep. 1410 (1997).

Police Officer Testifying as to Meaning of Taped Conversation: The authorities hired an informant to aid them in drug investigations. The defendant was arrested, and the primary evidence against him was a tape recording taken by the informant. Nowhere on the tape was there any specific reference to drugs. The prosecutor called an officer to testify as to how the taped conversation should be interpreted. The Supreme Court ruled that the officer's testimony was inadmissible because the jury was able to understand the plain language on the tape and therefore it was improper to allow a lay witness to interpret the conversation. St. v. Webb, 243 M 368, 792 P2d 1097, 47 St. Rep. 1050 (1990).

Landowner Testimony — Value of Property: In this action involving the sale of commercial real estate, the purchaser was allowed to estimate the value of the resort he purchased from the defendant seller. A landowner has the right to testify as to the value of his property. Zugg v.

Ramage, 239 M 292, 779 P2d 913, 46 St. Rep. 1693 (1989), followed in Dew v. Dower, 258 M 114, 852 P2d 549, 50 St. Rep. 454 (1993).

Testimony Admitted as Exception to Lay Opinion Rule: The trial court excluded the plaintiff's testimony that a third party had told him that the defendant had made statements pressuring the third party not to award a subcontract to the plaintiff. The trial court held that the testimony of the plaintiff was an opinion that the defendant's statements constituted an attempt to pressure the third party and was therefore inadmissible. The Supreme Court reversed on grounds that the testimony was admissible as an exception to the lay opinion rule since the evidence could be characterized as concerning the various mental and moral aspects of humanity, such as disposition and temper, anger, fear, veracity, and other conditions and things, both moral and physical, too numerous to mention. Phillip R. Morrow, Inc. v. FBS Ins. Mont.-Hoiness Labar, Inc., 236 M 394, 770 P2d 859, 46 St. Rep. 455 (1989).

Existence of Agreement and Subsequent Breach: The District Court erred in allowing lay witnesses to testify as to the existence and breach of an agreement between the parties when their testimony was based on conversations with others rather than their own personal perceptions. First Bank-Billings v. Clark, 236 M 195, 771 P2d 84, 46 St. Rep. 291 (1989).

Acceptability of Lay Witness Opinion Testimony: Opinion testimony of a lay witness was acceptable where the witness was substantially involved in the affairs of his business enterprise, his statements were rationally based on his own perceptions, and the testimony was helpful to the determination of a fact in issue. Springer v. Opsahl, 229 M 10, 744 P2d 884, 44 St. Rep. 1738 (1987).

Police Officer Testifying to Effect of Mechanical Defect in Automobile: Law enforcement officer testified solely as to what, in his experience, happens to a vehicle when its power steering fails and did not offer an opinion as to what specifically happened to defendant's vehicle. Testimony indicated officer was well-qualified to offer his lay opinion, and admission of his testimony was not error. St. v. Johnson, 221 M 503, 719 P2d 1248, 43 St. Rep. 1010 (1986).

Determination of Major Issue of Fact — No Error: In a product liability case, both parties agreed that the brake line on a truck was defective but disagreed as to whether it left the factory in a defective condition or was altered at a later time. Defendant maintained that the brake line could have been altered at the shop where the truck frame was shortened. Undoubtedly the question of whether the shop could have altered the line was helpful in determining a major issue of fact. Because the employee who did the actual frame shortening was unavailable as a witness, the owner of the shop was an appropriate witness to respond to questioning with regard to the procedure. The District Court did not abuse its discretion in admitting the cross-examination of the shop owner. Rix v. Gen. Motors Corp., 222 M 318, 723 P2d 195, 43 St. Rep. 1296 (1986).

Sufficient Proof of Existence, Cause, and Permanency of Physical Injury: In a tort suit for damages for a back injury, plaintiff was competent to testify as to his past and present condition and his testimony was sufficient for the jury to determine whether there was an injury. However, the testimony was not sufficient to prove permanency or cause of the injury when his testimony was disputed and permanency and cause were not apparent from the injury itself. Since the trial court gave the issue of permanency to the jury with insufficient proof, error occurred and a new trial on the issue of damages was ordered. Cain v. Stevenson, 218 M 101, 706 P2d 128, 42 St. Rep. 1428 (1985), followed in St. v. Bower, 254 M 1, 833 P2d 1106, 49 St. Rep. 586 (1992), and in Moralli v. Lake County, 255 M 23, 839 P2d 1287, 49 St. Rep. 872 (1992).

Later Voluntary Amplification of Confession — No Second Miranda Warning — Sheriff as Nonexpert — Not Error: Approximately a month after his arrest for homicide, followed by a Miranda warning and confession, the defendant asked to see the Sheriff. When the Sheriff arrived at the cell, no Miranda warning was given, but the defendant began clarifying his confession and reenacting transactions that occurred the day of the homicide. The Supreme Court held it was not error for the District Court to admit the Sheriff's testimony regarding the incident because the defendant had been given a Miranda warning at the time of his first confession and he had asked to talk to the Sheriff and voluntarily offered information in an atmosphere free from coercion. The court also held that because there was no direct infringement of the defendant's fourth or fifth amendment rights under the federal constitution, the Sheriff's testimony could not be excluded as the fruit of a suppressed statement. In a further holding, the court provided that the Sheriff's statements were not inadmissible under Rule 701, M. R. Ev., on the grounds that the Sheriff's testimony was nonexpert opinion testimony and that, even if error had occurred, there was no reversible error because no prejudice was demonstrated. St. v. Kutnyak, 211 M 155, 685 P2d 901, 41 St. Rep. 1277 (1984), cited in St. v. Allen, 276 M 298, 916 P2d 112, 53 St. Rep. 403 (1996).

Investigator Not Expert — Investigation Not Opinion Based on Perceptions: Defendant was charged with eight counts of sexual intercourse without consent with his stepdaughter. After defendant pleaded not guilty and noticed an alibi defense, the State amended the information to allege the times of the rapes less precisely. Defense counsel hired Goddard to investigate the charges alleged in the original information. At trial, the trial court refused to allow Goddard to synopsize evidence gleaned from 40 interviews to establish an alibi for defendant to the original information. On appeal, the Supreme Court upheld the trial court ruling. Goddard's proposed testimony about defendant's alibi defense and the victim's credibility did not involve scientific, technical, or specialized knowledge. The testimony was not a proper subject matter for expert testimony, so Goddard's "opinion" was properly excluded. As a lay witness, Goddard's "opinion" was not based on his own perceptions. His opinion was gathered from interviewing other persons regarding the crimes charged. The trial court properly excluded the hearsay and opinion testimony of the investigator. St. v. Clark, 209 M 473, 682 P2d 1339, 41 St. Rep. 833 (1984).

Safety of Workplace: Mydlarz fell from a ladder at the workplace and was seriously injured. Lins had fallen from the same ladder while performing the same job several days before Mydlarz's fall. The District Court improperly excluded Lins' layman's opinion concerning the safety of the workplace. His opinion was based on his perception from working the same job as Mydlarz, and his testimony would have helped the jury understand the conditions under which Mydlarz was working. Mydlarz v. Palmer/Duncan Constr. Co., 209 M 325, 682 P2d 695, 41 St. Rep. 738 (1984).

Farmer's Testimony as to Damage to Own Land:

Where the State condemned a piece of the defendant's land as right-of-way for an interstate frontage road, the District Court did not err in admitting the defendant's testimony that the heat, noise, and dust from the road would damage the defendant's pig rearing business and testimony of the resulting reduction in value of the property. The landowner-witness rule relied on by the State to exclude that testimony is not directly applicable to this case. What is at issue is the competency of the landowner to testify on the causal link between the taking and any damages to the remainder, and ultimately to the depreciation in market value. The record indicates that the defendant was informed regarding the facts of construction and use of the highway. When a landowner is so informed, he is competent to estimate before-and-after value as to that particular use of his property or the causes of damage to the remaining property. St. v. Howery, 204 M 417, 664 P2d 1387, 40 St. Rep. 975 (1983).

Plaintiffs own a farm surrounded on three sides by the Flathead River and Flathead Lake. After Kerr Dam was built in 1939, the water table in the area began to rise. In 1960 plaintiffs filed suit claiming inverse condemnation of their land and damages due to the rising of the water table. The complaint was amended four times over the years and was finally tried in 1979. Defendant claimed that the cause was barred by prescription and the Statute of Limitations. At all times defendant denied any damage. Plaintiffs presented photographs of the land and a chart showing various tracts in different colors, denoting the degree of soil damage in each tract. Defendant objected that the evidence was a self-serving statement. The Supreme Court recognizes a farmer's competence to testify, without proper foundation, about the effects of water damage to his crop and land. (See Watson v. Colusa-Parrot Min. & Smelting Co., 31 M 513, 79 P 14 (1905).) The chart was held to be properly admissible on this basis. Blasdel v. Mont. Power Co., 196 M 417, 640 P2d 889, 39 St. Rep. 219 (1982).

The landowner-witness rule in valuation of property in a condemnation proceeding consists of two parts: the landowner on prima facie showing of ownership may testify as to value so long as his testimony is reasonable and the value testified to is for the use to which he is putting the land; if the landowner desires to testify as to value when used for other purposes, he must have some peculiar means of forming an intelligent and correct judgment beyond what is presumed to be possessed by men generally. Highway Comm'n v. Marsh, 175 M 460, 575 P2d 38 (1978). See also St. v. Donnes, 187 M 338, 609 P2d 1213, 37 St. Rep. 702 (1980).

Lay Witness Opinion Testimony Inadmissible When Witnesses Did Not See Event: Defendant was convicted of negligent homicide after a vehicle owned by defendant and his wife struck and killed a pedestrian. Both defendant and his wife were in the car at the time of the accident. At the trial, defendant's wife stated the defendant had been driving. There were no eyewitnesses to the accident. The District Court refused to admit the testimony of two lay witnesses who had seen the parties shortly after the accident. Defendant claimed the witnesses should have been allowed, under this rule, to state their opinion as to who had been driving the car at the time of the accident. The Supreme Court ruled that the District Court had not erred in its discretionary decision since the witnesses had not actually seen the accident and since the testimony of one of the witnesses was in conflict with a previous sworn statement. St. v. Henricks, 201 M 157, 653

P2d 479, 39 St. Rep. 2022 (1982), followed in St. v. Smith, 1998 MT 257, 291 M 236, 967 P2d 424, 55 St. Rep. 1058 (1998).

Appraiser-Remodeler Testifying to Defects in House: It was not an abuse of discretion to allow a certified real estate appraiser who had once managed a remodeling department of a lumber company to testify to damage caused by defects in a modular house. Little v. Grizzly Mfg., 195 M 419, 636 P2d 839, 38 St. Rep. 1994 (1981).

Qualifications of Expert Witnesses: A trial court has broad discretion in determining whether a witness may qualify as an expert, and the degree of a witness' qualifications affects the weight but not the admissibility of his testimony. Little v. Grizzly Mfg., 195 M 419, 636 P2d 839, 38 St. Rep. 1994 (1981).

Bond Forfeiture Hearing — Opinion as to Mental Condition: In a hearing to discharge a bond forfeiture order, the trial court improperly excluded the defendant's wife's opinion testimony concerning the defendant's mental condition. The surety offered the wife's testimony in order to meet the statutory criteria of satisfactory excuse for defendant's failure to appear. St. v. Musgrove, 187 M 549, 610 P2d 710, 37 St. Rep. 755 (1980).

Improperly Admitted Expert Testimony — Harmless Error: Although testimony by Sheriff as to his opinion of where an alleged murder weapon was located was improperly admitted over defense attorney's objection, the testimony did not affect substantial rights of the defendant, since cross-examination revealed that the Sheriff's belief regarding the location of the handgun was based on information given him by a third party. St. v. Fitzpatrick, 186 M 187, 606 P2d 1343, 37 St. Rep. 194 (1980).

Testimony to Be Rationally Based on Perception of Witness — Testimony as to Probable Location of Weapon: When a witness had testified that the defendant had taken a handgun from car, walked over an embankment into an open field but out of her sight, and then returned to the car without the gun, the District Court erred in allowing a Sheriff who had gone to the site with the witness and searched unsuccessfully for the weapon to testify as to his opinion of where the weapon was probably located. The Sheriff's testimony was not rationally based on his own perception. St. v. Fitzpatrick, 186 M 187, 606 P2d 1343, 37 St. Rep. 194 (1980).

Opinion Testimony as to State of Intoxication — Harmless Error: Failure to allow witnesses to answer defense attorney's question of whether they thought defendant was drunk or on drugs, when witnesses had testified as to defendant's erratic actions, responses, appearance, and condition and defendant's expert witness had testified concerning the effect of alcohol and drugs, was at most harmless error not affecting the substantive rights of the defendant. St. v. Hardy, 185 M 130, 604 P2d 792, 37 St. Rep. 1 (1980), followed in St. v. Bradley, 262 M 194, 864 P2d 787, 50 St. Rep. 1511 (1993).

Exclusion of Lay Testimony: In the context of this case, the court's exclusion of lay testimony on bullet angles was harmless error as it did not affect the substantial rights of the defendant. St. v. Bier, 181 M 27, 591 P2d 115, 36 St. Rep. 466 (1979).

Lay Opinion — Objection: The court did not commit reversible error in overruling defendant's objection to plaintiffs' testimony concerning opinions as to causation of physical illness which consisted of self-serving statements and speculation because there was ample evidence in the record that plaintiffs suffered emotional distress at the hands of defendant, as established by testimony of another plaintiff to which defendant failed to object. Harrington v. Holiday Rambler Corp., 176 M 37, 575 P2d 578 (1978).

Law Review Articles

Expert Testimony in Child Sexual Abuse Cases in Montana: A Proposal for Change, Harrison, 54 Mont. L. Rev. 297 (1993).

Montana Supreme Court Survey—Civil Procedure and Evidence, Dyrud, 42 Mont. L. Rev. 343 (1981).

Montana Supreme Court Survey—Civil Procedure and Evidence, Young & McLean, 41 Mont. L. Rev. 293 (1980).

Collateral References

Criminal Law *key* 448 through 494; Evidence *key* 470 through 574.

32 C.J.S. Evidence §§438 through 575.

31A Am. Jur. 2d Expert and Opinion Evidence §§15, et seq., 68, 131, et seq.

Opinion by nonexpert testimony:

Under influence of drugs. 21 ALR 4th 905.

Weather conditions. 56 ALR 3d 575.

Speed of motor vehicle. 33 ALR 3d 1405 (sound); 93 ALR 2d 287 (appearance); 92 ALR 2d 1391 ("fast"); 33 ALR 2d 1250 (moving).

Cause of fire. 88 ALR 2d 230, superseded by 85 ALR 5th 69 and 85 ALR 5th 187.
Cause of death. 66 ALR 2d 1082.
Point of contact in motor vehicle collision. 66 ALR 2d 1048.
Self-inflicted death. 56 ALR 2d 1447.
Diseases and physical condition of animals. 49 ALR 2d 932.
Future medical expenses. 45 ALR 2d 1148.
Cause of accident. 38 ALR 2d 13.
Value of chattel. 37 ALR 2d 967.
Agricultural profits — condemnation. 16 ALR 2d 1113.
Competency of nonexpert's testimony, based on sound alone, as to speed of motor vehicle involved in accident. 33 ALR 3d 1405.
Ability to see, hear, smell, or otherwise sense as proper subject of opinion by lay witnesses (comment note). 10 ALR 3d 258.
Requisite foundation or predicate to permit nonexpert witness to give opinion, in a civil action, as to sanity, mental competency or mental condition. 40 ALR 2d 15.
Construction and application of Rule 701 of the Federal Rules of Evidence, providing for opinion testimony by lay witnesses under certain circumstances. 44 ALR Fed. 919.
7 Wigmore §§1917 through 2028.

Rule 702. Testimony by experts.

Commission Comments

This rule is identical to Federal and Uniform Rules (1974) Rule 702. It states the two common-law standards required before an expert is allowed to give his opinion, each of which is found in existing Montana law.

These two standards are set forth in Section 93-401-27(9), R.C.M. 1947 [superseded]: "...his opinion of a question or [sic, should be of] science, art, or trade, when he is skilled therein". The first standard is concerned with whether or not the subject matter is that requiring expert testimony. Case law has construed the phrase "science, art, or trade" to include any particular area "...not within the range of ordinary training or intelligence...." [Bracketed material in commission comments.] (Kelly v. John R. Daily Co., 56 Mont. 63, 79, 181 P 326 (1919)) or "the question must be one involving matters too complex to be readily grasped by the average mind...". Wibaux Realty Co. v. N. Pac. Ry., 101 Mont. 126, 139, 54 P2d 1175 (1935). The rule states this standard in slightly different terms of having the "scientific, technical, or other specialized knowledge...assist the trier of fact to understand the evidence or to determine the fact in issue...". This is consistent with Forquer v. Slater Brick Co., 37 Mont. 426, 460, 97 P 843 (1908) which indicated that expert testimony would not have aided the jury in its determination and so it should be excluded. Demarais v. Johnson, 90 Mont. 366, 370, 3 P2d 283 (1931) and cases cited therein indicate that expert testimony should be admitted so that the jury is able to understand the facts and draw correct conclusions. Other cases exclude expert testimony when the Supreme Court has found that the opinion testimony is not necessary for the jury to be capable of rendering a verdict. Hightower v. Alley, 132 Mont. 349, 354, 318 P2d 243 (1957) and Lamb v. Page, 153 Mont. 171, 178, 455 P2d 337 (1969). The Commission intends the rule to be consistent with both statements of this standard.

The second standard is concerned with whether or not the particular witness is qualified as an expert to give an opinion in the particular area of his testimony. This is consistent with Section 93-401-27(9), R.C.M. 1947 [superseded], quoted above ("...when he is skilled therein."), and with case law which has allowed an expert to be qualified in the same terms of the rule, that is "...qualified as an expert by knowledge, skill, experience, training, or education...". DeSandro v. The Missoula Light and Water Co., 52 Mont. 333, 338, 157 P 641 (1916); Graham v. Rolandson, 150 Mont. 270, 284, 435 P2d 263 (1968) and Haynes v. County of Missoula, 163 Mont. 270, 289, 517 P2d 370 (1973).

Finally, the rule states that an expert properly qualified and testifying in an area requiring expert testimony may not only testify in the form of opinion but "otherwise". This allows an expert to give testimony which need not be in the form of opinion, but which informs the jury so they may render the correct decision. This is consistent with State v. Cassill, 70 Mont. 433, 448, 227 P 49 (1924) where prosecution witnesses qualified as experts in accounting and bookkeeping were allowed to explain the meaning of various bookkeeping entries because the court "...found the explanations illuminative and useful and have no doubt they served to enlighten the jury".

Case Notes

General 389
When Expert Testimony Proper 396

Medical Experts 408
Valuation 415
Polygraphs 416

GENERAL

Failure to Object to Firefighter's Lay Testimony Regarding Burn Patterns — Admissibility Affirmed: During Henderson's arson trial, the state sought to introduce testimony of a firefighter who was at the scene. Defense counsel objected that because the firefighter was not a qualified expert, the firefighter's opinion testimony should not be allowed. The trial court allowed counsel to voir dire the firefighter in the presence of the jury, and the firefighter responded by explaining how to find a point of origin of a fire, describing indications of arson, and discussing pour patterns. Defense counsel did not move to strike the testimony or move for a limiting instruction after the court allowed the firefighter to testify as a lay witness, nor did counsel register a continuing objection to ensuing testimony that was based in part on the voir dire responses. Following conviction, Henderson contended that the testimony amounted to impermissible expert testimony, but the Supreme Court affirmed. By eliciting the evidence on voir dire, Henderson waived the right to object on appeal. Additionally, even though the testimony went beyond personal observations made at the scene, given Henderson's failure to object to the voir dire testimony regarding pour patterns, the trial court did not err in allowing testimony concerning the firefighter's observation of pour patterns at the scene. St. v. Henderson, 2005 MT 333, 330 M 34, 125 P3d 1132 (2005).

Accuracy and Reliability of Preliminary Blood Test Established — Test Results Properly Admitted in Evidence: An officer measured Damon's blood alcohol content at 0.274, using an Alco-Sensor III preliminary breath test (PBT). The state and Damon both presented expert testimony as to whether the PBT was reliable and accurate as an evidentiary tool. Both experts testified that when administered according to protocols, the Alco-Sensor III had a margin of error in the range of 10%. The trial court held that the PBT was sufficiently reliable and accurate and admitted the PBT results. Damon appealed, but the Supreme Court affirmed. Although holding that PBT evidence is not necessarily admissible or inadmissible as a matter of law, the court reaffirmed the holding in Barmeyer v. Mont. Power Co., 202 M 185, 657 P2d 594 (1983), that it is better to admit relevant scientific evidence in the same manner as other expert testimony and allow the weight of the evidence to be attacked by cross-examination and refutation. Applying the 10% margin of error to Damon's test results, Damon's blood alcohol content was in the range of 0.247 to 0.301, more than twice the legal limit of intoxication. Thus, the state met its burden in establishing that Damon's intoxication exceeded the legal limit, and the trial court did not abuse its discretion in admitting the results of Damon's PBT. St. v. Damon, 2005 MT 218, 328 M 276, 119 P3d 1194 (2005).

Standards Applicable to Termination of Indian Parental Rights — Active Department Efforts to Provide Services Required: The District Court terminated the parental rights of an Indian father after the children were removed from the father's custody a fourth time because of the father's abuse and neglect. The father appealed on grounds that: (1) the state did not make active efforts to provide remedial services; (2) the District Court relied on expert testimony based on the Department file rather than personal interviews; and (3) it was error not to grant the father's request for an extension of temporary legal custody. The Supreme Court affirmed on all issues. The father left no phone number or address with the social worker and moved multiple times. Without any involvement, the father prevented the Department from making active efforts at providing more intensive services. Second, the federal Indian Child Welfare Act requires testimony from a qualified expert witness, but does not require a specific form of that testimonial evidence or personal interviews, and a District Court need not conform its decision to a particular piece of evidence or a particular expert's report or testimony as long as a reasonable person could have found beyond a reasonable doubt that continued custody by an Indian parent or custodian is likely to result in serious emotional or physical damage to the child. Last, the District Court did not abuse its discretion in refusing to extend temporary custody because the Department had already provided active efforts and did not need more time to assist the father in attaining his goals. The District Court had an accurate perspective on the father's parenting abilities, and refusal to extend the temporary placement did not make the court's decision any less reasonable. In re A.N. & M.N., 2005 MT 19, 325 M 379, 106 P3d 556 (2005). See also In re Marriage of McKenna, 2000 MT 58, 299 M 13, 996 P2d 386 (2000).

Sufficient Foundation for Lay Testimony of Police Officers Based on Training and Experience: Frasure contended that two police officers were allowed to give expert testimony at Frasure's drug trial without the prosecution first laying a foundation establishing the officers'

qualifications as experts, as required in this rule. The state contended that the testimony was actually admissible lay testimony under Rule 701, M.R.Ev. The Supreme Court found that the state had established that the officers had extensive training and experience in the methods used in the illicit drug trade and in the prices that illicit drugs generally garner and that this provided a sufficient foundation for the officers to provide testimony as to whether Frasure possessed drugs with the intent to sell. The testimony was rationally based on the officers' perceptions and helped give a clear understanding of whether Frasure had the necessary intent and was thus admissible as lay testimony. St. v. Frasure, 2004 MT 305, 323 M 479, 100 P3d 1013 (2004).

Failure to Provide Expert Testimony Regarding Adequacy of Swimming Pool Depth for Diving — Summary Judgment Proper: Plaintiff was injured diving into a municipal swimming pool and sued the city for negligence and strict liability. Administrative rules adopted in 1985 set standards articulating board lengths for various pool depths, but the rules apply only to pools constructed or remodeled after June 28, 1985, and the pool in question was constructed in 1972, so the rules did not apply. Further, 50-53-107 does not define a particular standard of conduct to which public pool operators must conform, but rather imposes a general duty on a city to keep a pool safe. Absent an applicable standard, plaintiff was required to present expert testimony to assist jurors in determining whether the pool depth was unreasonably dangerous for the diving board length. Plaintiff offered no expert testimony on the subject, thus failing to establish a prima facie case of liability, so the District Court properly granted summary judgment to the city. Dayberry v. E. Helena, 2003 MT 321, 318 M 301, 80 P3d 1218 (2003).

Finding of Gap Between Easements Not Clearly Erroneous — Remediation and Injunctive Relief Proper: In attempting to exercise an easement to some trust property, defendants breached plaintiffs' fence line and plowed about 70 to 80 feet of new road across plaintiffs' property to connect a 1950 road on the trust property to defendants' newly relocated easement. Plaintiffs sued, contending that there was a mismatch between the terminus of the 1950 road and defendants' newly surveyed and relocated easement. Faced with conflicting testimony from two professional surveyors, the District Court Judge conducted an on-the-ground inspection of the property, concluding that in the process of relocating the original easement running along defendants' property line, defendants created a gap of 70 to 80 feet between the old road and the new road and breached the gap by crossing plaintiffs' property. Defendants appealed, but the Supreme Court found no clear error in the District Court's findings and affirmed. The District Court was at liberty to give the expert testimony whatever weight that the court considered to be justified. Substantial credible evidence supported the finding that a large gap existed and that defendants connected the roadways by plowing across plaintiffs' land without regard to plaintiffs' property rights. The Supreme Court also affirmed the District Court's grant of plaintiffs' request to enjoin defendants from using the connecting road, its order to defendants to reinstall plaintiffs' fence line and gates and to resurface and restore plaintiffs' property, and its holding of defendants in contempt for failing to obey the mandates of the preliminary injunction. Koeppen v. Bolich, 2003 MT 313, 318 M 240, 79 P3d 1100 (2003).

Standard of Admissibility of Expert Testimony: Under Cottrell v. Burlington N. RR Co., 261 M 296, 863 P2d 381 (1993), issues concerning the admissibility of evidence are within the discretion of the District Court, including determinations of the qualification and competency of expert witnesses, and those determinations will not be disturbed by the Supreme Court absent a showing of an abuse of the District Court's discretion. St. v. DuBray, 2003 MT 255, 317 M 377, 77 P3d 247 (2003). See also St. v. Larson, 2004 MT 345, 324 M 310, 103 P3d 524 (2004).

Expert Witness in Indian Child Welfare Proceeding — Cultural Knowledge of Particular Tribe Not Required: Federal law does not define "qualified expert witness" or provide criteria for determining whether a person is qualified to testify as an expert under the Indian Child Welfare Act of 1978 (ICWA), although federal guidelines do allow expert testimony of a professional person having substantial education and experience in the area of the professional's specialty. In the present case, the state called an expert who: (1) was a Blackfeet tribal member with knowledge of Blackfeet culture; (2) worked closely with Indian families while conducting home studies and writing reports relating to adoption and foster care placement of Indian children in Montana; (3) was a teacher in Minnesota and was exposed to the culture of other tribes; (4) worked for the state as a family resource specialist; and (5) was trained and certified by the state as a qualified ICWA expert witness. The father of the Indian youth in need of care objected that the state's witness was not qualified because the witness had no knowledge of the Confederated Tribes of Siletz Indians of Oregon. The objection was overruled, and the father appealed. The Supreme Court affirmed. It is not necessary that an expert witness in an ICWA case have knowledge of the cultural standards of a particular tribe. The determination of whether the

witness is sufficiently qualified remains within the discretion of the trial court, and it was not an abuse of that discretion for the District Court to accept the state's witness in this case. In re M.R.G., 2003 MT 60, 314 M 396, 66 P3d 312 (2003), followed in In re K.S., D.S., & C.S., 2003 MT 212, 317 M 88, 75 P3d 325 (2003).

Introduction of Results of Horizontal Gaze Nystagmus Test — Explanation of Underlying Scientific Basis of Correlation Between Alcohol Consumption and Nystagmus Required: At Van Kirk's DUI trial, the District Court allowed the arresting officer to testify regarding Van Kirk's performance on a horizontal gaze nystagmus (HGN) test. Van Kirk contended that the state failed to lay the proper foundation for admitting the test results. The Supreme Court agreed. Pursuant to Hulse v. St., 1998 MT 108, 289 M 1, 961 P2d 75 (1998), in order to lay the proper foundation, the state must establish a scientific basis for the reliability of the test results and in addition show that the test was properly administered. This requires that a qualified expert explain the underlying scientific basis of the correlation between alcohol consumption and nystagmus. In this case, the arresting officer had a bachelor's degree in medical technology, had worked as a lab supervisor and technician at the state hospital, was certified to administer the HGN test, and testified that the test was properly administered to Van Kirk. However, nothing in the evidence established that the officer was specially trained or educated or had adequate knowledge to qualify as an expert able to explain the underlying scientific basis of the HGN test. Thus, the District Court erred in permitting the officer to offer the test results into evidence without the state first establishing the requisite foundation. However, the error was not prejudicial to Van Kirk, so the DUI conviction was affirmed. St. v. Van Kirk, 2001 MT 184, 306 M 215, 32 P3d 735 (2001). See also St. v. Crawford, 2003 MT 118, 315 M 480, 68 P3d 848 (2003), in which the testimony of an HGN expert was properly admitted given the expert's extensive training and education.

Admissibility of Testimony of Police Officers Not Qualified as Experts: Onstad was assaulted on the job and sued the employer, Payless Shoesource (Payless), for failure to provide a safe workplace. In her case in chief, Onstad presented testimony by three police officers who investigated the assault, but the officers had not been qualified as witnesses prior to trial. Notwithstanding that Payless had, in its opening statement, raised issues about which the officers testified, including store security and the escalation of severity in a sexual deviant's actions, Payless objected to the testimony on grounds that the officers were unqualified lay witnesses testifying on issues that required expert opinions. On appeal, the Supreme Court held that the District Court did not abuse its discretion in allowing the officers to answer, pursuant to Rule 701, M.R.Ev., because their opinions sprang from their work and experience as police and involved matters about which they were qualified to testify through training and extensive experience. Onstad v. Payless Shoesource, 2000 MT 230, 301 M 259, 9 P3d 38, 57 St. Rep. 943 (2000). See also Hislop v. Cady, 261 M 243, 862 P2d 388 (1993).

Opinion Testimony Regarding Cause of Accident:

In a case involving the rollover of a tractor-trailer, defendant called a mechanical engineer to give opinion testimony concerning kingpin design, abuse, and misuse, metallurgy, and accident reconstruction and analysis. The foundation concerning the engineer's qualifications as an expert witness was challenged. On appeal, the Supreme Court held that the witness qualified as an expert because the engineer possessed knowledge and experience that was not within the common knowledge or experience of people of ordinary education and had a degree of specialization that did not affect the competency to testify as an expert. The court also noted that a witness's specialization in an area goes to the weight of the testimony, rather than to the witness's competency to testify, and that the credibility and weight of a witness's testimony is for the jury to decide. Baldauf v. Arrow Tank & Eng'r Co., Inc., 1999 MT 81, 294 M 107, 979 P2d 166, 56 St. Rep. 337 (1999).

The trial court did not err in allowing the investigating officer to offer opinion testimony regarding the cause of the pedestrian-auto accident when the officer was identified as an expert prior to trial and when he testified as to the cause of the accident, not the negligence of the parties. The evidence obtained by the investigating officer at the scene of the accident, coupled with his experience in accident investigation, provided a sufficient basis for the court to determine that he had a proper foundation to testify. Campbell v. Johnson, 251 M 12, 823 P2d 237, 48 St. Rep. 1097 (1991), followed in St. v. Arrington, 260 M 1, 858 P2d 343, 50 St. Rep. 905 (1993).

Expert Testimony Regarding Blood Alcohol Levels: In a negligent homicide case arising out of a car accident, when the record contained evidence of factors identified by an expert witness as necessary in order to estimate blood alcohol levels, the expert offered an indepth explanation of the formula used to make the estimation and the defendant's counsel extensively

cross-examined the expert on the formula. The District Court did not abuse its discretion in permitting the expert to estimate the number of drinks that the defendant had consumed on the night of the accident. St. v. Ingraham, 1998 MT 156, 290 M 18, 966 P2d 103, 55 St. Rep. 611 (1998).

DUI Field Sobriety Eye Tests and Admission of General and Novel Scientific Testimony: Not all scientific evidence is subject to the Daubert standard. The Daubert test should be used only to determine the admissibility of novel scientific evidence. In addition, and whether or not the scientific evidence is novel, a court presented with scientific evidence is encouraged to follow the Barmeyer decision and liberally construe the rules of evidence so as to admit all relevant expert testimony, the weight of which may be attacked by cross-examination and refutation. Nystagmus is the involuntary jerking of the eyeball resulting from the body's attempt to maintain balance and orientation. It may be aggravated by alcohol. The inability of the eyes to maintain visual fixation (a jerking movement of the eyes) as they are turned to the side is known as horizontal gaze nystagmus (HGN). The HGN test is a common field sobriety test. It measures various aspects of these involuntary, jerking eye movements. This is a scientific test in that science, not common knowledge, provides the legitimacy for the test. The HGN evidence could have a disproportionate impact on the jury's decision because of the test's scientific nature and because the jury may not understand the nature of the test or the methodology of its procedure. The test has been used for decades, and it is not novel scientific evidence. Therefore, the Daubert standard does not apply to its admissibility. However, the court must conduct a conventional analysis under this rule and adhere to Barmeyer to determine admissibility. An officer testifying as to the results of a test that the officer administered must be shown to have proper training in the test and to have administered the test in accordance with that training (though a proper foundation for testifying as to test results does not constitute an adequate foundation to testify as to the scientific basis for the test). In the present case, the officer testified that he had 40 hours of field sobriety tests (including HGN) training, stated how he administered the test to defendant, and stated that defendant failed. However, there was no evidence establishing that the officer had special training or education or adequate knowledge to qualify him to testify that everyone's eyes exhibit nystagmus at maximum deviation and that with the introduction of alcohol, the nystagmus becomes more prevalent and does not cease. Thus, there was insufficient foundation for that statement, and the lower court abused its discretion by allowing the officer to testify as to the test results. Hulse v. St., 1998 MT 108, 289 M 1, 961 P2d 75, 55 St. Rep. 415 (1998), followed in Bramble v. St., 1999 MT 132, 294 M 501, 982 P2d 464, 56 St. Rep. 532 (1999), and Missoula v. Robertson, 2000 MT 52, 298 M 419, 998 P2d 144, 57 St. Rep. 250 (2000). See also St. v. Crawford, 2003 MT 118, 315 M 480, 68 P3d 848 (2003), in which the testimony of an HGN expert was properly admitted given the expert's extensive training and education.

Exclusion of Expert Testimony — Insufficient Factual Grounds and Testimony Directed to Question of Law: Plaintiffs contended that they attempted to introduce evidence of the applicability of the National Electrical Code (NEC) and the National Electrical Safety Code (NESC) through testimony of an expert and that it was error for the trial court to deny a jury instruction regarding the NEC and NESC. However, the instruction was properly denied because there were insufficient factual grounds to establish the relevancy of the NEC and NESC and because the expert's testimony was directed to a question of law. Harwood v. Glacier Elec. Co-op, Inc., 285 M 481, 949 P2d 651, 54 St. Rep. 1257 (1997).

Opportunity Required to Cross-Examine Expert as to Safety Standards: Occupational Safety and Health Administration (OSHA) regulations and American National Standards Institute (ANSI) requirements are not admissible to prove negligence in a case of an individual owner constructing the owner's own home. However, if the owner offers expert testimony that the owner complied with minimum OSHA or ANSI safety standards, despite the general inadmissibility of the evidence, then the issue is injected into the case and opposing counsel must be afforded the opportunity to cross-examine the expert as to the expert's understanding of the standards. The trial court's restriction of cross-examination of the expert left the jury with the impression that the owner had complied with the minimum safety standards, which prejudiced the case. The case was remanded for a new trial. Lynch v. Reed, 284 M 321, 944 P2d 218, 54 St. Rep. 902 (1997).

DNA Evidence — Conflicting Expert Testimony on Statistical Foundation for Test — Weight and Admissibility: Weeks was convicted of sexual intercourse without consent with his stepdaughter. The conviction was based in part upon DNA evidence gained from blood samples taken from Weeks, the stepdaughter, and a child of the stepdaughter. Weeks contended that because of conflicting expert testimony as to the size of the statistical basis necessary to apply the results to a population of 100 million, the DNA results should not be admitted. Citing

Barmeyer v. Mont. Power Co., 202 M 185, 657 P2d 594 (1983), the Supreme Court held that the conflicting evidence was a matter for the jury to consider in deciding the weight of the evidence. St. v. Weeks, 270 M 63, 891 P2d 477, 52 St. Rep. 78 (1995).

Evidence Supporting Discounting of Opinion of Doctor Who Did Not Have Complete Foundation for Conclusion: There was substantial credible evidence to support a finding as to when Sanford's knee was injured, and the Supreme Court would not reweigh that evidence. The Workers' Compensation Court's discounting of the weight attributable to a doctor's testimony was also supported by substantial credible evidence, which included evidence that the doctor, at the time that he gave his opinion on the knee, did not have a complete foundation from which to make a conclusion. Sanford v. St. Comp. Mut. Ins. Fund, 268 M 8, 885 P2d 444, 51 St. Rep. 1187 (1994).

Defense Complaint Concerning DNA Analysis Evidence Admission — Lack of Statistical Evidence: DNA statistical analysis evidence was excluded on defendant's motion. Defendant could not complain on appeal that the jury had no valid statistics to assist it in understanding the DNA analysis evidence. St. v. Moore, 268 M 20, 885 P2d 457, 51 St. Rep. 1151 (1994).

DNA Testing Challenges That Go to Weight of Evidence, Not to Admissibility: Whether DNA paternity analysis probes lacked consistency because of alleged anomalies, whether the thermal cycler used was the proper one and properly constructed, whether proper testing procedures were followed, whether the lab technician was qualified, and whether DNA PCR analysis is sufficiently reliable for forensic use were matters of weight for the jury, not questions of lack of foundation for or of admissibility of the DNA test results. The standard for the admission of expert scientific testimony is: (1) whether the theory or technique can be and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error in using a particular scientific technique and the existence and maintenance of standards controlling its operation; and (4) whether the theory or technique has been generally accepted or rejected in the particular scientific field. An alleged error in the application of a reliable methodology is grounds for exclusion of an opinion only if the error negates the basis for the reliability of the principle itself. St. v. Moore, 268 M 20, 885 P2d 457, 51 St. Rep. 1151 (1994), followed in St. v. Weeks, 270 M 63, 891 P2d 477, 52 St. Rep. 78 (1995).

Threshold Test for Admissibility of DNA Evidence: The threshold test for admissibility of DNA evidence should require only a preliminary showing of reliability of the particular data to be offered, that is, some indication of how the laboratory work was done and what analysis and assumptions underlie the probability calculations. St. v. Moore, 268 M 20, 885 P2d 457, 51 St. Rep. 1151 (1994).

Test for Determining Whether Witness Qualifies as Expert — "Generally Accepted" Reliability Test Rejected: Hart-Albin sued Leviton under a strict liability theory for manufacture of an extension cord connector that caused a fire in the Hart-Albin store. Leviton defended, alleging that the connector was misused because it was improperly assembled by a store employee. Dr. Dorris, a human factors expert, testified that warnings and instructions should have been provided with the extension cord connector. Citing Daubert v. Merrell Dow Pharmaceuticals, 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786 (1993), the Supreme Court rejected the "general acceptance" standard for admitting expert testimony and adopted a standard based upon Rule 702 of the Federal Rules of Evidence. Under this test, the District Court properly admitted the testimony of the witness. Hart-Albin Co. v. McLees, Inc., 264 M 1, 870 P2d 51, 51 St. Rep. 112 (1994). See also St. v. Cline, 275 M 46, 909 P2d 1171, 53 St. Rep. 32 (1996).

"Defendant's Admissions" Exception to Expert Testimony Requirement Not Applicable: The Supreme Court held that the plaintiff could not rely on the "defendant's admissions" exception to the requirement for expert medical testimony in a malpractice suit against a veterinarian because the defendant had not made any admissions during his testimony. Zimmerman v. Robertson, 259 M 105, 854 P2d 338, 50 St. Rep. 703 (1993).

Not Allowing Testimony on Simple Physics Not Error: Plaintiff argued that the lower court erred in not allowing his expert witness to testify concerning fundamental laws of physics and the angle of his tires when his vehicle left the road. The Supreme Court held that the trial court had wide discretion in determining whether to admit expert testimony and had not abused its discretion. Thomsen v. St., 253 M 460, 833 P2d 1076, 49 St. Rep. 533 (1992).

Opinion Testimony Regarding Nonparty Driver: The trial court did not err in allowing the investigating officer to offer opinion testimony regarding the unsafe behavior of a nonparty driver. When plaintiff failed to offer any evidence tending to show that the testimony was significant, plaintiff's argument was merely speculative and it was not reversible error for the trial court to allow the testimony. Campbell v. Johnson, 251 M 12, 823 P2d 237, 48 St. Rep. 1097 (1991).

Social Worker With Only Sexual Abuse Treatment Experience Not Qualified as Expert — Reversible Error: In determining that the District Court improperly allowed into evidence opinion testimony by a social worker on whether the victim had been sexually abused, the Supreme Court held that allowing the testimony constituted reversible error because the social worker had no experience in treating children who had not been sexually abused and thus had no controlled standard that allowed her to arrive at the conclusion that abuse had occurred. St. v. Scheffelman, 250 M 334, 820 P2d 1293, 48 St. Rep. 1023 (1991), followed in St. v. Whitlow, 285 M 430, 949 P2d 239, 54 St. Rep. 1227 (1997). See also St. v. Scott, 257 M 454, 850 P2d 286, 50 St. Rep. 353 (1993).

Expert Testimony on Custom of Architectural Profession Proper: An architect was obligated under contract to supervise construction of a building, using the ordinary care exercised by members of his profession. Therefore, expert testimony on the custom of the architectural profession constituted rebuttable proof aimed at assisting the trier of fact in determining whether the architect negligently performed the contract and the testimony was properly admitted. N. Mont. Hosp. v. Knight, 248 M 310, 811 P2d 1276, 48 St. Rep. 444 (1991).

Valuation of Insurance Business — Determination of Qualification of Expert Witness: The determination of the qualification of an expert witness is a matter of discretion for the trial court. Absent a showing of abuse of that discretion, the decision will not be disturbed. The District Court did not abuse its discretion when it found a certified public accountant qualified to testify as an expert witness on the value of goodwill of an insurance business in a dissolution hearing. In re Marriage of Arrotta, 244 M 508, 797 P2d 940, 47 St. Rep. 1775 (1990), followed in In re Marriage of Lee, 282 M 410, 938 P2d 650, 54 St. Rep. 409 (1997).

Evaluation of Expert Testimony: An expert witness for the defendant in a DUI case testified that in his opinion, a wide number of chemicals could affect breath alcohol tests. The District Court disregarded the testimony and found the defendant guilty. The Supreme Court affirmed, stating that the evaluation of expert testimony lies within the province of the trier of fact. St. v. Holman, 241 M 238, 786 P2d 667, 47 St. Rep. 256 (1990).

Proper Foundation Laid for Expert's Qualifications as Auditor: Plaintiff laid a proper foundation for an expert's qualifications as an auditor when testimony reflected that the expert: (1) had been employed by the Local Government Service Division of the Department of Administration as an auditor for 17 ½ years; (2) had 5 years of accounting experience before working for the state; (3) held a 2-year degree in business administration and accounting; (4) trained new employees and auditors, conducted audits, wrote audit programs, and conducted special examinations; and (5) received training from the Lower Court Commission on examination of City Judges' accounts. Fairview v. Deming, 238 M 496, 778 P2d 876, 46 St. Rep. 1446 (1989).

Limitation of Testimony of Statistician With Regard to Age Discrimination — Union Versus Nonunion Employees: The District Court correctly limited the age discrimination testimony of plaintiff's statistical expert to testimony of statistical tests performed only on nonunion employees when the inclusion of union employees (whose employment contracts contained seniority rights) in the statistical population would skew the figures affecting older terminated nonunion employees as to the probability that older nonunion employees were discriminated against on the basis of age. Mahan v. Farmers Union Cent. Exch., Inc., 235 M 410, 768 P2d 850, 46 St. Rep. 96 (1989).

Expert Testimony by Highway Patrolman That No Arrest Made After Accident — Prejudicial Error: Statement by a highway patrolman, testifying as an expert, that he had not issued a citation following an accident because of his determination that the driver was not negligent constituted prejudicial error. Questions as to why an arrest was not made were objectionable at least on the following grounds: (1) they were irrelevant; (2) they were argumentative in form; (3) they described as crimes things that were not crimes; (4) they called not for objective evidence but for the mental conclusions of the witness; and (5) they were hearsay. Smith v. Rorvik, 231 M 85, 751 P2d 1053, 45 St. Rep. 451 (1988), followed in Hart-Anderson v. Hauck, 239 M 444, 781 P2d 1116, 46 St. Rep. 1817 (1989), and distinguished in Campbell v. Johnson, 251 M 12, 823 P2d 237, 48 St. Rep. 1097 (1991).

Attorney as Expert Witness — Not to Advise Jury as to Law of Case: Insurance company argued that the District Court's instructions implying that company's position was frivolous as a matter of law were reinforced by detailed attorney opinion testimony on the law applicable to insurance coverage, in violation of 25-7-102 and Rule 704, M.R.Ev. The Supreme Court, citing Energy Oils, Inc. v. Mont. Power Co., 626 F2d 731 (9th Cir. 1980), adopted the finding that admission of opinion testimony as to the legal effect of a contract is erroneous, but in view of the District Court holding that there was insurance coverage as a matter of law, the Supreme Court

concluded that counsel's testimony regarding the law of the case did not constitute reversible error under the unique facts of this case. The court found no abuse of discretion in allowing attorneys who appear as expert witnesses to state their opinion on an insurer's duty to evaluate the facts, on what constitutes a reasonable evaluation of the facts, or on how an insurer should have approached the negotiations with the plaintiff; however, as a general rule an attorney cannot advise the jury as to the law of the case. Safeco Ins. Co. v. Ellinghouse, 223 M 239, 725 P2d 217, 43 St. Rep. 1689 (1986), followed in Hart-Anderson v. Hauck, 44 St. Rep. 508 (1987) (opinion withdrawn and replaced by 230 M 63, 748 P2d 937, 45 St. Rep. 18 (1988)).

No Formal Acknowledgement of Qualifications Required: The trial court did not formally rule on whether a psychologist was qualified as an expert. The Supreme Court stated that the determination that the witness was qualified as an expert was made when the trial court overruled objections to the witness and permitted him to testify. Objections to the qualification of an expert go to the weight rather than the admissibility of the expert's testimony. In re J.W.K., 223 M 1, 724 P2d 164, 43 St. Rep. 1483 (1986).

Expert — Duty to Determine Qualifications — Relevance of Degree of Qualifications: Whether a witness is an expert is largely within the discretion of the trial judge. Defendant objected that a witness was not qualified. The trial judge said: "The court is going to permit her to testify. If the jury doesn't believe she is qualified—well, that will be up to the jury to decide". The judge did not leave to the jury the decision whether the witness was qualified. He made that decision when he permitted the testimony and then stated that the jury could determine the degree of the qualifications. The degree of qualification affects the weight, not the admissibility, of the testimony. St. v. Berg, 215 M 431, 697 P2d 1365, 42 St. Rep. 518 (1985), followed in St. v. Martin, 226 M 463, 736 P2d 477, 44 St. Rep. 804 (1987), Zugg v. Ramage, 239 M 292, 779 P2d 913, 46 St. Rep. 1693 (1989), and in St. v. Baker, 249 M 156, 815 P2d 587, 48 St. Rep. 685 (1991). See also St. v. Evans, 247 M 218, 806 P2d 512, 48 St. Rep. 170 (1991).

Eyewitness to Automobile Accident Also Expert Witness — Deputy Sheriff: A Deputy Sheriff, who was not the investigating officer at an automobile accident but was an eyewitness to the accident involving another Deputy Sheriff who was driving in front of him going to the same emergency, could be qualified as an expert witness to testify regarding the cause of the accident. Foreman v. Minnie, 211 M 441, 689 P2d 1210, 41 St. Rep. 1478 (1984).

Intoxication — Expert Testimony Within Court's Discretion: Plaintiff was injured when she opened an elevator door and fell 15 feet because the car was not on the floor level. After a verdict was returned for plaintiff, defendants appealed, alleging the trial court erred in excluding testimony from a toxicology expert regarding the number of drinks consumed by the plaintiff on the night of the accident. Plaintiff's alcoholic blood content of .16% was admitted without objection. Over objection, the toxicologist testified about the effect upon a person of different ranges of alcohol blood content. The trial court then excluded testimony as to the amount of alcohol necessary to be consumed to reach plaintiff's blood alcohol content. The Supreme Court said the admission of this kind of testimony was discretionary with the trial court. The relevant consideration is whether plaintiff was intoxicated, and if so, how that affected her conduct on the night in question. The trial court received testimony on the relevant matters. The trial court is vested with great latitude in ruling on the admissibility of expert testimony. Exclusion of the offered evidence was not clearly erroneous or sufficiently prejudicial to require a new trial. Cash v. Otis Elevator Co., 210 M 319, 684 P2d 1041, 41 St. Rep. 1077 (1984), followed in Niles v. Big Sky Eyewear, 236 M 455, 771 P2d 114, 46 St. Rep. 504 (1989).

Investigator Not Expert — Investigation Not Opinion Based on Perceptions: Defendant was charged with eight counts of sexual intercourse without consent with his stepdaughter. After defendant pleaded not guilty and noticed an alibi defense, the State amended the information to allege the times of the rapes less precisely. Defense counsel hired Goddard to investigate the charges alleged in the original information. At trial, the trial court refused to allow Goddard to synopsize evidence gleaned from 40 interviews to establish an alibi for defendant to the original information. On appeal, the Supreme Court upheld the trial court ruling. Goddard's proposed testimony about defendant's alibi defense and the victim's credibility did not involve scientific, technical, or specialized knowledge. The testimony was not a proper subject matter for expert testimony, so Goddard's "opinion" was properly excluded. As a lay witness, Goddard's "opinion" was not based on his own perceptions. His opinion was gathered from interviewing other persons regarding the crimes charged. The trial court properly excluded the hearsay and opinion testimony of the investigator. St. v. Clark, 209 M 473, 682 P2d 1339, 41 St. Rep. 833 (1984), followed in St. v. Haskins, 269 M 202, 887 P2d 1189, 51 St. Rep. 1474 (1994).

General Acceptance Rule Not Governing in State: The "general acceptance rule" requiring that foundation be laid showing that the expert testimony to be offered involves a field of science

which has gained general acceptance by the scientific community is not in conformity with the spirit of the new rules of evidence and is not applicable to evidence offered under this rule. Barmeyer v. Mont. Power Co., 202 M 185, 657 P2d 594, 40 St. Rep. 23 (1983), followed in St. v. Clark, 234 M 222, 762 P2d 853, 45 St. Rep. 1859 (1988), St. v. Walters, 247 M 84, 806 P2d 497, 48 St. Rep. 102 (1991), and St. v. Southern, 1999 MT 94, 294 M 225, 980 P2d 3, 56 St. Rep. 395 (1999).

Defendant's Expert Unrefuted — Effect of Testimony: Because by its very nature it deals with opinion, expert testimony offered by defendant, though unrefuted except for impeachment, does not mandate a result for defendant. The jury should be free to weigh that testimony and accept or reject it. Jacques v. Mont. Nat'l Guard, 199 M 493, 649 P2d 1319, 39 St. Rep. 1565 (1982).

Wrongful Death Action — Highway Patrolman as Expert in Traffic-Control Devices: In a wrongful death action in which the decedent's surviving spouse brought suit against the state and the state's contractor for negligently failing to warn the decedent of an abrupt edge at the shoulder of a highway construction project, a highway patrol officer was properly qualified as an expert in highway control devices and could offer his opinion as to whether a highway was adequately signed. An expert witness may be qualified by reason of practical experience in an area of special knowledge not shared by mankind in general. Workman v. McIntyre Constr. Co., 190 M 5, 617 P2d 1281, 37 St. Rep. 1637 (1980).

Prevailing Party Not Presenting Expert Testimony: Plaintiffs contracted with defendant to build their log home. Before and after occupancy of the home, structural problems requiring repair occurred. At trial, plaintiffs were awarded damages against the defendant. On appeal, defendant claimed that the findings that the roof had not been constructed as planned and bid and that construction defects by defendant brought about the instability and unsafe nature of the house were findings not supported by credible evidence, especially since the District Court did not accord any weight to the testimony of defendant's expert architect. The Supreme Court rejected the claim stating that when substantial evidence in the record supports the findings of the District Court, the fact that the prevailing party does not present expert testimony does not mean that the testimony produced by experts on the other side is inherently superior. When the evidence is conflicting but the findings are supported by substantial credible evidence, the findings of the District Court will be upheld. Carroccia v. Todd, 189 M 172, 615 P2d 225, 37 St. Rep. 1437 (1980).

Expert Qualification and Testing — Timely Objection Required: Plaintiff contends on appeal that the defense's expert witness was not properly qualified and that the experiment conducted by the expert was under conditions differing from those on the night of the accident. These objections were not timely made at the trial level, however, and cannot be raised on appeal. Penn v. Burlington N., Inc., 185 M 223, 605 P2d 600, 37 St. Rep. 93 (1980).

WHEN EXPERT TESTIMONY PROPER

Failure of Both Parties to Abide by Scheduling Order — Neither or Both Parties' Experts Allowed to Testify: Although both parties failed to abide by a scheduling order regarding the presentation of experts, only one party was allowed to present its expert testimony at trial. On appeal, the Supreme Court concluded that the action was an abuse of the trial court's discretion. Either both experts should have been allowed to testify, or neither expert's testimony should have been allowed, and failure to deal with the parties equitably was reversible error. Circle S Seeds of Mont., Inc. v. T&M Transporting, Inc., 2006 MT 25, 331 M 76, 130 P3d 150 (2006).

Failure to Meet Expert Witness Disclosure Deadline — No Error in Disallowing Expert's Report: Prior to trial, defendant moved in limine to exclude a doctor's report interpreting plaintiff's x-rays on grounds that plaintiff disclosed the report 8 months after the expert disclosure deadline, precluding defendant from properly researching and preparing a rebuttal; yet at trial, defendant was allowed to question plaintiff regarding plaintiff's previous fractures. The motion was granted. On appeal, plaintiff contended that disallowing the report constituted prejudice, but the Supreme Court noted that the motion was not granted because of a lack of relevancy, but rather because plaintiff missed the disclosure deadline. Absent a showing of prejudice, the District Court was affirmed. Howard v. St. James Community Hosp., 2006 MT 23, 331 M 60, 129 P3d 126 (2006).

Qualified Expert May Testify — Application of Expert Field to Facts Immaterial — Daubert Hearing Not Required: In a deposition, a documents expert concluded that defendant authored various threatening letters, but the expert could give only representative details of the methods of analysis by which the conclusion was reached and could explain neither how nor why the conclusion was reached that defendant authored the letters. Defendant asserted that the District Court should have held a hearing pursuant to Daubert v. Merrell Dow Pharmaceuticals,

Inc., 509 US 579 (1993), to determine the reliability of the field of expert methods, but the Supreme Court disagreed. The Daubert test does not require a District Court to determine whether the expert reliably applied expert methods to the facts. Rather, if a reliable field helps the trier of fact and the court determines that that expert is a qualified expert in the field, the expert may testify. Under a Daubert analysis, the reliability of the expert's application of the expert field to the facts is immaterial in determining the reliability of the expert field, so in this case, a Daubert hearing was not required. Additionally, Rule 704, M.R.Ev., allowed the expert to testify to the ultimate conclusion of who wrote the letters. St. v. Clifford, 2005 MT 219, 328 M 300, 121 P3d 489 (2005).

Pretrial Order Allowing Expert Witness Supplementation — Amount of Notice Held Proper: Six months prior to trial, defendant notified plaintiffs that a witness would be called to discuss industry standards related to certain construction materials. Defendant substituted that witness as an expert for its original expert witness, but the witness was not disclosed as an expert until 2 weeks before trial. Plaintiffs complained that the new expert should not have been allowed to testify. The Supreme Court held that the expert's testimony was properly allowed, given that plaintiffs had 6 months' notice of the witness and 2 weeks' notice that the witness would testify as an expert. Tripp v. Jeld-Wen, Inc., 2005 MT 121, 327 M 146, 112 P3d 1018 (2005). See also Ostermiller v. Alvord, 222 M 208, 720 P2d 1198 (1986).

Expert Testimony That Would Impermissibly Bolster Defendant's Credibility Properly Excluded: Defendant sought to introduce testimony of a psychologist regarding the outcome of defendant's psychological testing and the expert's opinion of the test results as exculpatory evidence. The District Court disallowed the testimony, and the Supreme Court affirmed. The general rule is that expert testimony offered to bolster the credibility of a party and the party's claims is improper because it invades the province of the jury by placing a stamp of scientific legitimacy on a victim's allegations or by dismissing the validity of the allegations. St. v. Bailey, 2004 MT 87, 320 M 501, 87 P3d 1032 (2004), distinguishing Benjamin v. Torgerson, 1999 MT 216, 295 M 528, 985 P2d 734 (1999).

Defense Expert Testimony Properly Limited to General Review of Legal and Medical Documents: The District Court did not abuse its discretion when it limited the testimony of defendant's medical expert regarding whether defendant's assault victim suffered a seizure on the night of the assault. The expert was allowed to address two of six instances of the victim's previous conduct, to testify that the victim's file had been reviewed and that the expert opinion was based on other incidents, and to give a general explanation of the nature and symptomatology of the victim's disorder, including the effect of medications and alcohol. However, the expert was precluded from testifying about the specific nature of the other documents that were reviewed. The Supreme Court held that it was proper to limit the expert's testimony to general references in light of the prohibition against the introduction of evidence of other crimes, wrongs, or acts. Thus, defendant was afforded ample opportunity to demonstrate the victim's conditions and limitations in support of the defense theory, and the conviction was affirmed. St. v. Slavin, 2004 MT 76, 320 M 425, 87 P3d 495 (2004). See also Benjamin v. Torgerson, 1999 MT 216, 295 M 528, 985 P2d 734 (1999).

Testimony at Sentencing Hearing by Counselor Who Evaluated Defendant in Different Case Not Violation of Privileged Communication: At defendant's sentencing hearing, the court allowed testimony from a counselor who had performed a psychosexual evaluation on defendant in connection with an earlier unrelated case. Defendant contended on appeal that the counselor's testimony should not have been allowed under the rules of evidence. The Supreme Court disagreed, noting that under St. v. Race, 285 M 177, 946 P2d 641 (1997), the rules of evidence are not applicable or controlling in sentencing hearings and that a statement covered by the psychotherapist-patient privilege that may be inadmissible at trial is admissible at a sentencing hearing. Further, the counselor's statement in question here was a matter of public record and did not constitute violation of a privileged communication. A sentencing court is allowed to have the fullest information possible concerning a defendant's life and characteristics in order to individualize punishment, and the testimony at issue helped the sentencing court frame the punishment in this case. St. v. J.C., 2004 MT 75, 320 M 411, 87 P3d 501 (2004).

Failure to Show Good Cause for Endorsing Expert Witness Five Days Before Trial — No Prejudice — Sanction Proper: Only 5 days before trial and more than 1 year after arraignment on criminal charges, DeMary moved to endorse an expert witness to rebut the state's expert. DeMary was aware of the state's expert at least 4 months before trial but failed to provide any explanation for waiting until 5 days before trial to seek endorsement. Although 46-15-323 allows a defendant to add witnesses more than 30 days after arraignment if good cause is shown, DeMary failed to demonstrate good cause for the tardiness of the motion, nor did he show that

the state was prepared to address the expert's testimony. DeMary also failed to demonstrate prejudice in the disallowance of his expert's testimony because the state never called the witness that DeMary's proposed expert was to refute. The District Court did not abuse its discretion in sanctioning DeMary for failure to comply with 46-15-323 by disallowing the expert. St. v. DeMary, 2003 MT 307, 318 M 200, 79 P3d 817 (2003).

Nonprejudicial Preclusion of Expert Witness Not Violative of Right to Fair Trial or Effective Counsel: DeMary contended that the District Court's denial of a motion to endorse an expert witness 5 days before trial constituted ineffective assistance of counsel and denied DeMary's right to a fair trial. Under the Strickland test, a defendant must show that counsel's performance was deficient and that the performance prejudiced the defendant and deprived the defendant of a fair trial. However, DeMary failed to comply with 46-15-323 and failed to demonstrate prejudice in the disallowance of his expert's testimony because the state never called the witness that DeMary's proposed expert was to refute. Absent a showing of sufficient prejudice, DeMary could not show that the trial was unfair, and the assertion of ineffective assistance of counsel failed. St. v. DeMary, 2003 MT 307, 318 M 200, 79 P3d 817 (2003).

Exclusion of Expert Testimony on Hypnosis Proper When No Significant New Facts Recalled Through Hypnosis Sessions: In an effort to learn more details about the night of a homicide, police twice attempted to hypnotize a witness, but the witness never achieved a hypnotic state and was able to remember no significant new facts through hypnosis. Nevertheless, the District Court decided to allow the witness's testimony. DuBray then sought to introduce expert testimony regarding the effects of hypnosis on memory, such as memory hardening, but the expert testimony was refused, and DuBray appealed. The Supreme Court affirmed. Memory hardening was not a factor here because hypnosis was unsuccessful. Further, given the fact that the witness's memory remained substantially unchanged after the unsuccessful hypnosis sessions, exclusion of expert testimony regarding the effects of hypnosis on memory was not erroneous. St. v. DuBray, 2003 MT 255, 317 M 377, 77 P3d 247 (2003).

Expert Testimony Regarding Credibility of Incarcerated Informants Within Knowledge of Jury and Properly Disallowed: DuBray sought to introduce expert testimony regarding the credibility of incarcerated informants, but the testimony was disallowed. The Supreme Court agreed with the trial court that the concept of prisoners bartering information and testimony in exchange for favorable treatment was generally understood by society and one that the jury was capable of understanding without the assistance of expert testimony. St. v. DuBray, 2003 MT 255, 317 M 377, 77 P3d 247 (2003).

When Expert Testimony on Eyewitness Testimony Proper — Limited Admissibility Rule: In determining whether expert testimony on eyewitness testimony is admissible, the Supreme Court adopted the limited admissibility rule set out in People v. McDonald, 690 P2d 709 (Calif. 1984), that when eyewitness identification of a defendant is a key element of the prosecution's case but is not substantially corroborated by evidence giving it independent reliability and the defendant offers qualified expert testimony on specific psychological factors shown by the record that could have affected the accuracy of the identification but are not likely to be fully known or understood by the jury, it will ordinarily be error to exclude the expert testimony. Here, DuBray claimed error when his offered expert testimony on eyewitness testimony was denied. However, inconsistencies existed in the testimony of DuBray's alibi witness, and the conviction did not rest solely on the testimony of only one eyewitness. Given these and other examples of additional evidence supporting DuBray's conviction, it was not erroneous to exclude the expert testimony. St. v. DuBray, 2003 MT 255, 317 M 377, 77 P3d 247 (2003).

State Not Liable for Unforeseeable Accident — Intervening Criminal Act of Third Person — Expert Testimony on Foreseeability Proper: Samson's son was killed by Bercier, a youth who walked away from a nonsecure, supervised licensed youth group home. Samson sued the state for negligence. The jury returned a verdict for the state, and Samson appealed. Rather than retry the case and evaluate the facts to determine whether the state was negligent, the Supreme Court reviewed the verdict to determine if there was substantial evidence to support it and determined that there was. In order to sustain a negligence action, plaintiff must establish a legal duty on the part of defendant, a breach of that duty, causation, and damages. In cases involving a dispute over the intervening criminal act of a third party, foreseeability must be analyzed twice—first with regard to the existence of a legal duty and second with regard to proximate causation. Samson contended that the District Court erred in allowing the state to present evidence in the form of expert testimony and to argue that the shooting was an unforeseeable accident. The state argued that the expert testimony was relevant and aided the jury. Given the need to determine the foreseeability of Bercier's actions, the expert testimony was properly allowed. Further, in cases alleging an intervening cause, juries must be instructed that the specific injury to plaintiff

need not have been foreseen. Samson v. St., 2003 MT 133, 316 M 90, 69 P3d 1154 (2003), affirming Lacock v. 4B's Restaurants, Inc., 277 M 17, 919 P2d 373 (1996). See also Lopez v. Great Falls Pre-Release Serv., Inc., 1999 MT 199, 295 M 416, 986 P2d 1081 (1999), and St. v. LaTray, 2000 MT 262, 302 M 11, 11 P3d 116 (2000).

Use by Expert of Likelihood Ratio to Explain Relevance of DNA Evidence: Defendant moved to exclude expert testimony using the likelihood ratio in presenting DNA results, but the motion was denied, and defendant appealed. The Supreme Court affirmed. Although there is no set standard for determining whether a scientific technique is novel, the court has consistently given credence not only to previous treatment of a technique by other cases and jurisdictions, but also to how long a technique or theory has been used in the scientific community. Under that standard, the likelihood ratio is not considered a novel scientific technique that warrants analysis under the test in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 US 579 (1993). In considering admissibility, the court noted that expert testimony is required in areas that are not within the range of ordinary training or intelligence and that the intricacies and mathematical principles underlying the likelihood ratio and other statistical analyses related to DNA evidence are subjects that require expert testimony. Further, the expert in this case was qualified to testify on the basis of both educational background and experience. Criticisms of specific applications of procedures or concerns about the accuracy of test results go to the weight of the evidence, not the admissibility. Defendant had ample opportunity to question the expert regarding application of the likelihood ratio, so admission of the expert testimony did not prejudice defendant. St. v. Ayers, 2003 MT 114, 315 M 395, 68 P3d 768 (2003). See also St. v. Weeks, 270 M 63, 891 P2d 477 (1995), and Hulse v. St., 1998 MT 108, 289 M 1, 961 P2d 75 (1998).

No Violation of Motion In Limine in Allowing Certain Evidence Regarding Tendency of Parent for Sexual Abuse of Child in Custody Modification Proceeding: In a proceeding to revise a parenting plan, the mother made a motion in limine to preclude the testimony of a medical expert who performed a psychosexual evaluation of the father. The District Court ruled that the expert could testify as to whether the father was a person who had a tendency to sexually abuse a minor child, but could not testify about the child's credibility or the polygraph examination that was administered to the father. The mother then appealed on grounds that the court claimed that it would sustain the objection to certain testimony, but then adopted the testimony in its oral statement of findings. The Supreme Court found no violation of the motion in limine. The testimony considered by the trial court was the type of testimony that the trial court said it would allow. Further, deposition testimony by one of the mother's experts essentially affirmed the findings, and there was no motion in limine to preclude any deposition testimony. In re Marriage of Nies & Cooper, 2003 MT 100, 315 M 260, 68 P3d 697 (2003).

Abuse of Discretion in Allowing Testimony of Accident Reconstructionist Absent Foundation for Expert Opinion Testimony: Defendants presented an accident reconstructionist as an expert witness. However, the expert explained that the visibility test about which he testified required no specialized skill or knowledge to perform or analyze, so the foundational requirements for expert testimony in this rule were not met. Further, because defendants never disclosed the expert as a fact witness during discovery or pretrial proceedings, testimony as a lay witness was also precluded under Rule 701, M.R.Ev. Thus, absent establishment of the necessary foundation for expert opinion testimony, the District Court erred in allowing the expert to testify on the visibility test. Perdue v. Gagnon Farms, Inc., 2003 MT 47, 314 M 303, 65 P3d 570 (2003).

Refusal of Opinion Testimony Regarding Defendant's Mental State Not Erroneous: The District Court refused to admit the opinion testimony of two doctors regarding Hoffman's mental state at the time that Hoffman committed aggravated assault. Hoffman asserted that under Rule 704, M.R.Ev., and this rule, the court erred by precluding the opinion testimony, in violation of due process. However, the language of 46-14-213 and the decision in St. v. Santos, 273 M 125, 902 P2d 510 (1995), proscribe such testimony and controlled the situation here. The testimony was properly refused. St. v. Hoffman, 2003 MT 26, 314 M 155, 64 P3d 1013 (2003), distinguishing St. v. Fish, 190 M 461, 621 P2d 1072 (1980).

Witness Without Adequate Knowledge of Intoxilyzer Test Properly Precluded From Testifying as to Validity of Test Results: Russette was arrested for DUI and attempted at trial to introduce as an expert witness a chemistry professor who would testify that an Intoxilyzer analysis constituted a scientific test that was not valid or reliable unless at least two scientific tests had been performed pursuant to the scientific method. The District Court did not allow the professor to testify because he had no specific knowledge regarding the Intoxilyzer, so the testimony would not help the jury to understand the evidence or determine a fact in issue. Russette appealed, but the Supreme Court affirmed. The party presenting a witness as an expert must establish to the satisfaction of the trial court that the witness possesses the requisite knowledge, skill,

experience, training, and education to testify to the issue in question. Russette failed to lay any foundation that the professor had adequate knowledge upon which to challenge the validity of the Intoxilyzer, and the District Court did not abuse its discretion in precluding the witness from testifying. St. v. Russette, 2002 MT 200, 311 M 188, 53 P3d 1256 (2002).

Reversible Error in Failure to Disclose Expert Witness — Prejudice to Opposing Party: Despite its continuing duty to disclose the identity of each person expected to be called as an expert witness, the subject matter on which the person is expected to testify, and the substance of the person's testimony, defendant failed to disclose an expert witness prior to trial despite several opportunities to do so. Failure to disclose an expert witness constitutes reversible error and will usually prejudice the opposing party because the opposing party has no time to: (1) prepare for the witness; (2) effectively plan for cross-examination of the witness; and (3) obtain an expert to refute or question the testimony of the witness. Here, plaintiff initially listed a person as a witness, but not as an expert, and did not learn that the person would be called as a witness until he was called by defendant as an expert to refute plaintiff's experts. Therefore, plaintiff was prejudiced by defendant's failure to identify the person as an expert witness in response to discovery requests and in the scheduling order agreed upon by the parties, and the District Court abused its discretion by allowing the person to testify. The case was reversed and remanded for a new trial. Superior Enterprises, LLC v. Mont. Power Co., 2002 MT 139, 310 M 198, 49 P3d 565 (2002).

Improper Admission of Testimony by Highway Patrol Officer Regarding Effect of Prescription Medication on Driving Ability — Harmless Error: During Nobach's DUI trial, the District Court allowed testimony from a highway patrol officer regarding the effect of prescription medications on Nobach's driving ability, without specifically determining whether the testimony would be considered expert or lay opinion. The officer opined that Nobach's ability to drive safely was diminished as a result of the consumption of drugs. Following conviction, Nobach appealed on grounds that the testimony was an expert opinion that was improperly allowed without the requisite foundation. The state contended that the testimony was a lay opinion, and cited St. v. Bradley, 262 M 194, 864 P2d 787 (1993), and St. v. Carter, 285 M 449, 948 P2d 1173 (1997), for the proposition that a lay witness may give an opinion regarding intoxication based on the witness's personal observations. The Supreme Court first distinguished Bradley and Carter because the type of intoxication in those cases involved alcohol, while in Nobach's case, the officer concluded that drugs were involved only when alcohol use was ruled out by the administration of a Breathalyzer test. The court was not convinced that lay people are sufficiently knowledgeable about common symptoms of drug consumption and its effect on driving ability to offer lay testimony on the subject based on personal observation. The officer's opinion testimony was thus considered expert testimony rather than lay testimony, requiring an adequate foundation under this rule. The officer's training and experience did not provide a sufficient foundation for admitting the expert testimony, so the District Court abused its discretion in allowing it. However, because the abuse was trial error rather than structural error, the error did not warrant automatic reversal. Rather, the question was whether the finder of fact was presented with admissible evidence that proved the same facts as the tainted evidence and, if so, whether the tainted evidence would have contributed to the conviction qualitatively by comparison. In this case, the state provided other expert testimony from a pharmacist that tended to prove the same facts as the officer's testimony, and because the officer's testimony would not have contributed to Nobach's conviction, the error was harmless and the conviction was affirmed. St. v. Nobach, 2002 MT 91, 309 M 342, 46 P3d 618 (2002).

Introduction of Results of Horizontal Gaze Nystagmus Test — Explanation of Underlying Scientific Basis of Correlation Between Alcohol Consumption and Nystagmus Required: At Van Kirk's DUI trial, the District Court allowed the arresting officer to testify regarding Van Kirk's performance on a horizontal gaze nystagmus (HGN) test. Van Kirk contended that the state failed to lay the proper foundation for admitting the test results. The Supreme Court agreed. Pursuant to Hulse v. St., 1998 MT 108, 289 M 1, 961 P2d 75 (1998), in order to lay the proper foundation, the state must establish a scientific basis for the reliability of the test results and in addition show that the test was properly administered. This requires that a qualified expert explain the underlying scientific basis of the correlation between alcohol consumption and nystagmus. In this case, the arresting officer had a bachelor's degree in medical technology, had worked as a lab supervisor and technician at the state hospital, was certified to administer the HGN test, and testified that the test was properly administered to Van Kirk. However, nothing in the evidence established that the officer was specially trained or educated or had adequate knowledge to qualify as an expert able to explain the underlying scientific basis of the HGN test. Thus, the District Court erred in permitting the officer to offer the test results into evidence

without the state first establishing the requisite foundation. However, the error was not prejudicial to Van Kirk, so the DUI conviction was affirmed. St. v. Van Kirk, 2001 MT 184, 306 M 215, 32 P3d 735 (2001).

Constructive Fraud for Failure to Disclose Risk of Erosion to Field Planted in Old River Channel: The sellers of farm land and an irrigation system failed to disclose to the buyers that the field at pivot three was an old river bed that had been filled but not riprapped and that the field was subject to increased risk of erosion. The buyers spent $99,575 to fix the impairment and sued for damages. The District Court found that the sellers were liable for constructive fraud for failure to disclose, and the sellers contested the District Court findings. The Supreme Court affirmed. The District Court was capable of finding that a risk of increased erosion existed without the benefit of expert testimony. Further, the court's conclusion, that filling the old river bed and creating a greatly increased risk of erosion was a serious impairment, was not clearly erroneous. Moreover, the court did not err in holding that the buyers had no way of knowing of the increased risk, even though a conversation with the the sellers' employee who performed the backfill work would have revealed the problem. The buyers were not required to speak with the sellers' employees before purchasing, particularly given the fact that when the field at pivot three was cleared and leveled, it looked like any other field. The sellers also contended that the buyers had merely to ask their own consultant, who would have informed them of the origin and obvious condition of the field. However, the buyers' consultant did not inspect the fields until after closing of the sale and thus could not have provided the buyers with any knowledge. H-D Irrigating, Inc. v. Kimble Properties, Inc., 2000 MT 212, 301 M 34, 8 P3d 95, 57 St. Rep. 832 (2000).

Admissibility of Expert Testimony on Munchausen Syndrome by Proxy: In her trial for criminally endangering her child by leaving her medicine where the child could access it, the District Court found that the proper foundational requirement had been satisfied to allow expert testimony regarding Hocevar's possible affliction with Munchausen Syndrome by Proxy (MSBP), also known as factitious disorder by proxy, which is a pattern of behavior wherein a caretaker, usually a mother, fabricates or causes illness in another, usually a preverbal child, to gain attention. The expert characterized MSBP as a form of child abuse in the field of pediatrics, rather than a psychiatric disorder. Hocevar appealed the admissibility of the MSBP evidence. The Supreme Court found that expert testimony regarding MSBP was neither novel nor scientific and thus not subject to the standard in Daubert v. Merrell Dow Pharmaceuticals, 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786 (1993), which only applies to the admissibility of novel scientific evidence, so the court applied the conventional analysis of admissibility under this rule. Testimony about MSBP is beyond the range of ordinary training or intelligence and is therefore a subject matter requiring expert testimony. The state established sufficient foundation to show that the expert was qualified to testify on MSBP and had adequate knowledge upon which to base an opinion, and the District Court did not abuse its discretion in allowing the testimony into evidence. St. v. Hocevar, 2000 MT 157, 300 M 167, 7 P3d 329, 57 St. Rep. 625 (2000). See also Calif. v. Phillips, 175 Cal. Rep. 703 (1981).

Expert Testimony Necessary to Establish Applicable Standard of Care Owed by Physician Who Treats Referred Patient — Functional Capacities Evaluation: Even though a physician-patient relationship may not exist when a test is administered at the request of a third party, a physician nevertheless owes a duty to an examinee who is not that physician's patient to exercise care commensurate with the examiner's professional training and experience. The standard of care applicable to the administration of a functional capacities evaluation (FCE) can be established only through expert testimony that takes into account the training and experience of the physical therapist relative to administering the FCE. Romans v. Lusin, 2000 MT 84, 299 M 182, 997 P2d 114, 57 St. Rep. 363 (2000). See also Webb v. T.D., 287 M 68, 951 P2d 1008, 54 St. Rep. 1502 (1997).

Interpretive Testimony by Defense Experts Regarding Evidence Introduced by Plaintiff's Experts Properly Admitted: Plaintiff who alleged that he was sexually abused as a child claimed District Court error in admitting testimony that was offered by defendant's experts regarding plaintiff's character that was offered by defendant's experts. However, plaintiff opened the door when his own experts testified regarding his character during his case in chief. The defense experts' interpretations of plaintiff's psychiatric history were properly admitted. Benjamin v. Torgerson, 1999 MT 216, 295 M 528, 985 P2d 734, 56 St. Rep. 847 (1999).

Expert Testimony Regarding Credibility of Witness Properly Excluded: Hardy was a primary witness in an arson case against Andersen, who sought to challenge Hardy's credibility at trial through the expert testimony of a psychiatrist who had examined Hardy and concluded that he was incapable of telling the truth. Generally, expert testimony evaluating the credibility of a

witness is inadmissible because testimony of that nature invades the jury's function, in that the jury may defer to the expert, when the credibility of a witness properly lies exclusively with the jury. Here, the expert's testimony did not comprise the only evidence regarding Hardy's credibility. Andersen was able to elicit virtually all of the expert's points from other witnesses, so the District Court did not err in excluding the expert's testimony. Travelers Indem. Co. v. Andersen, 1999 MT 201, 295 M 438, 983 P2d 999, 56 St. Rep. 782 (1999), following In re Renewal of Teaching Certificate of Thompson, 270 M 419, 893 P2d 301, 52 St. Rep. 200 (1995).

Expert Testimony on Evidence of Microscopic Hair Comparison Admissible: When considering whether expert evidence from microscopic hair comparison is admissible, the Supreme Court found that microscopic hair comparison is not novel scientific evidence; therefore, it was not error for the District Court to fail to consider the factors in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786 (1993), in determining if the expert's testimony was admissible. Nevertheless, when considering admissibility of microscopic hair comparison evidence, the District Court must conduct a conventional analysis under this rule. Applying Hulse v. Dept. of Justice, 1998 MT 108, 289 M 1, 961 P2d 75 (1998), the court held that microscopic hair comparison, like the horizontal gaze nystagmus test in Hulse, is beyond the range of ordinary training or intelligence and is thus a subject on which an expert may testify. Here the state established an adequate foundation for the expert's testimony, including education, training, and knowledge, and the District Court did not err in allowing it. St. v. Southern, 1999 MT 94, 294 M 225, 980 P2d 3, 56 St. Rep. 395 (1999), in accord with U.S. v. Matta-Ballesteros, 71 F3d 754 (9th Cir. 1995).

Abuse of Discretion in Admission of Testimony That, Based on Shell Casing Pattern, Shots Fired From Van — Harmless Error: The District Court abused its discretion in admitting expert testimony from a police officer regarding whether shots were fired from a van. The testimony was based on the ejection pattern of shell casings at the scene of a shooting. There was an insufficient foundation to qualify the officer as an expert because he lacked specialized knowledge that would distinguish him from a lay person in opining whether the shots came from a van. Citing 46-20-701, the Supreme Court held nevertheless that, in light of testimony from several eyewitness that the shots were indeed fired from a van, the abuse of discretion was harmless error and should be disregarded. St. v. Maier, 1999 MT 51, 293 M 403, 977 P2d 298, 56 St. Rep. 208 (1999).

Social Worker Must Qualify as Expert Under Federal Law With Respect to Custody of Indian Child: The District Court terminated the parental rights of an Indian parent based in part on the testimony of two social workers that the court treated as expert testimony. The Supreme Court reversed, holding that the testimony of the social workers could not be treated as expert testimony unless the social workers qualified as experts under the Indian Child Welfare Act of 1978 regulations. The Supreme Court further stated that a social worker must possess expertise beyond that of the normal social worker to satisfy the qualified expert witness requirement of the federal Act. In re Adoption of H.M.O., 1998 MT 175, 289 M 509, 962 P2d 1191, 55 St. Rep. 710 (1998), followed in In re K.H. & K.L.E., 1999 MT 128, 294 M 466, 981 P2d 1190, 56 St. Rep. 515 (1999), in which it was found to be highly preferable that an expert qualified for purposes of the Indian Child Welfare Act of 1978, particularly a non-Indian expert, possess significant knowledge of and experience with Indian culture (although not necessarily of a particular tribe), family structure, and child-rearing practices in general.

Highway Patrol Officer's Expert Opinion, in DUI Prosecution, That Driver Being Under the Influence Caused Accident: In a DUI prosecution, admission of a highway patrol officer's testimony that in her opinion, based on her investigation at the scene of defendant's accident and her discussion with defendant soon after the accident, defendant was under the influence of alcohol to an extent that diminished his ability to drive safely was not an abuse of discretion. Her training and experience in accident investigation and reconstruction qualified her as an expert for purposes of giving the opinion. She had been an officer for 8 years, was trained at the Montana Highway Patrol Academy for 12 weeks, had 4 weeks of training in traffic investigation, had attended an accident reconstruction school, had taught accident investigation, had special DUI investigation training and had taken a course on being a DUI detection instructor, was a recognized expert in accident reconstruction, had investigated more than 200 accidents, of which 15% to 20% had involved alcohol, and had participated in more than 100 DUI arrests. Her opinion did not invade the province of the jury by calling for a legal conclusion on the issue of guilt or innocence; she was giving an expert opinion as to the cause of the accident. St. v. Gregoroff, 287 M 1, 951 P2d 578, 54 St. Rep. 1469 (1997).

Highway Patrol Officer's Expert Opinion, in DUI Prosecution, That Driver Passed Out While Driving: In a DUI prosecution, admission of a highway patrol officer's testimony that in her

opinion, based on her investigation at the scene of defendant's accident and her discussion with defendant soon after the accident, defendant had passed out while driving was not an abuse of discretion. Her training and experience in accident investigation and reconstruction qualified her as an expert for purposes of giving the opinion. She had been an officer for 8 years, was trained at the Montana Highway Patrol Academy for 12 weeks, had 4 weeks of training in traffic investigation, had attended an accident reconstruction school, had taught accident investigation, had special DUI investigation training and had taken a course on being a DUI detection instructor, was a recognized expert in accident reconstruction, had investigated more than 200 accidents, of which 15% to 20% had involved alcohol, and had participated in more than 100 DUI arrests. St. v. Gregoroff, 287 M 1, 951 P2d 578, 54 St. Rep. 1469 (1997).

Expert Testimony Unnecessary on Issue of Standard of Care — District Court Not Directed as to All Expert Testimony on All Claims: Durbins purchased a home through the seller's realtors. Contrary to the representations of the realtors, Durbins discovered that the property had no legal septic system, that the household water was unsafe to use for any purpose, and that the access road was located on the neighbor's property. Durbins brought an action against the realtors, alleging negligent misrepresentation, actual and constructive fraud, and statutory violations involving the Montana real estate licensing laws and the Montana Unfair Trade Practices and Consumer Protection Act of 1973. The defendants sought and achieved dismissal of the case on the grounds that Durbins failed to prove through expert testimony the applicable standard of care of the realtors. The Supreme Court held that expert witnesses were unnecessary to prove a standard of care. Durbins also asked that the Supreme Court direct the District Court to exclude testimony of any expert witnesses on any claim asserted by the Durbins. The Supreme Court noted that the District Courts have great latitude concerning the admissibility of evidence and that the District Court would in any event have to comply with this rule. The Supreme Court therefore declined to direct the District Court as requested by the Durbins. Durbin v. Ross, 276 M 463, 916 P2d 758, 53 St. Rep. 471 (1996), followed in May v. ERA Landmark Real Estate of Bozeman, 2000 MT 299, 302 M 326, 15 P3d 1179, 57 St. Rep. 1256 (2000).

Sale of Home by Realtors — Negligent Misrepresentation, Actual and Constructive Fraud, and Real Estate Licensing and Consumer Protection Laws — Expert Witnesses Unnecessary to Prove Standard of Care: Durbins purchased a home through the seller's realtors. Contrary to the representations of the realtors, Durbins discovered that the property had no legal septic system, that the household water was unsafe to use for any purpose, and that the access road was located on the neighbor's property. Durbins brought an action against the realtors, alleging negligent misrepresentation, actual and constructive fraud, and statutory violations involving the Montana real estate licensing laws and the Montana Unfair Trade Practices and Consumer Protection Act of 1973. The defendants sought and achieved dismissal of the case on the grounds that Durbins failed to prove through expert testimony the applicable standard of care of the realtors. The Supreme Court held that because Durbins did not allege professional misrepresentation, the issues of whether the realtors negligently misrepresented the facts, were guilty of actual or constructive fraud, or were guilty of the statutory violations alleged by Durbins, were questions resolvable by common knowledge. The questions did not turn on a standard peculiarly within the knowledge of an expert witness, and scientific, technical, or other specialized knowledge was not necessary to assist the jury. The Supreme Court therefore held that Durbins were not required to provide expert standard of care testimony to establish any of the violations. Durbin v. Ross, 276 M 463, 916 P2d 758, 53 St. Rep. 471 (1996). See also May v. ERA Landmark Real Estate of Bozeman, 2000 MT 299, 302 M 326, 15 P3d 1179, 57 St. Rep. 1256 (2000), requiring expert testimony to establish a standard of care in a negligence action against a real estate agent.

Testimony Regarding Age of Latent Fingerprint Properly Admitted: The District Court allowed a fingerprint technician to testify at trial as to the age of Cline's latent fingerprint found at the crime scene. Cline claimed that because there is no reliable scientific procedure to evaluate the age of a fingerprint, the prejudicial effect of the testimony outweighed its probative value. Montana has adopted the standard in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786 (1993), in determining whether to allow expert testimony concerning novel scientific evidence. The Daubert test requires the trial judge to determine whether the expert is proposing to testify to scientific knowledge that will assist the trier of fact to understand or determine a fact in issue. To guide the assessment of the reliability of the evidence, the test in St. v. Moore, 268 M 20, 885 P2d 457 (1994), is applied regarding: (1) whether the theory or technique can be and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error in using a

particular scientific technique and the existence and maintenance of standards controlling the technique's operation; and (4) whether the theory or technique has been generally accepted or rejected in the particular scientific field. Acknowledging that fingerprint evidence in general is not novel, the use of magnetic powder to determine the age of a print is novel. The state established the necessary foundation regarding fingerprint age, and the trial court correctly found that this was an area in which experts could disagree, that the testimony would be subject to cross-examination, and that the credibility of the witnesses and the weight of their testimony should be for the jury to decide, not the court. The trial court did not abuse its discretion in allowing expert testimony regarding fingerprint age. St. v. Cline, 275 M 46, 909 P2d 1171, 53 St. Rep. 32 (1996).

Admissibility of Expert Testimony in Administrative Proceeding Regarding Sexual Conduct by Teacher: Allegations were made to a school board regarding sexual conduct by a teacher toward students and former students, triggering criminal charges that were later dismissed. The District Court found that conclusions by a hearings examiner denying renewal of the teacher's certificate were based on inadmissible testimony by a drug and alcohol counselor who testified as an expert on sexual abuse. The Supreme Court, examining the issue of expert testimony in administrative proceedings, noted that agencies are bound by common law and statutory rules of evidence and that while the rules of evidence are generally more relaxed in an administrative proceeding than they are in a court of law, they are not to be relaxed to the point of disregarding due process of law and fundamental individual rights. In a criminal case, the question of whether a child is a victim of sexual abuse is a question that may be clarified by expert testimony. However, expert testimony evaluating the credibility of witnesses is generally not admissible, except when the witness is a child victim who testifies at trial and credibility is brought into question. In this case, neither victim was a child, nothing in the record established that any of the witnesses were incompetent or were under any form of mental or physical disability, and the expert's general statements that the victims' conduct was consistent with that of sexually abused children prejudiced the accused because the trier of fact deferred to the expertise of the expert and inferred that the expert believed the witness to be credible. Failure to establish a foundation for the use of any of the expert testimony constituted reversible error. In re Renewal of Teaching Certificate of Thompson, 270 M 419, 893 P2d 301, 52 St. Rep. 200 (1995).

Failure to Comply With Disclosure Requirements of Disclosure Order — Sanctions Appropriate: Under 46-15-323, a defendant is required to provide the prosecution written notice of certain defenses within 30 days after arraignment and to simultaneously make available to the state the names and addresses of experts whom defendant intends to call at trial, together with reports and statements generated by those experts in connection with the case. Because of defendant's late notice of the intention to call an expert and to provide any written report or resume from the witness, the state was precluded from effectively meeting the proposed expert testimony. It was within the discretion and flexibility of the District Court to sanction defendant under 46-15-329 by prohibiting the expert from testifying. St. v. Haskins, 269 M 202, 887 P2d 1189, 51 St. Rep. 1474 (1994).

Lack of Familiarity With Chemicals That Damaged Crops: The trial court properly excluded testimony of the defendant crop sprayer's proffered expert in a suit for negligent damage to crops caused by the sprayer. The expert based his opinion on scientific studies that he performed in the 1960s under different conditions, was not familiar with the chemical mixture used on the plaintiffs' land, and did not examine samples of the damaged crops until the trial. Semenza v. Bowman, 268 M 118, 885 P2d 451, 51 St. Rep. 1209 (1994).

Testimony Not Allowed Due to Witness's Admission of Lack of Qualification: Mannix argued that the lower court erred in not allowing his expert to testify regarding breach of the covenant of good faith and fair dealing by the board of directors of the defendant corporation. The Supreme Court held that although expert testimony on breach of the covenant was admissible, the witness by his own admission had no knowledge of the relationship between officers and directors or the interpretation of bylaws regarding that relationship. Mannix v. Butte Water Co., 259 M 79, 854 P2d 834, 50 St. Rep. 691 (1993). See also Vincelette v. Metropolitan Life Ins. Co., 1998 MT 259, 291 M 261, 968 P2d 275, 55 St. Rep. 1071 (1998) (holding that a maintenance worker's testimony regarding investigating the incident upon receiving a radio report that plaintiff's fall was because of intoxication rather than worn carpet was inadmissible hearsay offered to prove the truth of the hotel's assertion regarding the cause of the fall).

Admission of Medical Journal Articles Proper: Youngs argued that the introduction of articles from medical journals was improper because the issue of credibility should have been determined by the jury, not by strangers. The Supreme Court held that the articles were

admissible as scientific knowledge admitted to assist the jury in understanding evidence concerning a fact in issue. Young v. Horton, 259 M 34, 855 P2d 502, 50 St. Rep. 662 (1993).

Child Sexual Abuse Victim: Expert testimony relating to the contradictory behavior and, when appropriate, the credibility of a child victim of sexual abuse will be allowed to enlighten the jury on a subject with which most people have no common experience and to assist the jurors in assessing the credibility of the victim. St. v. Scott, 257 M 454, 850 P2d 286, 50 St. Rep. 353 (1993), followed in St. v. Alexander, 265 M 192, 875 P2d 345, 51 St. Rep. 474 (1994), and St. v. Morgan, 1998 MT 268, 291 M 347, 968 P2d 1120, 55 St. Rep. 1112 (1998).

Sexually Abused Child — Not Necessary to Prove Reliability of Expert Witness's Testimony: Because the Supreme Court has recognized and sanctioned expert testimony concerning sexual abuse and specifically has allowed expert testimony concerning a child fitting the profile of a sexually abused child, this area is not a novel area of scientific expertise and the District Court did not err by allowing a medical expert's testimony without requiring a threshold determination of the reliability of her testimony. St. v. Walters, 247 M 84, 806 P2d 497, 48 St. Rep. 102 (1991).

No Expert Testimony Defining Gross Inefficiency Needed: The plaintiff, a terminated Deputy Sheriff seeking reinstatement, wanted to introduce expert testimony on the definition of gross inefficiency. The Supreme Court affirmed the exclusion of the evidence, stating that the court had instructed the jury on the definition and that the concept was not so technical that expert testimony was needed. Smith v. Roosevelt County, 242 M 27, 788 P2d 895, 47 St. Rep. 506 (1990).

Age Discrimination — Scope of Statistical Expert Testimony: Statisticians may testify that their statistics do or do not show patterns of discrimination based on age but may not testify to the ultimate conclusion that age discrimination was or was not exercised in an employment termination. Mahan v. Farmers Union Cent. Exch., Inc., 235 M 410, 768 P2d 850, 46 St. Rep. 96 (1989).

Expert's Testimony Allowable as to Credibility of Child Abuse Victim if Child Also Testifies: In determining whether the District Court properly refused to allow into evidence out-of-court statements made by a child abuse victim to a counselor, the Supreme Court held that testimony by an expert evaluating the credibility of a witness is inadmissible except when the witness is a child victim of sexual assault and the child also testifies. However, the expert may not identify the alleged perpetrator because identification requires only the common logic that is well within the capacity of a lay jury. St. v. J.C.E., 235 M 264, 767 P2d 309, 45 St. Rep. 2373 (1988). See also St. v. Harris, 247 M 405, 808 P2d 453, 48 St. Rep. 62 (1991), St. v. McLain, 249 M 242, 815 P2d 147, 48 St. Rep. 664 (1991), In re Renewal of Teaching Certificate of Thompson, 270 M 419, 893 P2d 301, 52 St. Rep. 200 (1995), and St. v. Riggs, 2005 MT 124, 327 M 196, 113 P3d 281 (2005). Thompson and Harris were followed, in a case not involving child abuse, in Travelers Indem. Co. v. Andersen, 1999 MT 201, 295 M 438, 983 P2d 999, 56 St. Rep. 782 (1999).

Expert Testimony Required in Legal Malpractice Case — Directed Verdict Proper: An attorney's standard of care depends on the skill and care ordinarily exercised by attorneys—a criteria that rarely falls within the common knowledge of lay persons. Therefore, expert testimony is required in a legal malpractice case. Absent such testimony, a directed verdict was proper. Carlson v. Morton, 229 M 234, 745 P2d 1133, 44 St. Rep. 1929 (1987), followed in Brown v. Small, 251 M 414, 825 P2d 1209, 49 St. Rep. 98 (1992), and Moore v. Does 1 to 25, 271 M 162, 895 P2d 209, 52 St. Rep. 399 (1995), and cited in Newville v. St., 267 M 237, 883 P2d 793, 51 St. Rep. 758 (1994). Newville was followed in May v. ERA Landmark Real Estate of Bozeman, 2000 MT 299, 302 M 326, 15 P3d 1179, 57 St. Rep. 1256 (2000), requiring expert testimony to establish a standard of care in a negligence action against a real estate agent.

Expert Testimony Regarding Shoe Prints:

A police officer was properly qualified as an expert witness because he had received special training in footprints and latent prints, attended both the Montana Law Enforcement Academy's basic and intermediate training sessions, received training in identifying and securing footprints and in the observation of individual footprint characteristics, and participated in several criminal investigations where the only physical evidence that was left at the crime scene was footprints and where that evidence had supported arrests and convictions. Admission of his testimony was not an abuse of discretion. St. v. Oliver, 228 M 322, 742 P2d 999, 44 St. Rep. 1567 (1987).

The Supreme Court held that expert testimony in the matter of shoe prints met the requirements of this rule because of the specialized knowledge of the witness which was not within the common knowledge of men or within ordinary education. The foundational requirement for the necessity of expert testimony was met. St. v. Smith, 220 M 364, 715 P2d 1301, 43 St. Rep. 449 (1986).

Admissibility of Expert Testimony in Assessing Credibility of Child Sexual Assault Victim: Expert testimony was admissible for the purpose of helping the jury assess the credibility of a child sexual assault victim since the jury had the discretion to accept or reject the testimony and the testimony merely enlightened the jurors on the subject without impinging on the jury's right to decide the victim's credibility. St. v. Geyman, 224 M 194, 729 P2d 475, 43 St. Rep. 2125 (1986), followed in St. v. French, 233 M 364, 760 P2d 86, 45 St. Rep. 1557 (1988), and in St. v. Donnelly, 244 M 371, 798 P2d 89, 47 St. Rep. 1600 (1990). Geyman and French were both distinguished on the basis of the age of the witness in St. v. Hensley, 250 M 478, 821 P2d 1029, 48 St. Rep. 1018 (1991). See also St. v. Hall, 244 M 161, 797 P2d 183, 47 St. Rep. 1501 (1990), and St. v. Imlay, 249 M 82, 813 P2d 979, 48 St. Rep. 588 (1991), which overruled Donnelly with regard to augmentation of sentence for failure to admit guilt.

Objection Sustained on Defendant's Cross-Examination of Expert Regarding Motive and Bias: The District Court did not err in sustaining the state's objection to defendant's cross-examination of an expert witness pertaining to the expert's bias and hostile feelings because the cross-examination went beyond the state's direct examination and was irrelevant, having no bearing on the expert's testimony as a coroner. Furthermore, the sustained objection did not prevent the defendant from pursuing a related line of inquiry, the defendant could have called the coroner during his case in chief, and the defendant failed to make any timely offer of proof in accordance with Rule 103(a), M.R.Ev., instead raising the issue for the first time on appeal. St. v. Atlas, 224 M 92, 728 P2d 421, 43 St. Rep. 2042 (1986).

Testimony of Crematorium Operator — Relevance to Arson Testimony: The District Court did not err in allowing brief and clinical evidence by a crematorium operator on the time and temperature necessary for cremation of a human body when the evidence corroborated the state pathologist's and fire marshal's testimony relating to the time and temperature of the fire involved and its effects on the victim. St. v. Atlas, 224 M 92, 728 P2d 421, 43 St. Rep. 2042 (1986).

General Observations of Expert — Admissible as Beyond Common Experience: A herbicide manufacturer argued that expert testimony should not have been admitted since the expert was unable to draw any specific conclusions as to this case based on his greenhouse study of the effects of deep-seeding and herbicide incorporation on spring wheat. The Supreme Court found no error in the admission of the testimony because, although he was unable to draw specific conclusions, the expert made general observations based on studies and years of experience in horticulture that assisted the jury in understanding the evidence and determining facts at issue. Vandalia Ranch, Inc. v. Farmers Union Oil & Supply Co., 221 M 253, 718 P2d 647, 43 St. Rep. 790 (1986).

Highway Patrol Officer — Wide Discretion by Court to Admit Opinion Testimony on Vehicle Speed: A trial judge is granted wide discretion in determining whether to admit opinion testimony of investigating police officers regarding the speed of vehicles. Given the officer's qualifications and experience in this case, as well as the general nature of his testimony, there was no abuse of discretion in allowing his testimony. Simonson v. White, 220 M 14, 713 P2d 983, 43 St. Rep. 133 (1986), followed in Cline v. Durden, 246 M 154, 803 P2d 1077, 47 St. Rep. 2306 (1990).

Employee of General Contractor Expert on Tile Installation — Standard of Review: In an action for breach of warranty brought by the general contractor against a subcontractor regarding installation of a tile floor, plaintiff's employee was allowed to testify as an expert witness on the subject of tile installation. The court rejected subcontractor's argument that the trial court abused its discretion in determining that the witness was an expert. Although the court expressed concern that witness was allowed to express his opinion on a skill of which he had no practical or personal involvement prior to preparation for trial, the fact that it would reach a different conclusion on the determination than that of the trial court does not render the trial judgment infirm. The trial court's ruling must be upheld unless shown to be clearly erroneous. Price Bldg. Serv., Inc. v. Christensen, 215 M 372, 697 P2d 1344, 42 St. Rep. 440 (1985). This standard applied in Goodover v. Lindey's Inc., 255 M 430, 843 P2d 765, 49 St. Rep. 1059 (1992).

Scope of Expert Testimony — Trial Court Regulation: In a wrongful death action arising out of a head-on car-truck collision, plaintiff attempted to introduce expert testimony regarding the causes of perceptual distortion encountered by the deceased prior to her death. The offered testimony sought to establish that the perception of the deceased was so distorted because of the conditions created by the defendant that a collision was very likely. He intended to establish causation by showing that the conditions caused the distortion and the distortion caused the accident. The trial court allowed testimony as to factors involving perceptual distortion. It did not allow testimony as to how these factors affected the deceased's mental processes. The

Supreme Court said that the factors useful in determining the admissibility of expert testimony are: first, qualified expert; second, proper subject; third, conformity to generally accepted explanatory theory; and fourth, probative value compared to prejudicial effect. The trial court must consider the facts of each case and the substance of the expert testimony offered on a case-by-case basis. The trial court was within its discretion in limiting the testimony concerning how the perceptual distortion factors affected the deceased's mental processes. Lindberg v. Leatham Bros., Inc., 215 M 11, 693 P2d 1234, 42 St. Rep. 137 (1985).

Expert Testimony Required for Title Insurance Company Standard of Care: In 1975, plaintiff negotiated to sell his property and a commitment for title insurance was ordered from defendant. The defendant issued a title commitment, but it contained no reference to a quiet title action or decree whereby plaintiff and his father had determined separate ownership of various parcels. In 1977, a judgment against plaintiff's father was entered and a Writ of Execution was levied on the father's and plaintiff's property. Plaintiff then brought an action to amend the judgment in the quiet title action nunc pro tunc to reflect the separate ownership. Plaintiff then brought this action to recover costs of the nunc pro tunc action. Plaintiff presented no expert testimony as to the standard of care of a title insurance company. Defendant appealed from an adverse judgment, contending the absence of expert testimony failed to establish a prima facie case of negligence. The Supreme Court, relying on Prosser, Law of Torts, 4th Ed. (1971), and Hill v. Squibb & Sons, 181 M 199, 592 P2d 1383 (1979), held that title examination is complex and intricate and beyond the common understanding of lay persons. Plaintiff must produce expert testimony to establish the standard of care required of a title insurance company. Without such testimony a prima facie case of negligence was not established. Doble v. Lincoln County Title Co., 215 M 1, 692 P2d 1267, 42 St. Rep. 128 (1985), distinguished in Old Republic Nat'l Title Ins. Co. v. Realty Title Co., 1999 MT 69, 294 M 6, 978 P2d 956, 56 St. Rep. 286 (1999).

Labor Expert — Evidence on Breach of Implied Covenant of Good Faith and Fair Dealing: The instant case is not a scenario of simple facts. Fault arising from breach of implied covenant of good faith and fair dealing is not easily comprehensible to the average person. Dr. Vinton's testimony was based on professional expertise and experience that the individual jury members were unlikely to possess. Her testimony assisted the trier of fact by providing the jury with information about hospital disciplinary procedures and labor relations beyond the common experience of a lay juror. Contrary to the hospital's reading of Rule 702, it does not exclude expert testimony on all matters about which jury members have any knowledge or experience. The courts must continue with the spirit of the new rules of evidence and recognize that individuals in fields other than medicine, especially in the complex domain of labor relations, are a new legion of experts. Crenshaw v. Bozeman Deaconess Hosp., 213 M 488, 693 P2d 487, 41 St. Rep. 2251 (1984), followed in Flanigan v. Prudential Fed. S&L Ass'n, 221 M 419, 720 P2d 257, 43 St. Rep. 941 (1986), Mahan v. Farmers Union Cent. Exch., Inc., 235 M 410, 768 P2d 850, 46 St. Rep. 96 (1989), and in Niles v. Big Sky Eyewear, 236 M 455, 771 P2d 114, 46 St. Rep. 504 (1989), and distinguished in May v. ERA Landmark Real Estate of Bozeman, 2000 MT 299, 302 M 326, 15 P3d 1179, 57 St. Rep. 1256 (2000).

Admissible for Expert to Give Opinion on Whether Violation of Law Occurred: It was not inadmissible for a Deputy Sheriff qualified as an expert to give his opinion on whether a violation of the law was the cause of an automobile accident. Adequate opportunity was given the plaintiff to elicit any assumptions or facts underlying the expert opinion. Foreman v. Minnie, 211 M 441, 689 P2d 1210, 41 St. Rep. 1478 (1984), followed in Hart-Anderson v. Hauck, 239 M 444, 781 P2d 1116, 46 St. Rep. 1817 (1989), and Hauck followed in Hislop v. Cady, 261 M 243, 862 P2d 388, 50 St. Rep. 1304 (1993).

Proper Subject Matter for Use of Expert Testimony: When parties allege different factors regarding the cause of an automobile accident, it is proper subject matter for the testimony of expert witnesses. Such an accident involves complicated matters beyond the ordinary understanding of the jury and is therefore distinguishable from Ployhar v. Bd. of Trustees, 187 M 363, 609 P2d 1226, 37 St. Rep. 744 (1980), which involved an accidental death caused by heavy equipment. Foreman v. Minnie, 211 M 441, 689 P2d 1210, 41 St. Rep. 1478 (1984).

Rape-Trauma Syndrome — Expert Testimony Admissible on Whether There Was Consent: Testimony of experts on whether the complaining witness in a sexual intercourse without consent case suffers from rape-trauma syndrome is admissible to aid a jury in determining whether there was consent to engage in the sexual intercourse that all parties acknowledge occurred. St. v. Liddell, 211 M 180, 685 P2d 918, 41 St. Rep. 1293 (1984), followed in St. v. Brodniak, 221 M 212, 718 P2d 322, 43 St. Rep. 755 (1986).

Highway Patrolman — Vehicular Speed in Complicated Collision: Whether or not a highway patrolman is qualified to testify as an expert witness in estimating vehicular speed in a

complicated collision is a matter within the discretion of the trial judge. As long as the cross-examiner is given adequate opportunity to elicit any assumptions or facts underlying an expert's opinion, the weight to be given the expert's testimony is for the jury to determine. Goodnough v. St., 199 M 9, 647 P2d 364, 39 St. Rep. 1170 (1982), followed in Cline v. Durden, 246 M 154, 803 P2d 1077, 47 St. Rep. 2306 (1990). See also St. v. Arrington, 260 M 1, 858 P2d 343, 50 St. Rep. 905 (1993).

Test for Admission of Expert Opinion: The test of whether one can give an expert opinion is whether the subject is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness whose expert opinion is sought to be introduced or whether the matter is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact. St. v. Howard, 195 M 400, 637 P2d 15, 38 St. Rep. 1980 (1981), followed in Durbin v. Ross, 276 M 463, 916 P2d 758, 53 St. Rep. 471 (1996).

Pathological Testimony Based on Photos Held Admissible — Death by Blunt Instrument: Where, in a prosecution for deliberate homicide caused by blows struck to the head of the deceased, the prosecution attempted to prove how the fatal blows were applied through the testimony of a pathologist, based on photographs, the court did not err in overruling the defendant's objection to the pathologist's testimony. The competency of a witness to testify as an expert is a question for the trial court's discretion. The pathologist had the knowledge, skill, training, education, and experience to qualify him to express an opinion on how the fatal blows were inflicted. St. v. Close, 191 M 229, 623 P2d 940, 38 St. Rep. 177 (1981).

Expert Opinion Concerning Cause of Accident — Subject Matter Not Beyond Ordinary Understanding — New Trial: An expert gave his opinion concerning the cause of an accident. The accident was relatively simple, and since opinion evidence concerning the cause of the accident is admissible only if the subject matter is beyond the ordinary understanding of the jury, the District Court did not abuse its discretion in granting a motion for a retrial because the expert's opinion should not have been admitted. Ployhar v. Bd. of Trustees, 187 M 363, 609 P2d 1226, 37 St. Rep. 744 (1980).

Purpose of Expert Testimony: Testimony as to the usual fee charged by an attorney to workers' compensation clients is relevant in a prosecution of the defendant on charges of larceny by bailee. The purpose of expert testimony is to aid the jury, but it does not limit the jury's capacity to decide for itself. Since the statute at the time in question provided that an agreement as to attorney fees could be implied, some standard as to what such an implied agreement might be was essential. St. v. Bretz, 185 M 253, 605 P2d 974, 36 St. Rep. 1037 (1979).

Expert Evidence Required: In matters where it is possible that a layman could have no knowledge at all, the court and jury must depend on expert evidence. Hill v. Squibb & Sons, 181 M 199, 592 P2d 1383, 36 St. Rep. 651 (1979).

Expert Testimony Required: A plaintiff must produce expert testimony to sustain an action against a drug company for failure to warn adequately of side effects of its products. Hill v. Squibb & Sons, 181 M 199, 592 P2d 1383, 36 St. Rep. 651 (1979).

Hypothetical Question Not Required: A hypothetical question is not a prerequisite in the testimony of an expert witness. It is only required that the witness testify as to the facts upon which he bases his opinion. St. v. Hallam, 175 M 492, 575 P2d 55 (1978).

MEDICAL EXPERTS

Expert Testimony of Mere Possibility of Paradoxical Drug Reaction Properly Disallowed: In attempting to establish a defense for attempted deliberate homicide, Vernes sought to have a medical expert testify regarding the possibility of Vernes' alleged paradoxical reaction to a prescription anxiety drug, asserting that instead of reducing anxiety, the drug may have had the opposite effect and caused Vernes to become aggressive or violent. The trial court restricted the expert's testimony because the testimony fell short of the standard for admissibility, in that the expert could not testify within a reasonable degree of medical certainty or even that it was more probable than not that Vernes suffered a paradoxical reaction. Vernes appealed, but the Supreme Court affirmed. Medical testimony of this type may not be admitted unless it meets the reasonable medical certainty test. The "more likely than not" standard ensures that expert testimony does not represent mere conjecture, but rather is sufficiently probative to be reliable. The expert could verify only that there was a mere possibility of a paradoxical reaction, and the trial court did not err in disallowing the evidence based on conjecture. St. v. Vernes, 2006 MT 32, 331 M 129, 130 P3d 169 (2006), following Dallas v. Burlington N., Inc., 212 M 514, 689 P2d 273 (1984).

Test Whether Witness May Testify as Expert on Child Abuse: Factors in the three-part test set out in St. v. Scheffelman, 250 M 334, 820 P2d 1293 (1991), for whether a witness may testify as

an expert on child abuse are: (1) the expert must have extensive first-hand experience with children who both have and have not been sexually abused; (2) the expert must have a thorough and current knowledge of the professional literature on child abuse; and (3) the expert must have objectivity and neutrality regarding individual cases. In Riggs's case, the state called a child abuse expert who met the qualifications but who had a therapeutic relationship with one of the victims to testify concerning interviewing techniques applied in a sexual abuse investigation. Riggs contended that the trial court erred by allowing the expert to testify and by limiting the defense's ability to cross-examine the expert. The Supreme Court disagreed on both issues. Given the limited scope of the expert's testimony, the objectivity with which the expert could testify regarding interviewing techniques was not susceptible to being compromised by the therapeutic relationship with one of the victims, so the trial court did not err in qualifying the witness as an expert. Additionally, Riggs was afforded a fair and full opportunity to expose any potential bias of the expert, so Riggs's right to confront witnesses was not infringed. St. v. Riggs, 2005 MT 124, 327 M 196, 113 P3d 281 (2005). See also St. v. Whitlow, 285 M 430, 949 P2d 239 (1997).

Proper Finding That Youths in Need of Care — Expert Testimony Based in Part on Hearsay — Adequate Exercise of Independent Factfinding Judgment: The District Court found that two youths were in need of care. The mother appealed on grounds of insufficient evidence and contended that the District Court erroneously adopted the state's findings of fact and conclusions of law without substantial change, but the Supreme Court affirmed. The record contained sufficient credible evidence to support the findings that the children were abused and neglected by the mother's actions that injured the children's capacity to function emotionally or psychologically and thus were youths in need of care. Additionally, it was not error for the District Court to rely on the testimony of a psychology expert, even though the testimony was based in part on hearsay, because the facts and data relied on by the expert were of the type typically relied on by experts in the field of psychology. Moreover, although the verbatim adoption of findings and conclusions of the prevailing party is not favored, the District Court in this case did not in fact adopt the state's findings and conclusions verbatim, but rather exercised independent factfinding judgment. In re A.R. & I.R., 2005 MT 23, 326 M 7, 107 P3d 457 (2005), distinguishing In re Inquiry Into J.L. & D.L., 2000 MT 289, 302 M 254, 14 P3d 473 (2000).

Admissibility of Expert Testimony on Blood Alcohol Content — Elimination Phase Versus Retrograde Extrapolation: Larson contended that the trial court improperly allowed expert testimony concerning Larson's blood alcohol content (BAC) because the expert estimated the BAC using the retrograde extrapolation method in violation of state crime lab policy. The Supreme Court disagreed. Retrograde extrapolation is a method of estimating BAC at a specified time using a person's known BAC at a later time. However, the expert in this case opined that Larson would have reached the peak alcohol phase earlier in the evening and would have been in the elimination phase when the blood was drawn, so the expert did not engage in retrograde extrapolation. Crime lab policy was not violated, and the testimony was properly admitted. St. v. Larson, 2004 MT 345, 324 M 310, 103 P3d 524 (2004).

Expert Testimony Not Targeting Defendant's State of Mind During Crimes Properly Admitted: In Sandrock's trial for sexual intercourse without consent, incest, and witness tampering, Sandrock maintained that he was suffering from a mental disease or defect and could not have committed the crimes because he could not have formed the requisite mental state. A medical expert testified that although Sandrock was an oddball, he knew right from wrong when he wrote several letters to his wife outlining his intended actions. Sandrock moved for a mistrial because the expert's testimony violated the prohibition on ultimate issue testimony. The motion was denied, and on appeal, the Supreme Court affirmed. Although a medical expert may not offer an opinion on the ultimate issue of whether a defendant had a particular state of mind that is an element of an offense, the expert may state the nature of a medical examination and the medical or psychological diagnosis of the defendant's mental condition, and testimony in the form of an opinion or inference that would otherwise be admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact. Here, the expert's testimony did not target the ultimate issue of whether Sandrock actually possessed the requisite mental states at the time that the crimes were committed, so the mistrial motion was properly denied. St. v. Sandrock, 2004 MT 195, 322 M 231, 95 P3d 153 (2004). See also St. v. Santos, 273 M 125, 902 P2d 510 (1995).

No Abuse of Discretion in Allowing Expert Testimony by Both Parties — Opportunity to Cross-Examine: Both parties in a wrongful death action were allowed to present expert medical testimony and to fully cross-examine the experts, and the court instructed the jury that they were not bound by either expert's opinion but should determine the weight to be given to each

expert's testimony based on the expert's qualifications and credibility. Plaintiff contended that the District Court abused it discretion by allowing testimony by defendant's expert that was irrelevant and prejudicial. The Supreme Court disagreed. For a court to abuse its discretion, it must act arbitrarily, without employing conscientious judgment, or exceed the bounds of reason, resulting in substantial injustice. Error may not be predicated on a ruling that admits evidence unless a substantial right of the party is affected, and plaintiff failed to show that admitting defendant's expert testimony affected substantial rights, so no abuse of discretion occurred. Christofferson v. Great Falls, 2003 MT 189, 316 M 469, 74 P3d 1021 (2003).

Proper Exclusion of Lay Testimony of Paramedics Regarding Resuscibility — Expert Testimony Required: Plaintiff requested that a medical team be sent to her home to attend to her husband who was in respiratory arrest, but the police dispatcher sent the medics to the wrong address. The husband subsequently died, and the wife brought a wrongful death and negligence action against the city. In their depositions, the paramedics testified that had they been correctly dispatched, they would have arrived at the home and begun resuscitation procedures several minutes earlier, enhancing the chances of survival. The city argued that the prospects for survival were a subject for expert testimony and that such testimony by the paramedics lacked foundation and was speculative. The District Court agreed and granted the city's motion in limine to exclude the testimony. On appeal, the Supreme Court affirmed. The paramedics' proposed testimony clearly extended beyond their observations at the scene or a description of their actions and into the realm of expert medical testimony. Absent a foundation establishing the expertise of the paramedics to give an expert opinion on resuscibility, their lay testimony was properly excluded. Christofferson v. Great Falls, 2003 MT 189, 316 M 469, 74 P3d 1021 (2003).

Objection to Medical Testimony Regarding Effects of Personality Disorder on Parenting Sustained — Cross-Examination Properly Limited: A medical expert who evaluated a mother regarding her parenting ability was asked about opinions that could be made based on the evaluation. The expert responded that it would require an explanation of personality and cognitive features and limitations. The guardian ad litem contended that inquiry should be allowed on cross-examination into the effects of a personality disorder on parenting. The mother objected, and the District Court sustained as beyond the scope of direct examination. The Supreme Court affirmed. The District Court did not abuse its discretion in limiting the latitude of cross-examination because the expert testimony in this case centered on the expert's observations and because the expert had not diagnosed the mother with a personality disorder. In re B.B., 2001 MT 285, 307 M 379, 37 P3d 715 (2001).

Objection to Qualifications of Pathologist to Testify Regarding Gunshot Wound: At Clausell's deliberate homicide trial, objection was made to the testimony of a Board-certified clinical pathologist who offered opinions regarding a gunshot wound, on grounds that the pathologist was not a Board-certified forensic pathologist and therefore was not qualified to testify. However, the doctor had performed over 400 autopsies, including about 40 that involved gunshot wounds. Clausell did not offer any applicable legal theory that a clinical pathologist with such experience who is not a forensic pathologist is not qualified to testify in a homicide case, and the Supreme Court declined to adopt a rule to that effect. Further, Clausell failed to preserve any other objection at trial to the pathologist's testimony and was precluded from raising other issues regarding the testimony on appeal. St. v. Clausell, 2001 MT 62, 305 M 1, 22 P3d 111 (2001), distinguishing In re K.H. & K.L.E., 1999 MT 128, 294 M 466, 981 P2d 1190 (1999).

Expert Testimony Necessary to Establish Applicable Standard of Care Owed by Physician Who Treats Referred Patient — Functional Capacities Evaluation: Even though a physician-patient relationship may not exist when a test is administered at the request of a third party, a physician nevertheless owes a duty to an examinee who is not that physician's patient to exercise care commensurate with the examiner's professional training and experience. The standard of care applicable to the administration of a functional capacities evaluation (FCE) can be established only through expert testimony that takes into account the training and experience of the physical therapist relative to administering the FCE. Romans v. Lusin, 2000 MT 84, 299 M 182, 997 P2d 114, 57 St. Rep. 363 (2000). See also Webb v. T.D., 287 M 68, 951 P2d 1008, 54 St. Rep. 1502 (1997).

Professional Testimony Not Speculative as to Defendant's Identity Admissible: Hamby was charged with felony sexual assault on a 10-year-old girl with Down syndrome. The girl was not competent to testify, but the District Court did allow a counselor to testify regarding the counselor's observations of the girl. Hamby argued that the expert's testimony was highly prejudicial because it had the same effect on the jury as if the expert had identified Hamby as the perpetrator. However, Hamby's identity as the person involved in the alleged assault was never in question, only his actions. The expert did not speculate about the reason for the girl's reactions

or provide any testimony to imply that Hamby sexually abused the girl, so the District Court did not err in allowing the expert to testify about her observations of the girl. St. v. Hamby, 1999 MT 319, 297 M 274, 992 P2d 1266, 56 St. Rep. 1272 (1999).

Limited Statements by Expert and Comparisons of Objectively Observable Behavior Not Considered Opinion on Credibility: Generally, an expert may not comment on the credibility of an alleged victim. Here, an emergency room physician who treated an alleged rape victim carefully limited his testimony to observations of the victim as compared to other women in his professional experience who reported being raped but did not state that the victim's emotions were consistent with and appropriate for women who had been raped. Such limited statements and comparisons of objectively observable behavior do not constitute an opinion on credibility, and the District Court did not abuse its discretion in admitting the physician's testimony. St. v. Rogers, 1999 MT 305, 297 M 188, 992 P2d 229, 56 St. Rep. 1228 (1999).

Opinion Regarding Standard of Care in Obtaining Informed Consent Not Novel Scientific Evidence: The plaintiff's expert opined that the defendant physician violated the standard of care regarding informed consent when the physician failed to inform a patient that a greater risk was posed by placement of a thoracic spinal epidural catheter while the patient was anesthetized. The District Court decided that the expert's opinion regarding the standard of care was inadmissible because it was not based on scientific evidence supported by reliable methodology or research and awarded summary judgment to defendant on the basis that without a qualified medical opinion, plaintiff could not prove medical malpractice. In excluding the expert's opinion, the court concluded that plaintiff had attempted to introduce novel scientific evidence of the type contemplated by Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786 (1993), and Hulse v. St., 1998 MT 108, 289 M 1, 961 P2d 75 (1998). Applying the twofold threshold obligation of a plaintiff in a medical malpractice action set out in Mont. Deaconess Hosp. v. Gratton, 169 M 185, 545 P2d 670 (1976), the Supreme Court noted that the Daubert test is limited to novel scientific evidence. Here, plaintiff sought to establish through expert testimony the amount of information that an anesthesiologist should provide to a patient in order to obtain the patient's informed consent, which is not novel scientific evidence. Thus, the District Court erred in relying on Daubert when excluding the expert testimony and in awarding summary judgment based on the conclusion that without a qualified medical opinion, plaintiff could not establish the existence of a legal duty as part of the prima facie case. The case was reversed and remanded. Gilkey v. Schweitzer, 1999 MT 188, 295 M 345, 983 P2d 869, 56 St. Rep. 734 (1999).

Evidence of Battered Woman Syndrome Admissible to Explain Recantation on Stand if Just Notice and Test Met: Stringer argued that the testimony of an expert regarding his wife's battered woman syndrome was inadmissible because it was used to bolster her credibility. The Supreme Court held that evidence of the syndrome was admissible to explain the victim's recantation on the stand of earlier testimony. The Supreme Court also stated that to be admissible, a foundation of prior abuse must be established. In order to do so, the notice and test established in St. v. Just, 184 M 262, 602 P2d 957 (1979), would apply. In the case before it, the Supreme Court held that the foundation had not been laid for admitting the testimony. St. v. Stringer, 271 M 367, 897 P2d 1063, 52 St. Rep. 473 (1995).

Standard of Care for Nonemergency Dental Care: Burlinghams sued dentist Mintz, alleging that Mintz's negligence caused Candance Burlingham's injury. Applying the standard of care set out in Negaard v. Feda, 152 M 47, 446 P2d 436 (1968), the District Court excluded two of Burlinghams' standard of care experts, one a suburban dentist from St. Louis and the other an oral surgeon from Albany, Oregon, on grounds that the experts had no idea of the standard of care in Eureka, Montana, or a similar community, and lacking expert testimony, the court summarily dismissed plaintiffs' case. On appeal, the Supreme Court held that the standard of care enunciated in Negaard was no longer appropriate for nonemergency dental care in Montana. The Supreme Court noted that the foundation for testimony must necessarily include evidence that the witness is familiar with the standard of care at the time when and the place where the alleged act of negligence occurred. Expert testimony may consist of direct or indirect knowledge of the standard of care in the community where the act occurred or in a similar community and may be based on evidence that the standard of care for a procedure at issue is the same in all communities, regardless of size or location. If the basis of the witness's familiarity with the applicable standard of care is that the standard is uniform throughout the country and evidence to the contrary is presented, then the issue raised by the contrary evidence goes to the weight of the witness's testimony but does not preclude its admission. In the case at hand, Burlinghams presented two appropriate experts who were familiar with the applicable nonemergency standard of care for dentists in the community, by either direct or indirect

knowledge, thereby meeting their burden of establishing a prima facie case. The District Court erred by excluding the experts and granting summary judgment. Burlingham v. Mintz, 270 M 277, 891 P2d 527, 52 St. Rep. 181 (1995), overruling, to the extent in conflict, Negaard v. Feda, 152 M 47, 446 P2d 436 (1968).

Social Worker Qualified to Testify on Custodial Placement: An expert with a master's degree in social work and extensive experience working with children who was familiar with the parties' situation and who had conducted the home study and responded to several complaints alleging abuse or neglect of the parties' children was qualified to testify regarding the appropriate custodial placement of the children. Exclusion of the expert's opinion testimony by the trial court on the grounds of competency was error. In re Marriage of Johansen, 261 M 451, 863 P2d 407, 50 St. Rep. 1403 (1993).

Testimony Excluded for Lack of Foundation on Which to Base Opinion: In a personal injury case, the lower court excluded the defendant's medical expert's testimony. The Supreme Court affirmed the decision on the basis that the doctor had no foundation on which to base his opinion because, among other things, he had never examined the plaintiff and had no information concerning the activities that the plaintiff was engaged in when the plaintiff alleged that he was injured. Cottrell v. Burlington N. RR Co., 261 M 296, 863 P2d 381, 50 St. Rep. 1323 (1993).

Admission of Medical Journal Articles Proper: Youngs argued that the introduction of articles from medical journals was improper because the issue of credibility should have been determined by the jury, not by strangers. The Supreme Court held that the articles were admissible as scientific knowledge admitted to assist the jury in understanding evidence concerning a fact in issue. Young v. Horton, 259 M 34, 855 P2d 502, 50 St. Rep. 662 (1993).

National Standard of Care Rejected to Ensure Provision of Medical Services to Rural Communities — Expert Witness Subject to Locality Rule: Falcon brought a medical malpractice suit on behalf of his mother's estate, alleging that the treatment she had received in 1988 was not up to the legal standard of medical care promulgated by the national accrediting organization under which the hospital had elected to operate. The Supreme Court held that, as a matter of public policy, in order to ensure that medical services would be provided to rural communities, the national standards did not apply. The court also affirmed the lower court's decision to exclude the testimony of the plaintiff's expert witness because the witness was not familiar with the standard of practice in Glasgow or a similar Montana locality. The court also held that a defendant doctor is entitled to summary judgment as a matter of law if the plaintiff fails to establish the applicable standard of care by competent medical testimony. Falcon v. Cheung, 257 M 296, 848 P2d 1050, 50 St. Rep. 276 (1993).

Clear and Convincing Evidence Required — Allegation in Complaint, Statements in Judgment, and Unqualified Expert Medical Opinion Insufficient: Because of allegations that alcohol was involved in a car accident, the District Court awarded $25,000 for punitive damages to Maulding as part of a default judgment against Hardman. The Supreme Court noted that the only evidence of the use of alcohol was an unsubstantiated allegation in the complaint and that the only rationale by the District Court was a statement in the judgment that "evidence showed" that the accident was caused by the use of alcohol. The Supreme Court also noted that at the hearing on the matter, Maulding's counsel was allowed to give unqualified expert medical opinion, which the District Court should not have accepted. For these reasons, the Supreme Court reversed the denial of a motion to set aside the default. Maulding v. Hardman, 257 M 18, 847 P2d 292, 50 St. Rep. 141 (1993).

Expert Testimony Required to Establish Hospital's Duty of Care — Summary Judgment Proper: Plaintiff's hip replacement surgery was terminated after an incision was made because an improperly sized prosthetic device was shipped by the supplier and was not discovered by hospital staff prior to surgery. The District Court did not err in granting summary judgment for defendant hospital when plaintiff failed to name an expert witness who would testify as to the duty owed by the hospital and a breach of that duty. The fact that the hospital changed its procedures several months after plaintiff's injuries did not establish the hospital's standard of care at the time of the injury. The standard of care in this case was not readily ascertainable by laypeople, so the case did not fall into the exception to the general requirement of establishing a medical standard of care through expert testimony. Dalton v. Kalispell Regional Hosp., 256 M 243, 846 P2d 960, 50 St. Rep. 54 (1993).

Proper Disallowance of Testimony on Subject Doctor Admitted He Was Not Competent to Discuss: The trial judge did not abuse his discretion when he refused to allow a doctor to testify as an expert witness on the subject of the pudendal nerve in its relation to the sphincter muscle because the doctor stated in a deposition that the sphincter muscle is a very complex system that he had not studied in a long time and that he was thus not competent in that area. O'Leyar v.

Callender, 255 M 277, 843 P2d 304, 49 St. Rep. 1008 (1992), followed in Seal v. Woodrows Pharmacy, 1999 MT 247, 296 M 197, 988 P2d 1230, 56 St. Rep. 959 (1999).

Refusing to Allow Doctor to Use Lab Slides of Removed Tissue in Giving Opinion on Depth of Surgery: In a medical malpractice case, defendant's expert was asked on cross-examination for his opinion on the depth of defendant doctor's laser surgery. The expert asked if he could use certain slides of the removed tissue to answer the question, and the judge said, "Just answer the question." The judge's statement was not improper. O'Leyar v. Callender, 255 M 277, 843 P2d 304, 49 St. Rep. 1008 (1992).

Evidence of Serious Bodily Injury Sufficient to Prove Assault Without Expert Medical Testimony: Based on the nature of victim's injuries and his uncontroverted testimony as to how he was injured, any rational trier of fact could have found without the aid of expert medical testimony that serious bodily injury occurred. The state's failure to present such testimony was not fatal to establishing serious bodily injury under the circumstances. St. v. Bower, 254 M 1, 833 P2d 1106, 49 St. Rep. 586 (1992).

Testimony Regarding Secondary Gain Prejudicial: The lower court allowed the defendant's medical expert to testify that in his opinion, the plaintiff was not permanently injured but, rather, that his symptoms were attributable to secondary gain. The Supreme Court held that the expert was not qualified to speculate about the plaintiff's possible motivation for making complaints that the expert felt could not be substantiated by his physical findings. Linden v. Huestis, 247 M 383, 807 P2d 185, 48 St. Rep. 241 (1991).

Chiropractor Barred From Testifying as to Impairment Rating: Public policy suggests that only qualified physicians, but not chiropractors, should be allowed to render opinions on impairment ratings based on the American Medical Association's Guides to Evaluation of Permanent Impairment. Restricting use of the guides in this way ensures reliable, authoritative opinions on which juries can depend in making their determinations. Wacker v. Park Rural Elec. Co-op, Inc., 239 M 500, 783 P2d 360, 46 St. Rep. 1864 (1989).

Qualifications Required of Expert Medical Witness in Physician Negligence Case: The party presenting a witness as an expert must establish, to the satisfaction of the trial court, that the witness possesses the requisite knowledge, skill, experience, training, or education to testify as to the diagnosis and treatment in question and as to the standard of care applicable to the physician charged with negligence. Whether such a witness is qualified lies within the discretion of the trial court. Glover v. Ballhagen, 232 M 427, 756 P2d 1166, 45 St. Rep. 1168 (1988).

Treating Physician's Opinion Based on Incomplete Knowledge — Evidentiary Weight: Because the treating physician normally has more contact with and greater knowledge of an injured worker, the treating physician should generally be in the best position to give an informed opinion. However, when an initial conclusion was based on incomplete knowledge, it was error for the court to ignore the physician's subsequent acknowledgment of medical probability and rely on his initial conclusion. Snyder v. San Francisco Feed & Grain, 230 M 16, 748 P2d 924, 44 St. Rep. 2216 (1987), followed in White v. Ford, Bacon & Davis Tex., Inc., 256 M 9, 843 P2d 787, 49 St. Rep. 1117 (1992).

Evidence of Abused Spouse Syndrome Not Applicable in Support of Credibility: The District Court did not err in refusing to authorize expenditures for retention of an expert who would testify to the effects of abused spouse syndrome when the defendant did not seek the testimony in regard to whether the necessary state of mind was present to justify homicide, but rather to support the defendant's credibility. St. v. Dannels, 226 M 80, 734 P2d 188, 44 St. Rep. 472 (1987), distinguished in St. v. Stringer, 271 M 367, 897 P2d 1063, 52 St. Rep. 473 (1995).

Expert and Defendant — No Mutual Exclusivity: A doctor who is also the defendant may be called to testify as an expert. The status of defendant is not mutually exclusive to that of expert witness. Clark v. Norris, 226 M 43, 734 P2d 182, 44 St. Rep. 444 (1987).

Psychologist Qualified to Testify on Reliability of Children's Testimony: A licensed psychologist with experience in psychological evaluations relating to sexual abuse was qualified to testify on the reliability of testimony by children in sexual assault cases. In re J.W.K., 223 M 1, 724 P2d 164, 43 St. Rep. 1483 (1986).

Expert Testimony — Character Evidence: A physician's expert testimony about the defendant dentist's ability to recognize and treat infections and his capability and conscientiousness as a dentist was not impermissible character evidence and was properly admitted on cross-examination. Ostermiller v. Alvord, 222 M 208, 720 P2d 1198, 43 St. Rep. 1180 (1986).

Improper Comment on Credibility of Complainant: In a case where defendant was charged with sexual intercourse without consent, the psychologist who examined the complainant testified with regard to malingering and the statistical percentage of false accusations. His testimony constituted improper comment on the credibility of the complainant and should not

have been admitted. It is well settled in Montana that the determination of the credibility of witnesses and the weight to be given their testimony is solely within the province of the jury. St. v. Brodniak, 221 M 212, 718 P2d 322, 43 St. Rep. 755 (1986), followed in St. v. Eiler, 234 M 38, 762 P2d 210, 45 St. Rep. 1710 (1988). See also St. v. Dahms, 252 M 1, 825 P2d 1214, 49 St. Rep. 106 (1992).

Qualified Sexual Assault Victim Expert — Psychologist: In prosecution for sexual assault, witness was a qualified expert where she was educated, trained, and experienced in a relevant area; testified that the victim fit the statistical picture of assaulted juveniles; had counseled the victim for some time; was a certified psychologist; and had a doctorate in psychology. St. v. Berg, 215 M 431, 697 P2d 1365, 42 St. Rep. 518 (1985), followed in St. v. Eiler, 234 M 38, 762 P2d 210, 45 St. Rep. 1710 (1988).

Doctor's Testimony Concerning Defendant's State of Mind — Not Character Evidence: A doctor's testimony that, in his opinion, the defendant had the capacity to act purposefully and knowingly at the time of the crime was properly admissible as his professional opinion as an expert witness. The doctor's testimony was not character evidence. St. v. Doll, 214 M 390, 692 P2d 473, 42 St. Rep. 40 (1985).

Admissibility of Serologist Testimony: D.K. was forcibly raped at knife point in her home in Butte. After the rape, D.K. called the police, who took D.K. to the hospital where staff acquired pubic hair and blood samples and took vaginal swabs to secure semen samples. The samples were tested by a serologist. At trial, the serologist testified as to blood types, PGM subtypes, and "H" factors present in secreted body fluids. Defendant contended that the testimony was more prejudicial than probative and should have been excluded. Defendant relied on People v. Robinson, 27 NY 2d 864, 265 NE 2d 543 (1970), where the court concluded that evidence of blood type was not probative in view of the large portion of the general population having the same blood type. On appeal, the Supreme Court found that evidence of blood type, secretor status, and PGM subtype correlates with the significantly smaller population of Silver Bow County. The court also found, as in Robinson, that there was other independent evidence of defendant's guilt. The court found the evidence admissible. St. v. Bauer, 210 M 298, 683 P2d 946, 41 St. Rep. 1066 (1984).

Expert Testimony on Ultimate Issue: In a prosecution for sexual intercourse without consent, the County Attorney asked a doctor if he had formed a clinical impression of the victim. The doctor replied that it was his impression that the woman had been raped. The doctor's statement was admissible under Rule 704, M.R.Ev., since he was qualified by experience and personal observation. Further, the statement was not sufficiently prejudicial to constitute reversible error. St. v. Dickens, 198 M 482, 647 P2d 338, 39 St. Rep. 1137 (1982).

Inadmissible Medical Opinion of Intent Behind Force: Prostitute testified that she and a customer had two fights over the course of an evening and that he choked her during the first and attempted to strangle her with her pantyhose during the second. The customer testified they had one fight and did not say he choked or strangled her. The doctor who had examined the prostitute that night testified that she had strangulation marks, a bluish tinge in her face, and tiny purple spots caused by strangulation. The jury was as qualified as the doctor to draw from the evidence an inference as to customer's intent, and it was thus error to allow the doctor to testify that he thought someone tried to murder the prostitute and that he could not believe one could sustain as much trauma as she with any other intent. However, the error was harmless and did not prejudice defendant or affect his substantial rights, as the jury did not rely on doctor's opinion, since: (1) it returned a verdict of aggravated assault and kidnapping rather than the charged attempted homicide, and the latter, but neither of the former, requires an intent or purpose to cause death; (2) intent was not a major issue in the trial; and (3) there was overwhelming evidence that defendant purposefully or knowingly inflicted bodily injury on the prostitute with a weapon, the pantyhose. St. v. Howard, 195 M 400, 637 P2d 15, 38 St. Rep. 1980 (1981).

Psychiatric Testimony on Intent Element — Permissible for Rebuttal: Defendant Fish had an argument with Miller at the bar where Miller worked over money Miller owed Fish. A fight ensued, which was broken up by patrons. Fish left saying he would settle with Miller. Fish recruited some friends and went to Miller's trailer park. Miller had already arrived and had friends with him. Fish, upon discovering that Miller was at home, began knocking and pounding on the door. Fish's friends, Hubbard and Lodge, were with him. Lodge began kicking the door. Miller got a gun and shot through the door, killing Lodge. Hubbard got in his truck, and Miller put the gun through the truck window. Hubbard took the gun away from Miller, who ran from the truck. Hubbard shot and killed Miller. Fish was convicted of attempted burglary, and Hubbard was convicted of mitigated deliberate homicide. Hubbard contends the trial court erred by refusal to allow a psychiatrist to testify as to his mental state at the time Miller was shot. With

respect to either deliberate homicide or mitigated deliberate homicide, the State must prove that the defendant "purposely or knowingly" caused the death of another human being. "Purposely or knowingly" are statutory descriptions of various states of the human mind. They are particular elements included in the definition of the offense. No element of an offense can be presumed, and thus the requisite state of mind must be established by the prosecution and believed by the jury beyond a reasonable doubt. The offered testimony included a conclusion that Hubbard, under the surrounding circumstances, more than likely did not intend to kill Miller when he shot but only intended to stop or apprehend him. The testimony would have gone to support a general rebuttal of the intent requirement. This was a proper subject for expert psychiatric testimony. To exclude testimony offered by Hubbard as rebuttal to an essential element of the crime denied him a full evidentiary hearing and deprived him of a fair trial. St. v. Fish, 190 M 461, 621 P2d 1072, 37 St. Rep. 2065 (1980).

Third Party Expert Testimony: Third party expert testimony is not necessary if a defendant doctor's own testimony establishes the standard of care and departure from it. Hill v. Squibb & Sons, 181 M 199, 592 P2d 1383, 36 St. Rep. 651 (1979), distinguished in Hunter v. Missoula Community Hosp., 230 M 300, 750 P2d 106, 45 St. Rep. 220 (1988).

General Practitioner Testifying Against Specialist: A general practitioner may testify in a negligence suit against a specialist since the training and specialization of the witness go to the weight of the evidence rather than to the admissibility. Hunsaker v. Bozeman Deaconess Foundation, 179 M 305, 588 P2d 493, 35 St. Rep. 1647 (1978).

Expansion of Locality Rule — Medical Standards: Montana's "locality rule" imposes on a physician undertaking the care of a patient the legal duty of possessing and exercising that reasonable and ordinary degree of learning, skill, and care possessed and exercised by physicians of good standing of the same school of practice in the same or similar (emphasis added) locality in Montana. A "similar locality in Montana" within the meaning of this rule is a locality of similar geographical location, size, and character in a medical context. Tallbull v. Whitney, 172 M 326, 564 P2d 356 (1977), geographical limit eliminated, Chapel v. Allison, 241 M 83, 785 P2d 204, 47 St. Rep. 101 (1990).

VALUATION

Determination of Fair Market Value Proper — Expert Testimony Properly Allowed: In condemning a parcel of defendants' property for a state highway project, the state's expert testified considering possible depreciation of the remainder of the property based on how the property was being used, the impact of any buildings on the property, no unreasonable impairment of access to the remainder of the property, comparable land sales in the area, and the value of comparable land without highway access. This testimony regarding fair market value was not considered speculative or conjectural, and the District Court properly allowed it. Dept. of Transportation v. Simonson, 2004 MT 60, 320 M 249, 87 P3d 416 (2004).

Qualifications of Real Estate Experts — Differing Valuation: At a hearing concerning the valuation and division of property in the dissolution of Maureen and Joseph's marriage, an agricultural real estate broker testified for Maureen that the parties' ranch was worth $398,000 to $400,000, while a certified and licensed property appraiser testified for Joseph that the ranch was worth $182,500. Joseph contended that the District Court erred in accepting the value of the ranch as testified to by the real estate broker because the broker had no experience as a real property appraiser. Citing Jim's Excavating Serv., Inc. v. HKM Associates, 265 M 494, 878 P2d 248 (1994), the Supreme Court held that whether an adequate foundation has been established for the admission of expert testimony is an issue largely within the discretion of the District Court and that the District Court did not abuse its discretion when it relied upon the testimony of the real estate broker. The Supreme Court therefore affirmed the part of the District Court's order that valued the parties' ranch at $400,000. In re Marriage of Ortiz, 282 M 500, 938 P2d 1308, 54 St. Rep. 446 (1997).

Failure to Disclose Identity of Expert Witnesses During Discovery — Reversible Error: It was an abuse of the trial court's discretion to allow the testimony of a land use consultant, a real estate agent, and an appraiser as to the market value of a parcel of land when none of the witnesses were named in interrogatories as experts. Determining the value of the land required expert testimony beyond the scope of ordinary training and intelligence to aid the trier of fact in determining facts in issue. Failure to disclose the names of the witnesses during discovery constituted a violation of Rule 26(b), M.R.Civ.P. (Title 25, ch. 20), and was reversible error. United First Fed. S&L Ass'n v. White-Stevens, Ltd., 253 M 242, 833 P2d 170, 49 St. Rep. 490 (1992).

Imprecision of Expert Opinion — Relates to Weight of Evidence, Not Admissibility: An expert witness testified that shoe prints found at the scene of a crime were exactly like the defendant's shoes, but that he could not positively identify the defendant's shoes as making the shoe prints. The Supreme Court dismissed the defendant's contention that unless the expert could positively identify the prints to a degree of scientific certainty, the testimony should be inadmissible. The Supreme Court said that relevance means having a tendency to make a fact more or less probable than it would have been without the testimony, and this testimony linked the defendant to the scene of the crime. Any imprecision of expert opinion goes to the weight of evidence, not admissibility. St. v. Smith, 220 M 364, 715 P2d 1301, 43 St. Rep. 449 (1986).

Hearsay Evidence Admissible in Workers' Compensation Court: On appeal from the Workers' Compensation Court, appellant contended opinion evidence of a real estate appraiser not qualified as an expert was hearsay and should not have been admitted. The Supreme Court noted that the Workers' Compensation Court was not bound by common law or statutory rules of evidence and found that the lower court in its findings did not unduly rely on the questionable hearsay evidence offered. Krause v. Sears Roebuck & Co., 197 M 102, 641 P2d 458, 39 St. Rep. 394 (1982).

Property Disposition — Expert Testimony on Valuation: The District Court in a dissolution of marriage proceeding made a substantially equitable property disposition. The husband contended that the trial court erred in determining the per-acre value of the couple's ranch. Conflicting testimony was presented. The husband's expert presented a much higher figure based upon the possibility of subdividing the land. The District Court, as the trier of fact in the trial without a jury, accepted the valuation of the wife's expert. This is not reversible error. The trier of fact has the discretion to give whatever weight he sees fit to the testimony of an expert. Dickerson v. Dickerson, 188 M 492, 614 P2d 521, 37 St. Rep. 1286 (1980).

Expert Appraisal Based on Use Other Than Highest: The court did not err in admitting testimony of the landowner's appraiser relative to valuation of the landowner's property for a recreational use in small tracts rather than as a whole because that portion of the cattle ranch subject to condemnation had a strong potential for river frontage tracts. Highway Comm'n v. Marsh, 175 M 460, 575 P2d 38 (1978).

POLYGRAPHS

Introduction of Polygraph Results in Custody or Visitation Dispute Prohibited: As part of a modification of Robert's visitation rights, the District Court required that Robert undergo a sex offender evaluation. Robert argued that the results of a polygraph test taken as a part of the sex offender evaluation should not be introducible. Citing St. v. Staat, 248 M 291, 811 P2d 1261 (1991), and 37-62-302 (now repealed), the Supreme Court held that the results of a polygraph test taken as part of a court-ordered sex offender evaluation would not be admissible in subsequent proceedings in the case. In re Marriage of Njos/Allard, 270 M 54, 889 P2d 1192, 52 St. Rep. 74 (1995), followed in St. v. Anderson, 1999 MT 58, 293 M 472, 977 P2d 315, 56 St. Rep. 243 (1999).

Polygraph Results Inadmissible: Iocca, Baugh, and the defendant lived together until Iocca's death. Shortly after the death, both Baugh and the defendant fled the state. Authorities apprehended Baugh and convicted him of deliberate homicide. Later the authorities apprehended the defendant and convicted him of obstructing justice by assisting Baugh in the burial of Iocca. Before the defendant's trial, Baugh submitted to a polygraph examination at which time he asserted that he alone had murdered and buried Iocca. The defendant attempted to introduce the result of the polygraph test. The Supreme Court held that the only thing the polygraph result can accomplish in this instance is to support the credibility of Baugh as to his testimony. Baugh's credibility is not a fact in issue in this action; thus, the opinion of the polygraph operator as to the truthfulness of the statements made does not fall within the scope of Rule 702, M.R.Ev. St. v. Beachman, 189 M 400, 616 P2d 337, 37 St. Rep. 1558 (1980).

Polygraph Test Results — Expert Testimony of Polygraphists: The defendant in a deliberate homicide case appealed the trial court granting of a motion in limine to prevent the introduction of expert testimony regarding polygraph test results of a friend of the defendant who had accompanied the defendant as a passenger in the defendant's car on the night of the shooting. The Supreme Court said that if the trial judge's ruling that as matter of law the testimony of the polygraph examiner was inadmissible was a correct ruling, it was not error for the District Court to refuse to consider the defendant's offer of proof or for it to refuse to admit into evidence this particular area of testimony and evidence. The Montana rule is that the results of polygraph examination are not admissible as evidence in a criminal trial. The polygraph test results in this case do not fall into the same category as other scientific evidence that is admissible to assist the

trier of fact to understand the evidence or to determine a fact in issue. Here only the friend's understanding of the defendant's motives could be established by the test, and that was not an issue in the case. St. v. Bashor, 188 M 397, 614 P2d 470, 37 St. Rep. 1098 (1980).

Law Review Articles

Into the Twilight Zone: Admissibility of Scientific Expert Testimony in Montana After Daubert, Sterup, 58 Mont. L. Rev. 465 (1997).

Expert Testimony in Child Sexual Abuse Cases in Montana: A Proposal for Change, Harrison, 54 Mont. L. Rev. 297 (1993).

After Abolition: The Present State of the Insanity Defense in Montana, Bender, 45 Mont. L. Rev. 133 (1984).

The Highway Patrol Officer as Expert Witness, Tanzer, 44 Mont. L. Rev. 251 (1983).

Montana Supreme Court Survey—Civil Procedure and Evidence, Dyrud, 42 Mont. L. Rev. 343 (1981).

A Model for Validating an Expert's Opinion in Medical Negligence Cases, Smith, 26 J. Legal Med. 207 (2005).

Beyond Admissibility: A Practical Look at the Use of Eyewitness Expert Testimony in the Federal Courts, Overbeck, 80 N.Y.U. L. Rev. 1895 (2005).

Juror Understanding of DNA Evidence: An Empirical Assessment of Presentation Formats for Trace Evidence With a Relatively Small Random-Match Probability, Nance & Morris, 34 J. Legal Stud. 395 (2005).

General Acceptance Versus Scientific Soundness: Mad Scientists in the Courtroom, Barnes, 31 Fla. St. U.L. Rev. 303 (2004).

What Happens When Dirty Harry Becomes an (Expert) Witness for the Prosecution?, Moreno, 79 Tul. L. Rev. 1 (2004).

Psychiatric Evidence on Trial, Davoli, 56 SMU L. Rev. 2191 (2003).

Reliability Under Rule 702: A Specialized Application of 403, Sharpe, 34 Seton Hall L. Rev. 289 (2003).

Language and Logic in Expert Testimony: Limiting Expert Testimony by Restrictions of Function, Reliability, and Form, Strong, 71 Or. L. Rev. 349 (1992).

The Need for an Appropriate Standard for Admission of Expert Witness Testimony in Toxic Tort Cases, Hunt, 16 Am. J. Trial Advoc. 573 (1992).

Expert Testimony on the Reliability of Eyewitness Identifications: A Critical Analysis of Its Admissibility, 54 Mo. L. Rev. 733 (1989).

The Use of an Economist's Testimony in Assessing Damages for Wrongful Death Under the New Federal Rules of Evidence, 99 Temple L. Q. 912 (1976).

Collateral References

Criminal Law *key* 477 through 481; Evidence *key* 747, et seq., 1505, et seq.

32 C.J.S. Evidence §546(60) through (64).

31A Am. Jur. 2d Expert and Opinion Evidence §§1, et seq., 10, 17, 84.

Admissibility and weight of voice spectrographic analysis evidence. 95 ALR 5th 471.

Admissibility of expert testimony as to susceptibility of defendant to inducement for purpose of establishing entrapment defense. 70 ALR 5th 491.

Admissibility of expert testimony regarding question of domestic law. 66 ALR 5th 135.

Admissibility of expert or opinion evidence of battered-woman syndrome on issue of self-defense. 58 ALR 5th 749.

Admissibility of expert testimony concerning domestic-violence syndromes to assist jury in evaluating victim's testimony or behavior. 57 ALR 5th 315.

Necessity of expert testimony on issue of permanence of injury and future pain and suffering. 20 ALR 5th 1.

Propriety of questioning expert witness regarding specific incidents or allegations of expert's unprofessional conduct or professional negligence. 11 ALR 5th 1.

Admissibility of expert opinion stating whether a particular knife was, or could have been, the weapon used in a crime. 83 ALR 4th 660.

Right of indigent defendant in state criminal case to assistance of ballistics experts. 71 ALR 4th 638.

Propriety of allowing state court civil litigant to call expert witness whose name or address was not disclosed during pretrial discovery proceedings. 58 ALR 4th 653.

Necessity of expert testimony to show standard of care in negligence action against insurance agent or broker. 52 ALR 4th 1232.

Admissibility at criminal prosecution of expert testimony on battering parent syndrome. 43 ALR 4th 1203.

Admissibility and weight of bloodgrouping tests in disputed paternity cases. 43 ALR 4th 579.

Admissibility of expert testimony as to criminal defendant's propensity toward sexual deviation. 42 ALR 4th 937.

Admissibility, at criminal prosecution, of expert testimony on rape trauma syndrome. 42 ALR 4th 879.

Consumption or destruction of physical evidence due to testing or analysis by prosecution's expert as warranting suppression of evidence or dismissal of case against accused in state court. 40 ALR 4th 594.

Admissibility of evidence of fingernail comparisons in criminal case. 40 ALR 4th 575.

Propriety of cross-examining expert witness regarding his status as "professional witness". 39 ALR 4th 742.

Necessity of expert testimony to establish negligence of media defendant in defamation action by private individual. 37 ALR 4th 987.

Admissibility of evidence as to linguistics or typing style (forensic linguistics) as basis of identification of typist or author. 36 ALR 4th 598.

Admissibility of expert testimony as to modus operandi of crime—modern cases. 31 ALR 4th 798.

Admissibility of testimony that bullet could or might have come from particular gun. 31 ALR 4th 486.

Admissibility of expert or opinion evidence as to adequacy of warning provided to user of product. 26 ALR 4th 377.

Admissibility and weight, in criminal case, of expert or scientific evidence respecting characteristics and identification of human hair. 23 ALR 4th 1199.

Admissibility of expert or opinion testimony concerning identification of skeletal remains. 18 ALR 4th 1294.

Admissibility of expert or opinion testimony on battered wife or battered woman syndrome. 18 ALR 4th 1153, superseded by 58 ALR 5th 749.

Propriety and prejudicial effect of informing jury that witness in criminal prosecution has taken polygraph test. 15 ALR 4th 824.

Admissibility and necessity of expert testimony of expert evidence as to standards of practice and negligence in malpractice action against attorney. 14 ALR 4th 170.

Propriety in medical malpractice case of admitting testimony regarding physician's usual custom or habit to establish nonliability. 10 ALR 4th 1243.

Admissibility of expert or opinion evidence that product is or is not defective, dangerous, or unreasonably dangerous. 4 ALR 4th 651.

Necessity of expert testimony to show malpractice of architect. 3 ALR 4th 1023.

Admissibility of social worker's expert testimony on custody issue. 1 ALR 4th 837.

Admissibility of expert medical testimony on battered child syndrome. 98 ALR 3d 306.

Necessity and sufficiency of expert evidence to establish existence and extent of physician's duty to inform patient of risks of proposed treatment. 52 ALR 3d 1084.

Necessity of expert evidence to support action against hospital for injury to or death of patient. 40 ALR 3d 515.

Malpractice testimony: competency of physician or surgeon from one locality to testify, in malpractice case, as to standard of care required of defendant practicing in another locality. 37 ALR 3d 420.

Locality rule as governing hospital's standard of care to patient and expert's competency to testify thereto. 36 ALR 3d 440.

Opinion testimony as to speed of motor vehicle based on skid marks and other facts. 29 ALR 3d 248.

Necessity and admissibility of expert testimony as to credibility of witness. 20 ALR 3d 684.

Admissibility, in civil case, of expert or opinion evidence as to proposed witness' inability to testify. 11 ALR 3d 1360.

Expert or opinion evidence as to speed based on appearance or condition of motor vehicle after accident. 93 ALR 2d 287.

Right to elicit expert testimony from adverse party called as witness. 88 ALR 2d 1186.

Expert and opinion evidence as to cause or origin of fire. 88 ALR 2d 230, superseded by 85 ALR 5th 69 and 85 ALR 5th 187.

Qualification of nonmedical psychologist to testify as to mental condition or competency. 78 ALR 2d 919, superseded by 72 ALR 5th 529.

Compelling expert to testify. 77 ALR 2d 1182, §3 superseded by 66 ALR 4th 213.

Qualification as expert to testify as to findings or results of scientific test to determine alcoholic content of blood. 77 ALR 2d 971.

Admissibility of opinion evidence as to cause of death, disease, or injury. 66 ALR 2d 1082.

Admissibility of opinion evidence as to point of impact or collision in motor vehicle accident case. 66 ALR 2d 1048.

Right of physician, notwithstanding physician-patient privilege, to give expert testimony based on hypothetical question. 64 ALR 2d 1056.

Admissibility, in homicide prosecution, of opinion evidence that death was or was not self-inflicted. 56 ALR 2d 1447.

Party litigant in civil personal injury or death case as bound by conflicting testimony of his own medical witnesses. 53 ALR 2d 1229.

Chiropractor's competency as expert in personal injury action as to injured person's condition, medical requirements, nature and extent of injury, and the like. 52 ALR 2d 1384.

Admissibility of opinion of medical expert as affected by his having heard the person in question give the history of his case. 51 ALR 2d 1051.

Cross-examination of expert witness as to fees, compensation, and the like. 33 ALR 2d 1170.

Necessity of expert testimony to show causal connection between medical treatment necessitated by injury for which defendant is liable and allegedly harmful effects of such treatment. 27 ALR 2d 1263.

Expert evidence to identify gun from which bullet or cartridge was fired. 26 ALR 2d 892.

Proof of identity of person or thing where object, specimen, or part is taken from a human body, as basis for admission of testimony or report of expert or officer based on such object, specimen, or part. 21 ALR 2d 1216, superseded by 76 ALR 5th 1, 77 ALR 5th 201, 78 ALR 5th 1, and 79 ALR 5th 237.

2 Wigmore §§555 through 571; 7 Wigmore §§1917 through 2028.

Rule 703. Basis of opinion testimony by experts.

Commission Comments

This rule is identical to Federal and Uniform Rules (1974) Rule 702. It is concerned with the sources of information upon which an expert may rely in forming an opinion. Rule 705 is concerned with when those particular sources of information should be placed before the trier of fact.

According to the Advisory Committee's Note to Federal Rule 703, 56 F.R.D. 183, 283 (1972), there are three possible sources upon which an expert may base his opinion. The first, as indicated in the rule, is facts or data perceived by the expert which he may testify to as part of his personal knowledge. The second, also indicated in the rule, is facts or data made known to the expert at the trial, either through listening to other testimony or a hypothetical question. *Id.* Therefore, the first sentence of this rule allows the traditional bases or foundation upon which an expert may rest his opinion.

The second sentence of Rule 703 provides the third source of information and allows information which "...consists of presentation of data to the expert outside of court and other than by his own perception". Advisory Committee's Note, *supra* 56 F.R.D. at 283. As the rule indicates, this source of information need not be admissible evidence if it meets the test of a type of fact or data reasonably relied upon by experts in that particular field. The Advisory Committee's Note also indicates that this step was taken "to broaden the bases for expert opinion beyond that current in many jurisdictions and to bring the judicial practice into line with the practice of the experts themselves when not in court". *Id.* The comment to a similar provision, California Evidence Code, Section 801(b), indicates that because of the wide variety of information upon which an expert may base his opinion, he must be able to rely on information that may not be admissible in evidence if he is going to give an opinion which will aid the jury. The comment also states "...It is not practical to formulate a detailed statutory rule that lists all of the matters upon which an expert may properly base his opinion, for it would be necessary to prescribe specific rules applicable to each field of expertise. This is clearly impossible...". The solution to this problem is the general requirement found in the rule and to allow the court to determine whether or not the sources of information are reliable.

The first sentence of this rule is consistent with existing Montana law. It has always been required that an expert have some basis for this opinion. Story v. Maclay, 3 Mont. 480, 483 (1880). An expert may base his opinion upon personal observation. Nesbitt v. City of Butte, 118 Mont. 84, 93, 163 P2d 251 (1945). Montana law also supports the rule that an expert may base his opinion upon hypothetical questions. Pickett v. Kryger, 151 Mont. 87, 96, 439 P2d 57 (1968).

Also, case law supports the rule which allows an expert to base his opinion upon facts testified to by other witnesses. State v. Peel, 23 Mont. 358, 364, 59 P 169 (1899).

Montana law has allowed some experts to base their opinion upon inadmissible evidence. Physicians have been allowed to give opinions based upon the statements of their patients (Kelly v. John R. Daily Co., 56 Mont. 63, 78, 181 P 326 (1919) and Bingham v. Nat'l Bank of Montana, 105 Mont. 159, 173, 72 P2d 90 (1937)) or upon the information given by nurses (In re Sales' Estate, 108 Mont. 202, 207, 89 P2d 1043 (1939)) or upon the reports of other physicians. Klaus v. Hilberry, 157 Mont. 277, 285, 485 P2d 54 (1971); Pachek v. Norton Concrete Co., 160 Mont. 16, 22, 499 P2d 766 (1972); and Bush v. Wardell, (165 Mont. 312, 318, 528 P2d 213 (1974)). Experts in land valuation have been allowed to base their opinion upon hearsay as to comparable sales. State Highway Comm'n v. Greenfield, 145 Mont. 164, 169, 399 P2d 989 (1965) and State Fish and Game Comm'n v. District Court, 163 Mont. 298, 301, 517 P2d 359 (1973). Further, it is apparent that highway patrolmen are allowed to reconstruct and give the cause of an accident based upon their investigation and interviews of persons involved in the accident. State v. Deshner, 158 Mont. 188, 193, 489 P2d 1290 (1971). Therefore, the second sentence of Rule 703 is consistent with existing Montana law but expands the rule of the cases just cited to allow *any* expert to base his opinion upon reliable, inadmissible information.

COMMISSION COMMENT TO JUNE 1990 AMENDMENT

The revision establishes gender neutral format only. No substantive change.

Compiler's Comments

1990 Amendment: Substituted gender neutral language for gender specific language. Amendment effective June 7, 1990.

Case Notes

Test Whether Witness May Testify as Expert on Child Abuse: Factors in the three-part test set out in St. v. Scheffelman, 250 M 334, 820 P2d 1293 (1991), for whether a witness may testify as an expert on child abuse are: (1) the expert must have extensive first-hand experience with children who both have and have not been sexually abused; (2) the expert must have a thorough and current knowledge of the professional literature on child abuse; and (3) the expert must have objectivity and neutrality regarding individual cases. In Riggs's case, the state called a child abuse expert who met the qualifications but who had a therapeutic relationship with one of the victims to testify concerning interviewing techniques applied in a sexual abuse investigation. Riggs contended that the trial court erred by allowing the expert to testify and by limiting the defense's ability to cross-examine the expert. The Supreme Court disagreed on both issues. Given the limited scope of the expert's testimony, the objectivity with which the expert could testify regarding interviewing techniques was not susceptible to being compromised by the therapeutic relationship with one of the victims, so the trial court did not err in qualifying the witness as an expert. Additionally, Riggs was afforded a fair and full opportunity to expose any potential bias of the expert, so Riggs's right to confront witnesses was not infringed. St. v. Riggs, 2005 MT 124, 327 M 196, 113 P3d 281 (2005). See also St. v. Whitlow, 285 M 430, 949 P2d 239 (1997).

No Error in Disallowing Expert to Testify Regarding Nonwitness Third-Party Experiences With Product Given Minimal Probative Value: Plaintiffs sought to introduce testimony from an expert regarding the functioning of a type of subflooring that was installed in plaintiffs' home, resulting in a squeaky floor. The District Court allowed the expert to testify concerning the expert's experiments on pieces of the subflooring and concerning the experience of another witness who previously testified to a squeaky floor after using the subflooring, but the court did not allow the expert to speak to the experiences of nonwitness third parties concerning other experiences with the subflooring. On appeal, plaintiffs contended that the expert's testimony on other incidents of subflooring failures should have been allowed because they formed the basis for the expert's opinion and demonstrated notice. The Supreme Court concluded that excluding the testimony was not an abuse of the trial court's discretion. Although under this rule, an expert witness may testify to evidence that might be otherwise inadmissible, if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice or confusion, the evidence may be excluded under this rule. With the expert's foundational testimony already in evidence, the probative value of the expert's testimony regarding experiences of nonwitness third parties would likely have been minimal, particularly since plaintiffs had declined the opportunity to cross-examine the witness who testified to a squeaky floor after using the subflooring. Tripp v. Jeld-Wen, Inc., 2005 MT 121, 327 M 146, 112 P3d 1018 (2005). See also Kissock v. Butte Convalescent Center, 1999 MT 322, 297 M 307, 992 P2d 1271 (1999).

Improper Use of Hearsay to Bolster Expert Testimony: This rule anticipates that experts form opinions and inferences based on first-hand observation, facts presented at trial, and information obtained outside the courtroom prior to trial, and an expert may rely on inadmissible evidence when forming an opinion. However, the rule does not allow an expert witness to repeat inadmissible out-of-court statements to bolster the expert's opinions before the jury. Here, an officer provided accident reconstruction evidence gleaned from interviews with others on direct defense examination for the purpose of asserting the truth of out-of-court statements and fortifying the conclusions of the officer as a result of the accident investigation. The hearsay testimony was improperly allowed, constituting reversible error. Perdue v. Gagnon Farms, Inc., 2003 MT 47, 314 M 303, 65 P3d 570 (2003), followed in St. v. Bailey, 2004 MT 87, 320 M 501, 87 P3d 1032 (2004).

Measure of Loss as Jury Question: Alternative approaches to measure loss are within the meaning of Rule 401, M.R.Ev., and it is up to the jury to decide which approach is more or less probable as a measure of loss. It was not error for the trial court to deny plaintiff's motion in limine to preclude a defense expert witness from testifying as to an alternate measure of loss. Simmons Oil Corp. v. Wells Fargo Bank, N.A., 1998 MT 129, 289 M 119, 960 P2d 291, 55 St. Rep. 508 (1998).

Lack of Foundation for Opinion on Validity of Child's Sexual Abuse Statements — Testimony Improper: In answer to a voir dire inquiry regarding generally accepted criteria used in validating a child's allegations of sexual abuse, the state's medical expert responded that the criteria involved reviewing the child's statements and determining the consistency of those statements. However, the expert formed her opinion of consistency based largely on the children's limited personal statements, without reviewing any of the children's written statements or medical reports, viewing videotaped depositions, or talking to any of the investigators assigned to the case. Because the expert's opinion was not based on the generally accepted criteria for validating such statements, her testimony was improperly allowed. St. v. Henderson, 265 M 454, 877 P2d 1013, 51 St. Rep. 606 (1994).

Medical Expert Who Is Not Patient's Attending Physician — Reading From Patient's Medical Records: It was not an abuse of discretion to allow two doctors testifying as experts for defendant to read from the medical records of plaintiff, even though neither was plaintiff's attending physician. The records were admissible under this rule because the doctors were experts who followed the practice of medical experts in basing their opinions on medical records. Mason v. Ditzel, 255 M 364, 842 P2d 707, 49 St. Rep. 986 (1992).

Social Worker With Only Sexual Abuse Treatment Experience Not Qualified as Expert — Reversible Error: In determining that the District Court improperly allowed into evidence opinion testimony by a social worker on whether the victim had been sexually abused, the Supreme Court held that allowing the testimony constituted reversible error because the social worker had no experience in treating children who had not been sexually abused and thus had no controlled standard that allowed her to arrive at the conclusion that abuse had occurred. St. v. Scheffelman, 250 M 334, 820 P2d 1293, 48 St. Rep. 1023 (1991), followed in St. v. Whitlow, 285 M 430, 949 P2d 239, 54 St. Rep. 1227 (1997).

Expert Commenting on Practices of Insurance Company That Never Employed Him: The Supreme Court held that the fact that the plaintiff's expert witness had never worked for the defendant insurance company did not preclude him from commenting on the company's practices. The Supreme Court stated that the lower court had broad discretion with respect to expert testimony and that the question of the witness's nonemployment by the defendant only went to the weight to be given his testimony. Schneider v. Minn. Mut. Life Ins. Co., 247 M 334, 806 P2d 1032, 48 St. Rep. 224 (1991).

Expert's Testimony Regarding Defendant's Statements Inadmissible: The defendant desired to have his psychiatric expert testify as to the defendant's statements to him describing the events surrounding the alleged crime. The Supreme Court held that the statements were properly excluded because the defendant's testimony was not reliable enough to overcome the possible prejudicial effect of the evidence. St. v. Van Dyken, 242 M 415, 791 P2d 1350, 47 St. Rep. 835 (1990).

Field Investigation of User Experience as Appropriate in Forming Opinion on Product Design: Plaintiff qualified a witness as an expert in vehicle transfer case design, and the expert testified regarding a conversation with a technician about a similar accident the technician had involving a transfer case that was the same as the transfer case in question. Field investigation of user experience is an appropriate method for an expert to form opinions as to whether a particular transfer case design is effective or dangerous, and the District Court did not abuse its discretion in allowing the expert's testimony concerning one of the bases upon which he formed his opinion,

despite defendant's claim of hearsay. Krueger v. Gen. Motors Corp., 240 M 266, 783 P2d 1340, 46 St. Rep. 2114 (1989).

Medical Records Prepared by Predecessor to Testifying Doctor — Not Inadmissible Hearsay: Medical records prepared by the predecessor of a testifying doctor that were used as part of his testimony did not constitute inadmissible hearsay evidence because a foundation was laid wherein the testifying doctor stated that he would never treat a patient of the predecessor doctor without first reviewing the patient's records. Thus, the records constitute records both for the purposes of medical treatment under Rule 803, M.R.Ev., and data relied on by experts when forming opinions on the subject under Rule 703, M.R.Ev. Garza v. Peppard, 222 M 244, 722 P2d 610, 43 St. Rep. 1233 (1986). See also Palmer v. Farmers Ins. Exch., 233 M 515, 761 P2d 401, 45 St. Rep. 1694 (1988).

Expert Testimony Regarding Defendant's Blood Alcohol Level: Both the defendant and the prosecution presented expert witness testimony regarding defendant's blood alcohol level at the time of an automobile accident that killed defendant's companion. Defendant challenged the qualifications of the State's expert. The Supreme Court observed that both experts were testifying as to hypothetical averages which would result from drinking certain amounts of alcohol under certain conditions. The hypothetical questions were within the scope of the evidence presented. The trial court instructed the jury that it could reject an expert's opinion. Therefore, the Supreme Court held that the District Court did not err in admitting the expert testimony. St. v. Gould, 216 M 455, 704 P2d 20, 42 St. Rep. 946 (1985).

Involuntary Commitment — Appointment of Two Professionals — One May Testify: The lower court appointed two psychiatrists—one to examine G.S. and one to present those findings at the commitment hearing since the examining doctor would be unavailable. The Supreme Court held that the lower court did not err in allowing the second psychiatrist to offer an opinion on the subject's mental condition without formally examining the patient, but relying, instead, on the first doctor's report. Of critical importance is the fact that the doctor who ultimately did diagnose G.S.'s mental condition was available for cross-examination. The critical requirement of professional justification was satisfied. Rule 703, Montana Rules of Evidence, clearly provides that one doctor can state his expert opinion based on another doctor's report. Section 46-14-213(1) does not apply since the Montana Rules of Civil Procedure apply to involuntary commitment procedures. In re G.S., 215 M 384, 698 P2d 406, 42 St. Rep. 451 (1985).

Admissible for Expert to Give Opinion on Whether Violation of Law Occurred: It was not inadmissible for a Deputy Sheriff qualified as an expert to give his opinion on whether a violation of the law was the cause of an automobile accident. Adequate opportunity was given the plaintiff to elicit any assumptions or facts underlying the expert opinion. Foreman v. Minnie, 211 M 441, 689 P2d 1210, 41 St. Rep. 1478 (1984), followed in Hart-Anderson v. Hauck, 239 M 444, 781 P2d 1116, 46 St. Rep. 1817 (1989).

Admission of Opinion Testimony Not Based on Personal Observation — Not Reversible Error: In a custody dispute, when a social worker testified on the children's environment in their mother's home even though the social worker had not been to the home, the Supreme Court ruled that this was not reversible error because there was no evidence that the trial judge had relied on the social worker's testimony on this matter since there was other similar evidence in the record. Connolly v. Connolly, 209 M 298, 680 P2d 568, 41 St. Rep. 720 (1984).

No Autopsy — Medical Testimony as to Cause of Death: Testimony showed that no autopsy was performed on persons defendant purposely hit and killed with auto he was driving while they were riding a bicycle. The medical experts stated that their conclusion that the collision brought about the injuries which caused death was an educated guess. The medical testimony also showed that the type of injuries suffered was consistent with the injuries one might expect to receive if struck by an auto. The weight of the testimony was for the jury, and the testimony was properly admitted. St. v. Woods, 203 M 401, 662 P2d 579, 40 St. Rep. 533 (1983).

Property Disposition — Expert Testimony on Valuation: The District Court in a dissolution of marriage proceeding made a substantially equitable property disposition. The husband contended that the trial court erred in determining the per-acre value of the couple's ranch. Conflicting testimony was presented. The husband's expert presented a much higher figure based upon the possibility of subdividing the land. The District Court, as the trier of fact in the trial without a jury, accepted the valuation of the wife's expert. This is not reversible error. The trier of fact has the discretion to give whatever weight he sees fit to the testimony of an expert. Dickerson v. Dickerson, 188 M 492, 614 P2d 521, 37 St. Rep. 1286 (1980).

Expert Qualification and Testing — Timely Objection Required: Plaintiff contends on appeal that the defense's expert witness was not properly qualified and that the experiment conducted by the expert was under conditions differing from those on the night of the accident. These

objections were not timely made at the trial level, however, and cannot be raised on appeal. Penn v. Burlington N., Inc., 185 M 223, 605 P2d 600, 37 St. Rep. 93 (1980).

Opinion Testimony Based on Hearsay: Under certain circumstances an expert witness giving medical testimony may offer an opinion based on hearsay information. Hunsaker v. Bozeman Deaconess Foundation, 179 M 305, 588 P2d 493, 35 St. Rep. 1647 (1978).

Hypothetical Question Not Required: A hypothetical question is not a prerequisite in the testimony of an expert witness. It is only required that the witness testify as to the facts upon which he bases his opinion. St. v. Hallam, 175 M 492, 575 P2d 55 (1978).

Expert Appraisal Based on Use Other Than Highest: The court did not err in admitting testimony of the landowner's appraiser relative to valuation of the landowner's property for a recreational use in small tracts rather than as a whole because that portion of the cattle ranch subject to condemnation had a strong potential for river frontage tracts. Highway Comm'n v. Marsh, 175 M 460, 575 P2d 38 (1978).

Law Review Articles

Expert Testimony in Child Sexual Abuse Cases in Montana: A Proposal for Change, Harrison, 54 Mont. L. Rev. 297 (1993).

Montana Supreme Court Survey—Civil Procedure and Evidence, Dyrud, 42 Mont. L. Rev. 343 (1981).

Montana Supreme Court Survey—Civil Procedure and Evidence, Young & McLean, 41 Mont. L. Rev. 293 (1980).

Admissibility of Expert Opinion Testimony, Luck, 37 Mont. L. Rev. 267 (1976).

General Acceptance Versus Scientific Soundness: Mad Scientist in the Courtroom, Barnes, 31 Fla. St. U.L. Rev. 303 (2004).

Hearsay Basis of Psychiatric Opinion Testimony: A Critique of Federal Rules of Evidence 703, O'Toole, 51 S.C. L. Rev. 129 (1977).

Collateral References

Criminal Law *key* 482 through 489; Evidence *key* 547 through 557.

32 C.J.S. Evidence §§549 through 560.

31A Am. Jur. 2d Expert and Opinion Evidence §§2, 4, 18, 25, et seq., 61, 86; 81 Am. Jur. 2d Witnesses §821.

Admissibility of testimony of expert, as to basis of his opinion, to matters otherwise excludable as hearsay—state cases. 89 ALR 4th 456.

Admissibility, in criminal cases, of evidence of electrophoresis of dried evidentiary bloodstains. 66 ALR 4th 588.

Thermographic tests: admissibility of test results in personal injury suits. 56 ALR 4th 1105.

Admissibility, weight, and sufficiency of blood-grouping tests in criminal cases. 2 ALR 4th 500.

Admissibility in criminal case, of results of residue detection test to determine whether accused or victim handled or fired gun. 1 ALR 4th 1072.

Admissibility on issue of sanity of expert opinion based partly on medical, psychological, or hospital reports. 55 ALR 3d 551.

Air pollution: evidence as to Ringelmann chart observations. 51 ALR 3d 1026.

Admissibility of hearsay evidence as to comparable sales of other land as basis for expert's opinion as to land value. 12 ALR 3d 1046.

Admissibility of X-ray report made by physician taking or interpreting X-ray pictures. 6 ALR 2d 406.

What information is of type "reasonably relied upon by experts" within Rule 703, Federal Rules of Evidence, permitting expert opinion based on information not admissible in evidence. 49 ALR Fed. 363.

2 Wigmore §§672 through 686; 7 Wigmore §1922.

Rule 704. Opinions on ultimate issue.

Commission Comments

This rule is identical to Federal and Uniform Rules (1974) Rule 704. Its effect is to specifically abolish the rule against opinions on ultimate issues of fact not currently followed in Montana. Therefore, this rule is consistent with existing Montana law. Kelly v. John R. Daily Co., 56 Mont. 63, 79, 181 P 326 (1919); State v. Shannon, 95 Mont. 280, 286, 26 P2d 360 (1933); State v. Campbell, 146 Mont. 251, 258, 405 P2d 978 (1965); Rude v. Neal, 165 Mont. 520, 525, 530 P2d 428 (1974); and McGuire v. Nelson, 167 Mont. 188, 536 P2d 768 (1975).

The Advisory Committee's Note to Federal Rule 704, 56 F.R.D. 183, 284 (1972), indicates that the "basic approach to opinions, lay and expert, in these rules is to admit them when helpful to the trier of fact". The language of the rule allows lay witnesses to give their opinions on an ultimate issue if the requirements of Rule 701 are met. In any case, the rule is not intended to allow all opinions and would exclude those "which would merely tell the jury what result to reach...". Advisory Committee's Note, *supra*, 56 F.R.D. at 285. In other words, the Commission intends this rule to follow the existing Montana practice of not allowing the witness to give a legal conclusion or to apply the law to the facts in his answer. Daniels v. Andes Ins. Co., 2 Mont. 78, 88 (1874); Allen v. Bearcreek Coal Co., 43 Mont. 269, 281, 115 P 673 (1911); Parsons v. Rice, 81 Mont. 509, 526, 264 P 396 (1928); and McGonigle v. Prudential Ins. Co., 100 Mont. 203, 219, 46 P2d 687 (1935).

Finally, it should be noted that this rule is also consistent with case law which holds that either lay or expert opinion testimony may be rejected by the trier of fact. Reser v. Ziebarth, 59 Mont. 7, 9, 195 P 98 (1928); Watts v. Billings Bench Water Ass'n, 78 Mont. 199, 219, 253 P 260 (1927); Putman v. Pollei, 153 Mont. 406, 411, 457 P2d 776 (1969); and Richardson v. Ford Motor Co., 163 Mont. 347, 353, 516 P2d 1153 (1973). Therefore, if the jury properly performs its duty, there should be no fear that an opinion admissible under this rule constitutes an invasion of the province of the jury.

Case Notes

Qualified Expert May Testify — Application of Expert Field to Facts Immaterial — Daubert Hearing Not Required: In a deposition, a documents expert concluded that defendant authored various threatening letters, but the expert could give only representative details of the methods of analysis by which the conclusion was reached and could explain neither how nor why the conclusion was reached that defendant authored the letters. Defendant asserted that the District Court should have held a hearing pursuant to Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 US 579 (1993), to determine the reliability of the field of expert methods, but the Supreme Court disagreed. The Daubert test does not require a District Court to determine whether the expert reliably applied expert methods to the facts. Rather, if a reliable field helps the trier of fact and the court determines that that expert is a qualified expert in the field, the expert may testify. Under a Daubert analysis, the reliability of the expert's application of the expert field to the facts is immaterial in determining the reliability of the expert field, so in this case, a Daubert hearing was not required. Additionally, this rule allowed the expert to testify to the ultimate conclusion of who wrote the letters. St. v. Clifford, 2005 MT 219, 328 M 300, 121 P3d 489 (2005).

Expert Testimony Not Targeting Defendant's State of Mind During Crimes Properly Admitted: In Sandrock's trial for sexual intercourse without consent, incest, and witness tampering, Sandrock maintained that he was suffering from a mental disease or defect and could not have committed the crimes because he could not have formed the requisite mental state. A medical expert testified that although Sandrock was an oddball, he knew right from wrong when he wrote several letters to his wife outlining his intended actions. Sandrock moved for a mistrial because the expert's testimony violated the prohibition on ultimate issue testimony. The motion was denied, and on appeal, the Supreme Court affirmed. Although a medical expert may not offer an opinion on the ultimate issue of whether a defendant had a particular state of mind that is an element of an offense, the expert may state the nature of a medical examination and the medical or psychological diagnosis of the defendant's mental condition, and testimony in the form of an opinion or inference that would otherwise be admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact. Here, the expert's testimony did not target the ultimate issue of whether Sandrock actually possessed the requisite mental states at the time that the crimes were committed, so the mistrial motion was properly denied. St. v. Sandrock, 2004 MT 195, 322 M 231, 95 P3d 153 (2004). See also St. v. Santos, 273 M 125, 902 P2d 510 (1995).

Legal Conclusions by Expert Witness Inadmissible: Under Rule 705, M.R.Ev., an expert may testify as to opinions or inferences, and under this rule, an expert may present opinions and inferences that embrace the ultimate issues to be decided by the jury. However, legal conclusions offered by an expert invade the province of the jury and can be highly prejudicial. Therefore, expert opinion that states a legal conclusion or applies the law to the facts is inadmissible. Perdue v. Gagnon Farms, Inc., 2003 MT 47, 314 M 303, 65 P3d 570 (2003).

Refusal of Opinion Testimony Regarding Defendant's Mental State Not Erroneous: The District Court refused to admit the opinion testimony of two doctors regarding Hoffman's mental state at the time that Hoffman committed aggravated assault. Hoffman asserted that under Rule 702, M.R.Ev., and this rule, the court erred by precluding the opinion testimony, in

violation of due process. However, the language of 46-14-213 and the decision in St. v. Santos, 273 M 125, 902 P2d 510 (1995), proscribe such testimony and controlled the situation here. The testimony was properly refused. St. v. Hoffman, 2003 MT 26, 314 M 155, 64 P3d 1013 (2003), distinguishing St. v. Fish, 190 M 461, 621 P2d 1072 (1980).

Expert Opinion Testimony Regarding Train Crew's Obligations Allowed: Mickelson was injured when the fire truck that he was driving was struck by a Montana Rail Link (MRL) train and sought damages. At trial, members of the train crew were allowed to express their opinions as to the cause of the accident, including the obligations and duties Mickelson and the train crew had at the railroad crossing. Mickelson claimed error because opinions about statutory or regulatory violations had been specifically excluded by the trial court pursuant to Heltborg v. Modern Mach., 244 M 24, 795 P2d 954, 47 St. Rep. 1254 (1990). The Supreme Court noted that under Heltborg, an expert may not state a legal conclusion or apply the law to the facts in an answer, but the expert may properly testify to the ultimate issue of fact. Here, the District Court did not err in allowing the train crew to testify as to the crew's obligations as they approached the crossing. Mickelson v. Mont. Rail Link, Inc., 2000 MT 111, 299 M 348, 999 P2d 985, 57 St. Rep. 446 (2000).

Highway Patrol Officer's Expert Opinion, in DUI Prosecution, That Driver Being Under the Influence Caused Accident: In a DUI prosecution, admission of a highway patrol officer's testimony that in her opinion, based on her investigation at the scene of defendant's accident and her discussion with defendant soon after the accident, defendant was under the influence of alcohol to an extent that diminished his ability to drive safely was not an abuse of discretion. Her training and experience in accident investigation and reconstruction qualified her as an expert for purposes of giving the opinion. She had been an officer for 8 years, was trained at the Montana Highway Patrol Academy for 12 weeks, had 4 weeks of training in traffic investigation, had attended an accident reconstruction school, had taught accident investigation, had special DUI investigation training and had taken a course on being a DUI detection instructor, was a recognized expert in accident reconstruction, had investigated more than 200 accidents, of which 15% to 20% had involved alcohol, and had participated in more than 100 DUI arrests. Her opinion did not invade the province of the jury by calling for a legal conclusion on the issue of guilt or innocence; she was giving an expert opinion as to the cause of the accident. St. v. Gregoroff, 287 M 1, 951 P2d 578, 54 St. Rep. 1469 (1997).

Victim's Deathbed Statements Admissible as to State of Mind of Victim — Cautionary Instruction Required: As Turner was dying, he made statements to several witnesses to the effect that Fuhrmann stabbed him "on purpose" and that the stabbing was "not an accident". The trial court admitted the statements into evidence. On appeal, Fuhrmann contended that the testimony by the witnesses was inadmissible hearsay because the statements regarding Fuhrmann's intent addressed Fuhrmann's, rather than Turner's, state of mind and thus did not fall within the hearsay exception in Rule 803(3), M.R.Ev. Following St. v. Magruder, 234 M 492, 765 P2d 716 (1988), and St. v. Losson, 262 M 342, 865 P2d 255 (1993), the Supreme Court concluded: (1) Turner's statements that Fuhrmann stabbed him "on purpose" and that the stabbing was "not an accident", if the statements were construed as providing evidence that Turner feared Fuhrmann, could only be construed as providing circumstantial evidence of Turner's fear and, under that construction, would not be considered as hearsay and would be admissible; (2) such statements must be offered only for the purpose of showing the declarant's state of mind and may not be offered for the truth of the matter asserted; and (3) to prevent any potential prejudicial effect on a defendant and to uphold the integrity of both the hearsay rule and the state of mind exception of Rule 803(3), M.R.Ev., a trial court must instruct the jury as to the limited purpose for which it may consider this type of testimony. Nevertheless, in Fuhrmann's case, failure by the court to offer a limiting instruction was harmless error given the overwhelming independent evidence of guilt. St. v. Fuhrmann, 278 M 396, 925 P2d 1162, 53 St. Rep. 966 (1996).

DNA Evidence — Province of Jury Not Invaded on Issue of Identity of Father: Weeks was convicted of sexual intercourse without consent with his stepdaughter. The conviction was based in part upon DNA evidence. Weeks argued that the province of the jury was invaded on the ultimate question of the identity of the perpetrator. The Supreme Court held that Weeks's argument had no merit, noting the language of this rule, the fact that Weeks himself offered statistical probabilities of the DNA match, and case law from another state. St. v. Weeks, 270 M 63, 891 P2d 477, 52 St. Rep. 78 (1995).

Expert Opinion on a Conclusion of Law: In a personal injury suit, the lower court allowed the plaintiff's expert witness to testify on certain issues to be decided by the jury. The Supreme Court held that while testimony on ultimate factual issues is admissible, an expert may not express an

opinion on a conclusion of law. Heltborg v. Modern Mach., 244 M 24, 795 P2d 954, 47 St. Rep. 1254 (1990), followed in Kizer v. Semitool, Inc., 251 M 199, 824 P2d 229, 48 St. Rep. 1115 (1991).

Testimony of Human Rights Commission Compliance Officer Properly Disallowed: Plaintiff in an age discrimination case sought to introduce the record of the hearing in which a compliance officer determined plaintiff had been discriminated against. The District Court properly found that the investigative information was specifically excluded under Rule 803, M.R.Ev. Further, under this rule, the compliance officer was not allowed to testify as an expert regarding his opinion on the ultimate issue because there was sufficient evidence presented from which the jury could make a reasonable determination of whether there was age discrimination. Mahan v. Farmers Union Cent. Exch., Inc., 235 M 410, 768 P2d 850, 46 St. Rep. 96 (1989).

Expert Opinion on Medical Evidence Not an Opinion on Weight and Credibility of Victim's Evidence: A physician's opinion that his medical findings led him to believe victim had been sexually assaulted did not constitute a comment on the weight and credibility of the evidence given by the victim or on the ultimate issue of whether it was defendant who was involved in the rape. St. v. Laird, 225 M 306, 732 P2d 417, 44 St. Rep. 254 (1987).

Attorney as Expert Witness — Not to Advise Jury as to Law of Case: Insurance company argued that the District Court's instructions implying that company's position was frivolous as a matter of law were reinforced by detailed attorney opinion testimony on the law applicable to insurance coverage, in violation of 25-7-102 and this rule. The Supreme Court, citing Energy Oils, Inc. v. Mont. Power Co., 626 F2d 731 (9th Cir. 1980), adopted the finding that admission of opinion testimony as to the legal effect of a contract is erroneous, but in view of the District Court holding that there was insurance coverage as a matter of law, the Supreme Court concluded that counsel's testimony regarding the law of the case did not constitute reversible error under the unique facts of this case. The court found no abuse of discretion in allowing attorneys who appear as expert witnesses to state their opinion on an insurer's duty to evaluate the facts, on what constitutes a reasonable evaluation of the facts, or on how an insurer should have approached the negotiations with the plaintiff; however, as a general rule an attorney cannot advise the jury as to the law of the case. Safeco Ins. Co. v. Ellinghouse, 223 M 239, 725 P2d 217, 43 St. Rep. 1689 (1986), followed in Hart-Anderson v. Hauck, 44 St. Rep. 508 (1987) (opinion withdrawn and replaced by 230 M 63, 748 P2d 937, 45 St. Rep. 18 (1988)). See also Kizer v. Semitool, Inc., 251 M 199, 824 P2d 229, 48 St. Rep. 1115 (1991).

Admissible for Expert to Give Opinion on Whether Violation of Law Occurred: It was not inadmissible for a Deputy Sheriff qualified as an expert to give his opinion on whether a violation of the law was the cause of an automobile accident. Adequate opportunity was given the plaintiff to elicit any assumptions or facts underlying the expert opinion. Foreman v. Minnie, 211 M 441, 689 P2d 1210, 41 St. Rep. 1478 (1984), followed in Hart-Anderson v. Hauck, 239 M 444, 781 P2d 1116, 46 St. Rep. 1817 (1989).

Expert Testimony on Whether Rape Occurred: In a prosecution for sexual intercourse without consent, the County Attorney asked a doctor if he had formed a clinical impression of the victim. The doctor replied that it was his impression that the woman had been raped. The doctor's statement was admissible under this rule, since he was qualified by experience and personal observation. Further, the statement was not sufficiently prejudicial to constitute reversible error. St. v. Dickens, 198 M 482, 647 P2d 338, 39 St. Rep. 1137 (1982).

Opinion as to Objective of Force or Violence: Defense objection, which stated that a prosecution question asking the doctor who examined assault victim if he had an opinion as to what the force applied to victim was designed to do was a question invading the province of the jury, was not adequate to justify exclusion of doctor's opinion, as it was merely another way of saying that the opinion embraced an ultimate issue to be decided by the jury, and this rule provides that such an opinion is not objectionable if otherwise admissible. St. v. Howard, 195 M 400, 637 P2d 15, 38 St. Rep. 1980 (1981), followed in St. v. Dickens, 198 M 482, 647 P2d 338, 39 St. Rep. 1137 (1982), and St. v. Arlington, 265 M 127, 875 P2d 307, 51 St. Rep. 417 (1994).

Wrongful Death Action — Highway Patrolman as Expert in Traffic-Control Devices: In a wrongful death action in which the decedent's surviving spouse brought suit against the State and the state's contractor for negligently failing to warn the decedent of an abrupt edge at the shoulder of a highway construction project, a highway patrol officer was properly qualified as an expert in highway control devices and could offer his opinion as to whether a highway was adequately signed. An expert witness may be qualified by reason of practical experience in an area of special knowledge not shared by mankind in general. Workman v. McIntyre Constr. Co., 190 M 5, 617 P2d 1281, 37 St. Rep. 1637 (1980).

Basis for Investigating Patrolman's Testimony:

In a wrongful death action involving a fatal car accident, it was proper to admit testimony concerning the cause of the accident given by a highway patrolman who had 29 years of experience and who had investigated the accident. Scofield v. Estate of Wood, 211 M 59, 683 P2d 1300, 41 St. Rep. 1212 (1984).

The opinion of the investigating patrolman as to the cause of the accident (failing to yield the right-of-way) is admissible. Here the investigating officer had lost notes made during his investigation and based his opinion on recollection, photographs, and documents he examined during the trial. As long as the cross-examiner is given adequate opportunity to bring forth for the jury's consideration the weaknesses of any assumptions or facts underlying the opinion, the weight to be given the expert's testimony, even on the ultimate issue, is for the jury to determine. Wollaston v. Burlington N., 188 M 192, 612 P2d 1277, 37 St. Rep. 1015 (1980), followed in Jim's Excavating Serv., Inc. v. HKM Associates, 265 M 494, 878 P2d 248, 51 St. Rep. 623 (1994).

Identification of Marijuana: Since the proper identification of marijuana requires chemical testing conducted by a qualified person and since a prosecution witness was properly qualified to give such an opinion based on tests he ran on the substance seized, such testimony was properly received even though it embraced an ultimate issue to be decided by the jury. St. v. Petko, 177 M 229, 581 P2d 425 (1978).

Law Review Articles

Montana Supreme Court Survey—Civil Procedure and Evidence, Dyrud, 42 Mont. L. Rev. 343 (1981).

Collateral References

Criminal Law *key* 450; Evidence *key* 472, 506.

31A Am. Jur. 2d Expert and Opinion Evidence §§2, 13, 14, 130, 132; 81 Am. Jur. 2d Witnesses §821.

Admissibility, in criminal prosecution, of expert opinion allegedly stating whether drugs were possessed with intent to distribute—state cases. 83 ALR 4th 629.

Admissibility of expert testimony that item of clothing or footgear belonged to, or was worn by, particular individual. 71 ALR 4th 1148.

Medical malpractice in performance of legal abortion. 69 ALR 4th 875.

Admissibility of expert testimony as to whether accused had specific intent necessary for conviction. 16 ALR 4th 666.

Admissibility of opinion as to cause of death, disease, or injury. 66 ALR 2d 1082.

Safety of condition, place, or appliance as proper subject of expert or opinion evidence in tort actions. 62 ALR 2d 1426.

Admissibility of opinion evidence as to the cause of an accident or occurrence. 38 ALR 2d 13.

2 Wigmore §673; 7 Wigmore §§1920, 1921.

Rule 705. Disclosure of facts or data underlying expert opinion.

Commission Comments

This rule is identical to Federal and Uniform Rules (1974) Rule 705. Its effect is to abolish the traditional requirement for a hypothetical question. Hypothetical questions have "...been the target of a great deal of criticism as encouraging partisan bias, affording an opportunity for summing up in the middle of a case, and as complex and time consuming". Advisory Committee's Note to Federal Rule 705, 56 F.R.D. 183, 285 (1972). The Commission intends this rule to be consistent with the policy of Article VII, making expert testimony helpful to the trier of fact.

Disclosure of the facts or data underlying an expert's opinion through a hypothetical question or otherwise is initially a matter of discretion with counsel offering the expert witness. If the court believes that the expert's opinion is not helpful without the disclosure of the basis of that opinion, it then has the discretion to order such a disclosure. Under the second sentence of the rule, the adverse party has the burden to demonstrate an opinion faulty through cross-examination of the expert as to the basis of his opinion. The cross-examiner should be aware of the underlying facts or data of the opinion through discovery under Rule 26(b)(4) of M.R.Civ.P.

Therefore, the commission intends this rule to abolish the time-consuming practice of disclosing the basis of an expert's opinion when unnecessary and provide a clearer presentation of expert opinion to aid the trier of fact.

Existing Montana law is inconsistent with this rule to the extent that it no longer absolutely requires that an expert testify without prior disclosure of the basis of his opinion through a hypothetical question, his own observation, or testimony of other witnesses. The rationale for

allowing an expert to testify through the use of hypothetical questions is found in Trogdon v. Hanson Sheep Co., 49 Mont. 1, 5, 149 P 792 (1914): "An expert is not required to know the actual facts respecting the subject matter under consideration. He may base his opinion, not upon facts, but upon an assumed state of facts". The Montana practice in connection with hypothetical questions was concisely stated in De Sandro v. Missoula Light and Water Co., 52 Mont. 333, 338, 157 P 641 (1916):

In putting a hypothetical question to a witness, counsel has the right to assume as established, for the time being, all the facts in evidence tending, directly or by fair inference, to establish his theory of the case.... He need not embody all the evidence on the subject to which it relates. If opposing counsel does not think the question incorporates all the facts in evidence, he can include them in questions propounded by himself.... It is then for the jury to say whether the facts assumed by the question are really established and whether the opinion of the witness has any probative value.

A possible exception to this statement is that a hypothetical question may be asked based on evidence not in the record if counsel promises to later introduce that evidence. Risken v. N. Pac. Ry., 137 Mont. 57, 70, 350 P2d 831 (1960). Although there is no requirement for a hypothetical question when an expert gives an opinion based upon fact gained through his own personal knowledge or through testimony of other witnesses (State v. Shannon, 95 Mont. 280, 286, 26 P2d 360 (1933)), if an expert is testifying from those sources. Montana law clearly requires that the expert testify as to those facts upon which he rests his opinion. Irion v. Hyde, 110 Mont. 570, 576, 105 P2d 666 (1940); Boehler v. Sanders, 146 Mont. 158, 164, 404 P2d 885 (1965); Jangula v. United States Rubber Co., 147 Mont. 98, 108, 410 P2d 462 (1966); and State Highway Comm'n v. Barnes, 151 Mont. 300, 307, 443 P2d 16 (1968). To the extent that these cases require an expert to testify as to the facts upon which he rests his opinion, they are superseded under the practice of the rule.

COMMISSION COMMENT TO JUNE 1990 AMENDMENT

The revision establishes gender neutral format only. No substantive change.

Compiler's Comments

1990 Amendment: Substituted gender neutral language for gender specific language. Amendment effective June 7, 1990.

Case Notes

No Error in Denial of Motion to Suppress Evidence Based on Failure to Record 9-1-1 Emergency Call and Promptly Provide Officer's Belt Recording: Saxton made a 9-1-1 emergency domestic violence call that ultimately resulted in officers entering Saxton's home and arresting her on drug charges. Saxton maintained that the evidence should be suppressed because the police improperly entered the home but failed to record the emergency call and promptly provide the audio recording from the belt recorder of the investigating officer, which might have provided exculpatory evidence. The Supreme Court found that entry into the home was not unlawful and affirmed. Although the state may not interfere with a defendant's right to gather exculpatory evidence, the state is not required to collect it. Here, there was no deliberate suppression of evidence by failing to record the 9-1-1 call, and Saxton was eventually allowed to review and enhance the belt recording, but it yielded no evidence that was material to Saxton's defense. Thus, the District Court did not abuse its discretion by failing to suppress the evidence under these circumstances. St. v. Saxton, 2003 MT 105, 315 M 315, 68 P3d 721 (2003), following St. v. Heth, 230 M 268, 750 P2d 103 (1988).

Legal Conclusions by Expert Witness Inadmissible: Under this rule, an expert may testify as to opinions or inferences, and under Rule 704, M.R.Ev., an expert may present opinions and inferences that embrace the ultimate issues to be decided by the jury. However, legal conclusions offered by an expert invade the province of the jury and can be highly prejudicial. Therefore, expert opinion that states a legal conclusion or applies the law to the facts is inadmissible. Perdue v. Gagnon Farms, Inc., 2003 MT 47, 314 M 303, 65 P3d 570 (2003).

Preclusion of Cross-Examination of Legal Expert as Error — Montana Case Law Preferred: Defense counsel sought to cross-examine an attorney testifying as plaintiff's expert regarding cases on liability in rear-end collisions, cases litigated by the attorney's firm, and case law from the Montana Supreme Court, Montana District Courts, and related cases from California, Idaho, Texas, and Tennessee. The questioning, although objected to, was designed in part to test the attorney's expertise. It was error for the District Court to preclude cross-examination on the Montana cases and on cases involving the attorney's firm. The Supreme Court further found that Montana cases are preferred in cross-examination of this kind, especially when the expert has

conceded his familiarity with Montana law. To hold otherwise would unduly restrict the right to cross-examination. Hart-Anderson v. Hauck, 44 St. Rep. 508 (1987) (opinion withdrawn and replaced by Hart-Anderson v. Hauck, 230 M 63, 748 P2d 937, 45 St. Rep. 18 (1988)), distinguished in Waller v. Hayden, 268 M 204, 885 P2d 1305, 51 St. Rep. 1291 (1994).

Admissible for Expert to Give Opinion on Whether Violation of Law Occurred: It was not inadmissible for a Deputy Sheriff qualified as an expert to give his opinion on whether a violation of the law was the cause of an automobile accident. Adequate opportunity was given the plaintiff to elicit any assumptions or facts underlying the expert opinion. Foreman v. Minnie, 211 M 441, 689 P2d 1210, 41 St. Rep. 1478 (1984), followed in Hart-Anderson v. Hauck, 239 M 444, 781 P2d 1116, 46 St. Rep. 1817 (1989).

Experiment Need Not Duplicate Exact Situation Concerning Which Expert Testimony Is Being Offered: The conditions under which an experiment is conducted need not be identical to the conditions existing at the time of an accident. If the conditions of an experiment are substantially similar to the actual occurrence and the experiment will assist the jury in more intelligently considering the issue, then it should be permitted. Barmeyer v. Mont. Power Co., 202 M 185, 657 P2d 594, 40 St. Rep. 23 (1983), followed in Harwood v. Glacier Elec. Co-op, Inc., 285 M 481, 949 P2d 651, 54 St. Rep. 1257 (1997).

Basis for Investigating Patrolman's Testimony: The opinion of the investigating patrolman as to the cause of the accident (failing to yield the right-of-way) is admissible. Here the investigating officer had lost notes made during his investigation and based his opinion on recollection, photographs, and documents he examined during the trial. As long as the cross-examiner is given adequate opportunity to bring forth for the jury's consideration the weaknesses of any assumptions or facts underlying the opinion, the weight to be given the expert's testimony, even on the ultimate issue, is for the jury to determine. Wollaston v. Burlington N., 188 M 192, 612 P2d 1277, 37 St. Rep. 1015 (1980), followed in Jim's Excavating Serv., Inc. v. HKM Associates, 265 M 494, 878 P2d 248, 51 St. Rep. 623 (1994).

Law Review Articles

Montana Supreme Court Survey—Civil Procedure and Evidence, Dyrud, 42 Mont. L. Rev. 343 (1981).

Montana Supreme Court Survey—Civil Procedure and Evidence, Young & McLean, 41 Mont. L. Rev. 293 (1980).

Collateral References

Criminal Law *key* 482 through 489; Evidence *key* 672 through 686.

32 C.J.S. Evidence §§546, 549 through 560.

31A Am. Jur. 2d Expert and Opinion Evidence §§32, 33, 61, 90.

Right of indigent defendant in state criminal case to assistance of chemist, toxicologist, technician, narcotics expert, or similar nonmedical specialist in substance analysis. 74 ALR 4th 388.

Right of accused in state courts to have expert inspect, examine, or test physical evidence in possession of prosecution—modern cases. 27 ALR 4th 1188.

Presumption and burden of proof of accuracy of scientific and mechanical instruments for measuring speed, temperature, time, and the like. 21 ALR 2d 1200.

2 Wigmore §686.

Article VIII
Hearsay

Article Case Notes

Inconsistent Hearsay on a Collateral Matter — Harmless Error: Armstrong was convicted of deliberate homicide. During his trial, Armstrong's sister testified about a separate incident in which Armstrong was shot. On cross-examination, the State impeached her testimony and then called a rebuttal witness who testified that her husband had indicated that the shooting was intentional. The State concedes that it was error to admit this rebuttal testimony as inconsistent hearsay on a collateral matter. On appeal, the Supreme Court found that the error was harmless beyond a reasonable doubt because it did not contribute to Armstrong's conviction. St. v. Armstrong, 189 M 407, 616 P2d 341, 37 St. Rep. 1563 (1980).

Article Law Review Articles

Expert Testimony in Child Sexual Abuse Cases in Montana: A Proposal for Change, Harrison, 54 Mont. L. Rev. 297 (1993).

"Electronic Fingerprints": Doing Away With the Conception of Computer-Generated Records as Hearsay, Wolfson, 104 Mich. L. Rev. 151 (2005).

Impeaching the Hearsay Declarant, Son, 74 Temp. L. Rev. 163 (2001).

Hearsay Evidence and the Federal Rules: Article VIII, Kelly & Zwick, 36 La. L. Rev. 139 (1975).

Article Eight of the Federal Rules of Evidence: The Hearsay Rule, Evans, 8 Valparaiso U. L. Rev. 261 (1974).

Rule 801. Definitions.

Commission Comments

(a) Statement. This subdivision is identical to Federal and Uniform Rules (1974) Rule 801(a). It is necessary because of the word "statement" in the definition of hearsay in subdivision (c) of this rule. The first clause, defining statement as an oral or written assertion, speaks for itself. The second clause covers the situation where nonverbal conduct is a substitute for speech, and therefore nonverbal conduct should be considered the equivalent of an oral or written assertion. The definition distinguishes various forms of nonverbal conduct by the intention of the person performing the conduct. If the person intends the nonverbal conduct to be a statement or substitute for speech, this is a statement within the hearsay rule and so would not ordinarily be admissible as hearsay. Any nonverbal conduct not intended as an assertion is therefore admissible so far as the hearsay rule is concerned.

There are no Montana statutes or cases directly concerned with what is a statement in connection with the hearsay rule. Statutes providing exceptions to the hearsay rule refer to acts, declarations, or omissions. R.C.M. 1947, Sections 93-401-7 [26-1-103], 93-401-9 [superseded], and 93-401-10 [superseded]. A recent case defining hearsay, State v. Newman, 162 Mont. 450, 457, 513 P2d 258 (1973), indicates, "Hearsay is testimony or evidence of someone's words or conduct outside the court, when offered in court to prove the truth of the thing being asserted, and thus resting for its value upon the credibility of the out-of-court asserter." (emphasis added). This definition implies that in order for conduct to be within the hearsay rule, it must be assertive, and so is consistent with the definition in this subdivision.

(b) Declarant. This subdivision is identical to Federal and Uniform Rules (1974) Rule 801(b). Like the definition in subdivision (a), this definition is necessary because of the use of declarant in the definition of hearsay in subdivision (c). The definition is self-explanatory. There is no Montana law concerning this subdivision.

(c) Hearsay. This subdivision is identical to Federal and Uniform Rules (1974) Rule 801(c). The definition has the effect of placing three types of testimony outside the hearsay rule, making each type admissible as far as the hearsay rule is concerned. First, from the definition in subdivision (a) of statement carried to this subdivision, a statement is not hearsay if it is not intended to be an assertion. Second, from the phrase in the subdivision referring to statements "...made by the declarant while testifying at the trial or hearing...", all such testimony is not hearsay. This is almost never considered a hearsay problem. And third, from the phrase "...offered in evidence to prove the truth of the matter asserted," statements offered for purposes other than to prove the truth of their contents are not hearsay.

The third type of testimony is the major concern of this subdivision. It is theoretically correct to say that statements not offered to prove the truth of their contents are not hearsay because their reliability is not in issue, only whether or not the statement was made. Hearsay statements are ordinarily not admitted because their reliability cannot be tested by oath, cross-examination, and the presence of the trier of fact, the three ideal conditions under which testimony is given by witnesses. Advisory Committee's Note, 56 F.R.D. 183, 288 (1972). When a statement is introduced for purposes other than proving the truth of its content, the witness testifying as to the making of the statement by the hearsay declarant is doing so under the three ideal conditions. Therefore, statements which are offered for purposes other than to prove the truth of their content are not hearsay under the definition.

Montana law is consistent with this definition of hearsay, although it has not been concerned with the definition of statement or testimony by declarants at the trial or hearing. As previously noted in the Commission Comments to subdivision (a). State v. Newman, *supra* 152 Mont. at 457, defined hearsay as testimony: "...offered in court to prove the truth of the matter asserted, and thus resting for its value upon the credibility of the out-of-court asserter". The rule was followed in Brown v. Homestake Exploration Co., 98 Mont. 305, 309, 39 P2d 168 (1934), where hearsay testimony was admitted for a purpose other than to prove the truth of its contents.

(d) Statements which are not hearsay. This subdivision is identical to Federal and Uniform Rules (1974) Rule 801(d), except that changes have been made in (d)(1)(A) and (d)(1)(B), which will be explained in the discussion of those clauses. The effect of this rule is to place certain

statements "...which would otherwise literally fall within..." the hearsay definition outside the hearsay rule. Advisory Committee's Note to Federal Rule 801(d), *supra* 56 F.R.D. at 295.

Subdivision (d)(1) deals with certain prior statements of the witness who is now testifying and subject to ideal conditions of oath, cross-examination, and presence of the trier of fact. The Commission feels that the application of the conditions at the trial or hearing is sufficient to take these statements out of the hearsay rule, for requiring their application at the time the statement was made would have the effect of excluding almost all prior statements. Therefore, these prior statements are admitted as substantive evidence. It should also be noted that the subdivision limits the types of prior statements placed outside the hearsay rule to three: This is a compromise between allowing "general use of prior prepared statements as substantive evidence" which could lead to an abuse of preferring prepared statements to actual testimony, and allowing no prior statements to be admitted, which is not sensible, for "...particular circumstances call for a contrary result. The judgment is one more for experience than logic". Advisory Committee's Note, *supra* 56 F.R.D. at 295.

Clause 801(d)(1)(A) is not the same as the Federal Rule. The Federal Rule provides "...inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial or hearing, or other proceeding, or in a deposition...". The clause deletes the oath requirement as unnecessary and harmful to the usefulness of the rule. The Commission believes that prior inconsistent statements should be admissible as substantive evidence. Although the rule does not specifically call for this result, the Advisory Committee Note to Federal Rule 801(d)(1)(A) states: "Prior inconsistent statements traditionally have been admissible to impeach but not as substantive evidence. Under the rule, they are substantive evidence". *Supra* 56 F.R.D. at 296. An argument in favor of this position, in addition to the consideration that the hearsay rule should not apply, is that the jury may consider this type of statement (when introduced for impeachment purposes) as substantive evidence because of a failure to regard the typical cautionary instruction. It can also be noted that this statement is always made closer in time to the event, free from any influences, and therefore has an assurance of trustworthiness like many hearsay exceptions.

The clause also indicates that the statement must be inconsistent with the declarant's testimony; this requires that an inconsistency does exist and that practice under Rule 613(b), impeaching with prior inconsistent statements, will be used with this clause. It is the intent of the Commission that a witness' failure to recollect at a trial or hearing is an inconsistency under 801(d)(1)(A) when the witness has made a prior statement on the matter under inquiry. See Commission Comments to Rule 613(b).

Montana law concerning this clause is uncertain. Older Montana cases follow the rule that a prior inconsistent statement cannot be used as substantive evidence, but only for impeachment purposes. State v. Willette, 46 Mont. 326, 330, 127 P 1013 (1912); Wise v. Stagg, 94 Mont. 321, 330, 22 P2d 308 (1933) and State v. Kinghorn, 109 Mont. 22, 36, 93 P2d 964 (1939). However, in State v. Jolly, 112 Mont. 352, 355, 116 P2d 686 (1941), the court indicated that it preferred that rule that a prior inconsistent statement could be used as substantive evidence; it went on to hold that the prior inconsistent statements were not sufficient evidence to convict the defendant and so did not apply the rule that it was announcing. Jolly has not been commented on since it was decided; however, later cases have cited Wise v. Stagg, *supra*, for the rule that prior inconsistent statements may be used for impeachment purposes, although this particular rule has not been properly applied in those cases. Batchoff v. Craney, 119 Mont. 157, 162, 172 P2d 308 (1946) and Seibel v. Byers, 136 Mont. 39, 48, 344 P2d 129 (1959). There are cases which demonstrate that prior inconsistent statements are given the effect of substantive evidence by the Montana Supreme Court. In State v. Mally, 139 Mont. 599, 608, 366 P2d 868 (1961), the court stated that a witness' testimony concerning a prior inconsistent statement of the defendant's brother was sufficient evidence to convict the defendant. In State v. Borchert, 156 Mont. 315, 320, 479 P2d 454 (1970), the court used an inconsistent statement by the defendant's wife as part of the evidence which sustained the defendant's conviction. Finally, in State v. Longacre, 168 Mont. 311, 542 P2d 322, 32 St. Rep. 1133, 1134 (1975), the court found that a prior inconsistent statement by the defendant's daughter testified to by another witness was part of the evidence supporting the conviction. It should also be noted that the apparent practice in Montana is to give a cautionary instruction that prior inconsistent statements may be used only for impeachment purposes. Therefore, this clause has the effect of clarifying as well as changing existing Montana law.

Clause 801(d)(1)(B) is not the same as the Federal Rule. It provides "...consistent with his testimony and his offer to rebut an express or implied charge against him of recent fabrication or improper influence or motive...". The clause deletes "recent" and "or" following fabrication so that

it reads "...consistent with his testimony and is offered to rebut an express or implied charge against him of subsequent fabrication, improper influence or motive...". The Commission changed the language of the Federal Rule to make the clause clearer. Under common law, a witness could not be supported by evidence of prior consistent statements because no amount of repetition makes the story more probable. 4 Wigmore Evidence, Section 1124 (3rd ed. 1940). However, the common law does allow rehabilitation of a witness who has been impeached on the grounds mentioned in the clause. *Id.* Sections 1128-29. The prior consistent statement is allowed to rehabilitate the witness because it was made prior to the existence of the impeaching evidence; that is, the consistent statement is made and subsequently the impeaching evidence comes into existence. When a witness testifies consistently with these prior statements, it "...will effectively explain away the force of the impeaching evidence; because it is thus made to appear that the statement in the form now uttered was independent of discrediting influence". *Id.* Section 1128 at 268.

The clause changes traditional common law only to the extent that it allows this type of evidence to be admitted as substantive evidence. This is realistic because of the probability that juries do not understand or choose not to follow instructions limiting this type of evidence to rehabilitative purposes. Further, "The prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally". Advisory Committee's Note, *supra* 56 F.R.D. at 296.

Existing Montana law is consistent with and perhaps broader than the clause. The clause does change Montana law to the extent that it allows prior consistent statements to be admitted as substantive evidence. The traditional common-law rule was discussed in Kipp v. Silverman, 25 Mont. 296, 301, 64 P 884 (1901), although it was not applied. In Farleigh v. Kelly, 28 Mont. 421, 433, 72 P 756 (1903), the court again declined to apply the traditional common-law rule. However, in a recent case, Allen v. Moore, 167 Mont. 330, 538 P2d 1352, 32 St. Rep. 478, 484 (1975), the court did allow a prior consistent statement to be admitted. In that case, the defendant testified that the deceased had grabbed the steering wheel when the vehicle in which they were riding went out of control. He was impeached by evidence of three statements in which he did not mention the deceased's action. The defense introduced a deposition of the owner of the vehicle to show the defendant had mentioned the deceased's action; this statement was made prior to at least one of the statements when the defendant had not mentioned this occurrence. Therefore, this case is consistent with the language of the clause, although it may also be interpreted as expressing concern over which story is the truth and not when the stories were told. *Dicta* in that case also indicates that the court should allow rehabilitation by prior consistent statements with any form of impeachment. On these two points it is apparent that this case is broader than the clause.

Clause 801(d)(1)(C) is the same as Federal Rule 801(d)(1)(C), as amended in 1975. There is substantial authority for the admissibility of these statements, "often without recognition of the presence of a hearsay problem". McCormick, Handbook on the Law of Evidence 603 (2d ed. 1972). The reasons for admitting these types of statements are first, "the generally unsatisfactory and inconclusive nature of courtroom identification..."; second, the higher reliability of prior identifications "made at an earlier time under less suggestive conditions" (Advisory Committee's Note, *supra* 56 F.R.D. at 296); and third, questions as to the reliability of identifications are really concerned with constitutional issues and not a hearsay problem. *Id.*

Montana law is apparently consistent with this clause, although of the two cases considering the problem, neither is on point. In State v. Fisher, 54 Mont. 211, 215, 169 P 282 (1917), the court held that reception of evidence of an identification of the defendant by the victim of the crime was not error. The second case, State v. McSloy, 127 Mont. 265, 273, 261 P2d 263 (1953), dealt with the testimony of the prosecution witness' father as to the identification. The court treated this testimony as corroborating evidence "to show that the prosecuting witness identified the accused at a time when there had been no opportunity for the witness to be swayed by any suggestion of others". *Id.* at 275.

Rule 801(d)(2) contains five categories of statements which may be offered against a party-opponent as an admission. Each of the clauses is identical to Federal Rule 801(d)(2). It should be noted that Rule 613(b) contains a cross-reference to this subdivision, in that admissions by a party-opponent are not treated as prior inconsistent statements. This subdivision changes existing Montana law to the extent that it defines admission outside the hearsay rule, rather than as an exception to it.

Subdivision (d)(2) deals with admissions of a party-opponent and settles the question of whether admissions are outside the hearsay rule or an exception to it. The subdivision places

admissions outside the hearsay rule, but in any event, they have always been admitted as substantive evidence. It is important to remember that this subdivision only has the effect of placing these types of statements outside the hearsay rule; this does not mean that they are to be admitted automatically, for they still are subject to other rules of evidence and constitutional safeguards.

Clause 801(d)(2)(A) refers to an individual's statement and "is the classic example of an admission". Advisory Committee's Note, *supra* 56 F.R.D. at 297. "If he has a representative capacity and the statement is offered against him in that capacity, no inquiry whether he was acting that representative capacity in making the statement is required; the statement need only be relevant to representative affairs". Section 93-401-27(2), R.C.M. 1947 [superseded], provides the equivalent of the clause as far as individuals are concerned: "...evidence may be given upon a trial of the following facts:... 2. The act, declaration, or omission of a party, as evidence against such party". Neither the statute nor the cases have specifically referred to admissions made by a person in his representative capacity. Cases construing this statute have followed its plain meaning. Sylvain v. Page, 84 Mont. 424, 438, 276 P 16 (1929) and Edquest v. Tripp and Dragstedt Co., 93 Mont. 446, 458, 19 P2d 637 (1933).

Clause 801(d)(2)(B) is concerned with adoptive admissions or situations where the party-opponent adopts or acquiesces in the statement of another. "Adoption or acquiescence may be manifested in any appropriate manner. When silence is relied upon, the theory is that the person would, under the circumstances, protest the statement made in his presence, if untrue." Advisory Committee's Note, *supra* 56 F.R.D. at 297. Montana law has only been concerned with adoptive admissions where acquiescence or silence is the method of adoption. Section 93-401-27(3), R.C.M. 1947 [superseded], states the equivalent of the clause: "...evidence may be given upon a trial of the following facts:... 3. An act or declaration of another, in the presence and within the observation of a party, and his conduct in relation thereto". Case law in Montana has only been concerned with silence as conduct in relation to the statement, which is also denominated the tacit admission rule. The cases dealing with the tacit admission rule are all criminal cases in Montana. Territory v. Big Knot On Head, 6 Mont. 242, 11 P 670 (1886); State v. Lucey, 24 Mont. 285, 302, 61 P 994 (1900); State v. Fisher, 54 Mont. 211, 215, 169 P 282 (1917); State v. Byrne, 60 Mont. 317, 326, 119 P 262 (1921); State v. McLean, 76 Mont. 351, 355, 246 P 956 (1926) and State v. Won, 76 Mont. 509, 518, 248 P 201 (1926). The Advisory Committee's Note to the equivalent of this clause, *supra* 56 F.R.D. at 298, indicates:

In criminal cases, however, troublesome questions have been raised by decisions holding that failure to deny is an admission: the inference is a fairly weak one, to begin with; silence may be motivated by advice of council or realization that 'anything you say may be used against you'; unusual opportunity is afforded to manufacture evidence; and encroachment upon the privilege against self-incrimination seems inescapably to be involved. However, recent decisions of the Supreme Court relating to custodial interrogation and the right to counsel appear to resolve these difficulties. Hence the rule contains no special provisions concerning failure to deny in criminal cases.

Finally, in Whorley v. Patton-Kjose Co., 90 Mont. 461, 485, 5 P2d 210 (1931), the court held that failure to reply or to protest false statements in a letter "...has no probative value as tending to show an admission of the matter stated, especially when the party failing to reply has taken a final position in the matter of dispute, or for some other reason the correspondence on the subject has ended...". It is apparent that the clause is consistent with existing Montana law.

Clauses 801(d)(2)(C) and (D) are concerned with admissions by an agent or employee against his principal or employer. Clause (C) states the traditional rule that a principal is not bound by statements of his agent unless he had the authority to make such statements. Clause (D) states a rule which changes the traditional common-law view by expanding it. The Advisory Committee's Note, *supra* 56 F.R.D. at 298, indicates that the usual test of agency to determine the admissibility of statements by agents usually results in exclusion of the statement rather than its admissibility "since few principals employ agents for the purpose of making damaging statements...". Clause (D) changes the usual rule because "dissatisfaction with this loss of valuable and helpful evidence has been increasing. A substantial trend favors admitting statements related to a matter within the scope of the agency or employment". *Id.*

Section 93-401-27(5), R.C.M. 1947 [superseded], states the rule concerning agent's admissions:

...evidence may be given upon a trial of the following facts:... 5. After proof of a partnership or agency, the act or declaration of the partner or agent of the party, within the scope of the partnership or agency, and during its existence.

It should first be pointed out that the statute plainly requires a foundation to be laid showing the existence of a partnership or agency before an agent's admissions will be allowed in evidence. Ashley v. Safeway Stores, Inc., 100 Mont. 312, 324, 7 P2d 53 (1935) and Shillingstad v. Nelson, 141 Mont. 412, 419, 478 P2d 393 (1963). Although the clauses (C) and (D) do not explicitly require a foundation, under (C) authorization must be shown before a statement would be admitted and under (D) the terminology "agent or servant" and "scope of agency or employment" indicates that this must be shown before this type of statement would be admitted.

Clause (C) would represent no change to existing Montana law. Montana has always followed the rule that an agent's statements will bind the principal only if they were made with proper authorization. Ryan v. Gilmer, 2 Mont. 517, 520 (1877). It is also certain that unauthorized statements cannot be treated as admissions. Fowlie v. Cruse, 52 Mont. 222, 234, 157 P 958 (1916) and Raish v. Orchard Canal Co., 67 Mont. 140, 144, 218 P 655 (1923). There are cases which have found an implied authority existed to allow an agent's admissions to bind his principal. Callahan v. Chicago, Burlington and Quincy R.R., 47 Mont. 401, 411, 133 P 687 (1913) (admissions by a conductor of a train admissible); Exchange State Bank v. Occident Elevator Co., 95 Mont. 78, 87, 24 P2d 126 (1933) (grain elevator operator's statements admissible because they were within the scope of his employment); and Fox v. Fifth West, Inc., 153 Mont. 95, 99, 454 P2d 612 (1969) (defendant corporation's president's statement against the corporation's interest admissible). Finally, it should be noted that the Advisory Committee's Note to the Federal Rule, *supra* 56 F.R.D. at 298, indicates that communications to the agent's principal as well as to third persons are admissible under the clause. To the extent that this question has not arisen in any Montana cases, this is new to Montana law.

Clause (D) represents a change to existing Montana law. Not only may unauthorized admissions be admissible under this clause and so contrary to the cases cited above, but admissions may be admitted regardless of whether or not they were part of the *res gestae* and regardless of the status of the agent or employee in relation to his principal or employer (as long as the relationship exists and the statement is concerned with the matter within the scope of the agent or employee's duties). Montana cases have always combined the rule that an agent's admissions must be within the scope of his authority with the *res gestae* rule. Hogan v. Kelly, 29 Mont. 485, 489, 75 P 81 (1903) ("to bind the principal, the declarations of an agent must be made within the scope of his authority, at the time of the transaction, and be a part of the *res gestae*."); Poindexter and Orr Livestock Co. v. Oregon Shortline R.R., 33 Mont. 338, 340, 83 P 886 (1905); Callahan v. Chicago, Burlington and Quincy R.R., *supra* 47 Mont. at 411 ("Now, it is a well-settled rule that when an agent is vested with authority to perform any act for his principal, his words... while engaged in that business are part of the *res gestae* of that business."); Raish v. Orchard Canal Co., *supra* 67 Mont. at 143 (statements by an agent will bind a corporation "only when made by the officer or agent acting within the scope of his authority and with reference to the transactions then pending...only because the declaration is a verbal act and part of the *res gestae* that it is admissible at all.") and Rossberg v. Montgomery Ward and Co., 110 Mont. 154, 161, 199 P2d 979 (1939) ("It is elemental that admissions or declarations of the officers or agents of private corporations are not admissible unless they are made while acting within the scope of their authority as part of the *res gestae* relating to the present transactions.") Therefore, to the extent that this clause separates the *res gestae* rule from the present rule regarding agent's admissions, it is a change to existing Montana law.

Montana law has also excluded statements by an agent on the ground that they were not made by a person with sufficient status in relation to his principal or employer to bind that principal or employer. In Callahan v. Chicago, Burlington and Quincy R.R., *supra* 47 Mont. at 412, the court admitted the statement of a conductor of a freight train in part because he had sufficient authority to bind the railroad. That case distinguished Ryan v. Gilmer, *supra* 2 Mont. at 520, where a sleigh driver had insufficient authority to bind his principal and Poindexter and Orr Livestock Co. v. Oregon Shortline *supra* 33 Mont. at 340, where a section foreman was held to have insufficient authority to bind the railroad. In Oscarson v. Grain Growers Ass'n, Inc., 84 Mont. 521, 536, 277 P 14 (1929), admissions by the defendant corporation's secretary-treasurer were held admissible because of the high position and extent of control he had over the corporation's affairs. In Rossberg v. Montgomery Ward Co., *supra* 110 Mont. at 160, the court held that a store manager had insufficient authority to bind the Montgomery Ward Company. It is apparent from that opinion that the court felt that the store manager was a subordinate agent. The latest case dealing with this question is Fox v. Fifth West, Inc., *supra* 153 Mont. at 99, where the court held that a president of a corporation had sufficient authority to make statements against the corporation's interest. Therefore, to the extent that this clause allows admissibility of statements by any agent or employee, it is a change to existing Montana law.

Section 93-401-27(5), R.C.M. 1947, [superseded], states that the rule applied to statements by agents also "...applies to the act or declaration of a joint owner, joint debtor, or other person jointly interested with the party". The only two cases construing this part of this subsection are Monidah Trust v. Kemper, 44 Mont. 1, 6, 118 P 811 (1911) where the court held that this provision does not affect the limitation of actions against joint obligees; and Credit Counsellors v. Park, 163 Mont. 55, 57, 514 P2d 1330 (1973) where a letter and phone conversation admitting the existence of a debt by a joint debtor was held admissible against another joint debtor. Since clauses (C) and (D) do not mention joint interests, the Commission intends that the existence of this relationship does not give rise to admissions, but should be treated as a declaration against interest under Rule 804(b)(3).

Clause 801(d)(2)(E) provides that statements by coconspirators are admissible as admissions against other conspirators. The clause requires that the statement be made during the course of the conspiracy, which the Commission intends to mean that statements may be admitted only after a foundation establishing the conspiracy has been laid and that statements must be made before the conspiracy terminates. The clause also requires that statements be made in furtherance of the conspiracy. The clause applies to both civil and criminal cases.

This clause is consistent with existing Montana law. Section 93-401-27(6), R.C.M. 1947 [superseded], provides: "evidence may be given upon a trial of the following facts:... 6. After proof of the conspiracy, the act or declaration of a conspirator against his coconspirator, and relating to the conspiracy". Montana case law requires that there be a foundation before a coconspirator's statement will be admitted. State v. Dotson, 26 Mont. 305, 309, 67 P 938 (1902) and Loncar v. National Union Fire Ins. Co., 84 Mont. 141, 153, 274 P 844 (1929). They require that statements must be made during the existence of the conspiracy and that statements made after the purpose of the conspiracy "has been accomplished and the joint enterprise completed, evidence of acts or declarations of one of the coconspirators is not admissible against another". State v. Wells, 33 Mont. 291, 297, 83 P 476 (1905); State v. Dotson, *supra* State v. Allen, 34 Mont. 403, 409, 102 P 988 (1906) and State v. Hopkins, 68 Mont. 504, 509, 219 P 1106 (1923). Finally, they also require that statements must be made in furtherance of the conspiracy. State v. DeWolfe, 29 Mont. 415, 419, 74 P 1048 (1904); State v. Allen, *supra* 34 Mont. at 409; and State v. Collins, 88 Mont. 514, 526, 294 P 957 (1930). Montana law applies the rule in the statute to civil and criminal cases. Examples of criminal cases are cited above, and civil cases include: Harrington v. Butte and Boston Mining Co., 19 Mont. 411, 419, 48 P 758 (1897); Farleigh v. Kelly, 28 Mont. 421, 432, 72 P 756 (1903) and Lane v. Bailey, 29 Mont. 548, 557, 75 P 191 (1903).

COMMISSION COMMENT TO JUNE 1990 AMENDMENT

The revision establishes gender neutral format only. No substantive change.

Compiler's Comments

1990 Amendment: Substituted gender neutral language for gender specific language. Amendment effective June 7, 1990.

Case Notes

Proof of Truth of Matter Asserted 435
Prior Statement by Witness 437
Admission by Party Opponent 444
Verbal Act 446
Miscellaneous 446

PROOF OF TRUTH OF MATTER ASSERTED

Motion In Limine to Exclude Relevant Statements Made by Defendant During and After Assault Properly Denied: During a bar fight, Brasda brandished a knife and stated that he would use it because he was not afraid to go back to prison. After the fight, Brasda stated to a deputy that he didn't try to stab anyone. At trial, Brasda made a motion in limine to suppress the statements on grounds that they were irrelevant to any fact at issue or, alternatively, that they were statements of other crimes or acts and inadmissible because no exception applied. The trial court denied the motion, and the Supreme Court affirmed. Both statements were clearly relevant and integral to the state's proof of the elements of the crime and to the jury's ability to evaluate witness testimony. Further, the statements were admissible under the mental, emotional, or physical condition exception to the hearsay rule and under the transaction rule in 26-1-103. The court also noted that under St. v. Bauer, 2002 MT 7, 308 M 99, 39 P3d 689 (2002), statements regarding a defendant's history or imprisonment and probationary status that are inextricably linked to circumstances surrounding the crime are admissible. Denial of the motion in limine was proper. St. v. Brasda, 2003 MT 374, 319 M 146, 82 P3d 922 (2003).

Admission of Prejudicial Hearsay Statements Warranting New Trial: The court in defendant's trial admitted statements from two witnesses that were offered solely to prove the truth of the matter asserted. The statements were thus inadmissible hearsay. To decide whether the admission constituted reversible error, the Supreme Court applied the test in St. v. Van Kirk, 2001 MT 184, 306 M 215, 32 P3d 735 (2001), to determine whether the error was structural or trial error, and in this case, the error was trial error. Because it could not be determined whether the jury could have convicted defendant absent the hearsay testimony and because the state did not demonstrate that there was no reasonable possibility that the hearsay testimony contributed to the conviction, defendant's right to a fair trial was prejudiced and a new trial was ordered. St. v. Runs Above, 2003 MT 181, 316 M 421, 73 P3d 161 (2003).

"AA" Meeting Attendance Slips Inadmissible as Hearsay: During a parental rights termination hearing, the appellant appealed the District Court's refusal to admit into evidence documentation of her attendance at alcoholic anonymous (AA) meetings. In affirming the District Court's decision, the Montana Supreme Court ruled that the AA attendance slips were clearly hearsay because they were written assertions made by the leaders of the AA meetings and offered by the appellant as proof of her attendance at the meetings. In re J.M.W.E.H, 1998 MT 18, 287 M 239, 954 P2d 26, 55 St. Rep. 65 (1998).

Admissibility of Victim Testimony as to Sexual Acts Committed by Nondefendants — Not Hearsay: The trial court allowed the victim to testify not only to the sexual acts committed by defendants but also to similar acts committed at about the same time by three other men not on trial. Defendants contended that the court abused its discretion in allowing the testimony because it was hearsay and violated the res gestae doctrine. However, the evidence was admissible because it was closely related to and explanatory of the offense and was therefore part of the transaction, as contemplated under 26-1-103. The testimony was not considered hearsay because the testimony of the other three men was not offered into evidence to prove the sexual acts. St. v. Wing, 264 M 215, 870 P2d 1368, 51 St. Rep. 223 (1994), followed in St. v. Maier, 1999 MT 51, 293 M 403, 977 P2d 298, 56 St. Rep. 208 (1999). See also St. v. Beavers, 1999 MT 260, 296 M 340, 987 P2d 371, 56 St. Rep. 1035 (1999).

Distinction Between Hearsay and Nonhearsay State of Mind Statements: In clarifying the distinction between hearsay and nonhearsay state of mind statements, the Supreme Court relied on U.S. v. Brown, 490 F2d 758 (D.C. Cir. 1973). The distinction turns on whether the statement is evidence that circumstantially or directly proves the declarant's state of mind. If the statement circumstantially proves the declarant's state of mind, then the evidence is not offered to prove the truth of the matter asserted and the evidence is not hearsay. Alternatively, when the evidence directly proves the declarant's state of mind, the evidence is introduced to prove the truth of the matter asserted and the evidence is hearsay. St. v. Losson, 262 M 342, 865 P2d 255, 50 St. Rep. 1588 (1993).

Admissibility in Second Trial of Testimony Given by Defendant in First Trial: After having testified in his first trial, which ended in a mistrial, defendant declined to testify in his second trial. The Supreme Court held that the testimony given in the first trial was admissible as evidence in the second trial under both this rule, as an admission of a party-opponent, and under Rule 804, M.R.Ev., as the declaration of an unavailable witness. St. v. Hall, 234 M 57, 761 P2d 1283, 45 St. Rep. 1726 (1988).

Testimony Offered to Show Statement Made and to Evidence State of Mind Not Hearsay: The Supreme Court cited Brown v. Homestake Exploration Corp., 98 M 305, 39 P2d 168 (1934), in holding that when an utterance is offered to evidence the state of mind that ensued in another person in consequence of the utterance, it being obvious that no assertive or testimonial use was sought to be made of it, the utterance was admissible so far as the hearsay rule is concerned. Therefore, a statement offered not to prove the truth of the matter asserted but for the purpose of showing that the statement was made and the resulting state of mind was properly admitted. Moats Trucking Co., Inc. v. Gallatin Dairies, Inc., 231 M 474, 753 P2d 883, 45 St. Rep. 772 (1988), distinguished in Mannix v. Butte Water Co., 259 M 79, 853 P2d 1258, 50 St. Rep. 691 (1993), Jim's Excavating Serv., Inc. v. HKM Associates, 265 M 494, 878 P2d 248, 51 St. Rep. 623 (1994), and Vincelette v. Metropolitan Life Ins. Co., 1998 MT 259, 291 M 261, 968 P2d 275, 55 St. Rep. 1071 (1998), and followed in Woolf v. Evans, 264 M 480, 872 P2d 777, 51 St. Rep. 355 (1994).

Anonymous Tip — Hearsay — Plain Error: In the prosecution of defendant for conspiracy to commit arson and attempted criminal mischief, admission of the contents of an anonymous tip was error as the tip was hearsay. However, because defendant did not object to admission of the tip at trial, the inquiry of whether admission constituted reversible error extends only to determining whether the admission was plain error affecting substantial rights of the defendant under Rule 103, M.R.Ev. St. v. Cain, 220 M 509, 717 P2d 15, 43 St. Rep. 568 (1986).

Decedent's Statements About His Stress Not Hearsay: Workers' Compensation Court did not err in admitting testimony about statements decedent made on the day of his death. The statements allegedly showed decedent's job-related mental and emotional stress. The court is not bound by common law or statutory rules of evidence, and even if it were, the statements were not hearsay. Their purpose was to show what decedent thought and felt shortly before he died of heart failure. Tocco v. Great Falls, 220 M 221, 714 P2d 160, 43 St. Rep. 310 (1986).

Admission of Hearsay Statements Harmless Error: Recollection by a witness of statements made by out-of-court declarants regarding paternity of an infant in a proceeding to terminate parental rights was hearsay, but was admissible to determine if the infant fell within the definition of "Indian child" under the Indian Child Welfare Act, and not to prove the truth of paternity. Other hearsay objections overruled by the trial court were properly raised, but the court failed to reverse the District Court since the erroneous admission of evidence was harmless. The objectionable statements were cumulative and amply corroborated by competent evidence. In re R.M.B., Youth in Need of Care, 213 M 29, 689 P2d 281, 41 St. Rep. 1925 (1984).

Rape Testimony Not Held Hearsay — Recent Fabrication: Where the defendant was charged with sexual intercourse without consent and offered the defense of consent by the victim, the court did not err in admitting into evidence the statements of two friends and a rape counselor recounting statements of the victim. The first two witnesses' statements, recalling that the victim called the defendant a "son of a bitch" and asking "Why is God doing this to me?", were not offered to prove the truth of the matter asserted and were therefore not hearsay. The rape counselor's testimony repeating the statements of the victim was offered after the defendant's attempt to impeach the testimony of the victim. The rape counselor's testimony was clearly offered to rebut a charge of recent fabrication and is therefore not hearsay. St. v. Mackie, 191 M 138, 622 P2d 673, 38 St. Rep. 86 (1981), followed in St. v. Hibbs, 239 M 308, 780 P2d 182, 46 St. Rep. 1705 (1989).

Observation of Signing Stolen Property Report: A police officer testified that he traveled in order to observe the owner of a stolen vehicle signing a stolen property report. The testimony was inadmissible hearsay because it was testimony about an extrajudicial statement in an effort to prove the truth of the statement, i.e., to show that a theft was committed. The actions of the officer in traveling and observing the signing are not admissible, not because they are hearsay but because those actions are irrelevant, having no probative value to the case at hand. In re D.W.L., A Youth, 189 M 267, 615 P2d 887, 37 St. Rep. 1452 (1980), followed in Heisler v. Boule, 226 M 332, 735 P2d 516, 44 St. Rep. 698 (1987).

Hearsay — Waiver of Objection: In an action by the respondent for damages occasioned by wrongful discharge from employment, the court correctly received a copy of a report of the United States Equal Employment Opportunity Commission (EEOC) into evidence over the objection of appellant that the report constituted hearsay. The report was not hearsay since it was not offered to prove the truth of the matter asserted but only to show that the EEOC had not terminated its intervention. Council for appellant also waived any valid hearsay objection by agreeing to a pretrial stipulation of exhibits. Strong v. St., 183 M 410, 600 P2d 191, 36 St. Rep. 1665 (1979).

Inadmissible Hearsay — Child's Statement: The court committed reversible error when it allowed witnesses to testify, over defendant's objection, to statements made by a 4-year-old child that defendant had beaten her and her sister, because the alleged statement went to the very facts which the state was trying to prove, was offered to prove the truth of the matter asserted, and was therefore inadmissible hearsay. St. v. Campbell, 176 M 525, 579 P2d 1231 (1978), distinguished in In re S.M. & P.L.M., 2001 MT 11, 304 M 102, 19 P3d 213 (2001).

PRIOR STATEMENT BY WITNESS

Admissibility of Prior Statements Made Before Motivation to Fabricate Arose: Teters contended that prior statements made by his stepdaughter to a child protective services worker regarding Teters' sexual contact with her were inadmissible because she may have been improperly influenced by her mother, who was involved in a contested divorce with Teters. The Supreme Court applied the four factors in St. v. Mensing, 1999 MT 303, 297 M 172, 991 P2d 950 (1999), to determine whether the prior statements were admissible. The first three factors were met because the declarant testified at trial and was subject to cross-examination and because the witness's statements were consistent with the declarant's testimony. The fourth factor requires that the statement rebut an express or implied charge of subsequent fabrication, improper influence, or motive. Here, the fourth factor was also met because the statements were made prior to the time that the alleged motive to fabricate arose, i.e., the beginning of divorce proceedings. Testimony regarding the prior statements was therefore properly admitted. St. v.

Teters, 2004 MT 137, 321 M 379, 91 P3d 559 (2004). See also St. v. Lunstad, 259 M 512, 857 P2d 723 (1993).

No Plain Error in Presenting Different Stories of Same Witness for Jury's Consideration: At Daniels' trial for robbery, witnesses presented inconsistent testimony regarding Daniels' involvement. The state was entitled to point out the inconsistencies to the jury, and the jury was entitled to choose which version to believe. There was no fundamental unfairness or error in presenting different stories of the same witness for the jury's consideration, and thus Daniels was not entitled to consideration on appeal under the plain error doctrine. St. v. Daniels, 2003 MT 247, 317 M 331, 77 P3d 224 (2003).

Evidence of Flight Unacceptable as Sole Corroboration of Inconsistent Statement: After Giant's conviction of aggravated assault for attacking his wife in her home, he moved for dismissal on grounds that the evidence was insufficient to convict him as a matter of law because evidence of flight was the only corroboration of the prior inconsistent statements of the victim identifying him as the assailant. The victim initially identified Giant as the assailant in pretrial statements, but at trial, she identified her son as the attacker. No forensic testing was performed on evidence seized from the home, and there was no other testimony to corroborate either statement. The state argued, and the trial court agreed, that undisputed testimony of Giant's flight behavior was sufficient to corroborate the victim's prior inconsistent statements and that evidence seized from the home matched her statements. When considering a motion for a directed verdict to determine whether any rational trier of fact could find the elements of a crime satisfied beyond a reasonable doubt, the Supreme Court will consider trial testimony and the evidence properly admitted and before the jury according to the criminal rules of evidence, but will not consider potential unintroduced evidence or other evidence outside the trial setting. A criminal conviction cannot be sustained when the only evidence of some essential element of a crime is a prior inconsistent statement. In Montana, all prior inconsistent statements are admissible as substantive evidence under subsection (d)(1)(A) of this rule; however, prior inconsistent statements admitted as substantive evidence of guilt must be corroborated in order to sustain a conviction. Evidence of flight is not sufficient in itself to prove guilt or to support a conviction as a matter of law because evidence of flight by itself is as consistent with innocence as it is with guilt. Therefore, evidence of flight cannot be the sole corroboration of a prior inconsistent statement admitted as substantive evidence of guilt. Here, the physical evidence recovered from the home and photographs of the victim's injury, which would normally be sufficient corroborating evidence, were insufficient because they did not corroborate the essential element of identity because the victim identified another possible assailant. Further, the victim's prior inconsistent statements alone were insufficient as a matter of law to support Giant's conviction, in light of evidence that the victim stopped cooperating with the County Attorney's office when Giant was released on bail and asked that the case be dismissed after her divorce proceedings against Giant were voluntarily dismissed—actions that affected the reliability of the prior inconsistent statements but did not independently corroborate the statements. Giant's conviction was reversed. St. v. Giant, 2001 MT 245, 307 M 74, 37 P3d 49 (2001). See also St. v. White Water, 194 M 85, 634 P2d 636 (1981).

Recorded Present Sense Impression of Partner Assault Victim Properly Admitted: At Hope's trial for partner assault, the District Court admitted into evidence a note that the victim wrote prior to the assault, describing Hope's angry mood and the victim's apprehension about further problems that might arise. Hope contended error in admission of the note because the note did not meet the requirements of the recorded exception to the hearsay rule in Rule 803, M.R.Ev. The state argued that the note was properly admitted under the recorded present sense impression exception to the hearsay rule. The Supreme Court agreed with the state. A recorded present sense impression is a written assertion describing or explaining an event or condition while the declarant was perceiving the event or condition or immediately thereafter. Further, the note did not impermissibly provide the jury with testimonial material regarding Hope's general character, or give undue emphasis to the critical elements of the state's case, because it described the victim's perception of Hope's anger rather than the assault itself. The trial court correctly advised the jury that it could give the note whatever weight that it considered appropriate, and the note was properly admitted. St. v. Hope, 2001 MT 207, 306 M 334, 33 P3d 629 (2001).

Failure of Counsel to Object to Introduction of Inconsistent Prior Statements on Confrontation Grounds Not Considered Ineffective Assistance: Jenkins was convicted of deliberate homicide, aggravated kidnapping, and robbery after having been implicated in the crimes based in part on statements made to police and at trial by his wife, Mary. Mary suffered from dementia related to Alzheimer's disease and periodic memory lapses. As a result, in some pretrial interviews, she answered questions with declarative statements while in other interviews, even when asked the

same or similar questions, she responded that she didn't know or couldn't remember. Nevertheless, at a pretrial hearing, it was determined that she knew the difference between truth and falsity, could express herself in court, and was competent to testify. At trial, she exhibited the same behavior. On direct examination, the prosecutor asked many of the same questions asked during the pretrial interviews, and although she answered some questions definitively, most of her testimony was that she didn't know or couldn't remember. On cross-examination, she often retracted the definitive answers she gave on direct examination, saying again that she could not remember. Following her testimony, the trial court allowed the prosecution to introduce the content of Mary's pretrial interviews through the testimony of the interviewing officers pursuant to the prior inconsistent statement exception to the hearsay rule, as set out in subsection (d)(1)(A) of this rule. Jenkins objected on evidentiary grounds, but not on confrontation grounds, so the issue was not preserved for appeal. In a petition for postconviction relief, Jenkins claimed that he was denied effective assistance of counsel because his attorney should have objected on confrontation grounds. The District Court denied the petition, holding that there was no confrontation clause violation and that even if the objection had been made, it would not have affected the outcome of the trial. Jenkins then appealed the denial of the petition for postconviction relief. The state contended that Jenkins' right to confront witnesses was satisfied by his opportunity to cross-examine Mary and demonstrate to the jury her poor and unreliable memory. The Supreme Court concurred. The implications of admitting prior inconsistent statements was addressed in Calif. v. Green, 399 US 149 (1970), in which it was held that the confrontation clause is not violated by admitting a declarant's out-of-court statements as long as the declarant is testifying as a witness and is subject to full and effective cross-examination. Further, under U.S. v. Owens, 484 US 554 (1988), the confrontation clause guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in a way that the defendant might wish. Even though Mary suffered from memory lapses, she was competent, appeared at trial, and was subjected to unrestricted cross-examination, giving Jenkins ample opportunity to demonstrate her inability to recall past events and giving the jury the opportunity to observe her testimony and judge the reliability of her memory as it pertained to both her in-court and out-of-court statements. Jenkins failed to show that an objection on confrontation grounds would have been sustained, therefore failing to demonstrate that his defense was prejudiced by his trial counsel's failure to preserve the issue for appeal. Jenkins was thus not denied effective assistance of counsel and his petition for postconviction relief was properly denied. St. v. Jenkins, 2001 MT 79, 305 M 95, 23 P3d 201 (2001).

Improper Admission of Hearsay Regarding Rape Victim's Prior Statements — Harmless Error: Four requirements must be met before a witness may testify as to a declarant's prior testimony. It was undisputed that in Mensing's trial for rape, the first three requirements were met: (1) the victim testified at trial; (2) the victim was available for cross-examination about her prior statements; and (3) the victim's statements to which arresting officers were testifying were consistent with the victim's testimony. However, the fourth requirement, that the statements must rebut an express or implied charge of fabrication, improper influence, or motive, was not met. Mensing made none of the requisite charges against the victim, and as a result, the officers' testimony regarding the victim's testimony was inadmissible hearsay and was improperly admitted. However, the hearsay statements were separately admitted through the victim's testimony, and Mensing had an opportunity to cross-examine regarding the statements at issue. Therefore, although the District Court abused its discretion in allowing the officers' testimony regarding prior consistent statements made by the victim, the error did not prejudice Mensing and was harmless. St. v. Mensing, 1999 MT 303, 297 M 172, 991 P2d 950, 56 St. Rep. 1220 (1999), following St. v. Veis, 1998 MT 162, 289 M 450, 962 P2d 1153 (1998).

Inflammatory Statements as Part of Same Transaction That Formed Basis of Criminal Offense Properly Admitted as Part of Res Gestae: Beavers contended that the trial court erred in admitting inflammatory statements made by a passenger in Beavers' car immediately after Beavers was stopped for speeding and just prior to his attempt to avoid arrest on an outstanding warrant. The Supreme Court held that the statements were properly admitted under the res gestae rule, along with the evidence of resisting arrest and the evidence of Beavers' felony warrant and classification as an escape risk, because they were part of the same transaction that included the acts that formed the basis of the underlying offense. Failure to admit the statements and evidence of flight would have left the jury with an incomplete picture of all the acts that transpired to result in the charge against Beavers. Relevance of the evidence outweighed any possible prejudice. St. v. Beavers, 1999 MT 260, 296 M 340, 987 P2d 371, 56 St. Rep. 1035 (1999). See also St. v. Wing, 264 M 215, 870 P2d 1368, 51 St. Rep. 223 (1994).

Investigating Officer's Written Statement of Interview With Victim, Upon Which Victim Wrote Comments: The victim's statement to the investigating officer, upon which the victim had written comments, was initially brought before the jury by the defense for impeachment purposes. The defense attempted to use the written comments as a prior inconsistent statement. However, the comments that the victim wrote on the written statement proved to be fairly consistent with her trial testimony. A prior consistent statement that predates the motive to lie is admissible into evidence. Thus, the state was entitled to use the statement as a prior consistent statement to rehabilitate the witness, and the statement was admissible. St. v. Johnson, 1998 MT 107, 288 M 513, 958 P2d 1182, 55 St. Rep. 408 (1998).

Propriety of Giving Jury Copy of Investigating Officer's Written Statement of Interview With Crime Victim, Upon Which Victim Wrote Comments: The trial court did not abuse its discretion in granting the jury's request, during jury deliberations, for a copy of the investigating officer's written statement of his interview with the victim, upon which the victim had written comments and corrections. The jury was interested in the victim's comments and corrections; it was not asking to review trial testimony, which would have violated the case law rule that a jury should not be given a witness's testimony transcript because undue emphasis could thereby be placed on the testimony of that witness. St. v. Johnson, 1998 MT 107, 288 M 513, 958 P2d 1182, 55 St. Rep. 408 (1998).

Inconsistent Statements Both Before and at Trial — Use of Pretrial Statements at Trial: In statements taped before trial and at trial, a witness sometimes directly stated what happened and at other times said that she could not remember. The witness was diagnosed as having dementia resulting in memory lapses and testified at trial to having memory lapses and to sometimes being able to remember something and sometimes not being able to remember it. Thus, both the statements before trial and the statements at trial were inconsistent. The District Court did not abuse its discretion in: (1) concluding that her failures to remember certain things at trial were inconsistent with pretrial statements clearly stating what happened in regard to those matters; (2) ruling that the state was trying to impeach her by using prior inconsistent statements, not trying to bolster her credibility by using prior consistent statements; and (3) admitting some prior consistent statements along with the prior inconsistent ones for reasons of judicial efficiency and assisting the jury. The District Court had ruled that the statements were so mixed together that it was probably necessary to allow all the statements in order for the jury to understand what was said. St. v. Lawrence, 285 M 140, 948 P2d 186, 54 St. Rep. 1082 (1997). See also companion case, St. v. Jenkins, 285 M 131, 948 P2d 204, 54 St. Rep. 1078 (1997).

Impeachment With Deposition Testimony Not Allowed if Not Clearly Inconsistent: The District Court did not manifestly abuse its discretion in refusing to allow the impeachment of a witness with deposition testimony when the deposition testimony and the trial testimony were not clearly inconsistent. Jim's Excavating Serv., Inc. v. HKM Associates, 265 M 494, 878 P2d 248, 51 St. Rep. 623 (1994).

Declarant to Testify and Be Subject to Cross-Examination Before Prior Statements Admissible: Following arrest, Brandon was interviewed by police. During trial, Brandon attempted to have a transcript of the statement admitted into evidence as an exhibit, but the exhibit was refused. On appeal, Brandon argued that the statement should have been admitted under this rule because as a prior statement by a witness, it was not hearsay and was properly offered to rebut an express or implied charge against the declarant of subsequent fabrication, improper influence, or motive. However, before prior statements qualify for admission, the declarant must testify and be subject to cross-examination. In this case, Brandon had not testified at the time that the statement was offered, and the statement was thus clearly inadmissible. St. v. Brandon, 264 M 231, 870 P2d 734, 51 St. Rep. 244 (1994).

Impeachment Required to Trigger Applicability of Rule: This rule applies only when the declarant's in-court testimony has been impeached by another party's allegations of subsequent fabrication, improper influence, or motive. In this case, the trial court denied the state's request to present prior consistent statements to the jury during the state's case in chief. Thereafter, the state questioned defendant and asked him directly if he believed the complainant was lying. When he answered affirmatively, the trial court held that defendant, by suggesting fabrication, opened the door for complainant's prior consistent statements to be admitted. However, the state cannot put a defendant in this tenuous position and then introduce prior consistent statements, which were ruled inadmissible hearsay during the case in chief, to rebut the only answer the defendant can give consistent with his defense. The state cannot use this type of cross-examination to get evidence admitted that was held inadmissible prior to cross-examination, nor can the state itself open the door for opinion testimony regarding the truthfulness of its own witness. St. v. Lunstad, 259 M 512, 857 P2d 723, 50 St. Rep. 916 (1993),

following St. v. Webb, 252 M 248, 828 P2d 1351 (1992), distinguishing St. v. Scheffelman, 250 M 334, 820 P2d 1293 (1992), and followed in St. v. Fina, 273 M 171, 902 P2d 30, 52 St. Rep. 887 (1995), and St. v. Maier, 1999 MT 51, 293 M 403, 977 P2d 298, 56 St. Rep. 208 (1999). St. v. Lunstad was followed, with regard to the requirement for a statement to be made before the declarant had a motive to fabricate, in St. v. Veis, 1998 MT 162, 289 M 450, 962 P2d 1153, 55 St. Rep. 651 (1998).

Exclusion of Testimony Presented to Witness Prejudicial to Defendant: Defendant, Stewart, contended that the trial court erred in excluding, on the basis that it was hearsay, testimony that indicated that the state's main witness had authorized Stewart to sign the witness's name to a document. Defendant contended that the testimony would show a prior inconsistent statement by the witness and thus was proper impeachment. The Supreme Court held that the exclusion of the testimony was error and had prejudiced Stewart's case. St. v. Stewart, 253 M 475, 833 P2d 1085, 49 St. Rep. 540 (1992).

Prior Inconsistent Statement: At trial, defendant's 12-year-old daughter testified that she could not remember what defendant had said at the time of the incident and that she did not remember defendant beating the victim. The District Court did not err in admitting the daughter's prior statement. Her trial testimony presented one claimed memory lapse and one positive contradiction. Her prior statement was therefore inconsistent within the meaning of this rule and was admissible as substantive evidence. St. v. Devlin, 251 M 278, 825 P2d 185, 48 St. Rep. 1093 (1991), followed in St. v. Maier, 1999 MT 51, 293 M 403, 977 P2d 298, 56 St. Rep. 208 (1999).

Victim's Prior Statements Admissible — No Motive to Fabricate: During cross-examination, the attorney for a defendant charged with sexual abuse attempted to challenge the victim by claiming that she had a motive to fabricate abuse and was subject to improper influence by the state's attorney. The state was allowed to show prior out-of-court statements made by the victim that were consistent with her testimony. On appeal, the Supreme Court held that the District Court did not err in admitting the prior statements because the victim's statement that she did not want the abuser to return to her household and continue the pattern of abuse provided the impetus to report abuse but was not evidence of a motive to lie or fabricate. St. v. Scheffelman, 250 M 334, 820 P2d 1293, 48 St. Rep. 1023 (1991), cited in St. v. Hensley, 250 M 478, 821 P2d 1029, 48 St. Rep. 1018 (1991).

Out-of-Court Statement Consistent With Trial Testimony Properly Excluded as Hearsay: Defendant sought to introduce deposition testimony of the grandmother of a victim of sexual intercourse without consent in order to impeach the victim's trial testimony regarding defendant's motives for the sexual contact. However, because the victim's out-of-court statement to her grandmother was not inconsistent with her trial testimony, it was properly excluded as hearsay. St. v. Goodwin, 249 M 1, 813 P2d 953, 48 St. Rep. 539 (1991).

Prior Consistent Statements by Victim of Sexual Assault, as Repeated by Witness, Properly Admitted: An investigator for the Department of Family Services (functions transferred in 1995 to Department of Public Health and Human Services and Department of Corrections) was called to interview a 15-year-old girl who made statements to the investigator implicating her father in her sexual assault. Defendant was charged with sexually assaulting his 15-year-old daughter. At trial and over the objection of defendant, the investigator repeated the out-of-court statements made by the daughter to the investigator. On appeal by defendant following his conviction, the Supreme Court held that the statements were properly admitted because they were not hearsay under this rule and because all of the requirements of this rule were satisfied: the declarant, the daughter, testified at trial; she was subject to cross-examination; and the witness investigator's testimony was consistent with the daughter's. The statements were used to rebut an allegation of fabrication when the defense attacked the daughter's credibility in opening and on cross-examination, and the statements were usable in the state's case in chief for that reason. St. v. Medina, 245 M 25, 798 P2d 1032, 47 St. Rep. 1832 (1990).

Witness's Prior Statement Implicating Defendant: The defendant argued that the primary reason the prosecution called a witness was to impeach that witness with a prior statement that implicated the defendant. The defendant relied on a federal evidentiary rule that has not been adopted by Montana, indicating that the prior statement was inadmissible. The Supreme Court ruled that the statement was admissible because the witness was subject to cross-examination by the defendant. St. v. Sorensen, 243 M 321, 792 P2d 363, 47 St. Rep. 873 (1990).

Victim's Prior Statements Admissible: The defendant in a rape case argued that the victim's out-of-court statements to others were inadmissible as hearsay. The Supreme Court held that they were admissible to rebut the defendant's attacks on the victim's credibility. St. v. Newman, 242 M 315, 790 P2d 971, 47 St. Rep. 711 (1990).

Deposition Testimony Inadmissible After Close of Trial: Workers' compensation claimant did not request the inclusion of his deposition testimony until after the trial was concluded. These hearsay statements were not admissible because the claimant did not request their inclusion at the trial, thereby giving the insurer the opportunity to rebut the claimant's statements, nor do they fall under one of the exceptions in Rule 803 or 804, M.R.Ev. To allow testimony by the claimant by admission of the deposition after the trial ended would effectively have denied the insurer an opportunity to challenge the statements made by the claimant in the deposition. Varela v. Petroleum Cas. Co., 237 M 300, 773 P2d 299, 46 St. Rep. 819 (1989).

Witness' Statement Not Referred to in Affidavit — No Ex Post Facto Problem — Admissible as Prior Inconsistent Statement: Defendant was convicted of operating a motor vehicle while designated a habitual traffic offender. Proceeding pro se, the defendant argued on appeal that failure to refer to a witness' statement in the affidavit supporting leave to file information constituted an ex post facto problem. The court held that he simply misunderstood that legal theory. The court further held that the statement, which asserted that defendant drove from Great Falls to Loma, was admissible as a prior inconsistent statement because the witness testified at trial that he, not the defendant, drove that distance. St. v. Grant, 217 M 357, 704 P2d 1064, 42 St. Rep. 1248 (1985).

Admissibility of Prior Inconsistent Statements — Impeachment Unnecessary: Under subsection (d)(1)(A) of this section, prior inconsistent statements of a declarant are admissible whether or not the declarant has been impeached by either side. St. v. Anderson, 211 M 272, 686 P2d 193, 41 St. Rep. 1357 (1984).

Prior Inconsistent Statements:

Federal Writ of Habeas Corpus granted for violation of defendant's confrontation rights (sixth amendment, U.S. Const.) because a prior statement by the employee, who had no genuine recollection of the substance of the prior statement, should be excluded as affecting right of cross-examination. Creekmore v. District Court, 571 F. Supp. 992, 40 St. Rep. 1638 (D.C. Mont. 1983), reversed in 745 F2d 1236 (1984).

In an attempt to obtain more money from an insurance company, Creekmore told an insurance company employee that he had taken a polygraph test through the Great Falls police and had been cleared of any wrongdoing. The employee contacted the police and was told that Creekmore had failed to keep his appointment to take the test. At trial the employee and a Great Falls police detective testified. The testimony indicated that the employee had made prior inconsistent statements. The court found no error in admitting the testimony. St. v. Creekmore, 196 M 187, 640 P2d 439, 39 St. Rep. 22 (1982).

Subsequent Insurance Application — Not Prior Inconsistent Statement: Plaintiff applied to defendant for health coverage for himself and his family. He met with an agent who filled out the application, which was signed by both parties. Plaintiff was not given a copy of the application or contract and was not advised that the application was part of the contract. The application was accepted. The family contracted medical bills which defendant declined to pay, claiming that the bills stemmed from "preexisting conditions" not covered by the contract. Defendant then unilaterally canceled the contract, claiming plaintiff had misrepresented his family's health in the application. Plaintiff sued for damages. Immediately after plaintiff's policy was canceled, they applied for similar coverage with Blue Shield. On that application plaintiff denied that any family member had some of the preexisting conditions. Defendant tried to introduce the Blue Shield application to impeach plaintiff with a prior inconsistent statement. Generally, information contained in a subsequent application for insurance is not admissible. Here, there was no convincing evidence that the applications were inconsistent. If the applications were not accurate and not inconsistent, they could not be used as evidence of a prior inconsistent statement. The Blue Shield application was properly excluded. Weber v. Blue Cross of Mont., 196 M 454, 643 P2d 198, 39 St. Rep. 245 (1982).

Discretion to Determine Statement's Reliability: Although the determination of reliability of a prior inconsistent statement is for the trial judge's discretion, he must view the situation in a light most favorable to the party offering the statement in evidence. St. v. White Water, 194 M 85, 634 P2d 636, 38 St. Rep. 1664 (1981).

Guilt Based Solely on Unreliable Prior Inconsistent Statement: An unreliable prior inconsistent statement of a witness should not be the sole substantive evidence upon which a jury is allowed to base guilt, and a conviction supported only by a prior inconsistent statement should not be allowed to stand. St. v. White Water, 194 M 85, 634 P2d 636, 38 St. Rep. 1664 (1981), followed in St. v. Gommenginger, 242 M 265, 790 P2d 455, 47 St. Rep. 681 (1990), and clarified in St. v. Giant, 2001 MT 245, 307 M 74, 37 P3d 49 (2001), which required that prior inconsistent statements admitted as substantive evidence of guilt be corroborated in order to

sustain a conviction. Gommenginger was distinguished in St. v. Neary, 284 M 409, 944 P2d 750, 54 St. Rep. 942 (1997). See also St. v. Charlo, 226 M 213, 735 P2d 278, 44 St. Rep. 597 (1987), and St. v. Stringer, 271 M 367, 897 P2d 1063, 52 St. Rep. 473 (1995).

Statutory Rape Not Proved Solely by Unreliable Prior Inconsistent Statement: Charge of sexual intercourse without consent was properly dismissed at the end of the state's presentation of its case where the only evidence upon which conviction could be based was an unreliable prior statement of the alleged victim that was inconsistent with her testimony at trial in which she repudiated the statement. St. v. White Water, 194 M 85, 634 P2d 636, 38 St. Rep. 1664 (1981).

Unsworn Statement by Person With Learning Disability: Although an interview between the Sheriff and the alleged crime victim was witnessed by a social worker, during which interview the Sheriff received a statement sought to be admitted by prosecution as a prior statement inconsistent to alleged victim's testimony at trial, the circumstances under which the statement was made, including that it was not made under oath and that the maker had a learning disability and was susceptible to agreement with suggestions made to her when she could not clearly verbalize her thoughts, tended to indicate the probable unreliability of the statement. St. v. White Water, 194 M 85, 634 P2d 636, 38 St. Rep. 1664 (1981).

When Hearsay Excluded — Repudiated Statements — Alternatives to Admission of Hearsay: A defendant convicted of sexual intercourse without consent and sexual assault alleged error on appeal relating to testimony of a prosecution witness' former attorney, which was offered but excluded at trial. The testimony related to the alleged denial of the right to counsel to one of the prosecution witnesses and the subsequent use of her statements to the police incriminating the defendant even though she had repudiated them. The Supreme Court on review held that the trial court ruling had been correct. The excluded testimony was inadmissible hearsay. In upholding the District Court ruling, the Supreme Court noted that the defendant could have questioned the police about prior inconsistent statements and he could have questioned the witness herself. St. v. Camitsch, 192 M 124, 626 P2d 1250, 38 St. Rep. 563 (1981), followed in St. v. Stuit, 277 M 227, 921 P2d 866, 53 St. Rep. 607 (1996).

Inconsistent Statements: A witness' answer to a question on redirect was that he made a statement to the police that he had not made a statement to anyone authorizing them to take his stereo. This answer includes two statements that must be analyzed within the hearsay rule. The first part of the answer that he "told the police" is not hearsay under Rule 801, M.R.Ev., because it was inconsistent with his prior testimony and it was offered to rebut the state's implied charge of subsequent fabrication, improper influence, or motive. The fact that he had not made a statement authorizing anyone to remove the stereo is admissible under the state of mind exception to the hearsay rule under Rule 803, M.R.Ev. St. v. Martinez, 188 M 271, 613 P2d 974, 37 St. Rep. 982 (1980).

Foundation for Prior Inconsistent Statement — Impeaching of Own Witness: When the prosecution called the declarant as a witness and questioned him as to the statement in question knowing that the witness would deny making the statement, the prosecution was not bound by the testimony of the witness and could thereafter impeach the declarant's denial of making the statement through the testimony of a coconspirator regarding a prior inconsistent statement. St. v. Fitzpatrick, 186 M 187, 606 P2d 1343, 37 St. Rep. 194 (1980), followed in St. v. Pease, 222 M 455, 724 P2d 153, 43 St. Rep. 1417 (1986).

Hearsay Exceptions Not Violative of Right to Confront Witnesses When Declarant Subject to Cross-Examination: A defendant is not denied the right to confront the witnesses against him by the admission under Rule 801, M.R.Ev., of a prior inconsistent statement made by a third person or a statement made by a coconspirator, implicating the defendant when the declarant testified as a witness and was subject to full and effective cross-examination. St. v. Fitzpatrick, 186 M 187, 606 P2d 1343, 37 St. Rep. 194 (1980), followed in St. v. Pease, 222 M 455, 754 P2d 153, 43 St. Rep. 1417 (1986), and St. v. Charlo, 226 M 213, 735 P2d 278, 44 St. Rep. 597 (1987). See also St. v. Maier, 1999 MT 51, 293 M 403, 977 P2d 298, 56 St. Rep. 208 (1999).

Prior Inconsistent Statement Not Required to Be Made Under Oath: Although Rule 801(d)(1)(A), M.R.Ev., is based on 801(d), Federal Rules of Evidence, it differs from its federal counterpart in that the federal rule requires that a prior inconsistent statement was one made under oath subject to a penalty of perjury. The Montana rule deletes that requirement as unnecessary and harmful to the purpose of the rule. Thus, when the declarant testified at the trial and was subjected to cross-examination concerning the prior statement, the testimony of a coconspirator that was inconsistent with the statement of the declarant is admissible despite the fact that the statement was made in the declarant's home rather than in a legal proceeding under oath. St. v. Fitzpatrick, 186 M 187, 606 P2d 1343, 37 St. Rep. 194 (1980), followed in St. v. Charlo, 226 M 213, 735 P2d 278, 44 St. Rep. 597 (1987).

ADMISSION BY PARTY OPPONENT

Improper Admission of Coconspirator's Out-of-Court Statements and Confession — Reversible Error: In a videotaped interview with detectives, Steilman admitted that he and Francis had murdered a man to prove their worth to each other in conducting other criminal activity. Steilman was offered a plea agreement and was called to testify at Francis's trial. When called as a witness, Steilman refused to answer any questions on fifth amendment grounds, so the state sought the admission of the videotaped interview and Steilman's out-of-court statements to lay witnesses. The state contended that the statements to lay witnesses were admissible as statements of a coconspirator made in furtherance of a conspiracy and that the statements to police were admissible as admissions against Steilman's penal interests. The District Court allowed the statements, but not the videotape, although the videotape was subsequently shown to the jury pursuant to a motion by defense counsel, in response to the ruling on the admissibility of the out-of-court statements, in order to give the jury an opportunity to observe Steilman. Francis was ultimately convicted of deliberate homicide and appealed on grounds that admission of the out-of-court statements was reversible error. The state conceded on appeal that the statements to lay witnesses were inadmissible because statements made after attainment of the conspirator's object are not admissible unless the movant can prove that an express agreement existed among the coconspirators to continue to act in concert to cover up the crime after its commission, and the state offered no such proof. Moreover, the statements were not admissible as testimony regarding out-of-court statements made by Francis, or admissible as statements made by Steilman and adopted by Francis. The state also conceded on appeal that the statements made to police were not admissible as statements against Steilman's penal interests. Pursuant to St. v. Castle, 285 M 363, 948 P2d 688 (1997), the fact that portions of a declarant's confession are admissible because they are self-inculpatory does not necessarily make the collateral noninculpatory statements either credible or admissible, particularly when the declarant implicates another person, as in this case when Steilman's confession consisted mainly of blaming Francis. The Supreme Court then applied 46-20-701, in light of St. v. Van Kirk, 2001 MT 184, 306 M 215, 32 P3d 735 (2001), to determine whether admission of the out-of-court statements constituted structural error or trial error and whether the error was reversible. The error here was trial error. In order to be considered harmless, it was necessary that the state demonstrate that there was no reasonable possibility that the inadmissible evidence contributed to the verdict. The court agreed that there was sufficient cumulative admissible evidence regarding Francis's purposeful participation in the killing. However, the court was forced to conclude that there was also a reasonable possibility that the erroneously admitted testimony of Steilman's out-of-court statements implicating Francis might have contributed to the conviction, so the case was reversed and remanded for a new trial. St. v. Francis, 2001 MT 233, 307 M 12, 36 P3d 390 (2001).

Stipulation Precluding Need to Bring Evidence of Insurance Settlement Before Jury: Dill suffered damages after being hit as a pedestrian by a vehicle operated by Jardine. State Farm Mutual Automobile Insurance Company (State Farm) provided both liability insurance for Jardine and underinsured motorist coverage for Dill. Dill maintained that State Farm's settlement of the underlying liability claim against Jardine was admissible as relevant under Rules 401 and 402, M.R.Ev., and as impeachment evidence pursuant to Rule 607, M.R.Ev., and subsection (d)(2) of this rule. However, it was not necessary to bring evidence of the settlement before the jury in light of the fact that State Farm stipulated that it had paid Dill the liability policy limit on behalf of Jardine and would pay any jury verdict that exceeded that amount up to the policy limit under the underinsured motorist policy. Simple knowledge that the policy limits were paid was sufficient. Dill v. District Court, 1999 MT 85, 294 M 134, 979 P2d 188, 56 St. Rep. 350 (1999).

Statements by Defendant Company's Attorney and Principal Owner Admissible: Clews sued Montana Mining Properties, Inc. (MMPI), for failure to pay him for his consulting services. MMPI argued that the lower court erred in admitting into evidence testimony of MMPI's attorney and principal owner, Smith, made in another judicial action that indicated that Smith had the power, as agent for the company, to bind the company to a consulting agreement with Clews. The Supreme Court held that the lower court had made no ruling that MMPI was collaterally estopped from arguing that Smith did not have authority to bind the company to an agreement with Clews and that although the lower court had mistakenly characterized the statements from the other action as judicial admissions, the statements were admissible as admissions by a party-opponent. C. Haydon Ltd. v. Mont. Min. Properties, Inc., 286 M 138, 951 P2d 46, 54 St. Rep. 1341 (1997).

Admission by One Defendant Testified to by Another Defendant: Ferree was called as a state witness and testified concerning statements made by Smith, a codefendant also accused of stealing stolen property. Smith objected to the admissibility of Ferree's testimony, arguing that the state failed to lay a foundation pursuant to subsection (d)(2)(E) of this rule. Citing St. v. Ottwell, 239 M 150, 779 P2d 500 (1989), the Supreme Court held that Smith's statements were an "admission by party-opponent", albeit admissions repeated by another defendant. For this reason, the Supreme Court held that Ferree's repetition of Smith's statement did not constitute hearsay. St. v. Smith, 276 M 434, 916 P2d 773, 53 St. Rep. 459 (1996).

Settlement Documents Inadmissible — Not Statement Against Interest by Party Opponent: In negotiations over damages for loss of business opportunity caused by Montana Rail Link (MRL), an adjuster for Farmers Mutual sent counsel for MRL a letter and a spreadsheet showing business interruption losses. MRL tried to introduce the letter and spreadsheet at trial, but the District Court disallowed the exhibit. Citing Lenahan v. Casey, 46 M 367, 128 P 601 (1912), and Gamble-Skogmo, Inc. v. McNair, 98 F. Supp. 440 (D.C. Mont. 1951), the Supreme Court held that the letter and spreadsheet were properly excluded. The Supreme Court said that the documents constituted statements made in settlement negotiations and were not made as independent statements of fact constituting statements against interest as an exception from the hearsay rule. DeTienne Associates Ltd. Partnership v. Mont. Rail Link, Inc., 264 M 16, 869 P2d 258, 51 St. Rep. 125 (1994).

Failure to Lay Foundation for Hearsay Affidavit — Failure to Carry Burden Proving Material Facts: Thornton offered to purchase certain real property by executing a buy/sell agreement. The evidence showed that Thornton knew that half of the property was held in trust by Norwest and half was owned by Songstad and her sisters. Thornton obtained the signature of Songstad (representing her sisters) on the buy/sell agreement, but not that of Norwest. In response to Norwest's motion for summary judgment, Thornton submitted an affidavit containing his own hearsay statements that an unidentified trust manager at Norwest had agreed to be bound by the desire of Songstad to sell her half of the property. Citing Eberl v. Scofield, 244 M 515, 798 P2d 536 (1990), and Passovoy v. Nordstrom, Inc., 758 P2d 524 (Wash. 1988), the Supreme Court held that because Thornton's affidavit failed to lay a foundation for the use of the trust manager's statements, the affidavit did not qualify as a statement of a party opponent, an exception from the hearsay rule, and therefore did not meet the requirements of Rule 56(e), M.R.Civ.P. (Title 25, ch. 20), by putting into dispute issues of material fact. The Supreme Court held that the District Court was therefore correct in granting Norwest's motion for summary judgment. Thornton v. Songstad, 263 M 390, 868 P2d 633, 51 St. Rep. 104 (1994).

Breach of Contract — Admissibility of Intracorporate Communication: In a breach of contract suit, the District Court did not abuse its discretion in admitting into evidence an internal audit regarding defendant's construction contract with plaintiff. The internal audit was admissible as an admission because it was relevant to the issue being resolved by the trial court. Haines Pipeline Constr., Inc. v. Mont. Power Co., 251 M 422, 830 P2d 1230, 48 St. Rep. 1102 (1991), cited in Ganz v. U.S. Cycling Fed'n, 273 M 360, 903 P2d 212, 52 St. Rep. 1030 (1995).

Plaintiff's Letter Written After Firing Admissible in Wrongful Termination Case: After he was fired, the plaintiff wrote a letter to the Social Security Administration and requested benefits on the basis that he was physically unable to take another job as a mechanic. The lower court ruled that the letter was inadmissible. The Supreme Court held that the letter was admissible because it was relevant with respect to the defendant's contention that one of the reasons for the plaintiff's firing was his physical condition. Heltborg v. Modern Mach., 244 M 24, 795 P2d 954, 47 St. Rep. 1254 (1990).

Admission of Wife's Exhibits on Husband's Financial Status: Wife's exhibits documenting husband's assets and liabilities, in husband's own handwriting, were properly admitted as relevant evidence of husband's financial status where husband refused to provide his own evidence. This admission by a party-opponent was not hearsay and met the test of admissibility under this rule. In re Marriage of Powell, 231 M 72, 750 P2d 1099, 45 St. Rep. 441 (1988).

Coconspirator Statements as Hearsay Exemption — Reliability Analysis: Coconspirator statements do not fall within a hearsay exception, but rather a hearsay exemption. Satisfaction of the requirements of Rule 801(d)(2)(E), M.R.Ev., does not ipso facto satisfy the right of defendant to confront witnesses; rather, a separate Confrontation Clause Analysis designed to guarantee the reliability of the challenged coconspirator statements is required. Relevant criteria are: (1) the declarant's knowledge of the identity and role of defendant in the crime; (2) the possibility that declarant was relying on faulty recollection; and (3) the circumstances under which the statements were made, possibly indicating that declarant might be lying about

defendant's involvement in the conspiracy. St. v. Stever, 225 M 336, 732 P2d 853, 44 St. Rep. 283 (1987), cited in St. v. Gommenginger, 242 M 265, 790 P2d 455, 47 St. Rep. 681 (1990).

Elements of Proper Foundation Required Before Coconspirator's Statements Admissible: Before a coconspirator's statement may be admitted pursuant to Rule 801(d)(2)(E), M.R.Ev., establishment of a proper foundation is required. The foundation must show that the requisite elements of the rule have been met, specifically: (1) that a conspiracy exists; (2) that the declarant coconspirator and the defendant were members in such conspiracy; and (3) that the declaration was uttered in the course of and in furtherance of the conspiracy. St. v. Stever, 225 M 336, 732 P2d 853, 44 St. Rep. 283 (1987).

Witness Questioned Concerning Prior Inconsistent Statement: If a witness testifies at trial and is cross-examined concerning a prior inconsistent statement, the statement at trial is not hearsay. The defendant's right to confront the witness is not denied because the defendant may cross-examine the declarant and ask him to explain why he is giving a statement inconsistent with his prior one. St. v. Bell, 225 M 83, 731 P2d 336, 44 St. Rep. 56 (1987).

Intercorporate Memoranda — Notice of Hazard — Admission of Party Opponent: The Troy Town Council had passed a resolution requesting a speed limit of 25 miles per hour on trains passing through town, due to the hazardous nature of the crossing where the accident in question occurred. The minutes of the Town Council, letters between the Town Council and the railroad, and intercorporate memoranda between railroad officials on the subject matter of the crossing should have been admitted into evidence. They were relevant to show notice of the claimed hazardous conditions and the intent of the railroad with respect to the same. These documents go to the issue of ordinary care to be exercised by the railroad and may go to the issue of punitive damages as an indication of wantonness or oppressiveness. The intercorporate memoranda are also relevant as possible admissions of a party opponent. Runkle v. Burlington N., 188 M 286, 613 P2d 982, 37 St. Rep. 995 (1980).

VERBAL ACT

Verbal Act Exception: The District Court did not err in admitting testimony by the plaintiff and the plaintiff's attorney concerning a Montana Power Company buyout offer of $35,000 when the plaintiff's refusal of the offer was found to be consideration necessary for the creation of an oral contract. Whether the Montana Power Company actually made an offer was not an issue in the case. The fact that the plaintiff believed that there had been such an offer and had communicated that fact to the defendant was a verbal act to which the plaintiff and the attorney could testify. Ragland v. Sheehan, 256 M 322, 846 P2d 1000, 50 St. Rep. 83 (1993).

Statement Containing Two Hearsay Declarations: Plaintiff testified that a third party told him that defendant made statements to the third party to pressure the third party into not awarding a subcontract to the plaintiff. The second hearsay declaration, that defendant made statements to pressure the third party, was admissible as nonhearsay because the statement constituted a verbal act in the sense that it went to prove the operative facts of the alleged tort, i.e., pressuring the third party. Phillip R. Morrow, Inc. v. FBS Ins. Mont.-Hoiness Labar, Inc., 236 M 394, 770 P2d 859, 46 St. Rep. 455 (1989).

Verbal Act: The District Court did not err by admitting testimony of an alleged statement of defendant that he had been imprisoned for rape since the statement was not offered for the purpose of proving the truth of the assertion regarding the prior felony but merely for the purpose of establishing the fact that the words had been said by the defendant, which constituted a "verbal act" relevant to the issues. St. v. Collins, 178 M 36, 582 P2d 1179, 35 St. Rep. 993 (1978).

Verbal Act Exception: The trial court did not err in admitting out-of-court statements made by defendant as a verbal act exception to the hearsay rule when they were not offered to prove the truth of such statements but rather to show how the investigation of the homicide focused on the defendant as a suspect. St. v. McGuinn, 177 M 215, 581 P2d 417 (1978).

MISCELLANEOUS

Prosecutor's Improper Reference to Hearsay Statement in Opening Cured by Court's Instruction: Defendant contended that the prosecutor's reference to a hearsay statement by a person who did not testify at trial was prejudicial. Defendant did not move for mistrial based on the statement, but asserted on appeal that the improper reference should warrant reversal. The Supreme Court noted that a lawyer's statements are not evidence and held that it would be inappropriate to apply the abuse of discretion standard to an action or lack of action that defendant never requested the trial court to take. In this case, the quoting of hearsay was cured by the trial court's instruction that the jury disregard the prosecutor's statement, and the Supreme Court declined to reverse the conviction. St. v. High Elk, 2006 MT 6, 330 M 259, 127

P3d 432 (2006), distinguishing St. v. Van Kirk, 2001 MT 184, 306 M 215, 32 P3d 735 (2001), and St. v. Runs Above, 2003 MT 181, 316 M 421, 73 P3d 161 (2003).

Cross-Examination of Child Witness Concerning Change in Testimony Not Considered Ineffective Assistance of Counsel: Following a break in trial, a child witness changed his testimony, and defense counsel questioned the child regarding who he talked to during the break and whether he was told to say anything different from what he had said before. On rebuttal, the state then introduced the child's prior consistent statements to others, and the trial court allowed the testimony about the child's prior statements over defendant's objections. On appeal, defendant contended that counsel's assistance was ineffective because defendant was prejudiced when counsel opened the door to rebuttal testimony regarding the child's prior consistent statements. The Supreme Court applied the Strickland test for effective assistance of counsel and disagreed that the tactic constituted deficient performance. Rather, counsel would have been remiss if the change in the child's testimony had been ignored. Questioning the child concerning possible improper influence by the state or persons associated with the state during the break was a proper trial strategy and could not be considered ineffective assistance of counsel. St. v. J.C., 2004 MT 75, 320 M 411, 87 P3d 501 (2004).

Inadmissible Recorded Commentary of Crime — Harmless Error: During Strauss's negligent homicide trial, the District Court admitted two videotape recordings of the crime scene. One tape included an audio commentary portion by an investigating officer, and one depicted the positions of Strauss and the victim relative to their positions at the time that the crime was committed. Strauss objected to both tapes, but they were admitted over objection. On appeal, the Supreme Court agreed that the tape with commentary should have been admitted without sound because the commentary was the prior statement of a nonparty witness that the Montana Rules of Evidence classify as nonhearsay. However, the commentary was not offered to rebut an allegation of fabrication, improper influence, or motive or for identification, so it could not be classified as admissible nonhearsay. Nevertheless, the state presented admissible evidence that proved the same facts as the commentary, so its admission was harmless error. As for the second videotape, based on Peschke v. Carroll College, 280 M 331, 929 P2d 874 (1997), the tape was a reenactment of Strauss's crime and was therefore subject to the foundational requirements in St. v. Leroux, 133 N.H. 781, 584 A2d 778 (1990), and Pickren v. St., 269 Ga. 453, 500 SE 2d 566 (1998), including authentication and identification. A recorded reenactment must accurately portray the event in question, and the party presenting the recording must show that the reenactment was filmed under conditions substantially similar to the actual event, which may be satisfied by testimony of a witness who was present at the crime. The state failed to meet its burden by not presenting testimony of a witness who was present at the crime scene and could testify to the accuracy of the tape. However, that error was also considered harmless because the second tape was largely cumulative of the first recording, was not injurious to Strauss's defense, was not probative of any disputed issue, and did not contribute to Strauss's conviction. St. v. Strauss, 2003 MT 195, 317 M 1, 74 P3d 1052 (2003).

Hearsay Statements of Child Improperly Admitted in Parental Rights Termination Case — Harmless Error: The District Court improperly admitted hearsay evidence related by the child of parents who were subject to a parental rights termination case. However, the improper hearsay was not necessary to the court's determination of proved abuse or neglect of the fitness of the parents and thus did not affect the parents' substantial rights or the result that the court reached. Although the court abused its discretion in admitting the testimony, the error was harmless, and termination of parental rights was affirmed on appeal. In re A.N. & C.N., 2000 MT 35, 298 M 237, 995 P2d 427, 57 St. Rep. 155 (2000).

Hearsay Statement by Witness Not Adopted by Defendant — Requirements for Finding Subpoenaed Witness "Unavailable": After having consumed drinks in Marysville, Widenhofer and Rothschiller were involved in a one-car accident on the Marysville Road. A car picked them up and took them to the closest business, the Silver City Bar. Because Widenhofer was injured, a highway patrol officer was called, who, upon arriving at the Silver City Bar, asked Rothschiller some questions about the accident. When he was in the patrol car with only the officer present, Rothschiller answered one of those questions by stating that Widenhofer was driving the vehicle. The officer then took both Widenhofer and Rothschiller to the hospital in Helena. After Widenhofer's injuries were cared for, the highway patrol officer continued to question Widenhofer; advised him that in the officer's opinion, alcohol was a factor in the accident; asked Widenhofer to submit to a blood-alcohol test; and read Widenhofer the implied consent form. Although Rothschiller was served with a subpoena by the Sheriff the night before a jury trial on Widenhofer's charge of DUI, Rothschiller failed to appear at trial. During the trial, the District Court allowed the highway patrol officer to repeat Rothschiller's answer, that Widenhofer was

the driver of the vehicle. The Supreme Court reversed the decision of the District Court allowing the hearsay testimony. The Supreme Court held that the state's reliance on subsection (d)(2)(B) of this rule was misplaced because the District Court did not make an express finding that Rothschiller's statement was adopted by Widenhofer, as the District Court should have under the rationale of U.S. v. Schaff, 948 F2d 501 (9th Cir. 1991), and because the state did not present sufficient evidence that Widenhofer acquiesced in Rothschiller's statement. The Supreme Court noted that Widenhofer could not hear the conversation between the officer and Rothschiller and had no reason to know what Rothschiller was telling the officer. For these reasons, the Supreme Court held that Rothschiller's statement as to who was driving the vehicle was not adopted by Widenhofer and that Rothschiller's statement could therefore not be allowed under this exception to the hearsay rule. Widenhofer also objected to the hearsay testimony of the highway patrol officer because it violated Widenhofer's right under the sixth amendment to the United States Constitution and under Art. II, sec. 24, Mont. Const., to confront and cross-examine a witness. The Supreme Court held that the "unavailability" exception under Rule 804(a)(5), M.R.Ev., could not be invoked because under the analysis of Ohio v. Roberts, 448 US 56 (1980), that rule requires the prosecution to demonstrate the "unavailability" of a witness before hearsay evidence of the witness's statements may be introduced. The Supreme Court held that the state's "minimal" attempt to procure Rothschiller's testimony by serving a subpoena on him the night before trial did not constitute "reasonable means" of procuring his testimony. St. v. Widenhofer, 286 M 341, 950 P2d 1383, 54 St. Rep. 1438 (1997).

Admission of Hearsay Held Harmless Error — Refusal to Grant Mistrial Upheld: During the trial of a negligence action against the state for failure to properly supervise on parole a convicted execution-style murderer, the plaintiff testified that during the criminal trial of the parolee in another state, a firearms expert testified as to the age of the parolee's handgun. The state objected to the plaintiff's testimony but was overruled and later moved for a mistrial on the grounds that the plaintiff's counsel knowingly used false testimony because that counsel had a transcript of the previous criminal trial containing the expert's statements. The District Court reviewed the transcript from the criminal trial, concluded that the plaintiff's statements were based upon her own erroneous impressions from that trial, and refused to grant the mistrial. The Supreme Court held that the plaintiff's statement was hearsay and that it was error to admit the statement but, because the plaintiff's statement was cumulative, that admission of the statement was harmless error. The Supreme Court also noted that what the state was requesting by the motion for mistrial was that the Supreme Court substitute its judgment for that of the District Court concerning the District Court's findings that the testimony was presented knowing it was false, which the Supreme Court refused to do. Starkenburg v. St., 282 M 1, 934 P2d 1018, 54 St. Rep. 214 (1997).

Admissibility of Deputy Sheriff's Testimony of Phone Conversation With Defendant's Attorney: Deputy Sheriff's testimony of phone conversations with defendant's attorney, who was inquiring about and attempting to resolve charges against defendant, was not impermissible hearsay. It was admissible as statements of a party made through an agent. The testimony was not a violation of the attorney-client privilege, which protects communications between an attorney and a client, not those between an attorney and a third party. St. v. Ahmed, 278 M 200, 924 P2d 679, 53 St. Rep. 804 (1996).

Statement Admissible Under One Rule Despite Inadmissibility Under Another Rule: Ferree and Smith conspired to steal stolen property. At trial, on charges of stealing stolen property, the state offered Ferree's direct testimony as part of its case against Smith. Smith objected to Ferree's testimony about Smith's statements, arguing that the state had not laid a proper foundation for admissibility of testimony of a coconspirator under subsection (d)(2)(E) of this rule. The Supreme Court held that Ferree's testimony was admissible under Rule 602, M.R.Ev., because Ferree testified to matters within his own knowledge and that the testimony was also admissible because Ferree was the "declarant" subsection (b) of this rule and his statements therefore did not come within the definition of hearsay in subsection (c) of this rule. Because the statements were admissible under one rule, the Supreme Court held that it made no difference that the testimony was inadmissible under another rule. St. v. Smith, 276 M 434, 916 P2d 773, 53 St. Rep. 459 (1996).

Therapist's Repetition of Children's Testimony — Harmless Error: In an action to terminate a mother's parental rights, the District Court did not commit reversible error by admitting hearsay testimony of a therapist repeating statements made by the mother's children. The court's finding that the mother allowed the children to be sexually abused was supported by the evidence, and any error by the court in admitting the testimony was harmless. In re Inquiry Into M.M., 274 M 166, 906 P2d 675, 52 St. Rep. 1170 (1995).

Prosecutor's Opening Statements Alluding to Testimony of Trial Witnesses — Not Hearsay: Statements made by the prosecutor in the opening comments of a sexual assault trial alluding to testimony of certain witnesses to be called during trial, which chronicled the development and investigation of the case up to the point of charging defendant, did not constitute hearsay or prejudice defendant by alluding to improper witness testimony. St. v. Alexander, 265 M 192, 875 P2d 345, 51 St. Rep. 474 (1994).

Opinion Testimony Regarding Cause of Accident: The trial court did not err in allowing the investigating officer to offer opinion testimony regarding the cause of the pedestrian-auto accident when the officer was identified as an expert prior to trial and when he testified as to the cause of the accident, not the negligence of the parties. The evidence obtained by the investigating officer at the scene of the accident, coupled with his experience in accident investigation, provided a sufficient basis for the court to determine that he had a proper foundation to testify. Campbell v. Johnson, 251 M 12, 823 P2d 237, 48 St. Rep. 1097 (1991).

Error Harmless Absent Contribution to Conviction: Following the rationale of St. v. Brush, 228 M 247, 741 P2d 1333 (1987), the Supreme Court held that only if there is a reasonable possibility that inadmissible evidence might have contributed to a conviction is there reversible error. St. v. Earl, 242 M 279, 790 P2d 464, 47 St. Rep. 691 (1990), followed in St. v. Cline, 275 M 46, 909 P2d 1171, 53 St. Rep. 32 (1996).

Not Error to Refuse to Grant Continuance to Subpoena Witness — Testimony Inadmissible Hearsay: Even if the motion to compel a subpoena had been made in a timely manner, the District Court did not err in refusing to grant a continuance to call the police chief as witness to testify as to what he reported to the Worker's Compensation Crime Compensation Unit because the police chief was not present during the assault and his testimony about the report would have been inadmissible hearsay. Sloan v. St., 236 M 100, 768 P2d 1365, 46 St. Rep. 214 (1989).

Expert Testimony by Highway Patrolman That No Arrest Made After Accident — Prejudicial Error: Statement by a highway patrolman, testifying as an expert, that he had not issued a citation following an accident because of his determination that the driver was not negligent constituted prejudicial error. Questions as to why an arrest was not made were objectionable at least on the following grounds: (1) they were irrelevant; (2) they were argumentative in form; (3) they described as crimes things that were not crimes; (4) they called not for objective evidence but for the mental conclusions of the witness; and (5) they were hearsay. Smith v. Rorvik, 231 M 85, 751 P2d 1053, 45 St. Rep. 451 (1988), followed in Hart-Anderson v. Hauck, 239 M 444, 781 P2d 1116, 46 St. Rep. 1817 (1989), and distinguished in Campbell v. Johnson, 251 M 12, 823 P2d 237, 48 St. Rep. 1097 (1991).

Absence of Agency Relationship — Nonparty Statements as Hearsay: Plaintiffs sought to introduce statements attributed to out-of-state nonparty independent fertilizer distributors, contending the statements were evidence of the in-state defendant's fraudulent marketing scheme. The Supreme Court found that absent proof of an agency relationship, the statements were hearsay. Gurnsey v. Conklin Co., Inc., 230 M 42, 751 P2d 151, 45 St. Rep. 1 (1988).

Inadmissible Hearsay — Cumulative Evidence — Harmless Error: Defendant charged with witness tampering contended the District Court erred in admitting into evidence a note written by two other inmates containing offers to "talk sense" into a witness, using physical force if necessary. The note was intercepted by jailers before it reached defendant. The state contended the note was offered to prove the witness' state of fear; however, the inference that the witness was fearful could not be reached without the immediate inference that the inmates actually attempted to "talk sense" into the witness. Therefore, the note was offered by the state to prove the contents of the note and as such was inadmissible hearsay under Rule 801, M.R.Ev. The Supreme Court held that the note constituted cumulative evidence in that the charge of witness tampering was also supported by substantial credible testimony of the witness and the defendant himself. The note was erroneously admitted, but the error was harmless. St. v. Woods, 221 M 17, 716 P2d 624, 43 St. Rep. 601 (1986).

No Testimony as to Statement by Declarant — Not Hearsay: Defendant was charged with criminal possession of dangerous drugs with intent to sell. The State wished to introduce tapes of conversations between an informant accomplice and defendant. The informant was not available at the trial. The State had a police officer testify as to the informant's consent to the recording so that the recording would be admissible. Defendant contended that the officer's testimony was hearsay. On appeal, the Supreme Court said that under Rule 801(b), M.R.Ev., the declarant was the informant. The essence of the challenged testimony was that the informant was aware the conversations were being taped and that the taping was done with her consent. The testimony established the fact of an agreement between the informant and the officer. Because the officer did not testify as to any statement made by the informant, there was no hearsay under the

definition found in Rule 801(c), M.R.Ev. St. v. Canon, 212 M 157, 687 P2d 705, 41 St. Rep. 1659 (1984), followed in St. v. Dannels, 226 M 80, 734 P2d 188, 44 St. Rep. 472 (1987).

Admissibility of Documents in 1929 Dispute — Weight Accorded: The Water Court improperly relied on the answer filed by the respondent's predecessor in a 1929 water rights case since the answer had no evidentiary value in light of conflicting evidence as to priority dates. Part of that evidence was an attorney-to-client letter that clearly disclosed the intent of the respondent's predecessor to withdraw his claims to particular priority dates. The letter did not constitute inadmissible hearsay, and its admission did not violate the attorney-client privilege. Hill v. Merrimac Cattle Co., Inc., 211 M 479, 687 P2d 59, 41 St. Rep. 1504 (1984).

Hearsay Within Hearsay — One Declarant Not Subject to Cross-Examination — Whole Statement Inadmissible: During rebuttal in a homicide trial, the State had a police officer testify as to what a witness had said the defendant had said to him just prior to the homicide. The witness had testified earlier in the trial but had been excused the day before rebuttal. The Supreme Court held that the officer's testimony was "hearsay within hearsay" as defined in Rule 805, M.R.Ev., and admissible only if both hearsay parts were admissible. Because the witness was absent and thus not subject to cross-examination, that part of the hearsay in which the witness was the declarant was inadmissible under Rule 801(d)(i), and thus the whole statement was inadmissible. St. v. Daniels, 210 M 1, 682 P2d 173, 41 St. Rep. 880 (1984).

Statement of Deceased Hearsay — State of Mind Not at Issue: Moen, an employee of defendant, died of a heart attack. His wife filed suit, alleging that defendant negligently failed to provide help to a worker stricken by a heart attack. Moen's supervisor testified that he asked Moen to work Saturday only upon discovering that he stayed in Decker on Friday night rather than return to Great Falls. The court properly excluded as inadmissible hearsay the testimony of Moen's wife that he called his wife on Friday and told her that he couldn't come home because he had to work on Saturday. One cannot impeach a witness on a collateral matter. The question of when the supervisor asked Moen to work overtime is not relevant or material to the issue of defendant's negligence. The testimony is not saved by being a statement of Moen's state of mind or his intent and hence is not an exception to the hearsay rule. Moen's state of mind is not at issue; rather the negligence of defendant is at issue. Moen v. Peter Kiewit & Sons' Co., 201 M 425, 655 P2d 482, 39 St. Rep. 2209 (1982).

After-the-Fact Exclusion of Evidence: The District Court admitted into evidence in a lien controversy a document prepared for concrete costs at the request of defendant's counsel. Plaintiff objected, contending the document was hearsay. At the conclusion of trial, the District Court Judge issued a memorandum excluding the document as hearsay. Defendant argued the after-the-fact ruling was prejudicial because it precluded him from calling other witnesses or otherwise presenting proof. The Supreme Court held that although the document was properly excluded as hearsay, since not issued in the ordinary course of business, the manner of the ruling was prejudicial and remanded the matter for reconsideration. Anderson v. Hobbs, 196 M 31, 637 P2d 817, 38 St. Rep. 2098 (1981).

Objection to Matter Agreed to at Pretrial: An objection to a fire department report on a fire on grounds of hearsay was properly denied when objecting party had agreed in pretrial order to the admission of the report as requiring no foundation or proof. Swenson v. Buffalo Bldg. Co., 194 M 141, 635 P2d 978, 38 St. Rep. 1588 (1981).

Multiple Hearsay: A detective testified that Polotto told him that Polotto had not told anyone that they were authorized to take his stereo. The declarant, Polotto, was not on the stand so Rule 801, M.R.Ev., does not apply. When a hearsay is included within a hearsay, Rule 805, M.R.Ev., requires the exclusion of the multiple hearsay unless each part of the combined statement conforms to an exception to the hearsay rule. Since no exception applies to the first part of the statement, "Polotto told him", the entire statement is inadmissible. St. v. Martinez, 188 M 271, 613 P2d 974, 37 St. Rep. 982 (1980).

Statement of Coconspirator — Conspiracy Still Viable: A statement made 4 hours after the crime was committed and during the first rendezvous of the conspirators following the crime, when the record is replete with evidence that the conspiracy extended for weeks after the statement was made, was not made after the conspiracy had ended but was made during the course and in furtherance of the conspiracy and was not hearsay under Rule 801(d)(2). St. v. Fitzpatrick, 186 M 187, 606 P2d 1343, 37 St. Rep. 194 (1980).

Evidence of Other Crimes, Wrongs, or Acts — Hearsay — Prejudicial Error: Direct evidence of other crimes, if such evidence came within the exceptions of Rule 404(3)(b), M.R.Ev., would be admissible. Indirect, hearsay evidence must also conform to the rules relating to the admission of hearsay testimony, including the exceptions. If the severely beaten victim were regarded as an unavailable witness because of her physical condition, her statements would be admissible if

they came within the exceptions of Rule 804, M.R.Ev. Here, however, the hearsay declarant was not found to have circumstantial guarantees of trustworthiness because she admittedly disliked the defendant. Nor could the victim's statements be admitted as "excited utterances" because such utterances are admissible only if they are part of the res gestae of the crime charged. Admission of the statements of the victim to a friend and to her doctor, therefore, constituted prejudicial error. Admission of proof of wholly independent crimes requires a balancing of the relative probative value of the evidence against the prejudicial effect. Evidence of a course of conduct similar to the crime charged tends to prove the crime charged, but such evidence should not be admitted unless the proof thereof tends toward the conclusion that the defendant is guilty of the crime charged with moral certainty and beyond a reasonable doubt. With proper safeguards, the court would allow evidence of previous assaults. St. v. Brubaker, 184 M 294, 602 P2d 974, 36 St. Rep. 1915 (1979).

Statement by Deceased Agent of Defendant — Admissibility: The statement of a corporate agent made to plaintiff within the scope and term of the agency is admissible as testimony by plaintiff when offered against the defendant, although the corporate agent died before trial. McNulty v. Bewley Corp., 182 M 260, 596 P2d 474, 36 St. Rep. 1110 (1979).

Expert Opinion Testimony Based on Hearing: Under certain circumstances an expert witness giving medical testimony may offer an opinion based on hearsay information. Hunsaker v. Bozeman Deaconess Foundation, 179 M 305, 588 P2d 493, 35 St. Rep. 1647 (1978).

Hearsay — No Applicable Exception: In a wrongful death action, the court properly refused admission of hearsay testimony from people who were not present at the time of the drowning and who attempted to testify to the approximate location where the deceased entered the water. Neither the "present sense impression" exception to the hearsay rule nor the "res gestae" rule operated in this case. Folda v. Bozeman, 177 M 537, 582 P2d 767, 35 St. Rep. 1019 (1978).

Medical Reports Considered: The Workers' Compensation Court properly considered unsworn written medical reports without violating Montana Rules of Evidence regarding hearsay, since the court is not bound by common law and statutory rules of evidence, and without violating claimant's right to cross-examination because she had the opportunity at the hearing to present rebutting medical evidence. Stevens v. Glacier Gen. Assurance Co., 167 M 61, 575 P2d 1326, 35 St. Rep. 278 (1978).

Law Review Articles

Expert Testimony in Child Sexual Abuse Cases in Montana: A Proposal for Change, Harrison, 54 Mont. L. Rev. 297 (1993).

Montana Supreme Court Survey—Civil Procedure and Evidence, Dyrud, 42 Mont. L. Rev. 343 (1981).

Employing Inconsistent Statements for Impeachment and as Substantive Evidence: A Critical Review and Proposed Amendments of Federal Rules of Evidence 801(d)(1)(A), 613, and 607, Graham, 75 Mich. L. Rev. 1565 (1977).

Surprise! That Damaging Turncoat Witness is Still With Us: An Analysis of Federal Rules of Evidence 607, 801(d)(1)(A) and 403, Ordover, 5 Hofstra L. Rev. 65 (1976).

Substantive Use of Prior Inconsistent Statements Under the Federal Rules of Evidence, Blakely, 64 Ky. L. J. 3 (1975-1976).

Collateral References

Criminal Law *key* 405 through 415, 419; Evidence *key* 200 through 265, 314 through 324; Witnesses *key* 397.

31A C.J.S. Evidence §§256, 270 through 383.

29 Am. Jur. 2d Evidence §658, et seq.; 29A Am. Jur. 2d Evidence §§754, et seq., 890, 891; 31A Am. Jur. 2d Expert and Opinion Evidence §31; 81 Am. Jur. 2d Witnesses §§897, 899 through 901, 906, 958.

Former testimony used at subsequent trial as subject to ordinary objections and exceptions. 40 ALR 4th 514.

Admissibility of evidence concerning words spoken while declarant was asleep or unconscious. 14 ALR 4th 802.

Admissibility of testimony concerning extrajudicial statements made to, or in presence of, witness through an interpreter. 12 ALR 4th 1016.

Admissibility of hearsay evidence in probation revocation hearings. 11 ALR 4th 999.

Admissibility of defense communications made in connection with plea bargaining. 59 ALR 3d 441.

Necessity and sufficiency of independent evidence of conspiracy to allow admission of extrajudicial statements of coconspirators. 46 ALR 3d 1148.

Witness's refusal to testify on ground of self-incrimination as justifying reception of evidence of prior statements or admissions. 43 ALR 3d 1413.

Admissibility and probative value of admissions of fault by agent on issue of principal's secondary liability, where both are sued. 27 ALR 3d 966.

Party's right to use, as evidence in civil trial, his own testimony given upon interrogatories or depositions taken by opponent. 13 ALR 3d 1312.

Admissibility as evidence in civil cases of admissions by infants. 12 ALR 3d 1051.

Admissibility of statements of coconspirators made after termination of conspiracy and outside accused presence. 4 ALR 3d 671.

Admissibility of statement under Rule 801(d)(2)(B) of Federal Rules of Evidence, providing that statement is not hearsay if party-opponent has manifested adoption or belief in its truth. 156 ALR Fed. 217.

Admissibility of statement by coconspirator under Rule 801(d)(2)(E) of Federal Rules of Evidence. 44 ALR Fed. 627.

What is "other proceeding" under Rule 801(d)(1)(A) of Federal Rules of Evidence, excepting from hearsay rule prior inconsistent statement given "at a trial, hearing, or other proceeding". 37 ALR Fed. 855.

Admissibility as against conspirator of extra-judicial declarations of coconspirator. 1 L Ed 2d 1780.

3 Wigmore §1018; 4 Wigmore §§1048 through 1087; 5 Wigmore §§1361 through 1365; 6 Wigmore §1788.

Rule 802. Hearsay rule.

Commission Comments

This rule is identical to Federal and Uniform Rules (1974) Rule 802, except the clause beginning "except as otherwise provided" has been changed so that the language is consistent with other exception clauses found in the rules. The Advisory Committee's Note to Federal Rule 802, 56 F.R.D. 183, 299 (1972), indicates "the provision excepting from the operation of the rule hearsay which is made admissible by other rules adopted by the Supreme Court or by Act of Congress continues the admissibility thereunder of hearsay which would not qualify under the evidence rules". The Advisory Committee's Note then goes on to list several examples of rules of procedure and acts of Congress which allow hearsay to be admitted. *Id.*

This rule is consistent with existing Montana law. Although a clear statement of the hearsay rule cannot be found in Montana statutes, Section 93-401-2, R.C.M. 1947 [superseded], has been interpreted as providing the hearsay rule. Patterson v. Halterman, 161 Mont. 278, 282, 505 P2d 905 (1973). That statute provides: "A witness can testify to those facts only which he knows of his own knowledge; that is, which are derived from his own perceptions except in those few express cases in which his opinion or inferences, or the declarations of others, are admissible". In Wilson v. Davis, 110 Mont. 356, 366, 103 P2d 149 (1940), the court cited this statute and stated that the exceptions to it are found in R.C.M. 1947, Sections 93-401-6 [superseded], 93-401-7 [26-1-103], 93-401-10 [superseded], and 93-401-27(4) [superseded]. These sections relate to various hearsay exceptions. However, the rule that hearsay is inadmissible has been followed in Montana without question since the early case of Davis v. Blume, 1 Mont. 463, 465 (1872).

Examples of hearsay exceptions are: Rules 803 and 804 of the Montana Rules of Evidence, stating the general hearsay exceptions; Rules 5(f), 43(e), and 56(e) of the Montana Rules of Civil Procedure, relating to proof by affidavit; Rule 32(a) of the Montana Rules of Civil Procedure, allowing depositions to be admitted as evidence; and Section 95-1802(e) R.C.M. 1947 [46-15-204], allowing depositions to be admissible in criminal actions.

Case Notes

Hearsay Statement of Assault Victim Properly Admitted as Excited Utterance: Following a sexual assault, the victim told her sister that Cameron tried to rape her. The trial court admitted the sister's statement under the present sense impression exception, but Cameron appealed on grounds that the statement was inadmissible hearsay. The Supreme Court disagreed. The statement was made when the victim was still laboring under the stress of excitement caused by the attack and was thus admissible under the excited utterance exception to the hearsay rule. Although the trial court admitted the statement for the wrong reason, the statement was nevertheless admissible, and the trial court did not abuse its discretion in admitting it. St. v. Cameron, 2005 MT 32, 326 M 51, 106 P3d 1189 (2005).

Admissibility of Prior Statements Made Before Motivation to Fabricate Arose: Teters contended that prior statements made by his stepdaughter to a child protective services worker regarding Teters' sexual contact with her were inadmissible because she may have been

improperly influenced by her mother, who was involved in a contested divorce with Teters. The Supreme Court applied the four factors in St. v. Mensing, 1999 MT 303, 297 M 172, 991 P2d 950 (1999), to determine whether the prior statements were admissible. The first three factors were met because the declarant testified at trial and was subject to cross-examination and because the witness's statements were consistent with the declarant's testimony. The fourth factor requires that the statement rebut an express or implied charge of subsequent fabrication, improper influence, or motive. Here, the fourth factor was also met because the statements were made prior to the time that the alleged motive to fabricate arose, i.e., the beginning of divorce proceedings. Testimony regarding the prior statements was therefore properly admitted. St. v. Teters, 2004 MT 137, 321 M 379, 91 P3d 559 (2004). See also St. v. Lunstad, 259 M 512, 857 P2d 723 (1993).

Lacking Business Records Foundation by Records Custodian, Medical Reports Considered Inadmissible Hearsay: In an employment discrimination case, Pannoni sought to introduce written medical reports in letter form that contained observational information and opinions regarding Pannoni's medical condition and ability to return to work. The letters were accompanied by written certification that the reports had been prepared as part of a mental health center's regularly conducted business and were made at or near the time of Pannoni's diagnosis, but no one testified as to the contents of the reports or their status as regular business records. The employer objected to the evidence as hearsay, but Pannoni contended that they were admissible under the business records exception. The District Court concluded that because Pannoni had attempted to lay the foundation for the evidence through written certification prepared by a records custodian who did not testify, the foundational evidence itself was hearsay that could not establish the foundation for admission of otherwise inadmissible hearsay documents. Absent a proper foundation for admission of the evidence, the Supreme Court affirmed. Pannoni v. Browning School District No. 9 Bd. of Trustees, 2004 MT 130, 321 M 311, 90 P3d 438 (2004).

Hearsay Statements of Child Improperly Admitted in Parental Rights Termination Case — Harmless Error: The District Court improperly admitted hearsay evidence related by the child of parents who were subject to a parental rights termination case. However, the improper hearsay was not necessary to the court's determination of proved abuse or neglect of the fitness of the parents and thus did not affect the parents' substantial rights or the result that the court reached. Although the court abused its discretion in admitting the testimony, the error was harmless, and termination of parental rights was affirmed on appeal. In re A.N. & C.N., 2000 MT 35, 298 M 237, 995 P2d 427, 57 St. Rep. 155 (2000).

Hearsay Evidence Presented by Out-of-State Residents Who Failed to Appear — Dismissal Proper: Plaintiffs, who resided in Ohio, sought recovery in a contract dispute but failed to appear in person or by counsel, claiming that the trial court could "fairly judge" the case based on documents submitted to the court. However, an examination of the documents showed they were replete with hearsay and that the unsworn written statements were made out of court and did not afford defendant with the opportunity to confront the writers or question them as to the veracity of the statements. The District Court properly dismissed the complaint with prejudice and awarded costs to defendant. Fields v. Wells, 239 M 392, 780 P2d 1141, 46 St. Rep. 1775 (1989).

Deposition Testimony Inadmissible After Close of Trial: Workers' compensation claimant did not request the inclusion of his deposition testimony until after the trial was concluded. These hearsay statements were not admissible because the claimant did not request their inclusion at the trial, thereby giving the insurer the opportunity to rebut the claimant's statements, nor do they fall under one of the exceptions in Rule 803 or 804, M.R.Ev. To allow testimony by the claimant by admission of the deposition after the trial ended would effectively have denied the insurer an opportunity to challenge the statements made by the claimant in the deposition. Varela v. Petroleum Cas. Co., 237 M 300, 773 P2d 299, 46 St. Rep. 819 (1989).

Hearsay Evidence Admitted Through Other Testimony — No Prejudice: Exclusion of a memorandum as hearsay did not prejudice or adversely affect appellant's rights when the substance of the memorandum was presented through the testimony of a witness and admission of the document would have added nothing to the evidence. Niemen v. Howell, 234 M 471, 764 P2d 854, 45 St. Rep. 2058 (1988), followed in Carl Weissman & Sons, Inc. v. D&L Thomas Equip. Corp., 1998 MT 213, 290 M 433, 963 P2d 1263, 55 St. Rep. 896 (1998).

Admission of Tape Recorded Statement Without Foundational Testimony — Neither Cumulative Nor Harmless Error: A tape recorded statement made by decedent to an insurance claims representative, edited to remove evidence of insurance, was held clearly prejudicial and not merely harmless cumulative evidence because it was introduced to the jury as evidence

without explanation about the circumstances under which it was taken and without information that the jury needed to put the statement into proper perspective and because the jury was not exposed to any foundational information reflecting biases or prejudices on the part of the adjuster in asking the questions or decedent in answering them. Heisler v. Boule, 226 M 332, 735 P2d 516, 44 St. Rep. 698 (1987).

Applicability of False Exculpatory Statement Not Related to Crime Charged: Defendant claimed that a false voluntary statement he gave to a deputy sheriff prior to the time he was a suspect in the homicide should not have been admitted. He argued that since the statement was not made regarding the homicide, it showed no consciousness of guilt and unlawful intent. The Supreme Court found that the suspicious circumstances about which he gave a false explanation tended to connect him to the homicide regardless of the reason for the statement. The court cited its decision in St. v. Goltz, 197 M 361, 642 P2d 1079 (1982), that a false exculpatory statement may be used as evidence of consciousness of guilt and unlawful intent. St. v. Grant, 221 M 122, 717 P2d 562, 43 St. Rep. 685 (1986).

Child Support Action — Affidavit of Officer of State Seeking Reimbursement: In North Dakota's action for a declaration of paternity and to obtain child support, it was proper to exclude the affidavit of a North Dakota welfare administrator setting forth what North Dakota had paid for public assistance to the mother, the child's medical costs, and blood tests to establish paternity, for which North Dakota sought reimbursement. The affidavit was hearsay, was made by a person not available for cross-examination, and did not fit within any of the hearsay exceptions. However, under 40-5-121 (now repealed) the welfare administrator's deposition as to his state's pleaded costs could be taken and the case was remanded to allow a deposition to be taken. Because North Dakota did not plead its expenditures for the child's medical costs, they could not be recovered and the deposition could not cover those costs. St. of N. Dak. ex rel. B.J.D. v. S.P.R., 219 M 26, 710 P2d 702, 42 St. Rep. 1817 (1985).

Hearsay and Violation of United States Constitutional Right of Confrontation: Although the Confrontation Clause (sixth amendment, U.S. Const.) does not prevent the introduction of all hearsay statements, the federal District Court granted a Writ of Habeas Corpus to petitioner where, at his trial, testimony as to a prior inconsistent statement was admitted, but because of a genuine lapse of memory, the witness could not recall the basis for the statement, thus effectively denying the petitioner of his right of cross-examination. Creekmore v. District Court, 571 F. Supp. 992, 40 St. Rep. 1638 (D.C. Mont. 1983).

False Exculpatory Statements: The defendant in a criminal action falsely assured her employer that the money she is accused of stealing was deposited in her personal checking account. The statements made by the defendant are admissible to impeach the defendant and also to prove consciousness of guilt and unlawful intent. Her statements are not admissions but false exculpatory statements which are admissible. St. v. Goltz, 197 M 361, 642 P2d 1079, 39 St. Rep. 613 (1982).

Unreliable, Uncorroborated Statement Attributed to Another: Employee's foreman stated that employee's supervisor had told him that employee was injured off the job while moving a refrigerator. Supervisor could not recall such a discussion with foreman, and employee stated that he had not moved a refrigerator. Foreman's statement was not reliable, was uncorroborated hearsay which if anything was contradicted by supervisor, and had little force when considered against the far more convincing and consistent explanation by claimant, supported by the depositions of two doctors who treated him, that he was injured on the job. Jones v. St. Regis Paper Co., 196 M 138, 639 P2d 1140, 38 St. Rep. 2201 (1981).

When Hearsay Excluded — Repudiated Statements — Alternatives to Admission of Hearsay: A defendant convicted of sexual intercourse without consent and sexual assault alleged error on appeal relating to testimony of a prosecution witness' former attorney, which was offered but excluded at trial. The testimony related to the alleged denial of the right to counsel to one of the prosecution witnesses and the subsequent use of her statements to the police incriminating the defendant even though she had repudiated them. The Supreme Court on review held that the trial court ruling had been correct. The excluded testimony was inadmissible hearsay. In upholding the District Court ruling, the Supreme Court noted that the defendant could have questioned the police about prior inconsistent statements and he could have questioned the witness herself. St. v. Camitsch, 192 M 124, 626 P2d 1250, 38 St. Rep. 563 (1981), followed in St. v. Stuit, 277 M 227, 921 P2d 866, 53 St. Rep. 607 (1996).

Reversible Error — Opening Statement About Evidence Later Held Inadmissible Hearsay: Where the prosecutor in his opening statement to the jury made the statement that a witness would testify to a conversation in which a third party said that he saw the defendant drive a car away from a car lot and where this conversation was later held inadmissible as a hearsay

violation, there is a "reasonable possibility" that the inadmissible evidence entered in the opening statement contributed to the conviction of the defendant and thus is grounds for reversal. St. v. West, 190 M 38, 617 P2d 1298, 37 St. Rep. 1772 (1980), following St. v. Zachmeier, 151 M 256, 441 P2d 737 (1968).

Radio Dispatch to Police — Hearsay Admissible to Establish Probable Cause: Testimony of a police officer regarding a radio dispatch received regarding a motorcycle theft, introduced to establish the officers probable cause for stopping the vehicle in which defendant was riding and subsequently to arrest him, was not hearsay in this context and was properly admitted. St. v. White, 185 M 213, 605 P2d 191, 37 St. Rep. 84 (1980).

Evidence of Other Crimes, Wrongs, or Acts — Hearsay — Prejudicial Error: Direct evidence of other crimes, if such evidence came within the exceptions of Rule 404(3)(b), M.R.Ev., would be admissible. Indirect, hearsay evidence must also conform to the rules relating to the admission of hearsay testimony, including the exceptions. If the severely beaten victim were regarded as an unavailable witness because of her physical condition, her statements would be admissible if they came within the exceptions of Rule 804, M.R.Ev. Here, however, the hearsay declarant was not found to have circumstantial guarantees of trustworthiness because she admittedly disliked the defendant. Nor could the victim's statements be admitted as "excited utterances" because such utterances are admissible only if they are part of the res gestae of the crime charged. Admission of the statements of the victim to a friend and to her doctor, therefore, constituted prejudicial error. Admission of proof of wholly independent crimes requires a balancing of the relative probative value of the evidence against the prejudicial effect. Evidence of a course of conduct similar to the crime charged tends to prove the crime charged, but such evidence should not be admitted unless the proof thereof tends toward the conclusion that the defendant is guilty of the crime charged with moral certainty and beyond a reasonable doubt. With proper safeguards, the court would allow evidence of previous assaults. St. v. Brubaker, 184 M 294, 602 P2d 974, 36 St. Rep. 1915 (1979).

Federal Law Compelling Exception to Hearsay Rule — Administrative Psychological Assessment Report Admitted: When an assessment of a child's psychologic and mental condition is made as part of administrative proceedings, the report is part of the administrative record and accordingly it is a part of the evidence that the District Court had to consider. Federal law requires this, and it overrides any other consideration with respect to the reception into evidence of the report, including the inherent evil in accepting hearsay evidence not subject to cross-examination. In re the "A" Family, 184 M 145, 602 P2d 157, 36 St. Rep. 1898 (1979).

Inadmissible Hearsay — Child's Statement: The court committed reversible error when it allowed witnesses to testify, over defendant's objection, to statements made by a 4-year-old child that defendant had beaten her and her sister, because the alleged statement went to the very facts which the state was trying to prove, was offered to prove the truth of the matter asserted, and was therefore inadmissible hearsay. St. v. Campbell, 176 M 525, 579 P2d 1231 (1978), distinguished in In re S.M. & P.L.M., 2001 MT 11, 304 M 102, 19 P3d 213 (2001).

Admissibility of Medical Reports — Workers' Compensation Court: It is well settled that it is not an abuse of discretion for the Workers' Compensation Court to consider the contents of medical reports contained in the case file before the court in spite of their alleged hearsay nature when counsel for defendant fails to object. Hayes v. Aetna Ins. Co., 176 M 513, 579 P2d 1225 (1978).

State Welfare Investigative Report — Hearsay: Custody of a child was improperly taken from defendant when decided on the basis of evidence reviewed in a Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) investigative report that constituted hearsay. Ronchetto v. Ronchetto, 173 M 285, 567 P2d 456 (1977).

Law Review Articles

State v. Carter (Admitting Hearsay Evidence and Confrontation Rights) (Recent Decisions Affecting the Montana Practitioner), Korver, 66 Mont. L. Rev. 475 (2005).

Crawford v. Washington (Sixth Amendment Confrontation Clause Protection) (Recent Keynote Decisions Affecting the Montana Practitioner), Capp, 65 Mont. L. Rev. 424 (2004).

Crawford v. Washington: A Small Advantage for Criminal Defense in Cases Where Prosecution Seeks to Introduce Hearsay Evidence, Eldridge, 31 Wm. Mitchell L. Rev. 1381 (2005).

"Electronic Fingerprints": Doing Away With the Conception of Computer-Generated Records as Hearsay, Wolfson, 104 Mich. L. Rev. 151 (2005).

Science, Crawford, and Testimonial Hearsay: Applying the Confrontation Clause to Laboratory Reports, Morin, 85 B.U.L. Rev. 1243 (2005).

The Confrontation Clause After Crawford v. Washington: Smaller Mouth, Bigger Teeth, Counseller & Rickett, 57 Baylor L. Rev. 1 (2005).

Crawford v. Washington: A Critique, Mendez, 57 Stan. L. Rev. 569 (2004).

Collateral References

Evidence *key* 314, et seq.

31A C.J.S. Evidence §193.

29 Am. Jur. 2d Evidence §658, et seq.; 29A Am. Jur. 2d Evidence §1441.

Admissibility of hearsay evidence in student disciplinary proceedings. 30 ALR 4th 935.

Admissibility of hearsay evidence in probation revocation proceedings. 11 ALR 4th 999.

Admissibility in evidence of sound recording as affected by hearsay and best evidence rules. 58 ALR 3d 598.

Admissibility, as against hearsay objection, of report of tests or experiments carried out by independent third party. 19 ALR 3d 1008.

Consideration, in determining facts, of inadmissible hearsay introduced without objection. 79 ALR 2d 890.

Written recitals or statements as within rule excluding hearsay. 10 ALR 2d 1035.

5 Wigmore §§1361 through 1365.

Rule 803. Hearsay exceptions; availability of declarant immaterial.

Commission Comments

This rule is identical to Federal Rule 803, except that changes have been made in several of the exceptions. Explanation of the changes appears in the Commission Comments to those exceptions. The Commission adopted the Federal scheme of setting out hearsay exceptions in Rules 803 and 804, which are differentiated by the requirement of availability of the hearsay declarant. Rule 803, contains exceptions which possess circumstantial guarantees of trustworthiness of such a high standard that the availability of the declarant is immaterial; that is, these statements may be admitted whether or not the declarant is available as a witness. Rule 804(b) contains exceptions which do not possess such a high circumstantial guarantee of trustworthiness and so require that the hearsay declarant be unavailable, as defined in Rule 804(a).

The Advisory Committee's Note to Federal Rule 803, 56 F.R.D. 183, 303 (1972), indicates that the rule is phrased so that statements are admissible only so far as the hearsay rule is concerned "...in order to repel any implication that other possible grounds for exclusion are eliminated from consideration". It also notes that it is intended that the firsthand knowledge rule applies to this rule and Rule 804. *Id.*

Finally, it should be mentioned that the Commission adopted, in Exception (24) of this rule, an exception which allows hearsay statements to be admitted if they have "...comparable circumstantial guarantees of trustworthiness..." of the other exceptions. In light of this exception, the theory of admissibility of each exception is set out in its Commission Comments.

Exception (1). Present sense impression. This exception is identical to Federal and Uniform Rules (1974) Rule 803(1). The guarantee of trustworthiness is provided by the spontaneity of the event and the reduced likelihood of deliberate misrepresentation; direct and cross-examination of either the declarant or witness who heard the hearsay statement adds to accuracy and aids in evaluation. Advisory Committee's Note, *supra*, 56 F.R.D. at 304. A slight time lapse is allowed because "...in most instances, precise contemporaneity is not possible...". *Id.* The subject of the statement may only concern the event because the trustworthiness attributed to spontaneity goes no further. *Id,* at 305.

This exception is consistent with existing Montana law. There is one case which can be analyzed as coming within this rule, Sellers v. Montana-Dakota Power Co., 99 Mont. 39, 55, 41 P2d 44 (1935), and one case which has stated that present sense impression is an exception to the hearsay rule found within the *res gestae* rule. State v. Newman, 162 Mont. 450, 457, 513 P2d 258 (1973). However, the *res gestae* rule is broader than any of the first three exceptions to the hearsay rule considered under Rule 803: first, because it goes beyond the time limits usually allowed (eleven years in Burns v. Smith, 21 Mont. 251, 275, 53 P 742 (1898) and 25 years in Welch v. All Persons, 85 Mont. 114, 128, 278 P 110 (1927)); and second, because it applies to events or actions outside the hearsay rule as defined in Rule 801; that is, in Montana evidence of other crimes occurring within the criminal transaction which is the basis of the case are admissible under the *res gestae* rule. State v. Howard, 30 Mont. 518, 524, 77 P 50 (1904); State v. Russell, 93 Mont. 334, 336, 18 P2d 611 (1933) and State v. Meidinger, 160 Mont. 310, 321, 502 P2d 58 (1972). The statutory basis of the *res gestae* rule is Sections 93-401-7, R.C.M. 1947 [26-1-103], and 93-401-27(7), R.C.M. 1947 [superseded].

Exception (2). Excited utterance. This exception is identical to Federal and Uniform Rules (1974) Rule 803(2). The guarantee of trustworthiness is provided by the spontaneity of the statement, caused by the excitement "...which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication". Advisory Committee's Note, *supra.* 56 F.R.D. at 304. The exception obviously requires an event which causes excitement and that the declarant be under the stress of excitement when he makes the statement. *Id.* The subject matter of the statement is broader than allowed under Exception (1), in that need only "relate" to the event.

This exception is also consistent with existing Montana law. As noted in the Notes for Exception (1), the *res gestae* rule is broader than any exception to the hearsay rule; however, excited utterances were included as hearsay exceptions within that rule in the analysis found in State v. Newman, *supra* 162 Mont. at 457. The Montana cases combine this hearsay exception with *res gestae* rule, but provide the same requirement noted above. Callahan v. Chicago, Burlington and Quincy R.R., 47 Mont. 401, 409, 133 P 687 (1913); Sullivan v. Metropolitan Life Ins. Co., 96 Mont. 254, 266, 29 P2d 1046 (1934) and State v. Medicine Bull, 152 Mont. 34, 44, 455 P2d 916 (1968).

Exception (3). Then-existing mental, emotional, or physical condition. This exception is identical to Federal and Uniform Rules (1974) Rule 803(3) except the phrase "unless it relates to the execution, revocation, identification, or terms of declarant's will", found at the end of the exception in those rules, is deleted from the exception. The Federal and Uniform Rules (1974) Rule 803(3), state of mind exception, generally follows the rule of Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285 (1892), which allows hearsay statements to prove state of mind from which future actions of the declarant may be inferred. Advisory Committee's Note, *supra* at 305. However, the state of mind exception is not allowed to be used to infer past actions of the declarant. Shepard v. United States, 290 U.S. 96 (1933). The Advisory Committee's Note, *supra* at 305, explains:

The exclusion of "statements of memory to prove the fact remembered or believed" is necessary to avoid the virtual destruction of the hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as the basis for an inference of the happening of the event which produced the state of mind.

The deleted phrase is an exception to this limitation which allows declarations of the testator's state of mind to infer his past actions in connection with his will. The Commission rejects this phrase because it is inconsistent with existing Montana probate law which the Commission felt should not be changed by rules of evidence. Montana case law holds the declarations of the testator are not admissible as to the existence or revocation of the will (In re Colbert's Estate, 31 Mont. 461, 471, 78 P 971 (1904)) and the testator's attitude toward the contestee of the will. In re Miller's Estate, 71 Mont. 330, 341, 229 P 851 (1924). It is also apparent that the deleted phrase is inconsistent with Montana statutes: Section 91A-2-603, R.C.M. 1947 [72-2-501, now repealed], provides that the "intention of the testator as expressed in his will controls the legal effect of his dispositions". Section 93-401-13, R.C.M. 1947 [28-2-905, 70-20-202, and 72-11-304, now repealed], provides that no evidence other than the will itself is admissible concerning its terms, as part of the parol evidence rule.

The guarantee of trustworthiness of the state of mind exception is also the spontaneity of the statement, for this exception is really a "specialized application of Exception (1), presented separately to enhance its usefulness and accessibility". Advisory Committee's Note, *supra* at 305.

The exception, as adopted, is consistent with existing Montana law. It is possible to interpret Burles v. Oregon Shortline Ry., 49 Mont. 129, 134, 140 P 513 (1914), as allowing hearsay statements relating to a physical condition. Statements of state of mind were held admissible in conjunction with the *res gestae* rule in Ross v. Industrial Accident Bd., 106 Mont. 486, 495, 80 P2d 362 (1938) and Thompson v. Steinkamp, 120 Mont. 475, 481, 187 P2d 1018 (1947). Finally, this exception was recognized in the analysis of the *res gestae* rule in State v. Newman, *supra* 162 Mont. at 457. (See Comments to Exception (1) for discussion of *res gestae* rule.)

Exception (4). Statements for purposes of medical diagnosis or treatment. This exception is identical to Federal and Uniform Rules (1974) Rule 803(4). The guarantee of trustworthiness is provided by the patient's motivation for proper diagnosis and treatment. However, it is apparent that when the patient is obtaining the physician's diagnosis only for purposes of litigation, as under Rule 35 of the Montana Rules of Civil Procedure, this guarantee is not present. However, these types of statements would be admissible as the basis for an expert's opinion under Rule 703, and the likelihood of the jury not distinguishing between the basis of an opinion and substantive evidence is strong enough that statements for purposes of diagnosis only are also admissible. Advisory Committee's Note, *supra* 56 F.R.D. at 306. The exception allows statements

made to any person and about any pertinent subject, so long as within the purpose of the exception. *Id.* The rule expands the law to allow statements of past medical history because the trustworthiness factor still applies and because it is apparent that statements of this type could be admissible as the basis for an opinion or under Rule 803(6), which could admit hospital or physicians' records.

This exception is a change to existing Montana law to the extent that it allows statements dealing with medical diagnosis and treatment to be admitted as substantive evidence rather than as the basis for an expert's opinion. Montana law allows physicians to base their opinion on statements of this kind (Kelly v. John Daily Co., 56 Mont. 63, 78, 181 P 326 (1919) and Bingham v. Nat'l Bank of Montana, 105 Mont. 159, 173, 72 P2d 90 (1937)) and upon unsworn medical reports. Klaus v. Hilberry, 157 Mont. 277, 285, 485 P2d 766 (1972).

Exception (5). Recorded recollection. This exception is identical to Federal and Uniform Rules (1974) Rule 803(5). The guarantee of trustworthiness "is found in the reliability inherent in a record made while events were still fresh in mind and accurately reflecting them". Advisory Committee's Note *supra* 56 F.R.D. at 306. It is important to distinguish this hearsay exception, recorded recollection, from Rule 612, writings used to refresh memory. As noted in the Commission Comments to Rule 612, a writing used to refresh the witness' memory is used only for that purpose and not as evidence, for the witness is able to testify after referring to such a writing. A recorded recollection is used in the situation where the witness is unable to testify independently of the writing because he has an insufficient memory of the subject.

This exception is consistent with existing Montana law as found in Section 93-1901-6, R.C.M. 1947 [superseded], and the leading case construing that statute, Marron v. Great N. Ry., 46 Mont. 593, 601, 129 P 1055 (1913). That case construed the statute to require that the witness "not retain any recollection of the particular facts recorded in the memoranda after he examines the entries...". This requirement was affirmed in O'Rourke v. Grand Opera House, 47 Mont. 459, 470, 133 P 965 (1913). Exception (5) complies with that requirement by stating: "a witness... had knowledge but now has insufficient recollection to enable him to testify fully and accurately...". Marron, *supra* at 602, construed the statute as requiring a three-part foundation:

(a) The entries must have been written by the witness himself or under his direction; (b) they must have been written at the time the facts occurred or at a time when the facts were fresh in the witness' memory; and (c) the witness must have known at the time the entries were made that they correctly stated the facts.

Exception (5) complies with these foundational requirements by stating: "...shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly." It is also obviously required under existing Montana law and the exception that the witness have personal knowledge of the matter. Spurgeon v. Imperial Elevator Co., 99 Mont. 432, 436, 43 P2d 891 (1935).

However, the exception changes existing Montana law in its last sentence which provides that the memorandum may be read into evidence but not received as an exhibit unless offered by an adverse party. Existing Montana law provides in Section 93-1901-6, R.C.M. 1947 [superseded], that the recorded recollection may be read to the jury and received with caution. In State v. Deidtman, 58 Mont. 13, 22, 190 P 117 (1920), the court stated the reason for this provision in the statute: "Recognizing the possibility of error in the memorandum, and the fact that the opposite party is practically precluded from testing its accuracy, the statute has wisely declared the testimony of the witness...shall be received by the jury with caution". The Commission believes the exception states the better policy of not generally allowing the memorandum to be admitted into evidence because the jury may give written testimony undue emphasis. The same policy is found in Section 93-5104, R.C.M. 1947 [25-7-404], which provides that the jury may deliberate with all papers received as evidence "except depositions or copies of such papers as ought not, in the opinion of the court, to be taken from the person having them in possession...", and Section 93-5106, R.C.M. 1947 [25-7-405], which provides the procedure for the jury's review of testimony.

Exception (6). Records of regularly conducted activity. This exception is identical to Federal and Uniform Rules (1974) Rule 803 (6) except the phrase "by or from information transmitted by, a person with knowledge," is deleted and the phrase "of the acts, events, conditions, opinions or diagnoses," is added. It is apparent that the Federal drafters were following the Federal statute (28 U.S.C. Section 1732) in stating the personal knowledge requirement. However, the Commission made this change because existing Montana law had not specifically called for the personal knowledge rule to have the effect of excluding such records. It was felt that the admissibility of business records presently admitted under Montana law could be restricted by strict construction of the deleted phrase. The Commission also felt that the deleted phrase had

the effect of requiring the proponent of the evidence and the custodian of the record to establish personal knowledge. If there is insufficient personal knowledge or lack of regularly conducted activity leading up to the entry in the record, the burden should be on the opponent of the evidence to show it and argue for exclusion under the authority of the phrase in the exception allowing the court to exclude records if the "source of information or method or circumstances of preparation indicate lack of trustworthiness".

The guarantee of trustworthiness is provided by the nature of the record and the circumstances of preparation, enhanced by "systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation". Advisory Committee's Note, *supra* 56 F.R.D. at 308.

The exception, as amended, is consistent with existing Montana law. Sections 93-1101-17, R.C.M. 1947 [26-1-607], and 93-1101-18, R.C.M. 1947 [superseded] contain the common-law exceptions for the shop book rule and regular business entry exceptions, and R.C.M. 1947, Sections 93-801-1 through 801-6 [all superseded] contain the Uniform Business Records as Evidence Act. Section 93-801-1, R.C.M. 1947 [superseded], contains a definition of business substantially the same as that contained in the last sentence of the exception. Section 93-801-2, R.C.M. 1947 [superseded], contains a provision for the admissibility of business records like the first sentence of the exception. The Commission amended the Federal and Uniform Rules (1974) Rule 803(6) to conform to what it believes to be the existing law and practice in Montana under the Uniform Act.

It should be noted that the exception allows opinions and diagnosis (contained in the record) to be admissible; this is consistent with Klaus v. Hilberry, 157 Mont. 277, 285, 485 P2d 54 (1971), which allowed medical reports containing opinions and diagnosis to be admitted and referred to Section 93-801-2, R.C.M. 1947 [superseded]. It should also be noted that the exception could be seen as an expansion of existing Montana law to the extent that records of regularly conducted activity in a wide variety of forms, including computer printouts, are admissible.

Exception (7). Absence of entry in records kept in accordance with the provisions of paragraph (6). This exception is identical to Federal and Uniform Rules (1974) Rule 803(7). The guarantee of trustworthiness is found in the logical assumption that if records under Exception (6) are allowed to prove the existence of a fact or occurrence of an event because the records are systematically, regularly, and accurately kept and relied upon, then the absence of an entry of a matter which would ordinarily appear should be allowed to prove the nonexistence or nonoccurrence of that matter. This exception has never been dealt with under existing Montana law, although an analogous exception presently exists in Rule 44(b), M.R.Civ.P. See Notes to Exception (10).

Exception (8). Public records and reports. This exception is not the same as Federal Rule 803(8), but is identical to Uniform Rule (1974) 803(8). The Commission chose to adopt the Uniform provision because it was clearer than the Federal Rule and because it expressed better policy with certain reports in requiring the official to testify rather than admitting his report as a hearsay exception.

The guarantee of trustworthiness of this exception can be found partly under Exception (6), records of regularly conducted activity, partly under the assumption that official duty is regularly performed (Section 93-1301-7(15), R.C.M. 1947 [26-1-602]), and "the unlikelihood that he will remember details independently of the record", Advisory Committee's Note, *supra* 56 F.R.D. at 311.

This exception is consistent with existing Montana law except that it clarifies several areas where official reports are to be excluded. Section 93-1001-32, R.C.M. 1947 [26-1-605], provides that the entries in official books or records, made in the performance of official duty, are prima facie evidence of the facts stated therein. Section 93-901-1, et seq., R.C.M. 1947 [all superseded], the Uniform Official Reports as Evidence Act, modernizes this exception to the hearsay rule. Section 93-901-1, R.C.M. 1947 [superseded], provides: "Written reports or findings of fact made by the officers of this state, on a matter within the scope of their duty as defined by statute, shall, insofar as relevant, be admitted as evidence of the matter stated therein". The adoption of the exception is intended to remove the restriction of admitting only reports from state officials, found in the statute and applied in Richardson v. Farmers' Union Oil Co., 131 Mont. 535, 553, 312 P2d 134 (1957). Note that a police report was excluded in a civil case, but on grounds that it stated the cause of an injury, in Gagnier v. Zook, 141 Mont. 214, 377 P2d 101 (1962). This exception is inconsistent with State v. Snider, 168 Mont. 220, 541 P2d 1204, 32 St. Rep. 1056, 1062 (1975), which held a state chemist's report admissible under Section 93-901-1, R.C.M. 1947 [superseded], and so this case is overruled by this exception.

Exception (9). Records of vital statistics. This exception is identical to Federal and Uniform Rules (1974) Rule 803(9). The circumstantial guarantee of trustworthiness is the same as found with Exception (8); the only distinction between the two is that the source of information is not necessarily a public official, although a public official does make the record or entry. This guarantee of trustworthiness is enhanced by the unlikelihood of a false entry being made when the report is of such an incident and is made pursuant to requirements of law.

This exception is consistent with existing Montana statutes. Section 93-1001-2, R.C.M. 1947 [2-6-101], provides that records of this sort are public writings, Section 93-1001-32, R.C.M. 1947 [26-1-605], provides that entries in official books are prima facie evidence of their contents, Section 69-4412, R.C.M. 1947 [50-15-109], provides that certificates concerning vital statistics are prima facie evidence of their contents, and Section 69-4435, R.C.M. 1947 [50-15-108], provides the duty of any person with knowledge to furnish information concerning vital statistics.

Exception (10). Absence of public record or entry. This exception is identical to Federal and Uniform Rules (1974) Rule 803(10). The circumstantial guarantee of trustworthiness is found in the same assumption made with Exception (7); that is, where a record is systematically, regularly, and accurately kept and relied upon, the absence of such a record or entry should be allowed to prove the nonoccurrence of the event.

This exception is consistent with Rule 44(b), Montana Rules of Civil Procedure, which provides: "A written statement that after diligent search no record or entry of a specific tenor is found to exist in the records designated by the statement...is admissible as evidence that the records contain no such record or entry". Note that Rule 44(a), as well as this exception, require proper authentication procedures. See Rule 902.

Exception (11). Records of religious organizations. This exception is identical to Federal and Uniform Rules (1974) Rule 803(11). These records would be admitted under Section 93-901-1, et seq., R.C.M. 1947 [all superseded], the business records exception, and therefore have the same guarantees of trustworthiness as the records admitted under Exception (6). This guarantee is enhanced by the unlikelihood of false information being provided to religious organizations. Advisory Committee's Note, *supra* 56 F.R.D. at 314. There are possible restrictions under Exception (6), relating to the source of information being within the regular course of business, which should not apply here, and so a separate exception is provided. *Id.*

Exception (12). Marriage, baptismal, and similar certificates. This exception is identical to Federal and Uniform Rules (1974) Rule 803(12). This exception is similar to Exceptions (8) and (9), official records and records of vital statistics, and the guarantee of trustworthiness is found under these exceptions. It is consistent with Montana law as noted under those exceptions, but goes beyond those exceptions in the area of sacrament and so expands Montana law. Note the certification procedure requires authentication. See Rule 902.

Exception (13). Family records. This exception is identical to Federal and Uniform Rules (1974) Rule 803(13). The guarantee of trustworthiness is provided by the unlikelihood that a false family record would exist. This represents the common law exception which has long received such records; the common law exception is found in Section 93-401-27(13), R.C.M. 1947 [superseded], which allows evidence of "...entries in family Bibles, or other family books or charts, engravings on rings, family portraits and the like...". A family Bible was admitted into evidence, even though it appeared it had been altered, for whatever probative value it might have in the case of In re Colbert's Estate, 51 Mont. 455, 467, 153 P 1022 (1916). Therefore, this exception is consistent with existing Montana law.

Exception (14). Records of documents affecting an interest in property. This exception is identical to Federal and Uniform Rules (1974) Rule 803(14). The guarantee of trustworthiness is provided by Exception (8), official records, and is enhanced by the procedures associated with the recording process of this type of document. Advisory Committee's Note, *supra* 56 F.R.D. at 315. This guarantee is strong enough to allow proof of execution and delivery of the document, even though the recorder probably does not have personal knowledge of those facts. *Id.* It should be noted that the importance of documents of this nature lends credibility to their contents.

This exception is consistent with existing Montana law as pointed out in the Commission Comments to Exception (8); Section 93-401-12(4), R.C.M. 1947 [superseded], which provides that evidence of contents of a writing are provable when the original has been recorded; and recording statutes such as R.C.M. 1947 Sections 16-2909 [7-4-2616], 39-129 [not codified], 52-310 [repealed], and 89-814 [repealed].

Exception (15). Statements in documents affecting an interest in property. This exception is identical to Federal and Uniform Rules (1974) Rule 803(15). The guarantee of trustworthiness is the same as that found in Exception (14), enhanced by "The circumstances under which

dispositive documents are executed and the requirement that the recital be germane to the purpose of the document...particularly in view of the nonapplicability of the rule if dealings with the property have been inconsistent with the document". Advisory Committee's Note, *supra* 56 F.R.D. at 315.

The exception is consistent with existing Montana law to the extent set out in the Commission Comments to Exception (14). Note that the document itself and not the record of the document is admissible under this exception and some of those statutes allow the record to be prima facie evidence of the contents of the document.

Exception (16). Ancient documents. This exception is identical to Federal and Uniform Rules (1974) Rule 803(16). There are two problems which arise in connection with ancient documents: authenticity and hearsay objection. The exception requires that the document be authenticated and in so doing lends trustworthiness to the document. The trustworthiness is enhanced by the fact that the written document predated the controversy in which it is used as evidence. Advisory Committee's Note, *supra* 56 F.R.D. at 315. It is also likely that the written document made 20 years before will be the most accurate evidence available.

Generally, existing Montana law is consistent with this exception. Section 93-1301-7(34), R.C.M. 1947 [26-1-602], provides a rebuttable presumption that a document more than thirty years old which is authenticated and acted upon as genuine by persons having an interest is genuine. Cook v. Hudson, 110 Mont. 263, 284, 103 P2d 137 (1940), construed this statute as presuming the contents of documents are genuine and prima facie evidence of the facts stated therein. King v. Schultz, 141 Mont. 94, 98, 375 P2d 108 (1962), construed the statute and Cook v. Hudson, *supra* by stating "the ancient document rule does not change the basis for admission of evidence other than as to genuineness of the document". This statement can be explained by later remarks that "ancient documents may be admitted in evidence as proof of the facts therein, provided the writers would have been competent to testify to such facts". This is apparently concerned with the firsthand knowledge rule which applies to this and all exceptions. The exception changes existing Montana law by allowing the age of the document to be twenty instead of thirty years and it need not be acted upon.

Exception (17). Market reports, commercial publications. This exception is identical to Federal and Uniform Rules (1974) Rule 803(17). The guarantee of trustworthiness is provided by "general reliance by the public or by a particular segment of it, and the motivation of the compiler to foster reliance by being accurate". Advisory Committee's Note, *supra* 56 F.R.D. at 316.

The exception is consistent with existing Montana law. Section 87A-2-724, R.C.M. 1947 [30-2-724], the Uniform Commercial Code, provides that prevailing price or value of goods regularly bought and sold may be proven by "reports in official publications or trade journals or in newspapers or periodicals of general circulation...". Section 93-1101-8, R.C.M. 1947 [superseded], provides that "historical works, books of science or art, and published maps or charts... are prima facie evidence..." of facts of general notoriety and interest. Cases construing this provision have allowed various commercial publications to be admitted: tables showing stopping distances of locomotives (Lynes v. N. Pac. Ry. Co., 32 Mont. 317, 326, 117 P 81 (1911)); and mortality and annuity tables. Ralph v. MacMarr Stores, 103 Mont. 421, 430, 52 P2d 1285 (1936). Safety reports and regulations may or may not be admissible. See Hackley v. Waldorf-Hoerner Paper Co., 149 Mont. 286, 294, 425 P2d 712 (1967).

Exception (18). Learned treatises. This exception is identical to Federal and Uniform Rules (1974) Rule 803(18). Exception (17) is really a limited application of the learned treatises exception, and so the guarantees of trustworthiness mentioned there are applicable to this exception. The adoption of this exception represents a change in existing Montana law. (See below). Arguments against the admissibility of learned treatises deal with the lack of cross-examination and potential misuse of treatises. Advisory Committee's Note, *supra* 56 F.R.D. at 316. These arguments are met, first, by the trustworthiness of the exception and, second, by provisions in the exception to prevent misuse. *Id.* The guarantees of trustworthiness of the exception, that experts in the area generally rely on the work, that the motivation of the writer is to be accurate in order to gain acceptance, and that the treatise was written impartially and without concern for litigation, are strong enough to displace the argument of lack of cross-examination of the author. *Id.* The provisions in the exception which prevent misuse are: first, that the treatise be called to the attention of an expert or relied upon by him; second, the treatise must be established as a reliable authority on the subject; and third, the learned treatise, if admitted, may only be read into evidence and not received as an exhibit.

This exception, as noted above, is contrary to Montana law. Although Section 93-1101-8, R.C.M. 1947 [superseded], discussed in Exception (17), would seemingly provide that learned treatises are admissible, case law has provided otherwise. First, cases have held that it is proper

to cross-examine an expert using a learned treatise. Emerson v. Butte Elec. Ry., 46 Mont. 454, 458, 129 P 319 (1922) and State v. Bess, 60 Mont. 558, 569, 199 P 426 (1921). However, it is not permissible to read or frame questions from treatises on direct examination of an expert. Schumacher v. Murray Hosp., 58 Mont. 447, 456, 193 P 397 (1920) and State v. Bess, *supra*. The adoption of this exception overrules these cases which prohibit the use of learned treatises on direct examination. It should be noted that learned treatises concerned with legal topics are apparently admissible to prove the contents of the treatise. In re Nielsen's Estate, 118 Mont. 304, 307, 165 P2d 792 (1945).

Exception (19). Reputation concerning personal or family history. This rule is identical to Federal and Uniform Rules (1974) Rule 803(19), except the phrase "or dissolution of marriage" is added to be consistent with the concepts contained in Section 48-316, R.C.M. 1947 [40-4-104], the Uniform Marriage and Divorce Act. The guarantee of trustworthiness of this and other reputation exceptions that follow is found "when the topic is such that the facts are likely to have been inquired about and that persons having personal knowledge have disclosed facts which have thus been discussed in the community; and thus the community's conclusion, if any has been formed, is likely to be a trustworthy one". Advisory Committee's Note, 56 F.R.D. *supra* at 317, quoting 5 Wigmore, Evidence, Section 1580 at 444. This exception is somewhat broader than that found at common law in that the circle of persons allowed to testify as to reputation is enlarged to include associates, a change consistent with conditions in today's society, and the range of matters about which reputation evidence may be used is broadened to include more than just marriage. *Id.*

This exception is consistent with existing Montana law, although it does represent an expansion as to persons who may testify and topics which may be proven. Section 93-401-9, R.C.M. 1947 [superseded], provides "the declaration, act, or omission of a member of a family, who is a decedent, or out of the jurisdiction, is also admissible in evidence of common reputation, in cases where, on questions of pedigree, such reputation is admissible". Section 93-401-27(11), R.C.M. 1947 [superseded], provides that among the facts provable at trial are "common reputation existing previous to the controversy, respecting facts... in cases of pedigree". Two cases have held this sort of evidence admissible. In re Colbert's Estate, 51 Mont. 455, 468, 153 P 1022 (1915) and In re Wehr's Estate, 96 Mont. 245, 251, 29 P 856 (1934). This exception is a change to Montana law to the extent that the exception no longer requires the reputation to predate the controversy.

Exception (20). Reputation concerning boundaries or general history. This exception is identical to Federal and Uniform Rules (1974) Rule 803(20). The guarantee of trustworthiness of reputation evidence is discussed in the Commission Comments to Exception (19). This exception is generally consistent with existing Montana law. Section 93-401-27(11), R.C.M. 1947 [superseded], provides that among the facts provable at trial are "common reputation existing previous to the controversy respecting facts of a public or general interest more than 30 years old, and cases of ... boundary". Section 93-1301-7(12), R.C.M. 1947 [26-1-602], provides the rebuttable presumption "that a person is the owner of property...from common reputation of ownership". Cases recognize the exception in relation to boundaries. Kurth v. LaJeune, 83 Mont. 100, 109, 269 P 408 (1928); Nemitz v. Reckards, 98 Mont. 229, 240, 38 P2d 930 (1934) and Brennan v. Mayo, 105 Mont. 276, 278, 72 P2d 463 (1937) and cases cited therein.

Exception (21). Reputation as to character. This exception is identical to Federal and Uniform Rules (1974) Rule 803(21). The guarantee of trustworthiness for reputation evidence is discussed in the Commission Comments to Exception (19). This exception is adopted to allow character evidence to be proved by reputation under Rules 404, 405, and 608 without a hearsay problem. See Commission Comments under those rules for discussion of existing Montana law which is consistent with this provision.

Exception (22). Judgement of previous conviction. This exception is identical to Federal and Uniform Rules (1974) Rule 802(22), except prosecution is substituted for Government and the phrase "for purposes other than impeachment" because of the Commission's action in relation to Rule 609, not allowing impeachment by conviction of crime. The effect of this exception is to admit judgments of previous convictions for what they are worth and to prove any fact essential to sustain the judgment. Advisory Committee's Note, *supra* 56 F.R.D. at 318.

This exception is inconsistent with existing Montana law. Doyle v. Gore, 15 Mont. 212, 213, 38 P 939 (1895), held that evidence of conviction for assault was inadmissible in the civil action arising out of the same incident. The rule was followed in State v. Vuckovich, 61 Mont. 480, 492, 203 P 491 (1921). The Commission felt that the guarantee of trustworthiness of this exception, the high standard of proof in criminal cases and the result of a jury's deliberations or plea of guilty, is equal to that of any of the other exceptions and so changed the rule in Montana. It

should be noted that the Montana Supreme Court sanctioned a trial court taking judicial notice of a criminal conviction in a civil action. Sikora v. Sikora, 160 Mont. 27, 34, 497 P2d 808 (1972).

Exception (23). Judgment as to personal, family, or general history, or boundaries. This exception is identical to Federal and Uniform Rules (1974) Rule 803(23). The guarantee of trustworthiness is that a judgment based on reputation is at least as reliable as the reputation itself. Advisory Committee's Note, *supra* 56 F.R.D. at 319. Therefore, when evidence admissible under Exceptions (19) and (20) is the basis for a judgment, this exception allows that judgment to be admissible. It is probable that this exception will be used when other reputation evidence is not available. There is no Montana law specifically on this exception, but reputation evidence of this sort is currently admissible. See Commission Comments to Exceptions (19) and (20).

Exception (24). Other exceptions. This exception is identical to the Exception (24) contained in the version of the Federal Rules submitted to Congress. Congress amended that exception to require, in addition to circumstantial guarantees of trustworthiness, that the statement is offered as evidence of material fact, that it is more probative on the point for which it is offered than any other evidence, that the general purposes of the rules and interests of justice will be served, and that notice be served on the adversary.

The Commission believed this exception should allow "room for growth and development of the law of evidence in the area of hearsay" (Advisory Committee's Note, *supra* 56 F.R.D. at 320) and that the amendments by Congress are too restrictive and contrary to the purpose of the provision. These amendments can be criticized as follows: the requirement that the statement be offered as evidence of a "material" fact is redundant in requiring relevance as defined in Rule 401 and uses outmoded language so indicated in the Commission Comments to that rule. The requirement that the evidence be more probative on the point for which it is offered restricts the use of these types of exceptions by imposing a requirement similar to that of unavailability under Rule 804; this restriction would have the effect of severely limiting the instances in which the exception would be used and be impractical in the sense that a party would generally offer the strongest evidence available regardless of the existence of this requirement. The requirement that the general purposes of these rules and interests of justice will be served is unnecessarily repetitive in view of Rule 102. Finally, the notice requirement is unnecessary because of discovery procedures and the discretion of the court in allowing advance rulings on the admissibility of evidence.

The guarantee of trustworthiness set out in the Commission Comments to each of the other exceptions is the criteria to be used in determining whether to apply this open-ended exception and find a "comparable circumstantial guarantee of trustworthiness".

There is no equivalent Montana law to this exception. The adoption of this exception changes existing Montana law to the extent that it allows a court to admit hearsay because an equivalent guarantee of trustworthiness exists even though there is no specific exception allowing it.

COMMISSION COMMENT TO JUNE 1990 AMENDMENT

The revision establishes gender neutral format only. No substantive change.

Compiler's Comments

1990 Amendment Note: In (8) inserted last sentence relating to crime laboratory reports.

1990 Amendment: Substituted gender neutral language for gender specific language. Amendment effective June 7, 1990.

Case Notes

Excited Utterance 463
Business Records 465
Other Records 467
State of Mind 469
Medical Diagnosis 471
Miscellaneous 473

EXCITED UTTERANCE

Admissibility of Hearsay Statements Made in Emergency Following Family Member Assault: During Mizenko's trial for partner or family member assault, the trial court admitted several hearsay statements made by the victim, Mizenko's wife, who did not testify. Mizenko contended that admitting the hearsay statements violated his constitutional right to confront witnesses against him, even though Mizenko had the opportunity to cross-examine the witnesses who related the hearsay statements, including a neighbor whom the wife had gone to for help, the emergency dispatcher who received the 9-1-1 call, and the investigating deputy. The dispatcher's testimony regarding the contents of the call was admitted without objection, and the deputy's

testimony verified that the acts related on the call had occurred, so their testimony, even if objectionable, was cumulative and therefore harmless. The neighbor's testimony related statements that the wife made while in distress and while addressing a nongovernmental agent. The wife's cursory statements describing the circumstances, though evidence, were not created by the judicial process, and the wife had no reason to believe that her excited utterances would be used in court, so the statements were considered nontestimonial and properly admitted under the excited utterance exception of this rule. St. v. Mizenko, 2006 MT 11, 330 M 299, 127 P3d 458 (2006), followed in St. v. Paoni, 2006 MT 26, 331 M 86, 128 P3d 1040 (2006). See also St. v Cameron, 2005 MT 32, 326 M 51, 106 P3d 1189 (2005).

Hearsay Statement of Assault Victim Properly Admitted as Excited Utterance: Following a sexual assault, the victim told her sister that Cameron tried to rape her. The trial court admitted the sister's statement under the present sense impression exception, but Cameron appealed on grounds that the statement was inadmissible hearsay. The Supreme Court disagreed. The statement was made when the victim was still laboring under the stress of excitement caused by the attack and was thus admissible under the excited utterance exception to the hearsay rule. Although the trial court admitted the statement for the wrong reason, the statement was nevertheless admissible, and the trial court did not abuse its discretion in admitting it. St. v. Cameron, 2005 MT 32, 326 M 51, 106 P3d 1189 (2005).

Evidence of Victim's Statements as to Perpetrator of Crime Not Within Concept of Corpus Delicti or Res Gestae — Use of Terms "Corpus Delicti" and "Res Gestae" Discouraged: The Supreme Court extensively reviewed the use of the terms "corpus delicti" and "res gestae", examining definitions and the historical development of Montana case law referencing the concepts. Here, statements by the victim to family members and friends regarding her troubled relationship with her husband, were not within the bounds of the concept of the corpus delicti because they tended to establish the perpetrator of the crime, which is not an element of the corpus delicti, and should not have been admitted under that rule. The statements were also inadmissible under the concept of res gestae. However, the admission of the victim's statements was merely cumulative and constituted harmless error. The Supreme Court urged that these vague and imprecise terms not be used in the future and advised that the court will henceforth review claims of error in the admission of evidence by determining whether the evidence was admissible under some provision of the Montana Code Annotated or under the Montana Rules of Evidence. St. v. Hansen, 1999 MT 253, 296 M 282, 989 P2d 338, 56 St. Rep. 997 (1999), clarifying numerous Montana cases that have properly or improperly applied the concepts.

Substance of 9-1-1 Call — Double Hearsay Rule Inapplicable — Admission Into Evidence Harmless Error: In a trial for sexual intercourse without consent, the District Court allowed a dispatcher to testify as to the substance of a 9-1-1 call related to the offense. The double hearsay rule did not apply. The caller's statement was hearsay, and the police dispatcher was too far removed to testify as to the victim's statements to the caller. It was error for the court to admit the substance of the 9-1-1 call into evidence; however, it was harmless error because all of the basic elements were established without question by other testimony properly admitted at trial. St. v. Graves, 272 M 451, 901 P2d 549, 52 St. Rep. 755 (1995), followed in St. v. Veis, 1998 MT 162, 289 M 450, 962 P2d 1153, 55 St. Rep. 651 (1998).

Present Sense Impression and Excited Utterance Exceptions to Hearsay Denied Absent Facts in Offer of Proof: When defendant presented no facts in offer of proof that would place an obvious hearsay statement within either the present sense impression or excited utterance exception to the hearsay rule, the offer of proof was properly denied. Hart-Anderson v. Hauck, 239 M 444, 781 P2d 1116, 46 St. Rep. 1817 (1989).

Admission of Defendant's Spontaneous Remarks — Motion to Strike During Cross-Examination: Defendant was charged with and convicted of sexual intercourse without consent. During his trial, the arresting officer was asked if defendant had made any statements. Defense counsel objected on the grounds of hearsay. The court was prepared to accept the evidence under the "excited utterance" exception to the hearsay rule. The officer testified defendant said, "Which bitch did it?". No immediate objection was raised, but during cross-examination defense counsel made a motion to strike, which was denied. The prosecution made no further reference to the statement. On appeal, the Supreme Court relied on Poindexter & Orr Livestock Co. v. Oreg. Short Line Ry., 33 M 338, 83 P 886 (1905), which held that "the practice, whether in civil or criminal cases, of deliberately permitting evidence to be given without objection in the first instance, and then moving to strike it on grounds which might readily have been availed of to exclude it when offered, is not to be tolerated". The court said that even if it were to focus on the allegations of prejudice, there was no reasonable possibility that

the evidence might have contributed to the conviction. St. v. Bauer, 210 M 298, 683 P2d 946, 41 St. Rep. 1066 (1984).

"Excited Utterance Exception" — Time Lapse — Event Precipitating Excitement: The Supreme Court did not reverse District Court's discretionary decision to deny admission of statement under "excited utterance exception" to hearsay rule where 1 hour had elapsed between the time of the event precipitating the statement and the statement itself and the precipitating event had been verbal argument rather than an assault with a weapon. St. v. Norgaard, 201 M 165, 653 P2d 483, 39 St. Rep. 2028 (1982).

Time Element of Present Sense Impression and Excited Utterance: Testimony of a witness, a week after the incident, with respect to statements made by a man who left with a broken jaw from the bar in which defendant allegedly used force in self-defense was properly excluded because the time element is important under the exceptions to hearsay made for present sense impressions and excited utterances. St. v. Cooper, 180 M 68, 589 P2d 133, 36 St. Rep. 30 (1979).

BUSINESS RECORDS

Lacking Business Records Foundation by Records Custodian, Medical Reports Considered Inadmissible Hearsay: In an employment discrimination case, Pannoni sought to introduce written medical reports in letter form that contained observational information and opinions regarding Pannoni's medical condition and ability to return to work. The letters were accompanied by written certification that the reports had been prepared as part of a mental health center's regularly conducted business and were made at or near the time of Pannoni's diagnosis, but no one testified as to the contents of the reports or their status as regular business records. The employer objected to the evidence as hearsay, but Pannoni contended that they were admissible under the business records exception. The District Court concluded that because Pannoni had attempted to lay the foundation for the evidence through written certification prepared by a records custodian who did not testify, the foundational evidence itself was hearsay that could not establish the foundation for admission of otherwise inadmissible hearsay documents. Absent a proper foundation for admission of the evidence, the Supreme Court affirmed. Pannoni v. Browning School District No. 9 Bd. of Trustees, 2004 MT 130, 321 M 311, 90 P3d 438 (2004).

Admissibility of Prison Work Logbooks as Business Records: Struble was charged with falsifying work records at the state prison where he was employed. Struble argued that prison logbooks should not have been allowed as evidence under the business records exception because the logbooks were inaccurate, untrustworthy, and unreliable. The state argued that the logbooks were regularly recorded business records of employees' comings and goings in the prison and that the jury was not misled with the notion that the logbooks kept time records of employees' work. The Supreme Court agreed with the state. The prison logbooks were prepared as an essential part of routine prison operations and, being kept in the regular course of prison business, were considered trustworthy and admissible under the business records exception to the hearsay rule. St. v. Struble, 2004 MT 107, 321 M 89, 90 P3d 971 (2004). See also St. v. Edmundson, 246 M 241, 805 P2d 1289 (1990), and Bean v. Bd. of Labor Appeals, 1998 MT 222, 270 M 253, 891 P2d 516 (1998).

Failure to List Fire Marshal's Report in Pretrial Order — Report Not Considered Rebuttal Evidence and Thus Properly Excluded: At an arson trial, Andersen sought to introduce into evidence a report written by a Deputy State Fire Marshal who had assisted local law enforcement in investigating the fire but who had died prior to trial and was unavailable to testify. Andersen contended that, even though it had not been endorsed as an exhibit in the pretrial order, the report was admissible under subsection (6) of this rule as a record kept in the ordinary course of business. The District Court disallowed the report under subsection (8)(i) of this rule because it was an investigative report. The Supreme Court did not reach the question of whether the report was admissible under this rule because Andersen conceded that the report had not been endorsed as an exhibit in the pretrial order; moreover, the report could not be considered rebuttal evidence because it was not offered to counter new evidence, but rather had been presented during plaintiff's case in chief. Because Andersen failed to list the report in the pretrial order, it was properly excluded. Travelers Indem. Co. v. Andersen, 1999 MT 201, 295 M 438, 983 P2d 999, 56 St. Rep. 782 (1999). See also Workman v. McIntyre Constr. Co., 190 M 5, 617 P2d 1281, 37 St. Rep. 1637 (1980), and State ex rel. St. Comp. Mut. Ins. Fund v. Berg, 279 M 161, 927 P2d 975, 53 St. Rep. 1098 (1996).

Incident Report Not Qualified as Admissible Business Record: The language of subsection (6) of this rule not only requires that the reported activity be a regularly conducted business activity but precludes admission of regularly prepared business records when the source of information

or method or circumstances of preparation indicate lack of trustworthiness. In the present case, an incident report was prepared as part of an activity incidental to the employer's main business activity, in anticipation of litigation, and the information was provided by a third party who was not employed by the employer and who thus had no duty to report accurately to the employer. In light of these facts, the incident report lacked any circumstantial guarantees of trustworthiness and thus did not qualify as a business record, but rather was considered inadmissible hearsay and was improperly admitted into evidence. Bean v. Bd. of Labor Appeals, 1998 MT 222, 270 M 253, 891 P2d 516, 55 St. Rep. 927 (1998).

Hearsay Exception Applicable to Testimony of Release Center Director in Considering Revocation of Conditional Release: The defendant asserted that testimony of the director of the release center where the defendant was committed was improperly admitted at a hearing to determine whether revocation of release was proper based on the defendant's behavior. The Supreme Court held that the director's testimony, based on regularly written reports of behavioral problems and counseling sessions kept in the regular course of business and prepared by a staff therapist, was credible, reliable, and well-grounded within the hearsay exception established in subsection (6) of this rule. St. v. Edmundson, 246 M 241, 805 P2d 1289, 47 St. Rep. 1937 (1990).

Hearsay Objection Not Permitted as to Stipulated Documents: When plaintiff made no objection and stipulated on the pretrial order to the admission of certain documents without foundation, he may not later raise a hearsay objection questioning whether the documents are admissible as business records under Rule 803(6), M.R.Ev. Crockett v. Billings, 234 M 87, 761 P2d 813, 45 St. Rep. 1751 (1988).

Authentication of Records by Stipulation — Hearsay Exception: The District Court admitted certain hospital and ambulance records as business records exceptions to the hearsay rule. Ordinarily such documents would not be self-authenticating; however, the defense stipulated to the authenticity of the records and agreed there was no need to call a medical librarian. Admissibility was affirmed because the defense was unable to identify any specific portion of the records as inaccurate. Palmer v. Farmers Ins. Exch., 233 M 515, 761 P2d 401, 45 St. Rep. 1694 (1988).

"Catchall" Exception to Hearsay Rule — Certain Business Records Inadmissible: In an action for unpaid wages mandated by 18-2-401, et seq., appellant claimed error in the trial court's admission of certain documentary evidence. Of the total $8,777.39 damage award, only $1,365.27 was based on oral testimony of witnesses. The balance was proved by evidence admitted under exceptions to the hearsay rule. The Commissioner of Labor introduced unverified letters of three construction companies under Rule 803(24), M.R.Ev. These letters are not business records, as they were not kept in the ordinary course of business, but were compiled for litigation purposes. The court held that sufficient guaranties of trustworthiness do not exist when documents are compiled for litigation purposes and that the letters should not have been admitted. The matter was remanded for trial on damages only. Hunter v. Bozeman, 216 M 251, 700 P2d 184, 42 St. Rep. 784 (1985).

Proof of Money Paid to Third Party Introducible Without Testimony of Third Party: Where the plaintiff made two agreements with a photographer to take aerial photos of property owned by the defendant, the District Court erred in refusing to allow the plaintiff, in an action against the defendant to recover his payments to the photographer, to introduce, without supporting testimony from the photographer, an itemized statement showing the plaintiff's costs and disbursements. The statement was made by the plaintiff in the regular conduct of his business and is therefore admissible under this rule. An employee of the plaintiff may testify as to the amount plaintiff claims it paid to the photographer, but an employee of the photographer may testify to establish a stronger credibility for the charges. Survco v. Kenyon Noble Ready-Mix, 204 M 411, 664 P2d 943, 40 St. Rep. 971 (1983).

Admissibility of Ledger of Accounts for Legal Services Rendered: As attorney performed work for client, he prepared a slip listing services performed and time involved. The client was shown the work slips on a monthly basis. The contents of the slips were then transferred in memorandum form by the attorney to client's account book. Then the slips were destroyed. In a suit for attorney fees, the account book was admissible under this rule. Morse v. Cremer, 200 M 71, 647 P2d 358, 39 St. Rep. 1162 (1982).

Testimony as to Procedures Followed in Certain Business Circumstances: In determining whether defendant had acted as an attorney in a suit brought against a corporation, the testimony of a staff attorney of the corporation that the corporation's policy was to immediately notify its insurance carrier by mail of any claims against the corporation and that no such letter appeared in their files regarding defendant's suit was admissible even though the staff attorney

had not been employed by the corporation when the alleged suit was filed. St. v. Bretz, 185 M 253, 605 P2d 974, 36 St. Rep. 1037 (1979).

OTHER RECORDS

Use of Nontestimonial Intoxilyzer Certification Reports in DUI Trial Not Violative of Defendant's Right to Confront Witnesses — Crawford Rule: At Carter's DUI trial, the state introduced three certification reports in order to demonstrate that an Intoxilyzer 5000 was working properly when Carter was tested. The officers who prepared the reports did not testify at trial. Carter initially contended that the reports were hearsay, but on appeal, Carter asserted that admission of the reports violated his right to confront witnesses. Although the Supreme Court will generally not address new arguments raised on appeal, the court applied the exception in Cottrill v. Cottrill Sodding Serv., 229 M 40, 744 P2d 895 (1987), in this case because of the new confrontation clause jurisprudence set out in Crawford v. Wash., 541 US 36 (2004), which was decided while Carter's case was pending. In Crawford, the U.S. Supreme Court for the first time distinguished testimonial and nontestimonial out-of-court statements, delineating testimonial statements, at a minimum, as applying to prior testimony at a preliminary hearing, before a grand jury, or at a former trial as well as to police interrogations. States are allowed flexibility in the development of hearsay law when nontestimonial hearsay is at issue. In Carter's case, the state asserted that the certification reports used at Carter's trial were nontestimonial evidence because they did not fall within the core group of statements that the confrontation clause was meant to address. The Supreme Court held that the certification reports were nontestimonial in that they were not substantive evidence of a particular offense, but rather constituted foundational evidence necessary for the admission of substantive evidence. Thus, Carter's confrontation right was not implicated despite the fact that the authors were not present to testify or be confronted. The court noted that a defendant is always free to subpoena authors of such reports if the defendant's pretrial investigation reveals that the reports are erroneous or are otherwise subject to attack. Therefore, in conformance with the Crawford rule, the Supreme Court exempted the certification reports from confrontation clause scrutiny and affirmed Carter's conviction. St. v. Carter, 2005 MT 87, 326 M 427, 114 P3d 1001 (2005), followed in St. v. Paoni, 2006 MT 26, 331 M 86, 128 P3d 1040 (2006).

Limitation on Use of State Pamphlet Concerning Blood Alcohol Content Not Erroneous: In a pretrial order, the District Court ruled that a pamphlet called BAC and You, published by the Department of Transportation and describing the effect of alcohol on blood levels, was admissible in a DUI case as a public document, but not for the truth or accuracy of the information in the pamphlet. Defense counsel further stipulated that the pamphlet would not provide a basis for substantive evidence regarding intoxication. Nevertheless, defense counsel attempted several times to use the pamphlet as proof that defendant was not intoxicated, based on the amount of alcohol that defendant admitted consuming prior to arrest. The court then limited further use of the pamphlet, and defendant contended on appeal that it was error for the court to limit use of a document that had been allowed into evidence. The Supreme Court disagreed. The trial court's limit on use of the pamphlet was not considered a reversal of its previous ruling admitting the pamphlet, but rather an underscoring of the pretrial ruling. Defense counsel's attempt to argue the substantive text of the pamphlet clearly exceeded the original intent and parameters of the pretrial order, so the trial court did not err in limiting its use. Helena v. Kortum, 2003 MT 290, 318 M 77, 78 P3d 882 (2003).

Officer's Use of Arrest Report Allowed for Refreshing of Memory: At Harrington's DUI trial, he objected to the fact that during direct testimony, the arresting officer read a nonadmitted document, the arrest report, into evidence. On appeal, Harrington asserted that the testimony was inadmissible because the foundation required by this rule was not met. However, Rule 612, M.R.Ev., allows witnesses to use writings to refresh their memories while testifying, and the trial court did not abuse its discretion in allowing the officer to refer to the report to refresh his memory. Columbus v. Harrington, 2001 MT 258, 307 M 215, 36 P3d 937 (2001).

Contents of Safe Deposit Box Not Considered Jointly Held Asset: Silver directed his son to lease a safe deposit box for Silver's cash and signed a statement authorizing his son's access to the box. The lease form was prepared by a bank employee, who indicated that it was a joint agreement. Without Silver's direction, consent, or knowledge, the son subsequently removed the cash and placed it in his own safe deposit box in the same bank. Silver died 8 days later, and the personal representative sought to recover the cash, a substantial portion of which Silver had bequeathed to a charitable foundation. The District Court allowed the personal representative and a family friend to testify regarding statements that Silver made to them about the cash and its disposition. The court also admitted extrinsic evidence regarding the safe deposit box lease,

holding that the fact that the lease form was prepared by a bank employee was relevant to interpretation of the document. The son alleged error on both issues, contending that the cash was a jointly held asset. The Supreme Court, citing Thompson v. Steinkamp, 120 M 475, 187 P2d 1018 (1947), and Anderson v. Baker, 196 M 494, 641 P2d 1035 (1982), found that the contested testimony put into context Silver's lease of the box and constituted evidence of Silver's intent to retain ownership of the cash. The fact that Silver did not select the form of lease or check the box on the lease form was supported by substantial credible evidence and was not clearly erroneous. Nevertheless, the son cited 70-1-308 for the contention that the cash was a jointly held asset. However, both the lease agreement and the statute provided for joint access to and possession of the safe deposit box and its contents, but not for joint ownership of the contents. Moreover, the language regarding the rights of surviving joint tenants did not apply here because Silver was still alive when the cash was removed. Thus, the District Court correctly concluded that the cash was not a jointly held asset by virtue of the agreement or the statute. The son could cite no contract theory under which he could be declared the owner of the cash, so the District Court did not err in applying gift theory rather than contract theory in determining ownership of the contents of the box or in concluding that the cash was not a gift to the son, based on the fact that Silver retained ownership. The District Court properly awarded the contents of the box to the estate. In re Estate of Silver, 2000 MT 127, 299 M 506, 1 P3d 358, 57 St. Rep. 526 (2000), distinguishing Malek v. Patten, 208 M 237, 678 P2d 201 (1984).

Rule Governing Introduction of Crime Laboratory Reports Violative of Due Process and Confrontation Clause Provisions: Under the Montana Constitution, a criminal defendant is guaranteed the fundamental right to a face-to-face confrontation with an accuser, including the right to cross-examination. Further, the constitution's due process guarantee makes it the state's duty in a criminal prosecution to prove beyond a reasonable doubt every element of the crime charged. Subsection (8) of this rule, which governs the introduction of state crime laboratory reports, effectively requires a defendant to subpoena and produce the state's expert in order to rightfully take advantage of the confrontation clause. The rule also compels the defendant to produce evidence during the case in chief, which in many cases will be incriminating, should the defendant choose to test the state's case. Therefore, the portion of this rule that governs the introduction of state crime laboratory reports violates both the confrontation clause in Art. II, sec. 24, Mont. Const., and the due process guarantee in Art. II, sec. 17, Mont. Const. St. v. Clark, 1998 MT 221, 290 M 479, 964 P2d 766, 55 St. Rep. 919 (1998), distinguished in St. v. Delaney, 1999 MT 317, 297 M 263, 991 P2d 461, 56 St. Rep. 1267 (1999).

Foundational Requirements for Introduction of Recorded Recollection: Citing the ruling case of Marron v. Great N. Ry. Co., 46 M 593, 129 P 1055 (1913), the Supreme Court outlined the following foundational requirements for a recorded recollection: (1) the entries must have been written by the witness or under the witness's direction; (2) the entries must have been written at the time the facts occurred or at a time when the facts were fresh in the witness's memory; and (3) the witness must have known at the time the entries were made that they correctly stated the facts. Absent these foundational criteria, refusal by a trial court to admit a letter was not error. Jim's Excavating Serv., Inc. v. HKM Associates, 265 M 494, 878 P2d 248, 51 St. Rep. 623 (1994).

Form From State Crime Lab Admissible: Due to the unavailability of the examining technician, the prosecution moved for the admission of a form from the state crime lab to establish the chain of custody of drug evidence. The defense objected on the basis that the evidence did not fall under any exception to the hearsay rule. The Supreme Court held that the form was admissible because it established that the investigating officer obtained the evidence, sent it to the crime lab, received it back from the lab, and identified it as the same evidence sent to the lab, thereby establishing the chain of custody. St. v. Zackuse, 253 M 305, 833 P2d 143, 49 St. Rep. 566 (1992). See also St. v. Romannose, 281 M 84, 931 P2d 1304, 54 St. Rep. 72 (1997), holding certain documents admissible in a criminal trial as the business records exception to the hearsay rule.

Admissibility of Government Pamphlets on Alcohol Consumption — Hearsay Exception: In a DUI trial, Department of Justice pamphlets relating to alcohol consumption were admitted in evidence for the limited purpose of showing that they were Department publications. The judge admonished the jury that the pamphlets were not admitted for their accuracy or truth. Defendant argued that they should have been admitted for their content, truth, and accuracy under the public records exception to the hearsay rule. Defendant failed to lay a proper foundation for admission under that exception because he did not show that the pamphlets were derived from the Department's regularly conducted and recorded activities, were published as a result of a duty imposed on the Department by law, or were the result of an investigation made under authority of law. St. v. Thompson, 237 M 384, 773 P2d 722, 46 St. Rep. 887 (1989).

Admissibility of Certified Abstract of Driving History and Copy of Suspension Notification Letter: Once certified as set out in 61-11-102(6), the authenticity of motor vehicle license information is established for purposes of admissibility without extrinsic evidence. Therefore, a certified abstract of driving history was admissible as was a certified copy of a suspension notification letter, which fell within the class of self-authenticating documents under Rule 902, M.R.Ev., the public document exception to the hearsay rule under this rule, and the requirements of the best evidence rule under Rule 1005, M.R.Ev. Taken together, this evidence was sufficient to sustain a conviction for driving with a suspended license. Billings v. Lindell, 236 M 519, 771 P2d 134, 46 St. Rep. 557 (1989).

Testimony of Human Rights Commission Compliance Officer Properly Disallowed: Plaintiff in an age discrimination case sought to introduce the record of the hearing in which a compliance officer determined plaintiff had been discriminated against. The District Court properly found that the investigative information was specifically excluded under this rule. Further, under Rule 704, M.R.Ev., the compliance officer was not allowed to testify as an expert regarding his opinion on the ultimate issue because there was sufficient evidence presented from which the jury could make a reasonable determination of whether there was age discrimination. Mahan v. Farmers Union Cent. Exch., Inc., 235 M 410, 768 P2d 850, 46 St. Rep. 96 (1989).

Reasonable Cause Finding of Human Rights Commission — Not Admissible: A reasonable cause finding of the Montana Human Rights Commission is not included in the public records and reports exception to the hearsay rule under Rule 803(8), M.R.Ev., and is inadmissible at trial. Crockett v. Billings, 234 M 87, 761 P2d 813, 45 St. Rep. 1751 (1988).

Admission of Death Certificate With Hearsay Statement That Decedent Was Passenger — Harmless Error: In a negligent homicide case, defendant contended decedent was driving. The trial court admitted a death certificate with a statement in it that decedent was a passenger in the truck that crashed. While the death certificate was admissible to prove the victim's death, the statement about the victim being a passenger was based on hearsay and should have been excised. However, the Supreme Court held that failure to do so was harmless error in light of the testimony by other witnesses that established a substantial basis for concluding that decedent was a passenger. St. v. Gould, 216 M 455, 704 P2d 20, 42 St. Rep. 946 (1985), followed in St. v. Thompson, 263 M 17, 865 P2d 1125, 50 St. Rep. 1683 (1993), in which defendant's voluntary statement that First Amendment allowed stepdaughter's punishment was admissible as inconsistent with his innocent plea.

Use of Self-Serving Statements in Pleadings to Advance Cause Some Fifty Years Later: The answer and counter-claim filed by respondent's predecessor in a 1929 water rights case could not be used to advance the cause of the respondent in a current water rights dispute. It did not matter that the pleadings could be classified as "ancient documents" under evidentiary rules that except certain hearsay statements from the prohibition against hearsay. Hill v. Merrimac Cattle Co., Inc., 211 M 479, 687 P2d 59, 41 St. Rep. 1504 (1984).

Town Meeting Minutes and Related Documents: The Troy Town Council had passed a resolution requesting a speed limit of 25 miles per hour on trains passing through town, due to the hazardous nature of the crossing where the accident in question occurred. The minutes of the Town Council, letters between the Town Council and the railroad, and intercorporate memoranda between railroad officials on the subject matter of the crossing should have been admitted into evidence. They were relevant to show notice of the claimed hazardous conditions and the intent of the railroad with respect to the same. These documents go to the issue of ordinary care to be exercised by the railroad and may go to the issue of punitive damages as an indication of wantonness or oppressiveness. The intercorporate memoranda are also relevant as possible admissions of a party opponent. Runkle v. Burlington N., 188 M 286, 613 P2d 982, 37 St. Rep. 995 (1980).

Report Cards: A child's school report card falls within this rule, subsection (6). In re Declaring T.E.R. Youth in Need of Care, 180 M 340, 590 P2d 1117, 36 St. Rep. 276 (1979).

STATE OF MIND

Motion In Limine to Exclude Relevant Statements Made by Defendant During and After Assault Properly Denied: During a bar fight, Brasda brandished a knife and stated that he would use it because he was not afraid to go back to prison. After the fight, Brasda stated to a deputy that he didn't try to stab anyone. At trial, Brasda made a motion in limine to suppress the statements on grounds that they were irrelevant to any fact at issue or, alternatively, that they were statements of other crimes or acts and inadmissible because no exception applied. The trial court denied the motion, and the Supreme Court affirmed. Both statements were clearly relevant and integral to the state's proof of the elements of the crime and to the jury's ability to evaluate

witness testimony. Further, the statements were admissible under the mental, emotional, or physical condition exception to the hearsay rule and under the transaction rule in 26-1-103. The court also noted that under St. v. Bauer, 2002 MT 7, 308 M 99, 39 P3d 689 (2002), statements regarding a defendant's history or imprisonment and probationary status that are inextricably linked to circumstances surrounding the crime are admissible. Denial of the motion in limine was proper. St. v. Brasda, 2003 MT 374, 319 M 146, 82 P3d 922 (2003).

No Dual Residency in Montana Despite Joint Custody Provisions — Affidavit Indicating Future Residency Intent Irrelevant: When the parties were divorced in Nevada, physical custody of their child was granted to the mother, who continued to reside with the child in Nevada, and Umland moved to Montana, having been granted visitation rights. When the child died in an automobile accident, Umland attempted to collect a settlement under his insurance policy, which provided coverage for relatives who were residents of the insured's household. As proof that the child was a resident of Montana, Umland submitted an affidavit asserting that the child had indicated an intent to reside with Umland. The District Court disallowed the affidavit and held that the policy did not apply because the child was not a resident. On appeal, Umland argued that because 1-1-215 establishes a minor's residence as the residence of the parent having legal custody and because Montana allows for joint custody, it naturally followed that Montana allows dual residency. The Supreme Court disagreed. Montana law provides that there may be only one residence. The child customarily resided with the mother and thus was a Nevada resident. Further, the affidavit indicating the child's intent to reside in Montana in the future was irrelevant because the child was a Nevada resident at the time of death. Umland v. Nat'l Cas. Co., 2003 MT 356, 319 M 16, 81 P3d 500 (2003).

Testimony of Child's Statement When Confronted by Abuser Admissible: Testimony concerning a child's statement that she was frightened when suddenly confronted by her abuser was admissible under this rule because it represented the child's present sense impression explanation of her condition, related to the startling event of being confronted by her abuser, represented her existing mental and emotional condition, was made before the child had time to reflect, and was not made in response to questioning. In re S.M. & P.L.M., 2001 MT 11, 304 M 102, 19 P3d 213 (2001).

Victim's Deathbed Statements Admissible as to State of Mind of Victim — Cautionary Instruction Required: As Turner was dying, he made statements to several witnesses to the effect that Fuhrmann stabbed him "on purpose" and that the stabbing was "not an accident". The trial court admitted the statements into evidence. On appeal, Fuhrmann contended that the testimony by the witnesses was inadmissible hearsay because the statements regarding Fuhrmann's intent addressed Fuhrmann's, rather than Turner's, state of mind and thus did not fall within the hearsay exception in subsection (3) of this rule. Following St. v. Magruder, 234 M 492, 765 P2d 716 (1988), and St. v. Losson, 262 M 342, 865 P2d 255 (1993), the Supreme Court concluded: (1) Turner's statements that Fuhrmann stabbed him "on purpose" and that the stabbing was "not an accident", if the statements were construed as providing evidence that Turner feared Fuhrmann, could only be construed as providing circumstantial evidence of Turner's fear and, under that construction, would not be considered as hearsay and would be admissible; (2) such statements may be offered only for the purpose of showing the declarant's state of mind and may not be offered for the truth of the matter asserted; and (3) to prevent any potential prejudicial effect on a defendant and to uphold the integrity of both the hearsay rule and the state of mind exception of subsection (3) of this rule, a trial court must instruct the jury as to the limited purpose for which it may consider this type of testimony. Nevertheless, in Fuhrmann's case, failure by the court to offer a limiting instruction was harmless error given the overwhelming independent evidence of guilt. St. v. Fuhrmann, 278 M 396, 925 P2d 1162, 53 St. Rep. 966 (1996).

Distinction Between Hearsay and Nonhearsay State of Mind Statements: In clarifying the distinction between hearsay and nonhearsay state of mind statements, the Supreme Court relied on U.S. v. Brown, 490 F2d 758 (D.C. Cir. 1973). The distinction turns on whether the statement is evidence that circumstantially or directly proves the declarant's state of mind. If the statement circumstantially proves the declarant's state of mind, then the evidence is not offered to prove the truth of the matter asserted and the evidence is not hearsay. Alternatively, when the evidence directly proves the declarant's state of mind, the evidence is introduced to prove the truth of the matter asserted and the evidence is hearsay. St. v. Losson, 262 M 342, 865 P2d 255, 50 St. Rep. 1588 (1993), followed in Rafanelli v. Dale, 278 M 28, 924 P2d 242, 53 St. Rep. 746 (1996).

Declarant Unavailable — No Hearsay Exemption Upon Trustworthiness Guaranty: Plaintiff questioned the admissibility under hearsay rules of the testimony of witnesses who recalled

statements of a person who was integral in determining the facts of the case but who died prior to trial. The Supreme Court held that when a declarant is unavailable as a witness, as for reason of death, his statements are not excluded by the hearsay rule if there are comparable circumstantial guaranties of trustworthiness. Whether there are guaranties is a matter for determination by the District Court, which will be upheld absent an abuse of discretion. Hobbs v. Pac. Hide & Fur Depot, 236 M 503, 771 P2d 125, 46 St. Rep. 544 (1989).

Testimony on State of Mind — Inference Inadmissible: Witness's testimony that an agreement existed between the parties was based solely on hearsay statements made to him by the respondent as to the respondent's belief that an agreement existed. The Supreme Court ruled that the testimony was not admissible as an exception to the hearsay rule because a statement of the respondent's then-existing state of mind cannot be introduced to prove the fact remembered or believed. First Bank-Billings v. Clark, 236 M 195, 771 P2d 84, 46 St. Rep. 291 (1989).

Admissibility of Victim's Statements as Indication of State of Mind — Relevance to Issue of Self-Defense: Testimony relating to the statements of a shooting victim was admissible as a hearsay exception when offered only to show the victim's state of mind. The Supreme Court cited U.S. v. Brown, 490 F2d 758 (D.C. Cir. 1974), in holding that the threshold requirement of admissibility of a victim's statements of fear of defendant in homicide cases is some substantial degree of relevance to a material issue in the case. The most common category involves defendant's claim of self-defense as justification for the killing. Defendant's assertion that the deceased first attacked him may be rebutted by extrajudicial declarations of the victim that he feared defendant, thus rendering it unlikely that deceased was in fact the aggressor. Victim's statement was not hearsay because it was not offered in evidence to prove the truth of the matter asserted. St. v. Magruder, 234 M 492, 765 P2d 716, 45 St. Rep. 2075 (1988), followed in St. v. Losson, 262 M 342, 865 P2d 255, 50 St. Rep. 1588 (1993).

Decedent's Statements About His Stress Not Hearsay: Workers' Compensation Court did not err in admitting testimony about statements decedent made on the day of his death. The statements allegedly showed decedent's job-related mental and emotional stress. The court is not bound by common law or statutory rules of evidence, and even if it were, the statements were not hearsay. Their purpose was to show what decedent thought and felt shortly before he died of heart failure. Tocco v. Great Falls, 220 M 221, 714 P2d 160, 43 St. Rep. 310 (1986).

Statement of Deceased Hearsay — State of Mind Not at Issue: Moen, an employee of defendant, died of a heart attack. His wife filed suit, alleging that defendant negligently failed to provide help to a worker stricken by a heart attack. Moen's supervisor testified that he asked Moen to work Saturday only upon discovering that he stayed in Decker on Friday night rather than return to Great Falls. The court properly excluded as inadmissible hearsay the testimony of Moen's wife that he called his wife on Friday and told her that he couldn't come home because he had to work on Saturday. One cannot impeach a witness on a collateral matter. The question of when the supervisor asked Moen to work overtime is not relevant or material to the issue of defendant's negligence. The testimony is not saved by being a statement of Moen's state of mind or his intent and hence is not an exception to the hearsay rule. Moen's state of mind is not at issue; rather the negligence of defendant is at issue. Moen v. Peter Kiewit & Sons' Co., 201 M 425, 655 P2d 482, 39 St. Rep. 2209 (1982).

State of Mind Exception: A witness's answer to a question on redirect was that he made a statement to the police that he had not made a statement to anyone authorizing them to take his stereo. This answer includes two statements that must be analyzed within the hearsay rule. The first part of the answer that he "told the police" is not hearsay under Rule 801, M.R.Ev., because it was inconsistent with his prior testimony and it was offered to rebut the State's implied charge of subsequent fabrication, improper influence, or motive. The fact that he had not made a statement authorizing anyone to remove the stereo is admissible under the state of mind exception to the hearsay rule. St. v. Martinez, 188 M 271, 613 P2d 974, 37 St. Rep. 982 (1980).

MEDICAL DIAGNOSIS

Acceptance of Expert Testimony Regarding Child's Custodial Preference — Determination of Admissibility Not Necessary When Qualified as Professional Advice: During trial on modification of a parenting plan, the District Court considered statements made by the children during a session with a psychologist hired by the father. During the session, the children indicated their unhappiness living with their mother and their desire to live with their father. The mother objected on grounds that the statements were inadmissible hearsay, arguing that the Supreme Court had previously declined to extend the hearsay exception in this rule to statements made by a child to a counselor and should have appointed an independent counselor. The Supreme Court noted that under 40-4-214, the District Court could have interviewed the

children to determine their wishes, but declined to do so in deference to the mother's objection. However, a District Court need not interview children to determine their preferences, but may rely on the evaluation of a professional counselor. Special appointment of an independent counselor is not necessary in all circumstances. Here, the children underwent extensive counseling by a doctor, as well as by counselors hired by both the father and mother, and the District Court admitted the entire testimony of all the professionals. It was not necessary to determine whether the psychologist's testimony was admissible under this rule because it qualified as professional advice available under 40-4-214. The trial court was in the best position to evaluate the credibility of witnesses, and the Supreme Court declined to overturn the custody matter absent a clear abuse of discretion. In re Marriage of Drake, 2002 MT 127, 310 M 114, 49 P3d 38 (2002).

Statements by Minors to Doctor Concerning Sexual Abuse Held Inadmissible — Conviction Upheld Because of Lack of Prejudice: The trial court admitted statements of two minor children made to an examining physician under the medical diagnosis exception to the hearsay rule. The Supreme Court found that the two minors were not in need of immediate medical attention when they spoke with the doctor. Therefore, the statements were not made with an intention consistent with seeking medical treatment and thus were not statements that would be relied upon by the physician regarding diagnosis or treatment and as such were not admissible as an exception to the hearsay rule. However, the Supreme Court also found that the admission of the evidence was harmless because both minors testified at the trial and their testimony was substantially the same as the statements that they made to the doctor. St. v. Whipple, 2001 MT 16, 304 M 118, 19 P3d 228 (2001), distinguishing St. v. Thompson, 263 M 17, 865 P2d 1125 (1993). See also St. v. Alexander, 265 M 192, 875 P2d 345 (1994), holding erroneously admitted evidence as harmless error.

Statements Made by Minor Victim of Assault Held Admissible — Arlington Procedure Complied With: When Huerta was tried on charges of assault of a juvenile, he objected on grounds of hearsay evidence to statements made by the juvenile to a treating physician. The Supreme Court held that the two-step analysis contained in St. v. Arlington, 265 M 127, 875 P2d 307 (1994), had been followed in that the physician had testified that his questions and the minor's responses were necessary for the purpose of medical diagnosis and treatment and that he did rely on the minor's responses in treating the minor. St. v. Huerta, 285 M 245, 947 P2d 483, 54 St. Rep. 1133 (1997).

Medical Diagnosis and Treatment Exception — Applicable Only to Medical Doctors: In determining that the District Court properly refused to allow into evidence out-of-court statements made by a child abuse victim to a counselor, the Supreme Court declined to extend the medical diagnosis and treatment exception under this rule, beyond medical doctors. The counselor is not licensed to render medical diagnoses and therefore cannot testify about such diagnoses under this exception. St. v. J.C.E., 235 M 264, 767 P2d 309, 45 St. Rep. 2373 (1988), followed in St. v. Mayes, 251 M 358, 825 P2d 1196, 49 St. Rep. 75 (1992), and St. v. Henderson, 265 M 454, 877 P2d 1013, 51 St. Rep. 606 (1994), distinguishing St. v. Harris, 247 M 405, 808 P2d 453 (1991), and distinguished in St. v. Arlington, 265 M 127, 875 P2d 307, 51 St. Rep. 417 (1994), in which the medical diagnosis and treatment exception was extended to emergency medical technicians as first responders in a medical crisis. See also St. v. Ryan, 691 P2d 197 (Wash. 1984), Idaho v. Wright, 497 US 805, 111 L Ed 2d 638, 110 S Ct 3139 (1990), and St. v. Harris, 247 M 405, 808 P2d 453, 48 St. Rep. 62 (1991).

Medical Records Prepared by Predecessor to Testifying Doctor — Not Inadmissible Hearsay: Medical records prepared by the predecessor of a testifying doctor that were used as part of his testimony did not constitute inadmissible hearsay evidence because a foundation was laid wherein the testifying doctor stated that he would never treat a patient of the predecessor doctor without first reviewing the patient's records. Thus, the records constitute records both for the purposes of medical treatment under Rule 803, M.R.Ev., and data relied on by experts when forming opinions on the subject under Rule 703, M.R.Ev. Garza v. Peppard, 222 M 244, 722 P2d 610, 43 St. Rep. 1233 (1986).

Victim's Statements to Physician — Foundation to Be Laid in Court Not Chambers: The statement of causation made by a victim to her physician was held improperly admitted because no proper foundation was laid for it in court since it was not shown in court (although it was in chambers) that the doctor had received the statement for the purpose of medical diagnosis and/or treatment, to come within the exception of Rule 803(4), M.R.Ev. St. v. Brubaker, 184 M 294, 602 P2d 974, 36 St. Rep. 1915 (1979).

Admissibility of Medical Reports — Workers' Compensation Court: It is well settled that it is not an abuse of discretion for the Workers' Compensation Court to consider the contents of

medical reports contained in the case file before the court in spite of their alleged hearsay nature when counsel for defendant fails to object. Hayes v. Aetna Ins. Co., 176 M 513, 579 P2d 1225 (1978).

MISCELLANEOUS

Testimonial Versus Nontestimonial Hearsay — Crawford Rule for Admissibility in Criminal Trial — Use of Emergency Calls: In Crawford v. Wash., 541 US 36 (2004), the U.S. Supreme Court bifurcated hearsay law from the constitutional confrontation clause (sixth amendment, U.S. Const.; Art. II, sec. 24, Mont. Const.) by allowing hearsay against criminal defendants in only two instances: (1) if hearsay is testimonial, a defendant must have had an opportunity to cross-examine the declarant and the prosecution must show that the declarant is unavailable to appear at trial; or (2) if hearsay is nontestimonial, the hearsay must bear adequate indicia of reliability or particularized guarantees of trustworthiness. However, the Crawford court declined to define what constitutes testimonial hearsay. The Montana Supreme Court noted that the sixth amendment itself defines the indicia of reliability or particularized guarantees of trustworthiness necessary to admit testimonial hearsay by establishing confrontation through cross-examination as the minimally adequate index. Crawford characterizes a casual remark to an acquaintance as nontestimonial hearsay, and the word "casual" modifies the declarant's assumption as to what use, if any, the listener might make of the statement. When an objective declarant would reasonably expect the state to use a statement at trial, the sixth amendment demands that courts exclude such statements absent an opportunity for confrontation. When speaking to government agents or officials, a declarant should reasonably expect the government to seek to use those statements at trial, and when a declarant signs an affidavit or gives a recorded statement, the declarant should likewise expect the state to make use of those statements, so those statements are considered testimonial. However, a declarant who is alerting law enforcement of imminent and immediate danger, such as through a 9-1-1 emergency call, has much less of an expectation that the state will seek to make prosecutorial use of the statements at trial, depending on the content of the conversation and the particular circumstances that led to the call. If the declarant has objective reason to believe that an emergency statement would serve only to avert or mitigate imminent or immediate danger and the agent who receives the statement had no intent to create evidence, then the statement is presumed to be nontestimonial. Alternatively, if a declarant has clear reason to believe that the statement would be used in court as substantive evidence against a defendant, statements to a nongovernmental agent are nontestimonial. St. v. Mizenko, 2006 MT 11, 330 M 299, 127 P3d 458 (2006), followed in St. v. Paoni, 2006 MT 26, 331 M 86, 128 P3d 1040 (2006).

Recorded Present Sense Impression of Partner Assault Victim Properly Admitted: At Hope's trial for partner assault, the District Court admitted into evidence a note that the victim wrote prior to the assault, describing Hope's angry mood and the victim's apprehension about further problems that might arise. Hope contended error in admission of the note because the note did not meet the requirements of the recorded exception to the hearsay rule in this rule. The state argued that the note was properly admitted under the recorded present sense impression exception to the hearsay rule. The Supreme Court agreed with the state. A recorded present sense impression is a written assertion describing or explaining an event or condition while the declarant was perceiving the event or condition or immediately thereafter. Further, the note did not impermissibly provide the jury with testimonial material regarding Hope's general character, or give undue emphasis to the critical elements of the state's case, because it described the victim's perception of Hope's anger rather than the assault itself. The trial court correctly advised the jury that it could give the note whatever weight that it considered appropriate, and the note was properly admitted. St. v. Hope, 2001 MT 207, 306 M 334, 33 P3d 629 (2001).

Sexual Abuse and Violence Against Women Act — Limitation of Evidence of Inappropriate Touching of Another: Evert sought damages against Swick based on Swick's alleged sexual abuse and violation of the federal Violence Against Women Act of 1994 (42 U.S.C. 13981). The District Court excluded proffered testimony of Evert's sister that Swick had also sexually and physically abused her. Swick was ultimately acquitted. Evert asserted on appeal that her sister's testimony was admissible to show opportunity, identity, or absence of mistake, that it was part of the res gestae, and that it should have been allowed as rebuttal testimony. The Supreme Court found no issue of opportunity, identity, or mistake because Swick and Evert had lived together, so the opportunity for abuse clearly existed. Moreover, the sister's testimony did not fall within any of the hearsay exceptions in this rule. The res gestae argument, when properly phrased in the context of the transaction rule, showed no evidence that Swick's contact with the sister involved part of the same transaction contained in Evert's complaint, a necessary element under

26-1-103. The Supreme Court also concluded that the testimony had no rebuttal value that would outweigh its prejudicial effect. The District Court correctly deduced that the evidence of other inappropriate touching was offered to impugn Swick's credibility and bolster Evert's credibility, which is not permitted under Rule 404, M.R.Ev., and the modified Just rule. The court properly exercised its discretion in weighing the probative value of the testimony against its prejudicial effect in limiting the sister's testimony to the allegations contained in the complaint and excluding the portion of her testimony regarding other acts. Evert v. Swick, 2000 MT 191, 300 M 427, 8 P3d 773, 57 St. Rep. 757 (2000).

Videotapes of Child Overdose Victim Properly Excluded as Hearsay: The mother left her child's headache medicine on the table with her own allergy medication, instructing the child to take his headache medicine and then leaving the room. The child took the allergy medicine instead and overdosed. The mother was subsequently charged with criminal endangerment. At trial, the child was not a witness. During her case in chief, she sought to introduce police videotapes taken of the child 5 and 7 days after the overdose. The videotapes were held inadmissible under any exception to the hearsay rule. Defendant appealed. The Supreme Court found the tapes inadmissible under the present sense impression exception, the recorded recollection exception, and other exceptions because of the lack of a timing element and no manifestation of circumstantial guarantees of the trustworthiness of the recollections. St. v. Hocevar, 2000 MT 157, 300 M 167, 7 P3d 329, 57 St. Rep. 625 (2000).

What Form of Compliance of Instrument Used in Breath Test Required as Foundation for Breath Test Results: ARM 23.4.214 requires that all breath analysis equipment be sent to the state Forensic Sciences Division annually for laboratory certification. A person charged with an alcohol-related offense is entitled to the procedural safeguards contained in the administrative rule, so in order for the results of a defendant's breath test to be admissible, the state must lay a proper foundation by establishing that the instrument complied with ARM 23.4.214. During pretrial discovery, Delaney requested documentation that the instrument used to test his breath had been certified, and the state provided a copy of the laboratory certification form. At trial, Delany moved to dismiss the results of the breath test, contending that the form was inadmissible hearsay that could not be used to lay the requisite foundation, and also maintained that failure to call the custodian of the annual certification records violated Delaney's right to confront witnesses. The state contended that it was not required to have the form admitted in order to lay a foundation for admissibility and that, consequently, it did not matter that the document was hearsay, but rather that all that was necessary was to establish to the satisfaction of the court that the certification had been performed. The District Court sided with the state and admitted the breath test results. On appeal, the Supreme Court affirmed, noting that the determination of whether adequate foundation exists is within the discretion of the District Court and that that determination is made pursuant to Rule 104(a), M.R.Ev., which authorizes the examination of any proffered evidence, regardless of its admissibility, in determining the admissibility of challenged evidence. Under the identical federal Rule of Evidence, federal courts have found that the plain language of the rule extends to consideration of hearsay and other evidence normally inadmissible at trial. (See Bourjaily v. U.S., 483 US 171, 97 L Ed 2d 144, 107 S Ct 1775 (1987), and its progeny.) Thus, the District Court was allowed to consider the certification form in determining whether an adequate foundation existed without regard to whether the form itself was hearsay, and consequently, the state was not required to call the records custodian to testify. St. v. Delaney, 1999 MT 317, 297 M 263, 991 P2d 461, 56 St. Rep. 1267 (1999), distinguishing St. v. Woods, 272 M 220, 900 P2d 320, 52 St. Rep. 762 (1995), and St. v. Clark, 1998 MT 221, 290 M 479, 964 P2d 766, 55 St. Rep. 919 (1998).

No Prejudice in Erroneous Admission of Incest Victim's Out-of-Court Statements — Harmless Error: The testimony of the investigating social worker who interviewed an incest victim, even though offered as a summary to a written report, was inadmissible hearsay repetition of allegations of incest. However, in the context of the record, the social worker testified only briefly prior to the victim and did not repeat any allegation to which the victim did not testify in much greater detail under cross-examination. Therefore, the court's error when it admitted the hearsay testimony was harmless. St. v. Riley, 270 M 643, 893 P2d 310, 52 St. Rep. 258 (1995), followed in St. v. Stuit, 277 M 227, 921 P2d 866, 53 St. Rep. 607 (1996), and St. v. Veis, 1998 MT 162, 289 M 450, 962 P2d 1153, 55 St. Rep. 651 (1998).

Self-Preservation Statement Within Hearsay Exception: A coconspirator feigned intoxication during questioning by police following a homicide, stating he did so for "self-preservation". His statements were properly admissible under this rule because his explanation for feigning intoxication related to his then-existing mental or emotional condition. St. v. McCord, 251 M 317, 825 P2d 194, 49 St. Rep. 53 (1992).

Admissibility of ACCRA Index in Child Support Calculations: The American Chamber of Commerce Researchers Association (ACCRA) Cost of Living Index is a public record admissible under subsection (8) of this rule for use in calculating cost-of-living differences that affect the amount of a child support obligation. Use of the ACCRA index by the District Court in adjusting for the cost of living in Alaska did not constitute reversible error. In re Marriage of Fronk v. Wilson, 250 M 291, 819 P2d 1275, 48 St. Rep. 936 (1991).

Admissibility of Evidence Regarding Breathalyzer Printout — Present Sense Impression: An officer who had experienced problems with a Breathalyzer printer prior to testing defendant copied the numerical results of the calibration and test result from the display screen to the printout card. Defendant averred that it was error to admit the officer's testimony regarding the numbers observed on the screen and subsequently recorded on the printout, contending the testimony was inadmissible hearsay that did not fall within any recognized exceptions. However, the numbers were a present sense impression under this rule, constituting a written assertion describing or explaining an event or condition made while the declarant was perceiving the event or condition, and as such they fell within the statutory hearsay exception in 61-8-404. Hoy v. Helena, 248 M 128, 809 P2d 1255, 48 St. Rep. 344 (1991), followed in St. v. Berosik, 1999 MT 238, 296 M 165, 988 P2d 775, 56 St. Rep. 938 (1999).

Hearsay as General Consensus, Not Personal Observation — Reputation Concerning Boundaries: To qualify under the hearsay exception regarding reputation concerning boundaries or general history, the testimony must report a general consensus of opinion and not just an assertion of an individual's personal observation. In this case, the rationale for excepting testimony was lacking because no evidence was presented regarding the reputation of a monument; however, in light of other evidence supporting the testimony, the error was harmless and did not rise to the level of reversible error. Goodover v. Lindey's, Inc., 232 M 302, 757 P2d 1290, 45 St. Rep. 1068 (1988).

Suicide Note Inadmissible as Exception to Hearsay Rule: Defendant was convicted of conspiring to deliver a pistol to her husband who was an inmate in the state prison. The delivery failed, and the inmate committed suicide after writing a note that implied his wife had done something wrong. The note admittedly was not written in furtherance of the conspiracy and contained no direct statement implicating defendant in the scheme. Speculation of defendant's complicity did not rise to a sufficient guarantee of trustworthiness nor did the note establish a fact in issue. Hence, the suicide note did not qualify as a recognized exception to the hearsay rule and was inadmissible. It was not a new and unanticipated situation requiring growth and development of the hearsay law because suicide notes predate the rules of evidence by many years. St. v. Brown, 231 M 334, 752 P2d 204, 45 St. Rep. 660 (1988).

Statements Made to Insurance Claims Adjuster — Circumstantial Guarantees of Trustworthiness Not Met: The grant of a new trial based on prior admitted hearsay was affirmed when tape recorded statements made to an insurance claims adjuster did not satisfy the requirements of trustworthiness under Rule 804(b)(5), M.R.Ev. There was no sense of impending death, no statement against interest, and nothing about personal or family interest; and the statement was not made under oath or subject to cross-examination. Heisler v. Boule, 226 M 332, 735 P2d 516, 44 St. Rep. 698 (1987).

Child Support Action — Affidavit of Officer of State Seeking Reimbursement: In North Dakota's action for a declaration of paternity and to obtain child support, it was proper to exclude the affidavit of a North Dakota welfare administrator setting forth what North Dakota had paid for public assistance to the mother, the child's medical costs, and blood tests to establish paternity, for which North Dakota sought reimbursement. The affidavit was hearsay, was made by a person not available for cross-examination, and did not fit within any of the hearsay exceptions. However, under 40-5-121 (now repealed) the welfare administrator's deposition as to his state's pleaded costs could be taken and the case was remanded to allow a deposition to be taken. Because North Dakota did not plead its expenditures for the child's medical costs, they could not be recovered and the deposition could not cover those costs. St. of N. Dak. ex rel. B.J.D. v. S.P.R., 219 M 26, 710 P2d 702, 42 St. Rep. 1817 (1985).

Telephone Survey by State Employee — Hearsay — No Circumstantial Guarantee of Trustworthiness: Plaintiff was awarded the mechanical subcontract on a research laboratory being constructed by the State. The State received a complaint that plaintiff was not paying the "standard prevailing rate" of wages. The State investigated and concluded that the complaint was legitimate. Plaintiff commenced a declaratory judgment action, and judgment was entered in his favor. At trial, the District Court admitted the testimony of the local job service office manager concerning a telephone wage survey he had conducted. The evidence was inadmissible hearsay and did not have a comparable guarantee of trustworthiness because it was not data

compiled as a result of a regularly conducted activity or a duty imposed by law. Thompkins v. Fuller, 205 M 168, 667 P2d 944, 40 St. Rep. 1192 (1983).

After-the-Fact Exclusion of Evidence: The District Court admitted into evidence in a lien controversy a document prepared for concrete costs at the request of defendant's counsel. Plaintiff objected, contending the document was hearsay. At the conclusion of trial, the District Court Judge issued a memorandum excluding the document as hearsay. Defendant argued the after-the-fact ruling was prejudicial because it precluded him from calling other witnesses or otherwise presenting proof. The Supreme Court held that although the document was properly excluded as hearsay, since not issued in the ordinary course of business, the manner of the ruling was prejudicial and remanded the matter for reconsideration. Anderson v. Hobbs, 196 M 31, 637 P2d 817, 38 St. Rep. 2098 (1981).

Admissibility Dependent on Nature of Treatise — Cross-Examination of Expert: Learned treatises are permissible for use in cross-examination of an expert if the treatise is "established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice". Here, a treatise on design at grade-railway highway crossings was properly used to test the knowledge of an expert witness in cross-examination. Another treatise concerning the visibility and audibility of trains approaching crossings was properly held to be inadmissible, as it was merely advisory in nature. Treatises may be admitted upon the foundation that they show what is feasible to the jury or show what the defendant knew or should have known about safety precautions. Runkle v. Burlington N., 188 M 286, 613 P2d 982, 37 St. Rep. 995 (1980).

Evidence Submitted to Be Timely and in Proper Form: Plaintiff submitted a letter from the State Compensation Insurance Fund in support of a motion to set aside the judgment. The letter was improperly included in appellant's brief for the following reasons: (1) it was not presented in the proper affidavit form as required by Rule 56, M.R.Civ.P.; (2) the opinion set forth in the letter could easily have been presented in timely fashion in opposition to respondent's motion for summary judgment, rather than subsequently in support of a motion to set aside the verdict that had been granted on the merits; and (3) the letter sets forth a generalized opinion offered without either foundation or regard to the facts of the case. Since the letter was not in proper form, it cannot be considered under Rule 803(8), M.R.Ev. Scott v. Robson, 182 M 528, 597 P2d 1150, 36 St. Rep. 1273 (1979).

Law Review Articles

Face to Face: The Crime Lab Exception of Rule 803(8) of the Montana Rules of Evidence and the Montana Confrontation Clause, Weilhammer, 60 Mont. L. Rev. 167 (1999).

Montana Supreme Court Survey—Civil Procedure and Evidence, Dyrud, 42 Mont. L. Rev. 343 (1981).

Montana Supreme Court Survey—Civil Procedure and Evidence, Young & McLean, 41 Mont. L. Rev. 293 (1980).

Montana's Rule on Res Gestae, Warren, 34 Mont. L. Rev. 269 (1973).

Official Written Statements, Bartlett, 30 Mont. L. Rev. 227 (1969).

Hearsay Objections to Expert Psychiatric Opinion Testimony and the Proposed Rules of Evidence, Seidel & Gingrich, U. of Mo. at K.C. L. Rev. 141 (1970).

Collateral References

GENERALLY

31A C.J.S. Evidence §193(e).

EXCEPTIONS (1) AND (2)

Evidence *key* 118, et seq.

31A C.J.S. Evidence §403, et seq.

29A Am. Jur. 2d Evidence §860, et seq.

Uniform Evidence Rule 803(24): the residual hearsay exception. 51 ALR 4th 999.

Necessity, in criminal prosecution, of independent evidence of principal act to allow admission, under res gestae or excited utterance exception to hearsay rule, of statement made at time of, or subsequent to, principal act. 38 ALR 4th 1237.

Admissibility of testimony regarding spontaneous declarations made by one incompetent to testify at trial. 15 ALR 4th 1043.

Business records: authentication and verification of bills and invoices under Rule 803(b) of the Uniform Rules of Evidence. 1 ALR 4th 316.

Time element as affecting admissibility of statement or complaint made by victim of sex crime as res gestae, spontaneous exclamation, or excited utterance. 89 ALR 3d 102.

Admissibility, as part of res gestae of spontaneous utterances of unidentified bystander testified to by an interested party. 50 ALR 3d 716.

Admissibility, as res gestae, of statements relating to origin or cause of, or responsibility for, fire. 13 ALR 3d 114.

Admissibility, as part of res gestae of accusatory utterances made by homicide victim after act. 4 ALR 3d 149.

Declarant's age as affecting admissibility as res gestae. 83 ALR 2d 1368, §§6, 11, 16 superseded by 15 ALR 4th 1043.

Admissibility in criminal case, as part of the res gestae, of statements or utterances of bystanders at time of arrest. 78 ALR 2d 300.

Spontaneity of declaration sought to be admitted as part of res gestae as question for court or ultimately for jury. 56 ALR 2d 372.

Admissibility as res gestae of statements or exclamations relating to cause of, or responsibility for, motor vehicle accident. 53 ALR 2d 1245.

Inability of person making utterance to recollect and narrate facts to which it relates as affecting its admissibility as part of res gestae. 7 ALR 2d 1324.

When is hearsay statement a "present sense impression" admissible under Rule 803(1) of the Federal Rules of Evidence. 60 ALR Fed. 524, superseded by 165 ALR Fed. 491.

6 Wigmore §§1745 through 1764.

EXCEPTION (3)

Evidence *key* 116, 268.

31A C.J.S. Evidence §241, et seq.

29A Am. Jur. 2d Evidence §§860, 861.

Admissibility of evidence of declarant's then-existing mental, emotional, or physical condition, under Rule 803(3) of Uniform Rules of Evidence and similar formulations. 57 ALR 5th 141.

Admissibility of declarations of grantor on issue of delivery of deed. 34 ALR 2d 588.

Exception to hearsay rule, under Rule 803(3) of Federal Rules of Evidence, with respect to statement of declarant's mental, emotional, or physical condition. 75 ALR Fed. 170.

6 Wigmore §§1714 through 1740.

EXCEPTION (4)

Evidence *key* 125, et seq., 268, 317(3).

31A C.J.S. Evidence §§242 through 246.

29A Am. Jur. 2d Evidence §867; 31A Am. Jur. 2d Expert and Opinion Evidence §86.

Admissibility of statements made for purposes of medical diagnosis or treatment as hearsay exception under Rule 803(4) of the Uniform Rules of Evidence. 38 ALR 5th 433.

Admissibility on issue of sanity of expert opinion based partly on medical, psychological, or hospital reports. 55 ALR 3d 551.

Admissibility of physician's testimony as to patient's statements or declarations, other than res gestae, during medical examinations. 37 ALR 3d 778.

Admissibility in civil action of electroencephalogram, electrocardiogram, or other record made by instrument used in medical test, or of report based upon such test. 66 ALR 2d 536.

Admissibility of hospital record relating to cause or circumstances of accident or incident in which patient sustained injury. 44 ALR 2d 553.

Admissibility of hospital record relating to intoxication or sobriety of patient. 38 ALR 2d 778, superseded by 80 ALR 3d 456 and 9 ALR Fed. 457.

Admissibility of statements made for purposes of medical diagnosis or treatment as hearsay exception under Rule 803(4) of the Federal Rules of Evidence. 55 ALR Fed. 689.

6 Wigmore §§1718 through 1723.

EXCEPTION (5)

Evidence *key* 355, 356, 377.

32 C.J.S. Evidence §696.

29A Am. Jur. 2d Evidence §1264.

Refreshment of recollection by use of memoranda or other writings. 82 ALR 2d 473.

Admissibility of statement under Rule 803(5) of Federal Rules of Evidence, providing for recorded-recollection exception to hearsay rule. 35 ALR Fed. 605.

3 Wigmore §§733 through 755.

EXCEPTIONS (6) AND (7)

Criminal Law *key* 434; Evidence *key* 350, 354, 361, 376, 383(8).

32 C.J.S. Evidence §§682 through 695.

29A Am. Jur. 2d Evidence §§1291, 1293, 1294, 1296, 1300, 1311, 1319.

Admissibility of computerized private business records. 7 ALR 4th 8.

Authentication and verification of bills and invoices under Rule 803(6) of the Uniform Rules of Evidence. 1 ALR 4th 316.

Admissibility, in action against notary public, of evidence as usual business practice of notary public of identifying person seeking certificate of acknowledgement. 59 ALR 3d 1327.

Admissibility of party's book accounts to prove loans or payments by person by or for whom they are kept. 13 ALR 3d 284.

Admissibility in civil action of electroencephalogram, electrocardiogram or other record made by instrument used in medical test, or of report based upon such test. 66 ALR 2d 536.

Admissibility of hospital record relating to physician's opinion as to whether patient is malingering or feigning injury. 55 ALR 2d 1031.

Admissibility of hospital record relating to cause or circumstances of accident or incident in which patient sustained injury. 44 ALR 2d 553.

Admissibility of hospital record relating to intoxication or sobriety of patient. 38 ALR 2d 778, superseded by 80 ALR 3d 456 and 9 ALR Fed. 457.

What constitutes books of original entry within rule as to admissibility of books of account. 17 ALR 2d 235.

Admissibility of records other than police reports, under Rule 803(6), Federal Rules of Evidence, providing for business record exception to hearsay rule. 61 ALR Fed. 359.

5 Wigmore §§1517 through 1561.

EXCEPTIONS (8), (9), AND (10)

Evidence *key* 333 through 349.

32 C.J.S. Evidence §626, et seq.

29A Am. Jur. 2d Evidence §1294, et seq.

Admissibility in state court proceedings of police reports under official record exception to hearsay rule. 112 ALR 5th 621.

Admissibility in state court proceedings of police reports as business records. 111 ALR 5th 1.

Admissibility in evidence, on issue of negligence, of codes or standards of safety issued or sponsored by governmental body or by voluntary association. 58 ALR 3d 148.

Weather reports and records as evidence. 57 ALR 3d 713.

Mutilations, alterations, and deletions as affecting admissibility in evidence of public record. 28 ALR 2d 1443.

Insurance: Coroner's verdict or report as evidence on issue of suicide. 28 ALR 2d 352.

Admissibility, under Rule 803(10) of Federal Rules of Evidence, of evidence of absence of public record or entry. 70 ALR Fed. 198.

Admissibility, over hearsay objection, of police observations and investigative findings offered by government in a criminal prosecution, excluded from public records exception to hearsay rule under Rule 803(8)(B) or (C), Federal Rules of Evidence. 56 ALR Fed. 168.

Admissibility, under Rule 803(8)(C) of Federal Rules of Evidence, of "factual findings resulting from investigation made pursuant to authority granted by law". 47 ALR Fed. 321.

Construction and application of provision of Rule 803(8)(B), Federal Rules of Evidence, excluding from exception to hearsay rule in criminal cases matters observed by law enforcement officers. 37 ALR Fed. 831.

5 Wigmore §§1630 through 1684.

EXCEPTIONS (11) AND (12)

Evidence *key* 353(6), (7).

32 C.J.S. Evidence §727.

29 Am. Jur. 2d Evidence §691; 29A Am. Jur. 2d Evidence §§1282, 1283, 1291, 1372.

5 Wigmore §§1523, 1643, 1644.

EXCEPTION (13)

Evidence *key* 285, et seq.

31A C.J.S. Evidence §226, et seq.

29 Am. Jur. 2d Evidence §§680, 691; 29A Am. Jur. 2d Evidence §1255.

Exception to hearsay rule, under Rule 803(11) or Rule 803(12) of Federal Rules of Evidence, with respect to information contained in records of religious organization. 78 ALR Fed. 361.
5 Wigmore §§1481, 1484.

EXCEPTIONS (14) AND (15)

Evidence *key* 325, et seq.
32 C.J.S. Evidence §626, et seq.
29 Am. Jur. 2d Evidence §§680 through 682.
5 Wigmore §§1563 through 1571, 1648 through 1656.

EXCEPTION (16)

Evidence *key* 372.
32A C.J.S. Evidence §743, et seq.
29A Am. Jur. 2d Evidence §§1201 through 1203.
Admissibility of ancient documents under Rule 803(16) of the Uniform Rules of Evidence. 63 ALR 5th 331.
5 Wigmore §§1573, 1573a.

EXCEPTION (17)

32 C.J.S. Evidence §§593(5), 724 through 726, 731.
29A Am. Jur. 2d Evidence §§1427, 1428; 31A Am. Jur. 2d Expert and Opinion Evidence §§121, 128.
Admissibility in evidence of professional directories. 7 ALR 4th 638.
6 Wigmore §§1702 through 1708.

EXCEPTION (18)

31A C.J.S. Evidence §194.
29A Am. Jur. 2d Evidence §§1413 through 1417; 31A Am. Jur. 2d Expert and Opinion Evidence §§102 through 108.
Medical books or treatises as independent evidence. 84 ALR 2d 1338.
Treatises, periodicals, or pamphlets as exception to hearsay rule under Rule 803(18) of Federal Rules of Evidence. 64 ALR Fed. 971.
6 Wigmore §§1690 through 1700.

EXCEPTIONS (19), (20), AND (21)

Boundaries *key* 35(2); Evidence *key* 106, 155(2), 285 through 297, 322 through 324.
31A C.J.S. Evidence §§226 through 234; 32 C.J.S. Evidence §432, et seq.
29 Am. Jur. 2d Evidence §§364 through 385, 503 through 521.
Admissibility of evidence of reputation as to land boundaries or customs affecting land, under Rule 803(20) of Uniform Rules of Evidence and similar formulations. 79 ALR 4th 1044.
Admissibility of evidence of reputation or declaration as to matter of public interest. 58 ALR 2d 615.
Admissibility on issue of child's legitimacy or parentage, of declarations of parents, relatives, or the child, deceased or unavailable. 31 ALR 2d 989.
Admissibility of declaration of persons other than members of family as to pedigree. 15 ALR 2d 1412.
Admissibility in divorce action for adultery of wife's statement that husband was not father of her child. 4 ALR 2d 567.
5 Wigmore §§1582 through 1599, 1602 through 1621.

EXCEPTIONS (22) AND (23)

29 Am. Jur. 2d Evidence §§180, 407, 681; 29A Am. Jur. 2d Evidence §§1330, 1338.
4 Wigmore §§1346a, 1671a.

EXCEPTION (24)

Validity, construction, and application of child hearsay statutes. 71 ALR 5th 637.
Uniform Evidence Rule 803(24): the residual hearsay exception. 51 ALR 4th 999.
Interpreter: admissibility of testimony concerning extrajudicial statements made to, or in presence of, witness through an interpreter. 12 ALR 4th 1016.
Admissibility of newspaper article as evidence of the truth of the facts stated therein. 55 ALR 3d 663.

Reputation as to ownership or claim as admissible on question of adverse possession. 40 ALR 2d 770.

Remarriage tables. 25 ALR 2d 1464.

Admissibility, over hearsay objection, of police observations and investigative findings offered by government in a criminal prosecution, excluded from public records exception to hearsay rule under Rule 803(8)(B) or (C), Federal Rules of Evidence. 56 ALR Fed. 168.

Admissibility of statement under Rule 803(24) of Federal Rules of Evidence, providing for admissibility of hearsay statement not covered by any specific exception but having equivalent circumstantial guaranties of trustworthiness. 36 ALR Fed. 742, superseded by 155 ALR Fed. 409 and 173 ALR Fed. 1.

5 Wigmore §§1420 through 1427.

Rule 804. Hearsay exceptions; declarant unavailable.

Commission Comments

(a) Definition of unavailability. This subdivision is identical to Federal and Uniform Rules (1974) Rule 804(a) except that in (a)(5) the parenthetical phrase "(or in the case of hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony)" has been deleted. The Commission deleted this phrase because it imposes a requirement which not only does away with the concept of uniform application of the unavailability requirement to the exceptions in subdivision (b) but also changes existing Montana law to require a party to take the expensive and time-consuming step of deposing a witness who makes a statement that would fall within Rule 804(b), (2), (3), or (4). The Commission felt that depositions should only be taken by a party at its option for discovery purposes or when the party feels there is a need for the preservation of the testimony. It also felt that it is unfair to make this a requirement of admissibility of a statement when the proponent has acted in good faith and, through no fault of his own, the witness is unavailable and was not deposed. Enacting this parenthetical clause would have the effect of depriving the trier of fact of valuable evidence and would also change Montana law to add a further restriction to the admissibility of hearsay statements.

The Commission adopted this subdivision because it represents a practical and sensible solution to the problem of admitting a hearsay statement or receiving no evidence at all when the witness is unavailable. Whether the witness is unavailable because of an exemption for privilege, refusal to testify, claim of lack of memory, inability to testify, or absence from the jurisdiction, the result will always be loss of his testimony and a need for reliance on his hearsay statement. Therefore this subdivision applies to each of the hearsay exceptions found in subdivision (b) a uniform definition of unavailability which considers whether the testimony of the witness will be received and, if not, then admits the hearsay statement insofar as unavailability is concerned.

This subdivision changes existing Montana law by uniformly applying the definition of unavailability to each of the hearsay exceptions in subdivision (b) and by expanding the unavailability requirement for all of those exceptions. The unavailability requirement under existing Montana law for each of the exceptions will be considered in the Commission Comments for those exceptions. It is sufficient to note here that Montana law does not recognize a claim of privilege, refusal to testify despite a court order, or lack of memory as satisfying the requirement that the hearsay declarant be unavailable. Inability to testify and absence from the hearing meet the unavailability requirement for former testimony under existing Montana law, but the other three exceptions require that the declarant be dead in order that he be considered unavailable. Finally, note under subdivision (a)(5) that absence from the hearing is allowable only if a proponent is unable to procure attendance by "reasonable means" and that this is consistent with the Constitutional requirements set out in State v. LaCario, 163 Mont. 511, 515, 518 P2d 982 (1974).

(b) Hearsay exceptions. (1) Former testimony. This exception is identical to Federal and Uniform Rules (1974) Rule 804 (b)(1) in its treatment of criminal actions and proceedings, and so the language of the introductory clause and clause (B) is the same as that exception. However, the Commission has adopted the more liberal rule contained in the Supreme Court draft of the Federal rule sent to Congress for civil actions and proceedings in clause (A). At common law, former testimony was admissible only when there was an identity of parties and interests; this is the approach taken by the Federal and Uniform Rules (1974) in that they admit former testimony only when the party against whom the testimony is offered had an opportunity and similar motive to develop the testimony, the phrase "similar motive" approximating the requirement of identity of issues. The Supreme Court draft adopted a more liberal rule allowing former testimony to be offered against any party so long as the party who previously

cross-examined had a similar motive and interest in examining the witness as the party against whom the testimony is being offered.

The Commission took this action for the following reasons. First, applying the liberalized Supreme Court draft found in clause (A) to criminal cases could easily pose constitutional problems concerned with the right to confrontation, in that former testimony could be admissible against the defendant even though he had never had the opportunity to cross-examine that witness. Therefore, the more conservative common law approach was applied to criminal cases in clause (B). Second, the Commission applied the more liberal Supreme Court version to civil actions and proceedings in clause (A) because it allows trustworthy evidence to be admitted where a stricter rule could exclude. It can be argued that it is unfair to impose the cross-examination of the party in the former action upon the party against whom the former testimony is offered and that it is unfair to admit testimony against any party who has not cross-examined the witness. However, it is apparent that former testimony is like many other hearsay exceptions which do not allow the hearsay deponent to be cross-examined. Further, while it may be unfair to place a burden of another party's cross-examination on the party against whom the testimony is now offered, the requirement that the parties have similar motivation and interest in the cross-examination will usually mean an effective cross-examination has occurred. Most important, when the choice is between no evidence at all and the former testimony, the former testimony should be admitted even though it may result in some unfairness. Third, differentiating between civil and criminal cases with former testimony is consistent with Montana case law, which has applied different rules to civil and criminal cases. (See below.)

Former testimony is admitted as a hearsay exception, like other hearsay exceptions, when the requirements of unavailability and a circumstantial guarantee of trustworthiness are met. The unavailability requirement with its exception is set out in subdivision (a) of this rule. The circumstantial guarantee of trustworthiness can be found in the conditions under which this type of hearsay statement is made; that is, the witness is under oath and subject to cross-examination. The Advisory Committee's Note, 56 F.R.D. 183, 323 (1972), indicates that this exception is the strongest hearsay and perhaps could be included under Rule 803 (which does not require the declarant to be unavailable). However, it also notes that placing this exception under Rule 804 is consistent with tradition, the policy of producing the witness if he is available, and expresses a preference for testimony personally given by the witness, rather than his former testimony.

This exception is generally consistent with existing Montana Law. Section 93-401-27(8), R.C.M. 1947 [superseded], provides:

In conformity with the preceding provisions, evidence may be given upon a trial of the following facts...8. The testimony of a witness, deceased, or out of jurisdiction, or unable to testify, given in a former action between the same parties, relating to the same matter.

Use of depositions in the same action or proceeding is governed in civil cases by Rule 32(a)(3) of the Montana Rules of Civil Procedure (as amended, 1975). Use of depositions in criminal proceedings is governed by Section 95-1802(e), R.C.M. 1947 [46-15-204].

The unavailability requirement contained in Section 93-401-27(8), R.C.M. 1947 [superseded], is met in three instances; death, absence from the jurisdiction, or inability to testify. The unavailability requirement of the statute has been construed in Reynolds v. Fitzpatrick, 28 Mont. 170, 172, 72 P 510 (1903) where the court held "the proponent of a former testimony must prove the ground of unavailability by positive testimony or by the existence of circumstances which warrant an inference that the ground of unavailability exists". The foundation showing unavailability in criminal cases is discussed in Petition of Tooker, 147 Mont., 207, 217, 410 P2d 923 (1966), and the Constitutional requirements for unavailability in criminal cases can be found in State v. Zachmeier, 153 Mont. 64, 72, 453 P2d 783 (1969) and State v. LaCario, *supra* 163 Mont. at 515.

Section 93-401-27(8), R.C.M. 1947 [superseded], also states that former testimony is to be allowed "between the same parties, relating to the same matter". This is the requirement found at common law for identity of parties and issues. Early cases strictly construed this requirement. Anaconda Copper Mining Co. v. Heinze, 27 Mont. 161, 167, 69 P 909 (1902) and Leggat v. Carroll, 30 Mont. 384, 389, 76 P 805 (1904).

However it appears that later Montana cases have applied a more liberalized rule in civil cases relating to the identity of parties. In O'Meara v. MacDermott, 40 Mont. 38, 57, 104 P 1049 (1909), the Court held "precise nominal identity of all the parties is not necessary in order to make former testimony competent". In that case, there were coparties on each side in the former action, but not in the action where the former testimony was offered. In Damm v. Damm, 82

Mont. 239, 245, 266 P2d 410 (1948), a case where depositions were offered from a former action where the parties and issues were the same, the Court stated, "admissibility of such depositions is not dependent upon exact identity of parties and causes of action, but rather upon the identity of the question being investigated, and the opportunity of the party against whom the deposition is offered to cross-examine". Finally, in Arnold v. Genzberger, 96 Mont. 358, 372, 31 P2d 396 (1934), the Court admitted the testimony of a deceased witness who was a party in the former action, citing O'Meara v. MacDermott, *supra* 40 Mont. at 57, and Damm v. Damm, *supra* 82 Mont. at 245. The reason for the rule requiring identity of parties and issues, as stated in Nelson v. Gough, 61 Mont. 301, 303, 202 P 196 (1921), also appears to be the reason for liberalizing the rule:

If the issues presented on the former occasion were materially different, the cross-examination of the witness 'would not have been directed to the same material point of investigation', and therefore could not have been an adequate test for exposing inaccuracies and falsehoods. (2 Wigmore on Evidence, Sec. 1386.)

Conversely, it is sufficient if the issue was the same or substantially so with reference to the likelihood of adequate cross-examination, because the opponent has thus already had the full benefit of the security intended by the law. (*Id.*, Section 1387).

In criminal cases, however, Montana law has not applied the same liberal standards. While State v. Byers, 16 Mont. 565, 568, 41 P 708 (1895), held that there was no confrontation clause problem as to the admissibility of former testimony, the later cases of State v. Storm, 127 Mont. 414, 417, 265 P2d 971 (1953), and State v. Piveral, 127 Mont. 427, 430, 265 P2d 969 (1953), held that the confrontation clause did not allow the admissibility of former testimony in a criminal trial. Both of these cases were overruled in State v. Bouldin, 153 Mont. 276, 281, 456 P2d 830 (1969), where the trial court admitted former testimony when the defendant had the opportunity to cross-examine the witness at the time the former testimony was given. Other criminal cases admitting former testimony, cited above in connection with the unavailability requirements, have all been instances where testimony was admitted against a defendant who had the opportunity to cross-examine the witness.

(2) Statement made under belief of impending death. This exception is identical to Federal and Uniform Rules (1974) Rule 804(b)(2) except that an introductory clause reading "in a prosecution for homicide or a civil action or proceeding", is deleted. The Commission deleted this clause because it feels that if statements of this sort are to be admissible in homicide prosecutions, they should also be admissible in any other criminal prosecutions. Section 93-401-27(4), R.C.M. 1947 [superseded], admits dying declarations in all criminal actions, and so the adoption of the Federal rule would have been a restriction on existing Montana law. None of the cases have expressed the rule that dying declarations are only admissible in prosecutions for homicide, although the cases considering admitting dying declarations have all been this type of prosecution. Note that the Federal, Uniform, and Montana rule all admit statements of this sort in civil actions; this is a major change from the common law. The Commission feels that if statements of this sort are reliable enough for use in criminal prosecutions, then they should also be used in civil cases where the outcome does not involve personal freedom. It should also be noted that the unavailability requirement, as defined in subdivision (a), allows the hearsay declarant's statement to be admitted even though he is not dead. However, the exception retains a circumstantial guarantee of trustworthiness required at common law, that the declarant make a statement under a belief of impending death.

This exception changes existing Montana law. First, it applies to criminal as well as civil cases, an expansion of Section 93-401-27(4), R.C.M. 1947 [superseded], which reads "...in criminal actions, the act or declaration of a dying person, made under a sense of impending death, respecting the cause of his death." And second, the unavailability requirement stated in the statute apparently requires the declarant to die in order for the statement to be admissible; this is changed by the unavailability requirement applied to this exception through Subdivision (a).

The other requirements contained in the statute, that the statement be made under a sense of impending death and that it concern the cause of death, are additional circumstantial guarantees of trustworthiness found in this exception. There are many Montana cases dealing with whether or not a sufficient foundation has been laid to show a sense of impending death. In State v. Russell, 13 Mont. 164, 167, 32 P 854 (1893), the Court held that it was not required that the declarant state he had no hope of recovery from his injury, for this may be shown by the facts and circumstances surrounding the declarant's making of the statement. In State v. Byrd, 41 Mont. 585, 600, 111 P 407 (1910) the Court held that the sense of impending death foundation was satisfied when it was shown that the declarant died from the wounds from which he was

suffering even though an operation was subsequently performed in an attempt to save his life. In State v. Martin, 76 Mont. 565, 568, 248 P 176 (1926) the Court indicated the requirements for the admissibility of this type of hearsay statement, as found in the statute, and concluded "It is the state of mind of the declarant which determines the admissibility of the declaration...". The leading case considering this foundation is State v. Morran, 131 Mont. 17, 30, 306 2d 679 (1956), in which the Court reviewed most of the Montana cases in this area. The requirement that the declaration relate to the circumstances of the declarant's death has been construed liberally in State v. Crean, 43 Mont. 47, 56 114 P 603 (1911), "to comprise the facts and circumstances of the killing, and such other facts and circumstances, immediately surrounding and attending it, as properly form a part of the res gestae". In State v. LeDuc, 89 Mont. 545, 557, 300 P 919 (1931), the Court held it was proper to allow a dying declaration which included the fact that defendant had hit another person than the declarant.

(3) Statement against interest. This exception is identical to Federal and Uniform Rules (1974) Rule 804(b)(3), except that the clause "or to make him an object of hatred, ridicule, or disgrace..." is added so that a statement against the declarant's social interests is included under this exception. This particular clause was deleted by Congress from the version of the Federal rules presented it by the Supreme Court. The Commission feels that clause should be included, for statements "against social interest" are of sufficient importance to meet the circumstantial guarantee of trustworthiness under this hearsay exception. That guarantee of trustworthiness is that persons do not make statements against their interest unless true. Allowing statements against penal interest to be admitted raises two problems. The first is concerned with statements which exculpate the accused in the criminal action in which he is being tried. This problem is solved by the last sentence in the exception which requires the statement to be corroborated so that false or trumped up confessions could not be used to exculpate. The second problem is concerned with statements against penal interests which inculpate the accused. The admissibility of these statements involves constitutional principles still under development, and so this type of statement is not governed by the rule.

This exception greatly expands existing Montana law concerning statements against interests. Statutes admitting these statements, Section 93-401-6, R.C.M. 1947 [superseded], declarations of predecessor in title against interest. Section 93-401-10, R.C.M. 1947 [superseded], declarations against pecuniary interest, Section 93-401-27(4), R.C.M. 1947 [superseded], declarations against proprietary interest, and Section 93-1101-17(1), R.C.M. 1947 [26-1-607], writings against interest, all require that declarant be deceased. Also see MacDonald v. Protestant Episcopal Church, 150 Mont. 323, 335, 435 P2d 369 (1967), holding that Montana only admits declarations against interest when the declarant is dead. Therefore, to the extent that Federal Rule 804(b)(3) and the definition of unavailability under 804(a) allow declarations against interest when the declarant is not deceased, this is a change to existing Montana law. The statutes just cited (which deal with declarations against interest) only allow statement against the declarant's pecuniary or proprietary interest. This was affirmed in MacDonald v. Protestant Episcopal Church, *supra* 150 Mont. at 335. This exception changes existing Montana law by allowing statements against penal and social interest as well as those against proprietary and pecuniary interest to be admissible.

This exception as well as existing Montana law requires that the statement be against the declarant's interests, and so the common law circumstantial guarantee of trustworthiness is retained. Cases which have specifically required that the declaration be against the interests of the declarant are: Washoe Copper Co. v. Juanila, 43 Mont. 178, 185, 115 P 916 (1911); Wilson v. Davis, 110 Mont. 356, 366, 103 P2d 149 (1940); McReynolds v. McReynolds, 147 Mont. 476, 481, 414 P2d 531 (1966) and MacDonald v. Protestant Episcopal Church, *supra* 150 Mont. at 335. It logically follows that when a declaration is self-serving, it is not against the interests of the declarant, the guarantee of trustworthiness fails, and the statement is not admissible under this exception. Welch v. Thomas, 102 Mont. 591, 601, 61 P2d 404 (1936) and King v. Schultz, 141 Mont. 94, 99, 375 P2d 108 (1962).

(4) Statement of personal or family history. This exception is identical to Federal and Uniform Rules (1974) Rule 804(b)(4) except the phrase "or dissolution of marriage" is added after divorce to be consistent with the concepts contained in Section 48-316, R.C.M. 1947 [40-4-104], The Uniform Marriage and Divorce Act, as well as the language contained in Rule 803(19). The distinction between 803(19) and this exception is that Rule 803(19) allows the same subject matter to be proven by reputation evidence while this exception relies upon the declaration of an unavailable witness to prove the same type of facts. The guarantee of trustworthiness for this exception is identical to that found for Rule 803(19). (See the Commission Comments to that rule.) In addition, it is quite natural for persons to discuss family history among members of the

family or close friends and it is highly unlikely that falsehood would be repeated in this context. Common law required that in order for these types of declarations to be admissible, the declaration [must?] be made before the controversy arose. This exception does not contain that requirement, and it is apparent that existing Montana law was already in accord with the exception. The exception expands the common law by allowing the statements to concern more than genealogy and in allowing a person closely associated with the family to be the hearsay declarant. Advisory Committee's Note, *supra* 56 F.R.D. at 328.

This exception is consistent with existing Montana law, although it is somewhat broader. Section 93-401-9, R.C.M. 1947 [superseded], provides "the declaration, acts, or omission of a member of a family, who is a decedent, or out of a jurisdiction, is also admissible as evidence of common reputation, in cases where, on question of pedigree, such reputation is admissible". It is possible this statute could be construed to apply to declarations concerning reputation and so would be consistent with Rule 803(19). However, Section 93-401-27(4), R.C.M. 1947 [superseded], provides "the act or declaration, verbal or written, of a deceased person in respect to the relationship, birth, marriage, or death of any person related by blood or marriage to such deceased person...". This section plainly allows the declaration of a deceased person but is changed to the extent that the unavailability requirements under Rule 804(a) allow the declarant to be unavailable through means other than death. That section also uses language that is slightly narrower concerning the subject matter of the declaration. That section also restricts declarations to persons related by blood or marriage, while the exception expands this restriction by allowing the declarant to be a person intimately associated with the family. Welch v. All Persons, 85 Mont. 114, 128, 278 P 110 (1929), held that depositions taken on an issue as to whether a marriage existed were admissible in a later trial, and so the court did not apply the common law restriction that the statements must be made before the controversy arose. This is consistent with the exception.

(5) Other exceptions. This exception is identical to the version of Federal Rule 804(b)(6) submitted to Congress but amended by renumbering and adding the exact conditions added to a similar exception found in Federal Rule 803(24). Since the conditions are identical in each exception and have been rejected in Rule 803(24), the Commission Comments to that Rule applies here. Note that the circumstantial guarantees of trustworthiness found in the Commission Comments to each of the exceptions in Rule 804(b) are to be applied with this exception in finding "comparable guarantees of trustworthiness".

COMMISSION COMMENT TO JUNE 1990 AMENDMENT

The revision establishes gender neutral format only. No substantive change.

Compiler's Comments

1990 Amendment: Substituted gender neutral language for gender specific language. Amendment effective June 7, 1990.

Case Notes

Admission of Unrelated Criminal Activity by Informant — Independent Corroboration Unnecessary: An informant who was known to police told the authorities that Meyer was in possession of illegal explosives after witnessing the explosives being delivered to Meyer. The informant admitted several instances of criminal activity, including use and possession of methamphetamine and being present when the explosives were delivered. Meyer sought to suppress evidence of the explosives because the informant's statements were not corroborated, the informant was not charged with transporting illegal explosives, and the drug charges were unrelated to the explosives investigation. The motion to suppress was denied, and on appeal, the Supreme Court affirmed. Independent corroboration is not required for a reliable informant whose identity is known to law enforcement and whose information is not based on hearsay, and an informant who gives an unequivocal admission against interest is considered reliable without further corroboration. Because corroboration was not necessary, the court declined to address whether admissions unrelated to the underlying offense may be classified as an admission against interest. St. v. Meyer, 2004 MT 272, 323 M 173, 99 P3d 185 (2004), following St. v. Reesman, 2000 MT 243, 301 M 408, 10 P3d 83 (2000).

Improper Consideration of Hearsay Evidence Corroborating Testimony of Child Sexual Abuse Victim — Trustworthiness of Child's Statement Considering Totality of Circumstances: Defendant convicted of incest contended on appeal that the District Court erred in determining that the child victim's hearsay statements were admissible under the residual exception of subsection (b)(5) of this rule because the statements had comparable circumstantial guarantees of trustworthiness, in violation of defendant's constitutional right to confront witnesses. Citing

Idaho v. Wright, 497 US 805 (1990), the Supreme Court noted that reliance upon exceptions to the hearsay rule is permissible if the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility. Factors often identified by courts as indicia of the reliability of statements made by child witnesses in sexual abuse cases, such as spontaneity, use of language unexpected of a child of similar age, and lack of motive to fabricate, all relate to whether the child was likely to be telling the truth when the statement was made, but do not include factors that may be added using hindsight. Thus, in child sexual abuse cases, a court may not consider corroborating evidence when making a determination about the admissibility of hearsay statements under the confrontation clause, and the District Court in this case erred as a matter of law in doing so. However, after considering the totality of circumstances exclusive of the corroborating evidence, the Supreme Court found that the child's statements were supported by the particularized guarantees of trustworthiness necessary to withstand a confrontation clause challenge, so the District Court's admission of the child's hearsay statements was affirmed. St. v. S.T.M., 2003 MT 221, 317 M 159, 75 P3d 1257 (2003). See also St. v. Osborne, 1999 MT 149, 295 M 54, 982 P2d 1045 (1999).

Improper Admission of Coconspirator's Out-of-Court Statements and Confession — Reversible Error: In a videotaped interview with detectives, Steilman admitted that he and Francis had murdered a man to prove their worth to each other in conducting other criminal activity. Steilman was offered a plea agreement and was called to testify at Francis's trial. When called as a witness, Steilman refused to answer any questions on fifth amendment grounds, so the state sought the admission of the videotaped interview and Steilman's out-of-court statements to lay witnesses. The state contended that the statements to lay witnesses were admissible as statements of a coconspirator made in furtherance of a conspiracy and that the statements to police were admissible as admissions against Steilman's penal interests. The District Court allowed the statements, but not the videotape, although the videotape was subsequently shown to the jury pursuant to a motion by defense counsel, in response to the ruling on the admissibility of the out-of-court statements, in order to give the jury an opportunity to observe Steilman. Francis was ultimately convicted of deliberate homicide and appealed on grounds that admission of the out-of-court statements was reversible error. The state conceded on appeal that the statements to lay witnesses were inadmissible because statements made after attainment of the conspirator's object are not admissible unless the movant can prove that an express agreement existed among the coconspirators to continue to act in concert to cover up the crime after its commission, and the state offered no such proof. Moreover, the statements were not admissible as testimony regarding out-of-court statements made by Francis, or admissible as statements made by Steilman and adopted by Francis. The state also conceded on appeal that the statements made to police were not admissible as statements against Steilman's penal interests. Pursuant to St. v. Castle, 285 M 363, 948 P2d 688 (1997), the fact that portions of a declarant's confession are admissible because they are self-inculpatory does not necessarily make the collateral noninculpatory statements either credible or admissible, particularly when the declarant implicates another person, as in this case when Steilman's confession consisted mainly of blaming Francis. The Supreme Court then applied 46-20-701, in light of St. v. Van Kirk, 2001 MT 184, 306 M 215, 32 P3d 735 (2001), to determine whether admission of the out-of-court statements constituted structural error or trial error and whether the error was reversible. The error here was trial error. In order to be considered harmless, it was necessary that the state demonstrate that there was no reasonable possibility that the inadmissible evidence contributed to the verdict. The court agreed that there was sufficient cumulative admissible evidence regarding Francis's purposeful participation in the killing. However, the court was forced to conclude that there was also a reasonable possibility that the erroneously admitted testimony of Steilman's out-of-court statements implicating Francis might have contributed to the conviction, so the case was reversed and remanded for a new trial. St. v. Francis, 2001 MT 233, 307 M 12, 36 P3d 390 (2001).

Admission of Prior Testimony of Unavailable Witness at Second Trial Not Violative of Confrontation Clause: Hall was acquitted of aggravated assault at his first trial. At his second trial, the District Court allowed testimony of a witness from the first trial to be read into evidence because the witness was unavailable at the second trial. Hall alleged error because admission of the testimony violated his right to confront the witness in violation of Art. II, sec. 24, Mont. Const. Under this rule, prior testimony is a recognized exception to the hearsay rule, and the rationale behind the exception is that there is a guarantee of trustworthiness at the time that the testimony is given. Although evidence may have surfaced after the first trial regarding an alleged conversation in which the witness's prior testimony was possibly rendered suspect, the reliability of the prior testimony was nevertheless inferred from the fact that the witness was

under oath and subject to cross-examination at the time of the original testimony. Because the evidence was available for the jury to weigh when contemplating the weight to be given to the prior testimony, subsequent admission of the testimony at the second trial was not violative of Hall's right to confront the witness at the second trial. St. v. Hall, 1999 MT 297, 297 M 111, 991 P2d 929, 56 St. Rep. 1190 (1999). See also Hamilton v. Mavros, 284 M 46, 943 P2d 963, 54 St. Rep. 741 (1997).

Child Sexual Abuse — Admissibility of Corroborating Evidence: Osborne was tried for sexual intercourse without consent with his minor stepdaughter. At the trial, the state introduced hearsay statements of the stepdaughter and testimony by a medical examiner that physical injuries to the stepdaughter were consistent with sexual abuse, but it could not be determined from those injuries who the perpetrator was. The District Court, on its own motion, prepared instructions, taken from the child hearsay guidelines set forth in St. v. J.C.E., 235 M 264, 767 P2d 309 (1988), admonishing the jury to consider, with regard to hearsay statements of the stepdaughter's testimony, "whether there is any corroboration for the statements" and "if the statement identifies a perpetrator, whether such identification can be corroborated". Osborne claimed that these instructions were given in violation of the U.S. Supreme Court's decision in Idaho v. Wright, 497 US 805 (1990), that "corroboration of a child's allegations of sexual abuse by medical evidence of abuse" should not be considered when assessing the reliability of the statements. The state argued that Wright applies only to the determination of admissibility of the hearsay statements and not to whether the jury is entitled to consider corroborating evidence. The Supreme Court held that medical evidence of abuse that does not identify the abuser should not be considered by the District Court when it assesses the admissibility of the hearsay statements and pointed out that the instruction given in this case by the District Court distinguished between evidence that corroborates the occurrence of an act and evidence corroborating that Osborne was the perpetrator. Because the medical examiner testified that it was impossible to identify the perpetrator from the medical evidence, the Supreme Court held that within the context of the instruction taken as a whole, the instruction did not allow the jury to "bootstrap" the medical evidence onto Cassie's identification of Osborne as the perpetrator. St. v. Osborne, 1999 MT 149, 295 M 54, 982 P2d 1045, 56 St. Rep. 589 (1999).

Hearsay by Young Child — Evidence of Material Fact More Probative Than Other Evidence — Circumstantial Guarantees of Trustworthiness — No Abuse of Discretion Found: Heen became suspicious that his 33-month-old granddaughter, Cassie, had been sexually abused by her stepfather, Osborne, Heen's son-in-law. Heen and his daughter, Jamie, Cassie's mother, talked to Cassie, who said or indicated to either or both Heen and Jamie that she had played with "daddy's rubber duck" and that the rubber duck was Osborne's genitalia. Cassie also gave information tending to implicate Heen, whom she called "Papa", as opposed to Osborne, whom she called "Daddy". A medical examination showed that Cassie had physical injuries consistent with sexual abuse. The District Court interviewed Cassie and found her unable to testify because she was extremely shy and may have been intimidated by the courtroom. The state relied upon the hearsay testimony by Heen and Jamie, and based upon that hearsay evidence, Osborne was convicted of sexual intercourse without consent. The Supreme Court applied the requirements of St. v. J.C.E., 235 M 264, 767 P2d 309 (1988), in which the Supreme Court required that three findings be made by a trial court in order for hearsay by a child to be admissible, one of those findings being that the hearsay must be evidence of a material fact and be more probative than other evidence. Osborne objected to introduction of the hearsay testimony, claiming that it was not more probative than other evidence, that evidence being Cassie's testimony implicating Heen. The Supreme Court held that Cassie's testimony implicating Heen was evidence of a different fact and was not probative as to the same material fact and that Cassie implicated Osborne. For those reasons, the Supreme Court held that Cassie's hearsay testimony implicating Osborne was admissible. The Supreme Court also reviewed whether, even though the hearsay testimony was admissible under subsection (b)(5) of this rule, the testimony nevertheless violated Osborne's confrontation clause rights and held that pursuant to its opinion in J.C.E., it would defer to the District Court's finding that there were sufficient indicia of trustworthiness, from the evidence taken as a whole, and that the District Court did not abuse its discretion in making that finding. St. v. Osborne, 1999 MT 149, 295 M 54, 982 P2d 1045, 56 St. Rep. 589 (1999).

Hearsay Statement by Witness Not Adopted by Defendant — Requirements for Finding Subpoenaed Witness "Unavailable": After having consumed drinks in Marysville, Widenhofer and Rothschiller were involved in a one-car accident on the Marysville Road. A car picked them up and took them to the closest business, the Silver City Bar. Because Widenhofer was injured, a highway patrol officer was called, who, upon arriving at the Silver City Bar, asked Rothschiller

some questions about the accident. When he was in the patrol car with only the officer present, Rothschiller answered one of those questions by stating that Widenhofer was driving the vehicle. The officer then took both Widenhofer and Rothschiller to the hospital in Helena. After Widenhofer's injuries were cared for, the highway patrol officer continued to question Widenhofer; advised him that in the officer's opinion, alcohol was a factor in the accident; asked Widenhofer to submit to a blood-alcohol test; and read Widenhofer the implied consent form. Although Rothschiller was served with a subpoena by the Sheriff the night before a jury trial on Widenhofer's charge of DUI, Rothschiller failed to appear at trial. During the trial, the District Court allowed the highway patrol officer to repeat Rothschiller's answer, that Widenhofer was the driver of the vehicle. The Supreme Court reversed the decision of the District Court allowing the hearsay testimony. The Supreme Court held that the state's reliance on Rule 801(d)(2)(B), M.R.Ev., was misplaced because the District Court did not make an express finding that Rothschiller's statement was adopted by Widenhofer, as the District Court should have under the rationale of U.S. v. Schaff, 948 F2d 501 (9th Cir. 1991), and because the state did not present sufficient evidence that Widenhofer acquiesced in Rothschiller's statement. The Supreme Court noted that Widenhofer could not hear the conversation between the officer and Rothschiller and had no reason to know what Rothschiller was telling the officer. For these reasons, the Supreme Court held that Rothschiller's statement as to who was driving the vehicle was not adopted by Widenhofer and that Rothschiller's statement could therefore not be allowed under this exception to the hearsay rule. Widenhofer also objected to the hearsay testimony of the highway patrol officer because it violated Widenhofer's right under the sixth amendment to the United States Constitution and under Art. II, sec. 24, Mont. Const., to confront and cross-examine a witness. The Supreme Court held that the "unavailability" exception under subsection (a)(5) of this rule could not be invoked because under the analysis of Ohio v. Roberts, 448 US 56 (1980), that rule requires the prosecution to demonstrate the "unavailability" of a witness before hearsay evidence of the witness's statements may be introduced. The Supreme Court held that the state's "minimal" attempt to procure Rothschiller's testimony by serving a subpoena on him the night before trial did not constitute "reasonable means" of procuring his testimony. St. v. Widenhofer, 286 M 341, 950 P2d 1383, 54 St. Rep. 1438 (1997).

Nonself Inculpatory Statements Not Admissible: Portions of a statement that tend to subject the declarant to criminal liability are properly admitted under subsection (b)(3) of this rule as an exception to the hearsay rule. The District Court erred in admitting those portions of the statement that tended to implicate the defendant. Rule 106, M.R.Ev., is separate and distinct from the hearsay rule and does not make admissible statements that would otherwise be inadmissible. St. v. Castle, 285 M 363, 948 P2d 688, 54 St. Rep. 1194 (1997).

Testimony of City Court Judge in District Court Recollecting Prior Testimony of Unavailable Witness — Inadmissible Hearsay: Mavros was convicted in City Court of reckless driving and two counts of assault. On appeal to the District Court, one of the original witnesses who was an assault complainant was unavailable to testify. Because the City Court was not a court of record, the District Court Judge allowed the City Court Judge to testify, over objection, from recollection and trial notes as to the feelings of the unavailable witness regarding the incident and the alleged assault, which occurred about 8 months before the City Court trial. The City Court Judge had no personal knowledge of the alleged incident and could not recall how the witness had testified to certain questions in the City Court proceedings. Mavros had no opportunity to cross-examine the unavailable witness in District Court but could only cross-examine the City Court Judge on the recollected testimony given by that witness. The judge's testimony did not fit within the hearsay exception of this rule because the testimony was presented through the judge's memory rather than through a transcript that accurately repeated the direct examination and cross-examination before the City Court jury. The judge's testimony constituted inadmissible hearsay, and without any testimony from the complaining witness or other evidence from the trial, the assault conviction as against that witness failed. Hamilton v. Mavros, 284 M 46, 943 P2d 963, 54 St. Rep. 741 (1997).

Declarant Not Unavailable on Assumption That Declarant Will Invoke Fifth Amendment: Fina argued that he should have been allowed to introduce the written statement of an inmate's testimony as that of an unavailable declarant on the basis that if called, he believed that the inmate would invoke the fifth amendment. The Supreme Court held that the witness had not been called and had not invoked the fifth amendment and therefore was not an unavailable declarant. St. v. Fina, 273 M 171, 902 P2d 30, 52 St. Rep. 887 (1995).

Statements of Counsel as Binding on Client — New Trial Warranted: In closing arguments during a negligence trial that resulted in a jury finding of no negligence on behalf of defendant, defense counsel made unequivocal statements which, when taken in full context with the rest of

his closing argument, constituted judicial admissions on the issue of negligence of his client that had the effect of a confessory pleading. Noting that the admissions of counsel are binding on the client, the Supreme Court granted a new trial, notwithstanding counsel's assertion that the statements were merely suggestions on the theory of the case. Kohne v. Yost, 250 M 109, 818 P2d 360, 48 St. Rep. 886 (1991).

Limited Hearsay Permitted in Incest Case — Failure to Use Guidelines Not Error: The District Court allowed the Department of Family Services (functions transferred in 1995 to Department of Public Health and Human Services and Department of Corrections) and Lake County personnel to testify from their personal knowledge regarding a child incest victim's unavailability to testify and the timeframe of the victim's charges as stated to them, restricting testimony to those two areas and stating that specific details of the alleged crime were inadmissible. Defendant contended that, however limited, the testimony was still hearsay unexcepted by this rule because the court failed to make preliminary findings under St. v. J.C.E., 235 M 264, 767 P2d 309 (1988). The Supreme Court saw no error in the lower court ruling, finding that any possible error was harmless. St. v. Kao, 245 M 263, 800 P2d 714, 47 St. Rep. 2100 (1990).

Issuance of Subpoena Not Required to Meet Due Diligence Obligation: The appellant argued that the lower court had erred in allowing the transcript of the plaintiff's brother's testimony to be entered into the record. The Supreme Court held that the lower court had not abused its discretion because the proceeding was a retrial with identical parties and issues and the brother had been subject to cross-examination in the first trial. The court also held that the plaintiff was not required to subpoena his brother in order to meet due process requirements when there had been no indication that the brother would not attend the trial. Barrett v. Asarco, 245 M 196, 799 P2d 1078, 47 St. Rep. 1980 (1990).

Declarant Unavailable — No Hearsay Exemption Upon Trustworthiness Guaranty: Plaintiff questioned the admissibility under hearsay rules of the testimony of witnesses who recalled statements of a person who was integral in determining the facts of the case but who died prior to trial. The Supreme Court held that when a declarant is unavailable as a witness, as for reason of death, his statements are not excluded by the hearsay rule if there are comparable circumstantial guaranties of trustworthiness. Whether there are guaranties is a matter for determination by the District Court, which will be upheld absent an abuse of discretion. Hobbs v. Pac. Hide & Fur Depot, 236 M 503, 771 P2d 125, 46 St. Rep. 544 (1989).

Hearsay Admissible When Alleged Child Abuse Victim Unavailable as Witness — Child Hearsay Guidelines Established: In determining whether the District Court properly refused to allow into evidence out-of-court statements made by a child abuse victim to a counselor and a social worker, the Supreme Court held that subsection (b)(5) of this rule henceforth is the provision under which proferred hearsay, other than expert testimony, is considered for admissibility in cases of sexual abuse of children when the alleged victim is unavailable as a witness. The court also established guidelines for consideration by the trial judge in determining the admissibility of hearsay testimony proffered when the alleged child victim is unavailable. In using these guidelines, the question of admissibility remains in the discretion of the trial judge. St. v. J.C.E., 235 M 264, 767 P2d 309, 45 St. Rep. 2373 (1988), followed in St. v. Mayes, 251 M 358, 825 P2d 1196, 49 St. Rep. 75 (1992), and St. v. Osborne, 1999 MT 149, 295 M 54, 982 P2d 1045, 56 St. Rep. 589 (1999), and distinguishing St. v. Harris, 247 M 405, 808 P2d 453 (1991). See also St. v. Ryan, 691 P2d 197 (Wash. 1984), Idaho v. Wright, 497 US 805, 111 L Ed 2d 638, 110 S Ct 3139 (1990), St. v. Harris, 247 M 405, 808 P2d 453, 48 St. Rep. 62 (1991), and St. v. S.T.M., 2003 MT 221, 317 M 159, 75 P3d 1257 (2003).

Admissibility in Second Trial of Testimony Given by Defendant in First Trial: After having testified in his first trial, which ended in a mistrial, defendant declined to testify in his second trial. The Supreme Court held that the testimony given in the first trial was admissible as evidence in the second trial under both Rule 801, M.R.Ev., as an admission of a party-opponent, and under this rule, as the declaration of an unavailable witness. St. v. Hall, 234 M 57, 761 P2d 1283, 45 St. Rep. 1726 (1988).

Circumstantial Guaranties of Trustworthiness — Factors Considered — Discretion of District Court:

Defendant offered to introduce testimony for the purpose of establishing that a certain person had a conversation with an accomplice to the crime wherein the accomplice allegedly stated that the defendant did not participate in the crime. The offered testimony did not qualify as an exception to hearsay because it was offered to exculpate the accused and no corroborating circumstances clearly indicated the trustworthiness of the statement. Although St. v. LaPier, infra, discusses Rule 804(b) (5), M.R.Ev., this case is persuasive as to the question of abuse of

discretion with relation to guarantees of trustworthiness concerning offered hearsay testimony under Rule 804(b)(3), M.R.Ev. St. v. Powers, 233 M 54, 758 P2d 761, 45 St. Rep. 1286 (1988).

Defendant was charged with an attempt to commit burglary. At trial, counsel for defendant attempted to introduce the testimony of a police officer as to his interview with a Canadian citizen who had allegedly witnessed the incident. While admitting that the testimony would constitute hearsay, the counsel argued that it should be admitted under Rule 804(b)(5). The trial court found insufficient circumstantial guaranties of trustworthiness and denied admission of the testimony. On appeal, the Supreme Court noted that Montana's version of Rule 804(b)(5), M.R.Ev., differs significantly from the federal counterpart. The commission comment suggests that the circumstantial guaranties of trustworthiness found in the commission comments to each of the other exceptions enumerated in Rule 804(b) are to be applied. The only applicable factor in this case was the fact that the citizen was apparently a disinterested observer. The trial court felt that the witness' disinterest alone was insufficient. The Supreme Court deferred to the discretion of the District Court absent a showing of abuse of discretion. St. v. LaPier, 208 M 106, 676 P2d 210, 41 St. Rep. 203 (1984).

Statement Subjecting Accomplice to Liability as Admissible Hearsay: A statement attributed to an alleged accomplice tended to subject her to criminal liability and was therefore admissible under the hearsay exception provided in Rule 804(b), M.R.Ev. St. v. Powers, 233 M 54, 758 P2d 761, 45 St. Rep. 1286 (1988), followed in St. v. McCord, 251 M 317, 825 P2d 194, 49 St. Rep. 53 (1992).

Unavailable Codefendant's Statements Exculpating Defendant Not Warranting New Trial: The District Court denied a motion for a new trial based on written statements of a codefendant exculpating defendant of the crimes. The court held that the statements were hearsay and that even if the statements were admissible, the motion would still be denied due to the conduct and questionable veracity of both defendants. The codefendant refused to testify, so the exclusion of the statements on the grounds of hearsay was error under the witness unavailable exception to this rule. However, the error was harmless in light of the court's explanation that a new trial would not be granted even if the material was not hearsay. St. v. Miller, 231 M 497, 757 P2d 1275, 45 St. Rep. 790 (1988).

Suicide Note Inadmissible as Exception to Hearsay Rule: Defendant was convicted of conspiring to deliver a pistol to her husband who was an inmate in the state prison. The delivery failed, and the inmate committed suicide after writing a note that implied his wife had done something wrong. The note admittedly was not written in furtherance of the conspiracy and contained no direct statement implicating defendant in the scheme. Speculation of defendant's complicity did not rise to a sufficient guarantee of trustworthiness nor did the note establish a fact in issue. Hence, the suicide note did not qualify as a recognized exception to the hearsay rule and was inadmissible. It was not a new and unanticipated situation requiring growth and development of the hearsay law because suicide notes predate the rules of evidence by many years. St. v. Brown, 231 M 334, 752 P2d 204, 45 St. Rep. 660 (1988).

Statements Made to Insurance Claims Adjuster — Circumstantial Guarantees of Trustworthiness Not Met: The grant of a new trial based on prior admitted hearsay was affirmed when tape recorded statements made to an insurance claims adjuster did not satisfy the requirements of trustworthiness under Rule 804(b)(5), M.R.Ev. There was no sense of impending death, no statement against interest, and nothing about personal or family interest; and the statement was not made under oath or subject to cross-examination. Heisler v. Boule, 226 M 332, 735 P2d 516, 44 St. Rep. 698 (1987).

Repair Costs Awarded Based on Repair Bill — No Circumstantial Guaranties of Reliability: District Court awarded respondent $619.13 for tractor repair based solely on a repair bill admitted over appellant's hearsay objection. There was no testimony from a representative of the repair shop. The District Court admitted the bill as having such circumstantial guaranties of reliability as to allow it to come in under the residual exception of the hearsay rule but offered no explanation as to what the guaranties were. The Supreme Court held that the District Court abused its discretion in admitting the bill. Nelson v. Davis Modern Mach., 220 M 347, 715 P2d 1052, 43 St. Rep. 423 (1986).

Statement of Defense Counsel Not Statement Against Interest: A statement by defense counsel to jury in closing argument suggesting that "a fair verdict would be $30,000" was not a statement against interest setting lower limits of a verdict at $30,000. The District Court erred in granting a new trial on grounds that the $25,000 jury award to the plaintiff constituted inadequate damages when there was substantial credible evidence to support the verdict of the jury. Brown v. Markve, 216 M 145, 700 P2d 602, 42 St. Rep. 708 (1985). See also White v. Ford, Bacon & Davis Tex., Inc., 256 M 9, 843 P2d 787, 49 St. Rep. 1117 (1992).

Invocation of Privilege Against Self-Incrimination — "Unavailable" Witness: Where the former wife of a child molester testified to her former husband's admission to acts of child molestation, the District Court did not err in admitting the wife's testimony over objection that the testimony was inadmissible hearsay. The testimony could be admitted under the statement against interest exception if the declarant (the husband) was "unavailable". A witness' privilege against self-incrimination, which was invoked by the husband, is generally regarded as sufficient grounds of unavailability to warrant reception as a statement against interest. Sarsfield v. Sarsfield, 206 M 397, 671 P2d 595, 40 St. Rep. 1736 (1983), followed in St. v. Stuit, 277 M 227, 921 P2d 866, 53 St. Rep. 607 (1996).

Evidence of Other Crimes, Wrongs, or Acts — Hearsay — Prejudicial Error: Direct evidence of other crimes, if such evidence came within the exceptions of Rule 404(3)(b), M.R.Ev., would be admissible. Indirect, hearsay evidence must also conform to the rules relating to the admission of hearsay testimony, including the exceptions. If the severely beaten victim were regarded as an unavailable witness because of her physical condition, her statements would be admissible if they came within the exceptions of Rule 804, M.R.Ev. Here, however, the hearsay declarant was not found to have circumstantial guaranties of trustworthiness because she admittedly disliked the defendant. Nor could the victim's statements be admitted as "excited utterances" because such utterances are admissible only if they are part of the res gestae of the crime charged. Admission of the statements of the victim to a friend and to her doctor, therefore, constituted prejudicial error. Admission of proof of wholly independent crimes requires a balancing of the relative probative value of the evidence against the prejudicial effect. Evidence of a course of conduct similar to the crime charged tends to prove the crime charged, but such evidence should not be admitted unless the proof thereof tends toward the conclusion that the defendant is guilty of the crime charged with moral certainty and beyond a reasonable doubt. With proper safeguards, the court would allow evidence of previous assaults. St. v. Brubaker, 184 M 294, 602 P2d 974, 36 St. Rep. 1915 (1979).

Law Review Articles

Montana Supreme Court Survey—Civil Procedure and Evidence, Young & McLean, 41 Mont. L. Rev. 293 (1980).

Use of Former Testimony as Substantive Evidence in Criminal Cases, Jones, 30 Mont. L. Rev. 201 (1969).

Collateral References

UNAVAILABILITY

Criminal Law *key* 542, 543; Evidence *key* 284, 576, 577.

23 C.J.S. Criminal Law §892; 31A C.J.S. Evidence §§391 through 402.

29 Am. Jur. 2d Evidence §§693, 694; 29A Am. Jur. 2d Evidence §§920, 921.

Residual hearsay exception where declarant unavailable: Uniform Evidence Rule 804(b)(5). 75 ALR 4th 199.

Admissibility, in a civil case, of expert opinion evidence as to proposed witness's inability to testify. 11 ALR 3d 1360.

Admissibility of statement made to government agent by unavailable witness, under Rule 804(b)(5) of Federal Rules of Evidence, providing for admissibility of hearsay statement not covered by any specific exception but having equivalent circumstantial guaranties of trustworthiness. 61 ALR Fed. 915.

5 Wigmore §§1403 through 1414.

FORMER TESTIMONY

Evidence *key* 575, et seq.

31A C.J.S. Evidence §384, et seq.

29 Am. Jur. 2d Evidence §§668, 675 through 700; 29A Am. Jur. 2d Evidence §§770, 890 through 931; 81 Am. Jur. 2d Witnesses §583.

Party's right to use, as evidence in civil trial, his own testimony given up on interrogatories or depositions taken by opponent. 13 ALR 3d 1312.

Admissibility in evidence of deposition as against one not a party at the time of its taking. 4 ALR 3d 1075.

Propriety and prejudicial effect of showing, in criminal case, withdrawn guilty plea. 86 ALR 2d 326.

Binding effect, upon party litigant, of testimony of his witnesses at a former trial. 74 ALR 2d 521.

Use in civil case of testimony given in criminal case by witness no longer accessible. 70 ALR 2d 1179.

Identity of subject matters or of issues as condition of admissibility in civil case of testimony or deposition in former proceeding of witness not now available. 70 ALR 2d 494.

Claim of privilege by witness as justifying the use in criminal case of his testimony given on a former trial or preliminary examination. 45 ALR 2d 1354.

Admissibility of depositions under Federal Evidence Rule 804(b)(1). 84 ALR Fed. 668.

Who is "predecessor in interest" for purposes of Rule 804(b)(1) of Federal Rules of Evidence. 47 ALR Fed. 895.

5 Wigmore §§1386 through 1389.

DYING DECLARATIONS

Evidence *key* 126 ½, 275 ½; Homicide *key* 200 through 221.

31A C.J.S. Evidence §238; 40 C.J.S. Homicide §§274 through 292.

29A Am. Jur. 2d Evidence §§773, 829; 40A Am. Jur. 2d Homicide §§354 through 393, 467 through 470.

Sufficiency of showing of consciousness of impending death, by circumstances other than statements of declarant, to justify admission of dying declaration. 53 ALR 3d 1196.

Statements of declarant as sufficiently showing consciousness of impending death to justify admission of dying declaration. (comment note) 53 ALR 3d 785.

Admissibility of homicide victim's statements exculpating the accused. 95 ALR 2d 637.

Admissibility in criminal trial of dying declarations involving an asserted opinion or conclusion. 86 ALR 2d 905.

5 Wigmore §§1430 through 1452.

STATEMENT AGAINST INTEREST

Evidence *key* 272, 273(4), 274(1), et seq.

31A C.J.S. Evidence §217, et seq.

29A Am. Jur. 2d Evidence §708, et seq.

Witness's refusal to testify on ground of self-incrimination as justifying reception of evidence of prior statements or admissions. 43 ALR 3d 1413.

Admissibility, in civil action, of confession or admission which could not be used against party in criminal prosecution because obtained by improper police methods. 43 ALR 3d 1375.

Admissibility of statements of coconspirators made after termination of conspiracy and outside accused's presence. 4 ALR 3d 671.

Admissibility, on behalf of one of multiple defendants in accident case, of admission against interest made out of plaintiff's presence by another defendant to a fourth person. 73 ALR 2d 1180.

Admissibility of evidence of party's silence, as implied or tacit admission, when a statement is made by another in his presence regarding circumstances of an accident. 70 ALR 2d 1099.

Admissibility, in action on employee fidelity bond or policy, of confessions or declarations of such employee no longer available as witness. 65 ALR 2d 631.

Admissibility of pleading as evidence against pleader, on behalf of stranger to proceeding in which pleading was filed. 63 ALR 2d 412.

Admissibility and conclusiveness, as against insured, of statements in proof of loss. 58 ALR 2d 429.

Admissibility of advertisements, brochures, catalogs, and the like as containing admissions by a litigant contrary to a position taken by him. 44 ALR 2d 1027.

Admissibility of statement made to government agent by unavailable witness, under Rule 804(b)(5) of Federal Rules of Evidence, providing for admissibility of hearsay statement not covered by any specific exception but having equivalent circumstantial guaranties of trustworthiness. 61 ALR Fed. 915.

What constitutes statement against interest admissible under Rule 804(b)(3) of Federal Rules of Evidence. 34 ALR Fed. 412, §5 superseded by 125 ALR Fed. 477.

5 Wigmore §§1455 through 1477.

PERSONAL OR FAMILY HISTORY

Evidence *key* 285, et seq.

31A C.J.S. Evidence §226, et seq.

29A Am. Jur. 2d Evidence §§680, 691.

Admissibility, on issue of child's legitimacy or parentage, of declarations of parents, relatives, or the child, deceased or unavailable. 31 ALR 2d 989.

Admissibility of declarations of persons other than members of family as to pedigree. 15 ALR 2d 1412.

5 Wigmore §§1480 through 1502.

OTHER EXCEPTIONS

Residual hearsay exception where declarant unavailable: Uniform Evidence Rule 804(b)(5). 75 ALR 4th 199.

Rule 805. Hearsay within hearsay.

Commission Comments

This Rule is identical to Federal and Uniform Rules (1974) Rule 805. The Advisory Committee's Note, 56 F.R.D. 183, 329 (1972), indicates "on principle it scarcely seems open to doubt that the hearsay rule should not call for exclusion of a hearsay statement which includes a further hearsay statement when both conform to the requirements of a hearsay exception". The Commission feels this is the only sensible solution to the problem of hearsay within hearsay or multiple hearsay situations. There is no existing Montana law directly dealing with hearsay within hearsay, perhaps indicating that this rule will help courts properly analyze the problem and admit hearsay statements under this rule.

Case Notes

Substance of 9-1-1 Call — Double Hearsay Rule Inapplicable — Admission Into Evidence Harmless Error: In a trial for sexual intercourse without consent, the District Court allowed a dispatcher to testify as to the substance of a 9-1-1 call related to the offense. The double hearsay rule did not apply. The caller's statement was hearsay, and the police dispatcher was too far removed to testify as to the victim's statements to the caller. It was error for the court to admit the substance of the 9-1-1 call into evidence; however, it was harmless error because all of the basic elements were established without question by other testimony properly admitted at trial. St. v. Graves, 272 M 451, 901 P2d 549, 52 St. Rep. 755 (1995), followed in St. v. Veis, 1998 MT 162, 289 M 450, 962 P2d 1153, 55 St. Rep. 651 (1998).

Statement Containing Two Hearsay Declarations: Plaintiff testified that a third party told him that defendant made statements to the third party to pressure the third party into not awarding a subcontract to the plaintiff. The second hearsay declaration, that defendant made statements to pressure the third party, was admissible as nonhearsay because the statement constituted a verbal act in the sense that it went to prove the operative facts of the alleged tort, i.e., pressuring the third party. Phillip R. Morrow, Inc. v. FBS Ins. Mont.-Hoiness Labar, Inc., 236 M 394, 770 P2d 859, 46 St. Rep. 455 (1989).

Testimony May Contain Hearsay Within Hearsay: The trial court excluded the plaintiff's testimony that a third party had told him that the defendant had made statements pressuring the third party not to award a subcontract to the plaintiff. The trial court excluded the evidence because the plaintiff did not have personal knowledge of the statements allegedly made by the defendant to the third party. The Supreme Court overruled, stating that the lower court misconceived the nature of the personal knowledge requirement in the hearsay context. When A testifies that B told him of an event, A usually has personal knowledge only of B's report. It is B who has personal knowledge of the event. The hearsay rules require that the declarant, B, not the witness, A, has such personal knowledge. Phillip R. Morrow, Inc. v. FBS Ins. Mont.-Hoiness Labar, Inc., 236 M 394, 770 P2d 859, 46 St. Rep. 455 (1989).

Hearsay Within Hearsay — One Declarant Not Subject to Cross-Examination — Whole Statement Inadmissible: During rebuttal in a homicide trial, the State had a police officer testify as to what a witness had said the defendant had said to him just prior to the homicide. The witness had testified earlier in the trial but had been excused the day before rebuttal. The Supreme Court held that the officer's testimony was "hearsay within hearsay" as defined in Rule 805, M.R.Ev., and admissible only if both hearsay parts were admissible. Because the witness was absent and thus not subject to cross-examination, that part of the hearsay in which the witness was the declarant was inadmissible under Rule 801(d)(i), and thus the whole statement was inadmissible. St. v. Daniels, 210 M 1, 682 P2d 173, 41 St. Rep. 880 (1984).

Statement Relevant to State of Mind and Motive: Defendant was convicted of deliberate homicide in the shooting death of Scotty Azure. Defendant's son had been involved with Azure's daughter. At the trial Azure's wife was questioned on her basis for believing the defendant might know of her daughter's whereabouts prior to the shooting. The testimony was objected to as hearsay. The Supreme Court held that the District Court properly allowed the statement into evidence with an instruction that it was not offered to prove the truth of the matter asserted but was offered only to show why the wife acted and believed as she did. The statement was relevant

to the issue of defendant's state of mind and motive. In a case such as this where self-defense is raised, the state of mind and intent of the defendant are the primary issues. The jury is entitled to know, so far as evidence is available, all the facts and circumstances that tend to throw light upon the parties and their relations and feelings toward each other. St. v. Weinberger, 204 M 278, 665 P2d 202, 40 St. Rep. 844 (1983), followed with regard to a homicide case in St. v. McCord, 251 M 317, 825 P2d 194, 49 St. Rep. 53 (1992).

Multiple Hearsay: A detective testified that Polotto told him that Polotto had not told anyone that they were authorized to take his stereo. The declarant, Polotto, was not on the stand so Rule 801, M.R.Ev., does not apply. When a hearsay is included within a hearsay, Rule 805, M.R.Ev., requires the exclusion of the multiple hearsay unless each part of the combined statement conforms to an exception to the hearsay rule. Since no exception applies to the first part of the statement, "Polotto told him", the entire statement is inadmissible. St. v. Martinez, 188 M 271, 613 P2d 974, 37 St. Rep. 982 (1980).

Evidence of Other Crimes, Wrongs, or Acts — Hearsay — Prejudicial Error: Direct evidence of other crimes, if such evidence came within the exceptions of Rule 404(3)(b), M.R.Ev., would be admissible. Indirect, hearsay evidence must also conform to the rules relating to the admission of hearsay testimony, including the exceptions. If the severely beaten victim were regarded as an unavailable witness because of her physical condition, her statements would be admissible if they came within the exceptions of Rule 804, M.R.Ev. Here, however, the hearsay declarant was not found to have circumstantial guarantees of trustworthiness because she admittedly disliked the defendant. Nor could the victim's statements be admitted as "excited utterances" because such utterances are admissible only if they are part of the res gestae of the crime charged. Admission of the statements of the victim to a friend and to her doctor, therefore, constituted prejudicial error. Admission of proof of wholly independent crimes requires a balancing of the relative probative value of the evidence against the prejudicial effect. Evidence of a course of conduct similar to the crime charged tends to prove the crime charged, but such evidence should not be admitted unless the proof thereof tends toward the conclusion that the defendant is guilty of the crime charged with moral certainty and beyond a reasonable doubt. With proper safeguards, the court would allow evidence of previous assaults. St. v. Brubaker, 184 M 294, 602 P2d 974, 36 St. Rep. 1915 (1979).

Rule 806. Attacking and supporting the credibility of declarant.

Commission Comments

This rule is identical to Federal and Uniform Rules (1974) Rule 806. The rule simply ensures that a hearsay declarant or the maker of a statement under Rule 801 (admissions by persons authorized, agents, employees, or coconspirators), may have his credibility attacked as though the person had in fact testified. Advisory Committee's Note, 56 F.R.D. 183, 329 (1972). This is the effect of the first sentence of this rule. The second sentence of the rule provides that the foundation requirements for impeachment by a prior inconsistent statement, as set out under Rule 613(b), are not required under this rule. Rule 613 requires that a person so impeached be afforded an opportunity to explain or deny the statement. It is obvious that this requirement must be waived in the case of a person not present at trial or this method of impeachment would be effectively foreclosed. The final sentence of the rule is intended to ensure the cross-examination is not restricted.

Only two Montana cases have been concerned with attacking the credibility of a hearsay declarant, and each is consistent with this rule. The leading case is State v. Kacar, 74 Mont. 269, 281, 240 P 365 (1925), where the Court held that the credibility of a declarant's dying declaration could be attacked like any other evidence. In Howe v. Messimer, 84 Mont. 304, 310, 275 P 265 (1929), the Court held that an admission by a party may be impeached by a prior inconsistent statement without laying a foundation. Note that the provisions of Section 93-1901-12, R.C.M. 1947 [superseded] relating to the foundation requirements for impeachment by a prior inconsistent statement, have been changed by Rule 613(b) and that the second sentence of this rule waiving foundation requirements can be construed as a further change to that statute. The final sentence of the rule, allowing open cross-examination of the declarant, could be construed as consistent with Rule 43(b) of the Montana Rules of Civil Procedure. (Also see Rule 607 and Commission Comments concerning impeachment of one's own witness.)

COMMISSION COMMENT TO JUNE 1990 AMENDMENT

The revision establishes gender neutral format only. No substantive change.

Compiler's Comments

1990 Amendment: Substituted gender neutral language for gender specific language. Amendment effective June 7, 1990.

Law Review Articles

On the Horns of an Evidentiary Dilemma: The Intersection of Federal Rules of Evidence 806 and 608(b), Hornstein, 56 Ark. L. Rev. 543 (2003).

Collateral References

Evidence *key* 313.
31A C.J.S. Evidence §268.
29 Am. Jur. 2d Evidence §§658, 659, 661.
3 Wigmore §§884 through 888.

Article IX
Authentication and Identification

Article Law Review Articles

Article IX: Authentication and Identification, Berger, 33 The Federal Bar J. 79 (1974).

Authentication of Documents Requirement: Barrier to Falsehood or to Truth?, Alexander, 10 San Diego L. Rev. 266 (1973).

Rule 901. Requirement of authentication or identification.

Commission Comments

(a) General Provision. This subdivision is identical to Federal and Uniform Rules (1974) Rule 901(a). The Commission has adopted this general provision to simplify the process of authentication or identification. The Advisory Committee's Note, 56 F.R.D. 183, 323 (1972) indicates "authentication and identification represent a special aspect of relevancy... Thus a telephone conversation may be irrelevant because of an unrelated topic or because the speaker is not identified. The latter aspect is the one here involved". The standard contained in this subdivision is generally consistent with existing Montana law. In State v. Davis, 60 Mont. 426, 436, 199 P 421 (1921), the Court held the standard for authenticity of a physical object is a prima facie showing of a connection between the object and the offense and that "clear, certain, and positive proof is not required". This standard has been affirmed in State v. Wilroy, 150 Mont. 255, 258, 434 P2d 138 (1967), and State v. Fitzpatrick, 163 Mont. 220, 230, 516 P2d 605 (1973). In State v. Cooper, 161 Mont. 85, 91, 904 P2d 978 (1972), the Court stated "authenticity for admissibility can be demonstrated by direct or circumstantial evidence and the consistency of evidence for a foundation is within the discretion of the trial judge". The Advisory Committee's Note, *supra* 56 F.R.D. at 333, indicates that the Federal drafters intend authenticity to be within the category of relevancy dependent upon fulfillment of a condition of fact under Federal Rule 104(b). Montana Rule 104(b) did not adopt the concept contained in the Federal Rule because it was felt it was impractical and inconsistent with Montana law. (See Commission Comments to Montana Rule 104(b).) The Commission feels that the present practice under existing Montana law of allowing the judge to admit evidence upon a proper authentication foundation should be continued, and the jury need not be allowed to exclude evidence conditionally admitted as under the Federal rule. Montana juries will still be allowed to reject evidence authenticated under this subdivision on grounds other than conditional admissibility. Whether the jury excludes evidence from its consideration because its conditional admissibility has failed or because of lack of credibility of authenticity, the result is the same; the evidence is disregarded. Therefore, the Federal rules concept of conditional relevance in Rule 901(a) has little practical difference from existing Montana law.

This general standard of authentication will supersede any specific provisions in existing Montana law. Two examples of specific provisions not contained in the list of illustrations in subdivision (b) are Sections 93-1101-13, R.C.M. 1947 [26-1-107, now repealed], and 93-1101-16, R.C.M. 1947 [26-1-108, now repealed]. Section 93-1101-13, R.C.M. 1947 [26-1-107, now repealed], provides that evidence of the execution of an instrument is not necessary when the party against whom it is offered has admitted its execution if the instrument is one mentioned in Section 93-1101-16, R.C.M. 1947 [26-1-108, now repealed], or produced from the custody of the adverse party and acted upon by him as genuine. Section 93-1101-16, R.C.M. 1947 [26-1-108, now repealed], provides that writings more than thirty years old may be authenticated by comparison with specimens purported to be genuine when the specimen has been "generally respected and acted upon as such (genuine) by persons having an interest..." The general standard in this subdivision that the writing or object is what its proponent says it is certainly

accomplishes the same end as these statutes, but without having to consider specific provisions relating to various types of writing or objects.

The authentication article does not distinguish the terms "authentication" and "identification", nor does it distinguish between the authentication and identification of writings and other physical objects. Therefore the general standard will govern the introduction of any writing or physical object into evidence.

(b) Illustrations. This subdivision is identical to Federal and Uniform Rules (1974) Rule 901(b) except for a change in illustration (10) which makes the subdivision consistent in language used in these rules. The change in illustration (10) is intended to allow application of authentication as it is provided by statute or rule in Montana, while Federal Rule 901(b)(10) is intended to allow application under Federal law. Note that the introductory clause to this subdivision indicates that it is intended to list illustrations and is not intended to be a limitation upon the application of the principle found in subdivision (a) of this rule.

(1) Testimony of Witness With Knowledge.

This illustration is identical to Federal and Uniform Rules (1974) Rule 901(b)(1). The simplest and most convenient form of authentication or identification is provided in this illustration, allowing a witness to simply testify that the matter is what the proponent claims it to be. This illustration is consistent with existing Montana law. A good example of this illustration is the introduction of photographs. In Pilgeram v. Hass, 118 Mont. 431, 449, 167 P2d 339 (1946), the Court stated the foundational requirement for authentication of a photograph.

Where the nature or condition of place is a matter of controversy in a civil action, photographs of the place shown to be true representations of the place at the time in question are generally admissible in evidence, and a photograph may be proved to be a correct representation of a place so as to be admissible by witnesses other than the person who took the photograph....

It can be noted that a photograph may be admissible even when there has been a change in conditions appearing in the photograph, so long as they are explained. Cases following these rules are State v. Peters, 146 Mont. 188, 200, 405 P2d 642 (1965); Pickett v. Kryger, 151 Mont. 87, 97, 439 P2d 57 (1968); and Lamb v. Page, 153 Mont. 171, 176, 455 P2d 337 (1969).

Several statutes also are good examples of the principle of this illustration: Section 93-1001-14, R.C.M. 1947 [superseded], allows a witness to testify as to the laws of a sister state or foreign country. Section 93-1001-19, R.C.M. 1947 [superseded], allows proof of a copy of a foreign country's judicial records by a witness' testimony that the copy has been compared with the original, that the original was in the custody of the clerk of the court, and that the copy is attested by the clerk of the court to be the original. Section 93-1101-12(1), R.C.M. 1947 [superseded], allows a writing to be authenticated by anyone who saw the writing executed, and Section 93-1101-12(3), R.C.M. 1947 [superseded], allows a subscribing witness to authenticate the writing. Finally, Section 93-1101-14, R.C.M. 1947 [superseded], allows a witness to authenticate his own handwriting by simply so testifying.

(2) Nonexpert opinion on handwriting.

This illustration is identical to Federal and Uniform Rules (1974) Rule 901 (b)(2). It expresses the rule observed at common law and in Montana that a nonexpert may give his opinion on genuineness of handwriting if familiar with that handwriting. Note that familiarity acquired for the purposes of litigation is not within this illustration, but within illustration (3). This illustration is consistent with existing Montana law found in several Montana statutes: Section 93-401-27(9), R.C.M. 1947 [superseded], provides existing Montana law found in several Montana statutes; Section 93-401-27(9), R.C.M. 1947 [superseded], provides: "In conformity with the preceding provisions, evidence may be given upon a trial of the following facts:...the opinion of the witness respecting the identity or handwriting of the person, when he has knowledge of the person or handwriting...". Section 93-1101-12, R.C.M. 1947 [superseded], provides:

Any writing may be proved either:

1. By anyone who saw the writing executed; or
2. By evidence of genuineness of the handwriting of the maker; or
3. By a subscribing witness.

Finally, Section 93-1101-14, R.C.M. 1947 [superseded], provides: "The handwriting of a person may be proved by anyone who believes it to be his, and who has seen him write, or had seen writing purporting to be his, upon which he has acted or been charged, and thus acquired a knowledge of his handwriting". Montana cases have conformed to these statutes and have liberally allowed the foundation to be established. In State v. Mahoney, 24 Mont. 281, 286, 61 P 647 (1900), the prosecutrix was allowed to authenticate the handwriting of a note to her from the defendant even when she was unable to swear positively that the note was in his handwriting. In

State v. Howard, 30 Mont. 518, 525, 77 P 50 (1904), a letter was allowed to be authenticated by a witness testifying that he was familiar with the defendant's handwriting and that the letter looked like it was in the defendant's writing. In Ingebrightsen v. Hatcher, 87 Mont. 482, 485, 288 P 1023 (1930), a witness, though not personally acquainted with the writer, had seen and acted upon the signature a number of times in the ordinary course of business, and this testimony was held sufficient foundation for authentication. This rule was followed in Leffek v. Luedeman, 95 Mont. 464, 27 P2d 511 (1933).

(3) Comparison by Trier or Expert Witness.

This illustration is identical to Federal and Uniform Rules (1974) Rule 901(b)(3). This illustration allows comparison by the trier of fact or by an expert witness of the item of evidence to be introduced with a specimen; it is not intended to be limited to writings, but may include any other authentication by comparison. This illustration is generally consistent with existing Montana law. Montana law allows the comparison by the trier of fact or by expert witness in authentication of a writing under Section 93-1101-15, R.C.M. 1947, [superseded], which provides:

Evidence respecting the handwriting may also be given by comparison, made by the witness or jury, with writings admitted or treated as genuine by the party against whom the evidence is offered, or proved to be genuine to the satisfaction of the judge.

The Advisory Committee's Note to this illustration, *supra* 56 F.R.D. at 334, indicates that this illustration is not intended to require the judge to be satisfied with the genuineness of the specimen, insofar as a high standard of genuineness is required. Therefore, this illustration could provide a slight change to existing Montana law, although certainly it is not intended that specimens be used which are not genuine. It can be noted that Section 93-1101-15, R.C.M. 1947 [superseded], has been interpreted by In Re Miller's Estate, 71 Mont. 330, 338, 229 P 851 (1924), so that "witness" means expert witness. The jury, as trier of fact, is free to accept or reject the opinion of an expert as to the genuineness of handwriting through comparison. Grosfield v. First Nat'l Bank, 73 Mont. 219, 239, 236 P 250 (1925). Also, Section 93-1101-16, R.C.M. 1947 [26-1-108, now repealed], allows a comparison of handwriting using documents thirty years old and relied upon by persons having an interest as genuine.

Finally, note that evidence of ballistics is another means of authentication through comparison and that this type of evidence is admissible under existing Montana law. State v. Simon, 126 Mont. 218, 223, 247 P2d 481 (1952).

(4) Distinctive Characteristics and the Like.

This illustration is identical to the Federal and Uniform Rules (1974) Rule 901(b)(4). This illustration allows a wide variety of circumstantial evidence to be introduced to show authenticity. This is consistent with existing Montana law. State v. Cooper, 161 Mont. 85, 91, 504 P2d 987 (1972). A good example of authentication of a writing by its contents is the reply letter doctrine, observed in Olsen v. Spoya, 129 Mont. 83, 92, 282 P2d 452 (1955), where the court stated:

While ordinarily a letter is not admissible in evidence without proof of its authenticity, a well-recognized exception to this rule is where a letter is received in due course of mail in reply to another communication proved to have been sent to the purported author of the letter sought to be introduced to be in evidence.

(5) Voice Identification.

This illustration is identical to Federal and Uniform Rules (1974) Rule 901(b)(5). This illustration allows a witness to identify a voice based upon familiarity acquired at any time, whether before or after the speaker's voice is the subject of identification. Advisory Committee's Note, *supra* 56 F.R.D. at 334. Existing Montana law is consistent with the illustration. In State v. Vanella, 40 Mont. 326, 339, 106 P 364 (1910), the court held that a witness may testify as to a person's identity from identification of his voice. Cases dealing with identification of person's voice on the telephone are covered in illustration (6). Although not dealing with the admissibility or authentication of tape recordings, State v. Warwick, 458 Mont. 531, 494 P2d 627 (1972), established foundational requirements for Montana which were followed in State v. Smith, 164 Mont. 334, 340, 523 P2d 395 (1974). Also, see Johnson v. Whitcombe, 149 Mont. 23, 27, 422 P2d 642 (1967).

(6) Telephone Conversations.

This illustration is identical to Federal and Uniform Rules (1974) Rule 901(b)(6). The illustration contains two clauses, the first dealing with identification of a person and the second, identification of businesses. Both of the clauses within this illustration are consistent with existing Montana law. As to clause (A), in Wood v. Ferguson, 71 Mont. 540, 547, 230 P 592 (1924), the court allowed identification of a telephone call when the witness testified that a certain

person's number was called and the person answering the telephone identified himself as that person. In Bingham v. Nat'l Bank of Montana, 105 Mont. 159, 175, 72 P2d 90 (1937), the court held testimony by the plaintiff identifying two other parties in a telephone conversation to be admissible when the witness testified that she was familiar with the voices of the speakers. Clause (B) of this illustration concerned with business calls is consistent with Ratliff v. the City of Great Falls, 132 Mont. 89, 94, 314 P2d 880 (1957) where the court stated:

The majority of the courts indulge the presumption or inference that a party called over the telephone who responds, as here, as purporting to answer for the office is, in fact, the person called, and that he is authorized to answer the call in the absence of a mistaken connection...and in the absence of proof of an officious intermeddler.

This court went on to hold sufficient identification of the telephone call made under the circumstances set out in the illustration.

(7) Public Records or Reports.

This illustration is identical to Federal and Uniform Rules (1974) Rule 901(b)(7). The illustration provides the widely accepted method of authentication of public records and reports of certification that the writing was authorized by law to be recorded and in fact was recorded in a public office where such writings are kept. The illustration is consistent with existing Montana law, expressed in several statutes. Sections 93-1001-16, R.C.M. 1947 [1-1-202], and 93-1001-17, R.C.M. 1947 [superseded], provide for the admissibility of judicial records, the latter section allowing proof by the production through certification procedures as to the correctness of the copy by the Clerk of Court. Section 93-1001-31, R.C.M. 1947 [superseded], provides that any public record of a private writing may be proved either by the original or by a copy certified by the legal keeper of the record.

(8) Ancient Documents or Data Compilation.

This illustration is identical to Federal and Uniform Rules (1974) Rule 901(b)(8). The illustration provides safeguards for the authenticity of this type of document which are slightly different than existing Montana law. Section 93-1301-7(34), R.C.M. 1947 [26-1-602(34), deleted from section by amendment], provides a rebuttable presumption that "a document more than thirty years old is genuine, when the same has been generally acted upon as genuine, by persons having an interest in the question, and its custody has been satisfactorily explained". Differences between this statute and the illustration are: first, the statute requires the document to be thirty years old, but the illustration only twenty; second, the statute requires the custody must be satisfactorily explained, but the illustration only in a place that is likely for a document to be kept if authentic; and third, the statute requires the document to be acted upon as genuine by persons having an interest, but the illustration only requires it to be of such a nature as to not create suspicion concerning authenticity. Therefore, this illustration represents a change in existing Montana law concerning the authentication of ancient documents.

(9) Process or System.

This illustration is identical to Federal and Uniform Rules (1974) Rule 901(b)(9). The Advisory Committee's Note, *supra* 56 F.R.D. at 335, indicates the illustration "is designed for situations in which the accuracy of a result is dependent upon a process or a system which produces it. X-rays afford a familiar instance. Among more recent developments is the computer...". Existing Montana law is generally consistent with the illustration. Section 32-2150.1, R.C.M. 1947 [61-8-702], states "the speed of any motor vehicle may be measured by the use of radio micro-waves or other electrical device. Results of such measurement shall be accepted as evidence...". There are also Montana cases dealing with the admissibility of x-rays, requiring a foundation as to the qualifications of the person taking the x-ray, the capabilities of the machine, as well as establishing that the x-rays are a fair representation of what they are intended to show. West v. Wilson, 90 Mont. 522, 528, 4 P2d 469 (1931) and Stokes v. Long 52 Mont. 407, 485, 159 P 28 (1916).

(10) Method Provided by Statute or Rule.

This illustration is similar to the Federal and Uniform Rules (1974) Rule 901 (b)(10), except that language used throughout these rules for the application of statutes, these rules, or other rules are used. The intent of this illustration is to make clear that other statutory methods or methods provided in Rules of Procedure for authentication are to be allowed. This is consistent with the language of the opening clause of this subdivision, for this list is only intended to be an example of some of the methods of authentication allowable. Therefore, this illustration is consistent with existing Montana law, for if a proponent of the evidence can cite a statute allowing a different method of authentication, then it should be allowed under this illustration. Rule 44(a), M.R.Civ.P., is an example of a Rule of Procedure providing a method of authentication.

Case Notes

Police Officer's Testimony Sufficient to Authenticate Photographs of Stabbing Victim to Warrant Admission Into Evidence: Notwithstanding the fundamental notion that a foundation is required for admission of photographs into evidence, there is no authority requiring that the photographer testify. Here, a police officer testified that the photographs in question were taken shortly after a stabbing victim arrived at the hospital and that the photographs were true and accurate depictions of the victim's wounds. The officer's testimony was sufficient to authenticate the photographs, and the trial court properly admitted the photographs into evidence. St. v. High Elk, 2006 MT 6, 330 M 259, 127 P3d 432 (2006), distinguishing St. v. Newman, 162 M 450, 513 P2d 258 (1973).

Impossible to Authenticate Altered Tape Recording — Inadmissibility Affirmed: Defendant in a partnership dispute attempted to introduce a tape recording that purported to show the intent of the other partner that defendant should receive a salary for managing the partnership property. The District Court disallowed the recording on grounds that it could not be authenticated because it had been altered. The Supreme Court affirmed. The standards for admissibility of a sound recording, as set out in St. v. Warwick, 158 M 531, 494 P2d 627 (1972), are: (1) a showing that the recording device was capable of taking testimony; (2) a showing that the operator of the device was competent; (3) establishment of authenticity and correctness of the recording; (4) a showing that changes, additions, or deletions have not been made; (5) a showing of the manner of preservation of the recording; and (6) identification of the speakers. Because the tape recording in this case was shown to have been altered so as to capture only certain phrases or sentences and because the original recording was not available, the recording could not be authenticated and was inadmissible under this rule. McCormick v. Brevig, 2004 MT 179, 322 M 112, 96 P3d 697 (2004).

File Fingerprints Considered Properly Authenticated Public Record: Part of DuBray's defense in a homicide trial was to cast suspicion on others for the crime, including Clark. During its investigation, the state compared fingerprints at the crime scene with various people, including Clark, and to refute DuBray's defense sought to introduce evidence of Clark's fingerprints on file with the County Sheriff. The trial court allowed the fingerprints into evidence, but DuBray objected on grounds that the fingerprints were not authenticated pursuant to this rule. The Supreme Court noted that under 44-5-202, the fingerprints were a public record and were thus properly authenticated, so admission of the fingerprints was not an abuse of discretion. St. v. DuBray, 2003 MT 255, 317 M 377, 77 P3d 247 (2003).

Chain of Custody — Sufficiency of Evidence Demonstrating Chain — Faulty Laboratory Procedure: Weeks was convicted of sexual intercourse without consent with his stepdaughter. The conviction was based in part upon serological DNA evidence gained from blood samples taken from Weeks, the stepdaughter, and a child of the stepdaughter. Weeks challenged the admissibility of the samples because one of the samples was mistakenly sent to another laboratory before being forwarded to the correct laboratory and because when a sample of blood was taken from him, the person marking the sample did not follow the requirements of the laboratory manual. Citing St. v. Bradley, 262 M 194, 864 P2d 787 (1993), the Supreme Court held that the state's evidence as to the chain of custody was sufficient even though the blood sample was inadvertently sent to the wrong laboratory. The Supreme Court also held that although the laboratory manual was not complied with, there was sufficient evidence to prove that the sample of blood tested by the laboratory was the blood that was taken from Weeks. St. v. Weeks, 270 M 63, 891 P2d 477, 52 St. Rep. 78 (1995), followed in St. v. Bowser, 2005 MT 279, 329 M 218, 123 P3d 230 (2005).

Chain of Custody — Drugs Under Official Seal: Briner contended that two packets of methamphetamine he allegedly sold were improperly admitted into evidence because there were several fatal gaps in the chain of custody. The state did not offer testimony from the person who mailed the packets from the Sheriff's office to the state crime lab for testing, the person who received them at the crime lab and mailed them back to the Sheriff, or the person at the Sheriff's office who received them from the crime lab and returned them to the evidence locker. However, the time periods in question were after the drugs were in official custody and under seal, and Briner showed no evidence to overcome the resulting presumption that there was no tampering with the drugs. St. v. Briner, 253 M 158, 831 P2d 1365, 49 St. Rep. 402 (1992).

Lack of Testimony That Letter Arrived Inside Envelope — Letter Inadmissible: Defendant sought to introduce into evidence a letter to his wife dated December 1987 and signed by him and an envelope postmarked December 22, 1987, at Redding, California, that would have established that he was out of state for about a month. His mother-in-law testified that she picked up the mail, including the envelope, before Christmas 1987, but she could not testify that the letter was

in the envelope because she did not read her daughter's mail. The wife did not testify at trial. Absent testimony that the letter arrived in the envelope, the letter and envelope were inadmissible because there was no evidence that they were what defendant claimed. St. v. West, 245 M 298, 800 P2d 1047, 47 St. Rep. 2129 (1990).

Proper Foundation Laid for Admission of Audit Materials and Results: A municipal auditor conducted an examination of a City Judge's records, accounts, and reports and discovered discrepancies in money collected and accounted for from tickets. The plaintiff city properly laid the foundation under subsection (b)(7) of this rule for admission of the tickets, a synopsis of the information contained in the tickets, and an examination report prepared by the auditor. Fairview v. Deming, 238 M 496, 778 P2d 876, 46 St. Rep. 1446 (1989).

Difference Between Weapon Described in Search Warrant and Weapon Seized — Insufficient to Deny Admissibility: Defendant contended the weapon described in a search warrant was not what its proponent claimed and did not bear distinctive characteristics or some form of identification required for admissibility under Rule 901(b)(4), M.R.Ev. However, defendant lacked standing to challenge seizure of the weapon, obtained pursuant to a valid search warrant, because he did not demonstrate a property or possessory interest in the apartment searched or in the weapon seized. Further, the weapon was sufficiently identified by testimony, and differences between the weapon described and the weapon seized were not adequate to deny admission into evidence. St. v. Powers, 233 M 54, 758 P2d 761, 45 St. Rep. 1286 (1988).

Admission of Nonexpert Opinion on Handwriting — Familiarity With Writing: Bank officer was permitted to give testimony regarding defendant's signature in criminal trial charging defendant with issuing bad checks. The court held that under this rule of evidence a nonexpert may give his opinion of the genuineness of handwriting if he is familiar with that handwriting. St. v. Fleming, 225 M 48, 730 P2d 1178, 44 St. Rep. 31 (1987).

Chain of Custody Applicable After Acquisition: Defendant was convicted of conspiracy to commit sale of dangerous drugs (now criminal distribution of dangerous drugs) after his son-in-law was apprehended in Texas with marijuana grown on defendant's premises in McCone County. Defendant contended that the state was required to account for the seized marijuana at all times prior to its seizure by law enforcement officials. The chain of custody rule does not require the police or prosecutors to account for the possession of evidence before it comes into their hands. A continuous chain of possession must be established after acquisition of the evidence. If the defendant claims the evidence was tampered with before the prosecution acquired it, he has the burden to show affirmatively that tampering took place. St. v. Walton, 222 M 340, 722 P2d 1145, 43 St. Rep. 1312 (1986), followed in St. v. Conrad, 241 M 1, 785 P2d 185, 47 St. Rep. 32 (1990), and St. v. Southern, 1999 MT 94, 294 M 225, 980 P2d 3, 56 St. Rep. 395 (1999).

Prima Facie Case Showing No Substantial Change in Evidence — Attack of Chain of Evidence at Trial: Defendant questioned whether evidence was properly admitted without the state's establishing a proper chain of evidence. Extensive testimony chronicled the labeling, storing, securing, transferring of possession, and testing of each exhibit. The state made a prima facie case showing that there had been no substantial change in the evidence, and defendant failed to produce any evidence to show if actual or even potential tampering could have occurred. Additionally, defendant vigorously attacked the chain of evidence at trial; thus, the jury had an opportunity to weigh this evidence. The Supreme Court found no abuse of discretion in admitting the evidence. St. v. Grant, 221 M 122, 717 P2d 562, 43 St. Rep. 685 (1986), followed in St. v. Evans, 247 M 218, 806 P2d 512, 48 St. Rep. 170 (1991).

Failure to Object at Trial: In a condemnation action, a landowner objected to the admission of two Highway Department (now Department of Transportation) exhibits on the grounds that the landowner did not believe the exhibits were official records. On appeal, the landowner objected on the basis of lack of foundation. Supreme Court found no error in the admission of the documents and ruled that a party complaining of error must stand or fall on the grounds relied on by the trial court. St. v. DeTienne, 218 M 249, 707 P2d 534, 42 St. Rep. 1557 (1985).

Ready Identification of Evidence — Proper Foundation Laid: In a prosecution of felony theft, although the items are not shown to be in the "chain of custody" for the entire period during which they were stolen, they are uniquely marked and readily identifiable by their owner. Thus, the "chain of custody" is not a foundational prerequisite for their admission in evidence. When introducing a readily identifiable piece of evidence, the foundation is complete if the witness testifies he previously observed the characteristic and presently recalls the characteristic. Only when the item of evidence is so commonplace as to be undistinguishable or not unique is it necessary to lay a chain of custody foundation. St. v. Fox, 212 M 488, 689 P2d 252, 41 St. Rep. 1884 (1984).

Chain of Evidence — Bicycle Ridden by Motor Vehicle Homicide Victims: Defendant purposely hit and killed, with auto he was driving, two persons riding a bicycle. Testimony indicated that investigating officer picked up the bicycle at the scene and that it appeared to be in reasonably the same condition at trial as it was in when he picked it up. There was no indication at trial that it had been tampered with or was in worse condition than when officer picked it up. It was properly admitted in evidence over objection that there was insufficient evidence that it was in the same condition at trial as it was at the scene of the incident and that no chain of evidence establishing to whom it belonged and its condition prior to and after the incident was shown. St. v. Woods, 203 M 401, 662 P2d 579, 40 St. Rep. 533 (1983).

Marked Photograph and Changed Angle of Photographed Door — Evidence Properly Admitted: Where the defendant fired a rifle through a door in his home and was later tried and convicted of aggravated assault on two police officers, the District Court did not err in admitting into evidence photographs on which the bullet holes and shell casings had been circled and a photograph depicting the door open farther than it had been at the time of the incident. The District Courts have wide discretion in admitting photographs. There was no prejudice shown to the defendant by the admittance of the two photographs. St. v. Warnick, 202 M 120, 656 P2d 190, 39 St. Rep. 2369 (1982).

Chain of Evidence — Burden of Proof: The State must identify the particular exhibit as relevant to the criminal charge and must show prima facie that no alteration or tampering with the exhibit has occurred. Once that has been done, the burden of proving alteration shifts to appellant. St. v. Austad, 197 M 70, 641 P2d 1373, 39 St. Rep. 356 (1982).

Chain of Custody of Evidence — Blood Alcohol Test:

Rumley appealed his conviction for negligent homicide. He argued that the court erred in admitting the results of a blood alcohol test because of a break in the chain of possession of the blood sample. He argued that because the police officer did not see the blood sample being drawn, the chain of possession was broken. There was testimony that the police officer gave a vial to a nurse who testified that she drew the blood sample, placed it in the vial, and returned it to the police officer. In light of that testimony, Rumley's claim lacks merit. The State's burden in establishing the chain of custody requires only that the evidence be identified and show prima facie that there has been no substantial change. In this case, the State satisfied its burden. St. v. Rumley, 194 M 506, 634 P2d 446, 38 St. Rep. 1351A (1981).

Blood alcohol test results were admissible in evidence even though there was a discrepancy as to the blood sample seal number, there was a 3-day delay between taking of the sample and its arrival in Helena for analysis, and the sample was left on a desk in the Sheriff's office overnight and no testimony was given as to the overnight period. St. v. Nelson, 178 M 280, 583 P2d 435, 35 St. Rep. 1337 (1978).

Photograph of Rape Victim Held Admissible: Where the defendant was charged with sexual intercourse without consent and offered the defense of consent by the prosecutrix, the trial court did not err in admitting into evidence a photograph depicting linear abrasions or scratches on the victim's back. The longstanding rule in Montana is that a photograph is admissible if it fairly and accurately represents relevant evidence, and it is within the discretion of the trial court to allow into evidence duly verified photographs to aid the jury in factfinding. The prosecution presented a sufficient foundation through the testimony of the nurse who took the pictures. St. v. Mackie, 191 M 138, 622 P2d 673, 38 St. Rep. 86 (1981), cited in St. v. Grant, 221 M 122, 717 P2d 562, 43 St. Rep. 685 (1986). .

Chain of Custody — Adequacy of Foundation Left to Discretion of District Court: Armstrong contends that the State must show a complete chain of custody from the time of the homicide until the introduction into evidence and that if a link in the chain is missing, the exhibit may not be admitted. On appeal, the Supreme Court said that the adequacy of the foundation for admission of such evidence is within the District Court's discretion, and the District Court's determination will not be reversed absent a clear abuse of discretion. The State established a complete chain of custody from the time the evidence was found until it was introduced, and that is sufficient. St. v. Armstrong, 189 M 407, 616 P2d 341, 37 St. Rep. 1563 (1980), followed in St. v. Fox, 212 M 488, 689 P2d 252, 41 St. Rep. 1884 (1984), and in St. v. Christenson, 250 M 351, 820 P2d 1303, 48 St. Rep. 1034 (1991).

Chain of Custody — Evidence Tampering — Burden of Proof: Testimony established prima facie that no one tampered with the evidence while it was in police custody. Once this was shown, the burden of proving tampering shifted to the defendant. The fact that the FBI found no blood on the boots when they were initially examined does not mean that there was no blood on them. It merely means that the FBI did not find the blood in the first instance. This is not proof of

tampering while in police custody. St. v. Armstrong, 189 M 407, 616 P2d 341, 37 St. Rep. 1563 (1980).

Admissibility of Phone Conversation — Voice Identification: Defendant, charged with mitigated deliberate homicide, alleged as error the admission of evidence overheard on an open telephone line because there was no proper authentication as a condition precedent to admissibility. It was argued that there is no inherent reliability to the evidence that the speaker who identified himself to a police officer over the phone was in fact the defendant. The court found that the fact that the deputy was not familiar with the defendant's voice went to the weight, not the admissibility of the testimony. Corroboration of a statement of identity by the caller sufficient to render the conversation admissible against him may be supplied by the evidence: (1) that the subject matter of the call revealed that only the named party would likely have knowledge of those conversation facts; or (2) of other confirming circumstances which make it probable that the named person was, in fact, the speaker. Circumstances preceding or following a telephone conversation may serve to identify the caller sufficiently so as to render telephone communication admissible. The contention that the evidence of the conversation should have been excluded because it did not fall within Rule 901(b)(6), M.R.Ev., is erroneous also, because the conditions stated therein are examples only. St. v. Hamilton, 185 M 522, 605 P2d 1121, 37 St. Rep. 70 (1980).

Admissibility of Voice Identification — Prior Familiarity With Voice: The court adopted the rationale of U.S. v. Vitale, 549 F2d 71 (8th Cir. 1977), certiorari denied, Vitale v. U.S., 431 US 907, 52 L ED 2d 393, 97 S Ct 1704 (1977), which allowed evidence of a voice identification although the witness had never heard the voice prior to the event testified to, and denied defendant's proposition that voice identification evidence is only admissible when the witness has a familiarity with the voice from hearing it at some time prior to the event testified to, or where the voice has some peculiarity or distinctive quality. St. v. Pendergrass, 179 M 106, 586 P2d 691, 35 St. Rep. 1512 (1978).

Law Review Articles

Recent Developments in Montana Law—Evidence—State v. Christenson: Videotape Use: Admission Into Evidence and Into the Jury Room, Hamill & Staley, 54 Mont. L. Rev. 405, 444 (1993).

Montana Supreme Court Survey—Civil Procedure and Evidence, Dyrud, 42 Mont. L. Rev. 343 (1981).

Chain of Custody Requirements in Admissibility of Evidence, Anderson, 37 Mont. L. Rev. 144 (1976).

Authenticating Electronic Mail Messages—Some Evidential Problems, Reed, 52 Mod. L. Rev. 649 (1989).

Voice Identification in Criminal Cases Under Article IX of the Federal Rules of Evidence, Shmulker, 49 Temple L. Q. 867 (1976).

Authentication, Identification and the Best Evidence Rule, La Rocca, 36 La. L. Rev. 185 (1975).

Evidence: Admissibility of Compelled Voice Exemplars and Voice Spectrograms (Comment), 26 Okla. L. Rev. 85 (1973).

Collateral References

AUTHENTICATION OR IDENTIFICATION REQUIREMENT

Evidence *key* 366, et seq.

32 C.J.S. Evidence §§624, 625.

29A Am. Jur. 2d Evidence §§965, 966, 978, 990, 991, 1003, 1004, 1032, 1292; 31A Am. Jur. 2d Expert and Opinion Evidence §§128, 130.

Admissibility of visual recording of event or matter other than that giving rise to litigation or prosecution. 41 ALR 4th 877.

Admissibility of visual recording of event or matter giving rise to litigation or prosecution. 41 ALR 4th 812.

Verification and authentication of bills and invoices under Rule 803(6) of the Uniform Rules of Evidence. 1 ALR 4th 316.

Proof of authorship or identity of sender of telegram as prerequisite of its admission in evidence. 5 ALR 3d 1018.

Authentication or verification of photographs as basis for introduction in evidence. 9 ALR 2d 899, §10 superseded by 41 ALR 4th 812, 41 ALR 4th 877.

7 Wigmore §§2128 through 2135.

HANDWRITING

Evidence *key* 196 through 198, 508, 511, 561, et seq.
32 C.J.S. Evidence §§546(84), 611, et seq.
29A Am. Jur. 2d Evidence §§1215 through 1220, 1383 through 1385; 31A Am. Jur. 2d Expert and Opinion Evidence §§56, 57.
Competency, as a standard of comparison to establish genuineness of handwriting, of writings made after controversy arose. 72 ALR 2d 1274.
Mode and degree of proof required to establish genuineness of handwriting offered as standard or exemplar for comparison with a disputed writing or signature. 41 ALR 2d 575.
3 Wigmore §§693 through 708; 7 Wigmore §1996.

DISTINCTIVE CHARACTERISTICS

Evidence *key* 366, et seq.
32 C.J.S. Evidence §733, et seq.
29A Am. Jur. 2d Evidence §1012; 31A Am. Jur. 2d Expert and Opinion Evidence §102, et seq.
Authentication of organic nonblood specimen taken from human body for purposes of analysis. 78 ALR 5th 1.
7 Wigmore §2148.

VOICE IDENTIFICATION AND TELEPHONE CONVERSATIONS

Evidence *key* 148.
31A C.J.S. Evidence §188.
29 Am. Jur. 2d Evidence §§566, 567, 577 through 582; 29A Am. Jur. 2d Evidence §1478; 31A Am. Jur. 2d Expert and Opinion Evidence §§279, 280.
Identification of accused by his voice. 70 ALR 2d 995.
2 Wigmore §§660, 669; 7 Wigmore §§1977, 2155.

PUBLIC RECORDS OR REPORTS

Evidence *key* 325, et seq.
32 C.J.S. Evidence §626, et seq.
29A Am. Jur. 2d Evidence §§1381 through 1411.
7 Wigmore §§2158, 2159.

ANCIENT DOCUMENTS

Evidence *key* 372.
32A C.J.S. Evidence §743, et seq.
29A Am. Jur. 2d Evidence §§1201 through 1203, 1251, 1252.
7 Wigmore §§2137 through 2146.

Rule 902. Self-authentication.

Commission Comments

This rule is identical to Federal and Uniform Rules (1974) Rule 902 except for changes in paragraphs (2), (4), and (10) which are explained in the Commission Comments for those paragraphs. The Advisory Committee's Note to Federal Rule 902, 56 F.R.D. 183, 337 (1972), indicates that cases and statutes have established a substantial number of instances:

...in which authenticity is taken as sufficiently established for purposes of admissibility without extrinsic evidence to that effect, sometimes for reasons of policy, perhaps more often because practical considerations reduce the possibility of unauthenticity to a very small dimension.

It also notes that while the rule collects these situations in some instances expanding the rules, "in no instance is the opposite party foreclosed from disputing authenticity". *Id.* This rule changes existing Montana law to the extent that there is no provision which encompasses as much as Federal Rule 902.

(1) Domestic Public Documents Under Seal. This paragraph is identical to Federal and Uniform Rules (1974) Rule 902(1). It is based on Rule 44(a)(1) of the Federal and Montana Rules of Civil Procedure. However, that rule of Civil Procedure deals only with proof of official records, not documents under seal. Broad jurisdictional language is common to each provision. The paragraph is consistent with existing Montana law in that it is based upon Rule 44(a)(1), M.R.Civ.P. There are also several statutes which deal with public documents under seal: Section 93-1001-17, R.C.M. 1947 [superseded], provides for the admissibility of judicial records under the seal of the Clerk of Court. Section 93-1101-30 [sic, 93-1001-30], R.C.M. 1947 [superseded], provides in four of its nine subdivisions for the admissibility of official documents as follows:

Subdivision 1, acts of the executive office by the records of the state departments of the states and United States, certified by the Secretary of State; Subdivision 5, acts of a municipal corporation by a certified copy of the legal keeper; Subdivision 6, documents of any other class in this state certified by the legal keeper; and Subdivision 9, documents in the departments of the United States government certified by their legal keeper. Sections 93-1001-33, R.C.M. 1947 [superseded], and 93-1001-34, R.C.M. 1947 [superseded], provide for the admissibility of records of the Justices of the Peace of other states under certificate of authenticity. Section 93-1001-35, R.C.M. 1947 [superseded], provides for other official documents to be admissible under certificate and official seal, and Section 93-1001-36, R.C.M. 1947 [superseded], applies the provisions of the preceding sections to public writings of sister states or public writings of the United States.

(2) Domestic Public Documents Not Under Seal. This paragraph is identical to Federal and Uniform Rules (1974) Rule 902(2), except that the phrase "except as otherwise provided by statute", is added so that the paragraph will be consistent with Montana law. This provision requires that in order for a domestic public document to be self-authenticating, if signed by an officer or employee of the entity included in Paragraph (1) having no seal, then a public officer having a seal with official duties in the same district or political subdivision as the signer must certify and place under seal the former's signature. There are Montana statutes which allow signatures of documents to be presumptive or prima facie genuine or authentic, without the necessity of an officer with a seal certifying its genuineness; for example, Section 4-218, R.C.M. 1947 [16-6-207], which allows an analyst's report and signature to be prima facie evidence of the contents of the report without proof of the appointment of the person or evidence as to the genuineness of his signature. Therefore, in order to be consistent with provisions like this, the paragraph was changed by the addition of the clause.

(3) Foreign Public Documents. This paragraph is identical to Federal and Uniform Rules (1974) Rule 902(3). It is based upon Rule 44(a)(2) of the Federal and Montana Rules of Civil Procedure, but is broader in that it applies to public documents rather than to public records. The paragraph is therefore a slight expansion of existing Montana law. There are several statutes which also allow the admissibility of foreign public documents: Section 93-1001-13, R.C.M. 1947 [superseded], allows evidence of foreign written laws or other public writings; Sections 93-1001-18, R.C.M. 1947 [superseded], and 93-1001-19, R.C.M. 1947 [superseded], provide for the methods of authentication of a judicial record of a foreign country; Section 93-1001-30(4), R.C.M. 1947 [superseded], provides for the admissibility of the acts of the executive of proceedings of the legislature of a foreign country by records under seal; and Section 93-1001-30(8), R.C.M. 1947 [superseded], provides for the documents of any other class of a foreign country to be admissible under the seal of the country.

(4) Certified Copies of Public Records. This paragraph is identical to Uniform Rule (1974) 902(4), which changes Federal Rule 902(4) in the last clause of the paragraph in order to be appropriate for state jurisdictions. This paragraph intended to allow copies of official records or reports to be admissible if properly certified and authorized to be recorded or filed in a public office where any copy of a document complying with Paragraph (1), (2), or (3) or any law of the United States or of this State. This is consistent with existing Montana law which has several statutory provisions for the admissibility of certified copies. Section 93-1001-30(5), R.C.M. 1947 [superseded], provides for the admissibility of acts of a municipal corporation or a board or department by a certified copy of the legal keeper of a record thereof; Section 93-1001-30(6), R.C.M. 1947 [superseded], provides for documents of any class if certified by the legal keeper; Section 93-1001-30(7), R.C.M. 1947 [superseded], for documents of any other class of a sister state if duly certified by the officer having legal custody of the original; Section 93-1001-30(9), R.C.M. 1947 [superseded], for documents in the department of the United States government by a certificate of the legal custodian. Section 93-1001-35, R.C.M. 1947 [superseded], provides for proof of contents of a copy of the writing by a certificate of correctness by the legal keeper. Finally, Section 93-1101-21, R.C.M. 1947 [superseded], provides that certified copies of records are admissible as evidence without further proof when certified and filed or recorded in the county clerk's office.

(5) Official Publications. This paragraph is identical to Federal and Uniform Rules (1974) Rule 902(5), which allows any book, pamphlet, or other publication issued by a public authority to be considered as self-authenticated. This is consistent with many Montana statutes on this subject. Section 93-1101-12, R.C.M. 1947 [superseded], provides that books containing laws of a foreign country or a sister state are to be presumed correct. The provisions of Section 93-1001-30(1), (2), and (3), R.C.M. 1947 [superseded], provide that acts of the executives of this state or the United States, the proceedings of the legislative assembly of this state or Congress or

of the executive or legislatures of sister states may be proven by official publication of those acts or proceedings. Section 93-1301-7(35), R.C.M. 1947 [26-1-602], provides the rebuttal presumption "that a printed and published book, purporting to be printed or published by a public authority, was so printed and published".

(6) Newspapers and Periodicals. This paragraph is identical to Federal and Uniform Rules (1974) Rule 902(6). The Advisory Committee's Note, *supra* 56 F.R.D. at 338, indicates that the likelihood of forgery is slight enough that no danger is apparent in receiving this type of writing. However, it also indicates "establishing the authenticity of the publication, may, of course, leave still open questions of authority and responsibility for items therein contained". *Id.*

This paragraph changes existing Montana law. Section 63-605, R.C.M. 1947 [35-11-202], provides that publication of the name of a partnership is presumptive evidence of the fact stated therein only if there is an affidavit from the printer or publisher of the newspaper. The same provision is found in Section 93-1701-2, R.C.M. 1947 [26-1-1011], concerning publication of notice as required by law. It can also be noted that in Harvey v. Townsend, 57 Mont. 407, 412, 188 P 897 (1920), the court held that a newspaper article was not sufficient evidence that a notice was published unless there was an affidavit of the publisher.

(7) Trade Inscriptions and the Like. This paragraph is identical to Federal and Uniform Rules (1974) Rule 902(7). The Advisory Committee Note, *supra* 56 F.R.D. at 339, indicates that there are several factors justifying self-authentication of this type of writing: "The risk of forgery is minimal. Trade mark infringement involves serious penalties. Great efforts are devoted to inducing the public to buy in reliance on brand names, and substantial protection is given them". It also cites Section 46-606, R.C.M. 1947 [81-3-105], which provides that a copy of the recorded brand is prima facie evidence of the right to exclusive use of the brand. However, Montana cases are not consistent with this exception. In Ashley v. Safeway Stores, Inc., 100 Mont. 312, 323, 47 P2d 53 (1935), on the issue of whether or not the driver of a truck was the agent of the Safeway Company, the Court held that the fact that the name of the Safeway Company appeared on the side of the truck did no more than to create an inference that Safeway was the owner of the truck. To the same effect is Monaghan v. Standard Motor Co., 96 Mont. 165, 173, 29 P2d 378 (1934), except that the defendant's name appearing on the truck, taken with other circumstances, raised a presumption that the driver was acting within the scope of his employment. To the extent that this paragraph allows a presumption of authenticity without further proof, these cases are superseded.

(8) Acknowledged Documents. This paragraph is identical to Federal and Uniform Rules (1974) Rule 902(8). This simply establishes that an acknowledged document is self-authenticating, in accord with existing Montana law. Section 93-1101-19, R.C.M. 1947 [superseded], provides that all private writings, except last wills and testaments, which are acknowledged in the manner provided for acknowledgment of proof of conveyances of real property are prima facie evidence of the execution of the writing. The section providing for acknowledgments of real property is 93-1101-21, R.C.M. 1947 [superseded], which provides that those instruments when acknowledged may be read into evidence without further proof. It should be noted that Angell v. Lewistown State Bank, 72 Mont. 345, 353, 232 P 90 (1925), held that sections relating to proof of private writings, 93-1101-12, R.C.M. 1947 [superseded], and the previously cited sections, did not dispense with the requirement the attesting witness testify as to the execution of the document. However, the interpretation of those sections was dependent upon the existence of what was then Section 10589, R.C.M. 1921, which was subsequently repealed in order to overturn the decision. Finally, as to last wills and testaments, note that Section 91A-2-504, R.C.M. 1947 [72-2-524], provides for a self-proved will, and that the testator and subscribing witnesses execute the will before a notary public so that the will may be admitted to probate under Section 91A-3-406, R.C.M. 1947 [72-3-309], without proof of proper execution.

(9) Commercial Paper and Related Documents. This paragraph is identical to Federal and Uniform Rules (1974) Rule 902(9). The Advisory Committee's Note, *supra* 56 F.R.D. at 339, indicates that despite use of the phrase "general commercial law", it intends certain provisions of the Uniform Commercial Code to be included under this paragraph. Those sections as enacted in Montana are Section 87A-1-202, R.C.M. 1947 [30-1-202], concerned with the genuineness of documents required under an existing contract; Section 87A-3-307, R.C.M. 1947 [30-3-307], concerned with the genuineness of signatures on negotiable instruments; Section 87A-3-510, R.C.M. 1947 [30-3-510], concerned with the admissibility of formed certificates of protest and stamped by the drawee that payment was refused, or bank records as a presumption of dishonor; and Section 87A-8-105(2), R.C.M. 1947 [30-8-105, now repealed], concerning a presumption as to the genuineness of signatures on negotiable instruments.

(10) Presumption Created by Law. This paragraph is identical to Uniform Rule (1974) 902(10). It is an equivalent to Federal Rule 902(10) except that it applies to Montana law, not just Federal law. The paragraph simply incorporates those statutes which allow a document, signature, or other matter to be presumptively or prima facie genuine or authentic. Some examples of statutes allowing this are: Section 7-104, R.C.M. 1947 [32-2-203], providing that evidence of the existence of a building and loan association may be proved prima facie by the certificate issued under state law; Section 62-203(2), R.C.M. 1947 [7-16-4210, now repealed], the minutes of a local board of park commissioners are prima facie evidence of the matters and things contained therein; Section 79-105, R.C.M. 1947 [17-4-103], a report of the state auditor as to accounts of money or personal property belonging to the state is prima facie evidence of the things therein stated; Section 87A-1-202, R.C.M. 1947 [30-1-202], documents required or authorized by contract listed in the section are prima facie evidence of their own authenticity and genuineness; Section 93-1001-12, R.C.M. 1947 [26-1-603], books containing laws are presumed to be correct; Section 93-1001-32, R.C.M. 1947 [26-1-605], entries in official books or records are prima facie evidence of their contents; Section 93-1001-17, R.C.M. 1947 [superseded], entries in certain writings or other private writings of a decedent are prima facie evidence of the facts stated therein; and Section 93-1701-3, R.C.M. 1947 [26-1-1012], certified affidavits of publication are prima facie evidence of the facts stated therein. For other examples of these statutes, see Appendix, Table E [found at compiler's comments for this rule].

COMMISSION COMMENT TO JUNE 1990 AMENDMENT

The revision establishes gender neutral format only. No substantive change.

Compiler's Comments

1990 Amendment: Substituted gender neutral language for gender specific language. Amendment effective June 7, 1990.

Table E: Table E, prepared by the Montana Supreme Court Commission on Rules of Evidence in 1977 as a supplement to Rule 902(10) is as follows:

TABLE E

LIST OF STATUTES ALLOWING DOCUMENTS, SIGNATURES, OR OTHER MATTER TO BE PRESUMPTIVELY OR PRIMA FACIE GENUINE OR AUTHENTIC

Rule 902 of the Montana Rules of Evidence allows certain documents and writings to be admissible without extrinsic evidence of their genuineness or authenticity because the nature of the document or writing is such that lack of genuineness or authenticity is very unlikely. Paragraph (10) of this self-authentication rule is intended to incorporate statutes declaring a document, signature or other matter presumptively or prima facie authentic or genuine; that is, statutes having the same effect as the other paragraphs in Rule 902.

There are several statutes declaring presumptions of authenticity or genuineness, and these are included in this Table. However, there are 260 references in 197 sections of the Revised Codes of Montana, 1947, to the words prima or prima facie. Many of these sections are not concerned with genuineness or authenticity; many allow documents containing certain matters to be prima facie evidence of the existence of those matters, and many allow certain documents and writings to be prima facie evidence of their contents. Because of difficulty in interpretation of these statutes, only the following types are included in this Table: those admitting documents, signatures or other matters as prima facie genuine or authentic; those admitting documents or writings as prima facie evidence of certain facts contained in those documents or writings where there is little contained in them other than those particular facts; and those admitting documents or writings as prima facie evidence of their contents.

This is not intended to be an exclusive list of those statutes qualifying under Rule 902(10), but only a research guide to Montana judges and lawyers. Therefore, the Table is not an authority for whether or not a particular statute admits evidence through self-authentication. All sections are from Revised Codes of Montana, 1947 [M.C.A. references follow in brackets].

Section 3-714(2) [80-3-512, now repealed] states that copies of records, inspection certificates, certified reports and all papers on file with the department of agriculture are prima facie evidence of matters contained therein in the enforcement of the Warehousemen's Act.

Section 3-1727(2) [80-10-303] states that certified copies of the analysis of composition of fertilizer are prima facie evidence of the composition of that fertilizer in the regulation of sale of commercial fertilizer.

Section 3-3307(2) [80-3-608, now repealed] states that copies of records, inspection certificates, certified reports and all papers on file with the department of agriculture are prima facie evidence of matters contained therein in the regulation of produce wholesalers.

Section 4-6-307 [6-6-207] states that in the enforcement of the Liquor Control Act, an analyst's report is prima facie evidence of the facts stated therein.

Section 5-1112 [32-1-532] states that an affidavit of service is prima facie evidence of service of the rejection of a claim or acceptance of a lower priority claim in proceedings liquidating banks.

Section 7-103 [32-2-202] states that a certified copy of the articles of incorporation of a building and loan association is prima facie evidence of the facts stated therein.

Section 7-104 [32-2-203] states that certificates issued to building and loan associations are prima facie evidence of the existence of that association and its capacity to do business.

Section 11-2006 [7-33-2315] states that certificates of membership issued by the secretary of a regularly organized fire department are prima facie evidence of the facts stated therein.

Section 11-3508 [7-3-1317] states that a record of surety bonds and securities for city or town bonds are prima facie evidence of the contents and tenor thereof.

Section 14-408(g) [35-17-202] states that articles of incorporation of marketing cooperatives are prima facie evidence of the facts contained therein.

Section 15-2024(7) [30-10-107] states that certified copies of documents and public records or entries registered by investment commissioners are prima facie evidence of their contents under the Securities Act of Montana.

Section 15-2288 [repealed] states that the Secretary of State's certificates that a corporation has failed to file an annual report is prima facie evidence of the facts stated therein under the Montana Business Corporation Act.

Section 15-2289 [repealed] states that the Attorney General's certificate of mailing of notice that a corporation has failed to file an annual report is prima facie evidence of that notice.

Section 15-22-130 [35-1-1306 repealed] states that all certificates issued by the Secretary of State under the Montana Business Corporation Act are prima facie evidence of the facts stated therein as well as certificates of existence or non-existence of corporations.

Section 15-22-136(c)(17) [35-1-604 repealed], providing limitation on the assessment of shares of capital stock, states that certificates by the secretary of the corporation or auctioneer concerning proof of publication and sale are prima facie evidence of their contents.

Section 15-2352 [repealed] states that certificates of the Secretary of State to the Attorney General that non-profit corporations have failed to file annual reports are prima facie evidence of the facts stated therein.

Section 15-2353 [repealed] states that certificates of the Attorney General of the mailing of notice that a non-profit corporation has failed to file an annual report is prima facie evidence of that notice.

Section 15-2389 [35-2-1105 repealed] states that certificates and certified copies by the Secretary of State of documents filed in his office are prima facie evidence of their contents and the existence or non-existence of a non-profit corporation and its compliance with the Montana Nonprofit Corporation Act.

Section 16-110 [not codified, obsolete] states that survey maps of boundary lines legally made and approved are prima facie evidence of the establishment of such boundary lines.

Section 16-504(2)6. [7-2-2207] states that petitions for creation of new counties are prima facie evidence of the truth of the matters and facts contained therein.

Section 16-1111 [7-21-3106] states that the Stub-Record of Public Weighers shall constitute prima facie evidence of the facts stated therein.

Section 16-2707 [25-3-302] states that the return of the sheriff upon process or notices is prima facie evidence of the facts stated therein.

Section 16-4533 [7-13-2346] states that a certified copy of an order of exclusion from the county sewer and water district recorded with the clerk and recorder is prima facie evidence of that exclusion.

Section 16-4801.1(1) [7-16-2311, now repealed] states that the Board of Park Commissioners' minutes of meetings approved by the Board is prima facie evidence of the matters and facts contained therein.

Section 37-103 [repealed] states that a county clerk's certificate verifying signatures as genuine on a petition for an initiative is prima facie evidence of the facts states therein.

Section 39-106(4) [1-5-105, now repealed] states that documents acknowledged by commissioned officers of the armed services are prima facie evidence of their authority to acknowledge such document.

Section 40-3664 [33-16-113], a provision relating to rate and rating organizations of insurance companies, states that in appeals from the insurance commissioner's orders or

decisions in the district court, findings of fact upon which the order is based are prima facie evidence of the matter stated therein.

Section 46-604 [81-3-103] states that the Department of Livestock record book of brands is prima facie evidence [of] the facts recorded in it.

Section 36-1811 [sic, should be 46-1811] [81-4-513] states that the report of a roundup foreman in charge of a roundup of abandoned horses is prima facie evidence of the facts stated therein.

Section 50-702(4) [82-2-102] states that a verified certificate of location or a certified copy thereof is prima facie evidence of the facts recited therein.

Section 50-704(7) [82-2-103] states that an affidavit of performance of annual work of a mining claim is prima facie evidence of the facts stated therein.

Section 52-314 [repealed] states that the report of the sale of personal property for mortgage foreclosures is prima facie evidence of the facts stated therein.

Section 52-410(2) [71-1-318] states that a recorded trustee's deed under the Small Tract Financing Act is prima facie evidence of the truth of the matter set forth.

Section 62-203(2) [7-16-4210, now repealed] states that the minutes of meetings of park commissioners of cities and towns, approved by the board, shall be prima facie evidence of the matters and things recited therein.

Section 66-102(4) [37-65-201] states that the register for applications for certificates through the Board of Architects is prima facie evidence of the matters contained therein.

Section 66-1019 [37-3-205] states that the register of State Board of Medical Examiners is prima facie evidence of the matters contained in it.

Section 66-1402(5) [37-5-201 repealed] states that the register for the State Board of Osteopathic Examiners for licensed applications, approval and rejections, are prima facie evidence of the matters recorded.

Section 66-2116 [37-52-401 repealed] states that certified abstracts of title by abstracters holding a certificate of authority from the Board of Examiners is prima facie evidence of its contents.

Section 66-2120 [repealed] states that a certified abstract of title by an abstracter holding a certificate of authority from the State Treasurer's office is prima facie evidence of its contents.

Section 69-4412 [50-15-109] states that certificates containing vital statistics filed with the Department of Public Health and Human Services is prima facie evidence of the facts stated in the certificates except that data pertaining to the father of a child is prima facie evidence only if he is the husband of the mother.

Section 79-105 [17-4-103] states that a report of account by the State Auditor of money or personal property which belongs to the State is prima facie evidence of the things therein stated.

Section 84-4121 [15-17-102, now repealed] states that affidavits of publication of notice for tax sales are prima facie evidence of the facts stated therein.

Section 84-4171 [15-8-710] states that the assessment book, duplicate assessment book, or other delinquent tax list is prima facie evidence of the assessment, the property assessed, delinquency, the amount of taxes due and unpaid.

Section 87A-1-202 [30-1-202] states that documents in due form purporting to be a bill of lading, policy or certificate of insurance, official weigher's or inspector's certificate, counselor's invoice, or any other document authorized or required by the contract to be issued by a third party shall be prima facie evidence of its own authenticity and genuineness and the facts stated in the document.

Section 87A-3-307(1)(b) [30-3-307] states when the effectiveness of a signature is put in issue, the signature is presumed to be genuine or authorized except where the signer has died or become incompetent before proof is required.

Section 87A-8-105(2)(b) [30-8-105, now repealed] states that in any action on a security the signature is presumed to be genuine or authorized.

Section 89-2214 [85-8-119] states that affidavits by signers of petitions to create drainage districts that they are acquainted with the locality of the district and the sufficiency of number and qualifications of persons who have signed the petition are prima facie evidence of the facts stated therein.

Section 92-1315(A)(1) [repealed] states that the contents of a report of a pulmonary specialist under the Occupational Disease Act when placed in the record shall constitute prima facie evidence of the facts contained therein.

Section 92-1316 [repealed] states that a report of a pulmonary specialist when silicosis is the cause of death shall constitute prima facie evidence of the facts as to the matters contained therein.

Section 92-1317 [39-72-605, now repealed] states that a report of a pulmonary specialist when another disease is the cause of death shall constitute prima facie evidence of the facts as to the matters contained therein.

Section 93-7602 [3-10-502] states entries in Justice of the Peace's docket certified by the justice or a successor in office are prima facie evidence of the facts so stated.

Section 93-1001-32 [26-1-605] states that entries in public or other official books or records are prima facie evidence of the facts stated therein.

Section 93-1001-38 [26-1-606] states that entries made by an officer or a board of officers or under their direction are prima facie evidence of the facts stated in such entries.

Section 93-1001-39 [26-1-621, now repealed; see, however, 26-1-622] states that certified findings of death under the Federal Missing Persons Act are prima facie evidence of the death of the person therein found.

Section 93-1001-40 [26-1-622] states that an official report of a missing person is prima facie evidence of the status of that person.

Section 93-1101-17 [26-1-607] states certain writings by a deceased person are prima facie evidence of the facts stated therein.

Section 93-1701-3 [26-1-1012] states that a certified affidavit of publication is prima facie evidence of the facts stated therein.

Section 95-1809(2) [46-15-112] states that a judge's certificate that a person is needed as a witness shall be prima facie evidence of the facts stated therein.

Case Notes

Foreign Medical Reports Not Considered Self-Authenticating Public Documents: In an employment discrimination case, Pannoni sought to introduce written medical reports in letter form that contained observational information and opinions regarding Pannoni's medical condition and ability to return to work. The letters were accompanied by written certification that the reports had been prepared as part of a Canadian mental health center's regularly conducted business. Pannoni contended that the records were self-authenticating documents under the authentication procedure for foreign public documents in this rule. The Supreme Court disagreed. Under Palmer v. Farmers Ins. Exch., 233 M 515, 761 P2d 401 (1988), hospital records and medical reports are ordinarily not documents that are self-authenticating and are not considered business records, and even though the reports were from Canada, they were not public documents of a foreign country as contemplated in this rule. Further, the medical expert who authored the reports was not called as a witness, did not give sworn testimony, and was not subject to cross-examination. Thus, the unsworn medical reports were not subject to any hearsay exception and constituted inadmissible hearsay. Pannoni v. Browning School District No. 9 Bd. of Trustees, 2004 MT 130, 321 M 311, 90 P3d 438 (2004).

Admissibility of Government Pamphlets on Alcohol Consumption — Hearsay Exception: In a DUI trial, Department of Justice pamphlets relating to alcohol consumption were admitted in evidence for the limited purpose of showing that they were Department publications. The judge admonished the jury that the pamphlets were not admitted for their accuracy or truth. Defendant argued that they should have been admitted for their content, truth, and accuracy under the public records exception to the hearsay rule. Defendant failed to lay a proper foundation for admission under that exception because he did not show that the pamphlets were derived from the Department's regularly conducted and recorded activities, were published as a result of a duty imposed on the Department by law, or were the result of an investigation made under authority of law. St. v. Thompson, 237 M 384, 773 P2d 722, 46 St. Rep. 887 (1989).

Admissibility of Certified Abstract of Driving History and Copy of Suspension Notification Letter: Once certified as set out in 61-11-102(6), the authenticity of motor vehicle license information is established for purposes of admissibility without extrinsic evidence. Therefore, a certified abstract of driving history was admissible as was a certified copy of a suspension notification letter, which fell within the class of self-authenticating documents under this rule, the public document exception to the hearsay rule under Rule 803, M.R.Ev., and the requirements of the best evidence rule under Rule 1005, M.R.Ev. Taken together, this evidence was sufficient to sustain a conviction for driving with a suspended license. Billings v. Lindell, 236 M 519, 771 P2d 134, 46 St. Rep. 557 (1989).

Authentication of Records by Stipulation — Hearsay Exception: The District Court admitted certain hospital and ambulance records as business records exceptions to the hearsay rule. Ordinarily such documents would not be self-authenticating; however, the defense stipulated to the authenticity of the records and agreed there was no need to call a medical librarian. Admissibility was affirmed because the defense was unable to identify any specific portion of the

records as inaccurate. Palmer v. Farmers Ins. Exch., 233 M 515, 761 P2d 401, 45 St. Rep. 1694 (1988).

Collateral References

Evidence *key* 325, et seq., 361, 381.

32 C.J.S. Evidence §§626, et seq., 717, et seq.

29A Am. Jur. 2d Evidence §§1180, et seq., 1381, et seq.; 32 Am. Jur. 2d Federal Practice and Procedure §442.

1 Wigmore §150a; 5 Wigmore §1684; 7 Wigmore §§2155a, 2158, 2163 through 2168.

Rule 903. Subscribing witness' testimony unnecessary.

Commission Comments

This rule is identical to Federal and Uniform Rules (1974) Rule 903. The rule simply provides that the subscribing witness to a writing need not testify in order to authenticate the writing, unless specifically required by law in the jurisdiction governing the validity of the writing. This is consistent with existing Montana law. The Commission Comments to Rule 902(8) indicates that Section 93-1101-12(3), R.C.M. 1947 [superseded], provides that a subscribing witness may authenticate a writing, but Sections 93-1101-19, R.C.M. 1947 [superseded], and 93-1101-21, R.C.M. 1947 [superseded], provide that acknowledged writings, other than wills, are admissible without further proof. That Comment also indicates that Angell v. Lewistown State Bank, 72 Mont. 345, 353, 232 P 90 (1925), holding the subscribing witness' testimony necessary because of these sections and Section 10589, R.C.M. 1921, has been overruled by the repeal of Section 10589, R.C.M. 1921. The necessity of subscribing witness' testimony concerning wills and last testaments is governed by the Montana Uniform Probate Code, providing in Section 91A-3-303(3), R.C.M. 1947 [72-3-213], that attesting witnesses need not testify in informal probate procedures and providing in Section 91A-3-406, R.C.M. 1947 [72-3-309], that attesting witnesses need testify only when the will is not self-proved in formal probate procedures. The language of the rule allows this statutory requirement to be fulfilled by reference to such laws.

Collateral References

Evidence *key* 374.

32 C.J.S. Evidence §742.

29A Am. Jur. 2d Evidence §§1038, 1039.

4 Wigmore §§1287 through 1321.

Article X
Contents of Writings, Recordings, and Photographs

Article Case Notes

Introduction of Photograph of Exemplar Exhibit Proper as Necessary Foundational Requirement: At trial, plaintiff sought to introduce a photograph of an exemplar vehicle kingpin through an expert, asserting that the purpose for introducing the photograph was to show what the subject kingpin looked like before the accident and to show a kingpin with a properly designed radius. The only foundation laid for admitting the photograph was the expert's testimony that the exemplar kingpin was fundamentally the same design as the subject kingpin, except in terms of radius; however, the expert could not identify the date and source of manufacture of the exemplar kingpin and, without this information, there was no way to know whether the kingpins were in fact substantially the same. The District Court did not err in refusing admission of the photograph and allowing the expert to refer to previously admitted exhibits to illustrate his opinion concerning adequate radiusing. Baldauf v. Arrow Tank & Eng'r Co., Inc., 1999 MT 81, 294 M 107, 979 P2d 166, 56 St. Rep. 337 (1999), distinguishing Simonson v. White, 220 M 14, 713 P2d 983, 43 St. Rep. 133 (1986).

Videotape With Blank Segment and Other Booking — Admissible: During the course of booking for a DUI arrest, the video camera was turned off for a short time to allow an independent investigator to obtain information from the defendant. Because of the interruption, the videotape contained a blank segment followed by a brief segment of a prior unrelated DUI booking. The defendant contended that the videotape was inadmissible because the interruption and the segment on the other booking constituted improper editing of the video. The Supreme Court held that proper foundation was made for the recording and that it was not abuse of discretion for the trial court judge to determine that the appropriate portions of the videotape were admissible. Missoula v. Forest, 236 M 129, 769 P2d 699, 46 St. Rep. 237 (1989).

Admissibility of Videotape — Introduction by Witness Other Than Tape Maker: A videotape will be allowed as evidence "as long as it shows a true representation of the scene at the time in question or any difference is explained". A witness need not be the maker of the videotape to introduce it. Palmer v. Farmers Ins. Exch., 233 M 515, 761 P2d 401, 45 St. Rep. 1694 (1988).

Interpretation of Largely Inaudible Tape Recording by Police — No Prejudice: It was not prejudicial to allow introduction of mostly inaudible tape recordings made with the consent and participation of an informant nor to allow a police officer who was present when the recordings were made to act as an oral transcriber to interpret what was said and what occurred while the tapes were being made. St. v. Morse, 229 M 222, 746 P2d 108, 44 St. Rep. 1919 (1987).

Photographs of Re-Creation of Accident — Substantial Similarity Required: If pictures taken of the re-creation of an accident are "substantially similar" to those at the time of the accident and the re-creation has been properly "foundationed" [sic], there is no abuse of discretion by the trial judge in admitting the evidence where, as here, the party assisting with the re-creation explained to the jury the dissimilarities between the re-creation and the actual incident. Simonson v. White, 220 M 14, 713 P2d 983, 43 St. Rep. 133 (1986), distinguished in Baldauf v. Arrow Tank & Eng'r Co., Inc., 1999 MT 81, 294 M 107, 979 P2d 166, 56 St. Rep. 337 (1999).

Photograph Held Not Prejudicial: Defendant's contention that the State's exhibit, a photograph of the defendant, was improperly admitted by the trial court over defendant's objection on the grounds that "photographs that are calculated to arouse the sympathies or prejudices of the jury are properly excluded, particularly if they are not substantially necessary or instructive to show material facts or conditions", following St. v. Bischert, 131 M 152, 308 P2d 969 (1957), has no merit. The photograph does not arouse anyone's passion or prejudice, nor is it inflammatory. St. v. Hansen, 194 M 197, 633 P2d 1202, 38 St. Rep. 1541 (1981), reversed on fifth amendment grounds in Hansen v. Risley, 40 St. Rep. 2100 (D.C. Mont. 1983)(apparently not reported in Federal Supplement).

Reference to Exhibits Not Introduced — Motion for Mistrial Properly Denied: Where on cross-examination in a prosecution for deliberate homicide, the state's expert witness briefly exhibited snapshot-sized photos of the deceased before the jury but the photos were not introduced as evidence, the court did not err in denying the defendant's motion for a mistrial. The question of whether to declare a mistrial is committed to the sound discretion of the trial court, and the court's decision cannot be reversed except upon a showing of abuse. The court in this case was in the best position to determine whether any of the jurors were actually exposed to the pictures in such a manner as to require a mistrial. The court gave the appropriate cautionary instruction to the jury, and no prejudice was shown by the defendant. St. v. Close, 191 M 229, 623 P2d 940, 38 St. Rep. 177 (1981).

Article Law Review Articles

Can This Photo Be Trusted? Digital Photos Can Be Enhanced to Help Jurors - or Manipulated to Mislead Them. Use Your Digital Images Carefully, and Know When to Challenge Your Opponent's, Imwinkelried, 41 Trial 48 (2005).

Effective Use of Trial Exhibits, Mierzwa, 18 Chi. B.A. Rec. 16 (2004).

Retention, Preservation, and Discovery of Electronic Evidence, Schultz & Lange, 73 Hennepin Law. 16 (2004).

The Brave New World of Electronic Evidence Discovery, Halligan, 92 Ill. B.J. 296 (2004).

"But Judge, I Got It From the Net!"—The Admissibility of Internet Evidence, Posner, 31 Colo. Law. 91 (2002).

Article X: Contents of Writings, Records and Photographs, Berger, 33 The Federal Bar J. 87 (1974).

Article Collateral References

Admissibility in homicide prosecution of allegedly gruesome or inflammatory visual recording of crime scene. 37 ALR 5th 515.

Rule 1001. Definitions.

Commission Comments

This rule is identical to Federal and Uniform Rules (1974) Rule 1001 except that paragraph (5) has been added to retain existing Montana law. These definitions are used extensively throughout the rules that follow in Article X.

(1) Writings and Recordings. Writings and recordings are defined broadly so as to include modern developments in storing and retrieving information. Advisory Committee's Note to Federal Rule 1001(1), 56 F.R.D. 183, 341, (1972). The law in Montana has required the original of

a writing but has never defined the term "writing". Section 93-1101-9, R.C.M. 1947 [superseded]. Therefore this definition is new to and an expansion of existing Montana law.

(2) Photographs. Photographs are defined and included in this rule and Rule 1002, but it should be kept in mind that the rule requiring the production of the original applies to photographs in only a few special cases and not in the usual instance where the witness incorporates a photograph as part of his testimony by identifying it as a correct and accurate representation of what it depicts. Advisory Committee's Note to Federal Rule 1002, *supra* at 56 F.R.D. at 342. Examples of when a photograph is to be included within this rule are: "copyright, defamation, and invasion of privacy by photograph or motion picture... Similarly as to situations in which the picture is offered as having independent probative value, e.g., automatic photograph of bank robber". *Id.* This definition is also new to and an expansion of existing Montana law.

(3) Original. Original is defined to include not only the writing or recording itself, but also "any counterpart intended to have the same effect by a person executing or issuing it". The Advisory Committee's Note to Federal Rule 1001(3), *supra* 56 F.R.D. at 341, states: "In most instances, what is an original will be self-evident... However, in some instances particularized definition is required". It goes on to give an example of a carbon copy of a contract executed in duplicate to show when the counterpart is to be treated as an original. The definition also refers to photographs and computer printouts in the second and third sentences; the intent of these sentences is to conform to "practicality and common usuage [sic]". *Id.*

Existing Montana law has never precisely defined "original". However, in Bond v. Hurd, 31 Mont. 314, 318, 78 P 579 (1904), the court stated the common-law rule of what is an original of a telegram, which is dependent upon whether the telegraph company is the agent of the sender or the receiver. Montana law has also recognized the "duplicate original rule", superseded by this definition, in Morris v. Langhausen, 155 Mont. 362, 365, 472 P2d 860 (1970), which admitted an executed carbon copy of a retail installment sales contract. Therefore, this definition is consistent with existing Montana law as well as expanding the definition into new areas of photographs and computer printouts.

(4) Duplicate. "Duplicate" is defined so that the copy is "produced by methods possessing an accuracy which virtually eliminates the possibility of error". Advisory Committee's Note, *supra* 56 F.R.D. at 341. This means that copies produced manually are not within the definition. *Id.* This definition is used in Rule 1003 to allow duplicates to be admitted unless a question of authenticity is raised or it would be unfair to admit a duplicate. It should also be noted that "what is an original for some purposes is a duplicate for others. Thus, a bank's microfilm record of checks cleared is the original as a record. However, a print offered as a copy of a check whose contents are in controversy is a duplicate". *Id.*

This definition is an expansion of existing Montana law. First, under Section 93-801-5, R.C.M. 1947 [superseded], the Uniform Photographic Copies of Business and Official Records as Evidence Act, photocopies are admissible, but only when the copy is made in the regular course of business and is of business or official records. This definition does not restrict the admissibility of copies to any type of document and does not restrict the purpose for which the copy was made to the regular course of business. Second, insofar as the duplicate original rule, discussed in the Commission Comments to the preceding definition, allows copies to be admissible, it is also superseded by the definition as applied in Rule 1003.

(5) Copies. This definition is based on Section 93-1101-18, R.C.M. 1947 [superseded], which provides: "When an entry is repeated in the regular course of business, one being copied from another or (sic) at or near the time of the transaction, all the entries are equally regarded as originals". It is included here so that it may be made admissible under Rule 1003. The Commission feels that this type of evidence is not admissible under any of the other definitions in Federal Rule 1001. The entry cannot be considered an original because the person making the entry has no such intent, but is carrying on a normal business function of collecting information to be stored in a single record. The entry cannot be considered a duplicate because as previously indicated, duplicates are defined to include only mechanical means of duplication and not manual means. Therefore, this definition is intended to continue existing Montana law contained in the statute.

Case Notes

Police Officer's Testimony Sufficient to Authenticate Photographs of Stabbing Victim to Warrant Admission Into Evidence: Notwithstanding the fundamental notion that a foundation is required for admission of photographs into evidence, there is no authority requiring that the photographer testify. Here, a police officer testified that the photographs in question were taken shortly after a stabbing victim arrived at the hospital and that the photographs were true and

accurate depictions of the victim's wounds. The officer's testimony was sufficient to authenticate the photographs, and the trial court properly admitted the photographs into evidence. St. v. High Elk, 2006 MT 6, 330 M 259, 127 P3d 432 (2006), distinguishing St. v. Newman, 162 M 450, 513 P2d 258 (1973).

Use of Color Slides as Evidence: The probative value of the use of color slides to portray degree of injury in negligent homicide case outweighed any prejudicial effect they may have had, where the reasonableness of the failure to provide medical attention was the controlling issue and where pathologist testified of the need for color photographs in order to accurately explain his findings. St. v. Hoffman, 196 M 268, 639 P2d 507, 39 St. Rep. 79 (1982). See also Lindberg v. Leatham Bros., Inc., 215 M 11, 693 P2d 1234, 42 St. Rep. 137 (1985).

Law Review Articles

Recent Developments in Montana Law—Evidence—State v. Christenson: Videotape Use: Admission Into Evidence and Into the Jury Room, Hamill & Staley, 54 Mont. L. Rev. 405, 444 (1993).

Retention, Preservation, and Discovery of Electronic Evidence, Schultz & Lange, 73 Hennepin Law. 16 (2004).

The Brave New World of Electronic Evidence Discovery, Halligan, 92 Ill. B.J. 296 (2004).

Collateral References

Admissibility in evidence of composite picture or sketch produced by police to identify offender. 23 ALR 5th 672.

Admissibility of duplicates under Rules 1001(4) and 1003 of Federal Rules of Evidence. 72 ALR Fed. 732.

4 Wigmore §§1179 through 1183, 1232 through 1234.

Rule 1002. Requirement of original.

Commission Comments

This rule is identical to Federal and Uniform Rules (1974) Rule 1002 except the exception clause found in those rules is deleted and an exceptions clause previously used in the Rules is substituted. It states the common-law rule that to prove the contents of a writing, the original of that writing is required, unless otherwise provided. The exceptions to this rule of major concern are those found in the rules that follow. Rules 1003 through 1007.

In applying this rule, the purposes of the rule requiring the production of the original should be kept in mind: first, the legal significance of particular words in a document requires the use of the original so that legal rights under those documents are not misinterpreted; second, use of the original prevents, to some degree, fraudulent use of copies; third, mechanical or human errors made in the process of copying are apt to be ignored when copies or other secondary evidence of the original is used; and finally, the use of the original allows a complete view of all that is contained in that document. McCormick, Handbook on the Law of Evidence, 561 (2d ed. 1972).

Further, application of this rule requires that the court determine whether the contents of the writing are being proved. Advisory Committee's Note to Federal Rule 1002, *supra* 56 F.R.D. at 342, offers the following guidelines:

Thus an event may be proved by nondocumentary evidence, even though a written record of it was made. If, however, the event is sought to be proved by the written record, the rule applies. For example, payment may be proved without producing the written receipt which was given. Earnings may be proved without producing books of account in which they are entered... Nor does the rule apply to testimony that books or records have been examined and found not to contain any reference to a designated matter.

This rule is consistent with existing Montana law. Section 93-1101-9, R.C.M. 1947 [superseded], provides: "The original writing must be produced and proved, except as provided in Sections 93-301-1 to 93-2501-3". Section 93-401-12, R.C.M. 1947 [superseded], provides: "There can be no evidence of the contents of a writing, other than the writing itself, except in the following cases". Several cases have also stated this rule. Cohen v. Clark, 44 Mont. 151, 158, 119 P 775 (1911); State v. Cates, 97 Mont. 173, 198, 33 P2d 578 (1934); and Morris v. Langhausen, 155 Mont. 362, 365, 472 P2d 860 (1970).

However, there has been some confusion in many cases on the issue of whether the original document or other evidence was required to prove certain facts. Examples of the confusion are: Whiteside v. Hoskins, 20 Mont. 361, 364, 51 P 739 (1898), held that a party could testify that the judgment which was the basis of the present suit had not been satisfied without introducing court records to that effect. Yet, Spencer v. Spencer, 31 Mont. 631, 641, 79 P 320 (1904), held that it was error to allow a witness to testify that another suit had been dropped without first

introducing court records which would be the best evidence. In State ex rel. Rankin v. Madison State Bank, 77 Mont. 498, 503, 251 P 548 (1926), the court held that oral evidence of the action of a state board was admissible even though a minute book was available and required to be kept by statute. Yet in State ex rel. Haley v. Dilworth, 80 Mont. 111, 116, 258 P 250 (1927), the court held that when a statute requires a minute book to be kept, oral testimony regarding those minutes is inadmissible. The Commission intends Rule 1002 to clarify these cases and that it be applied as in the former cases in each of the examples given; that is, the mere existence of a written record does not mean that it is the only source of evidence to prove the existence of facts or occurrence of events, but when the facts or events are sought to be proved by a writing, unless an exception applies, the original of that writing is required.

Finally, as noted in the Commission Comments to Rule 1001(2), defining photographs, the Commission intends Rule 1002 to apply to photographs in only a few special instances. The Commission does not intend to change the longstanding rule in Montana allowing photographs to be made part of the witness' testimony or illustrative of his testimony to assist the jury in their determinations. Stokes v. Long, 52 Mont. 470, 485, 159 P 28 (1916); Fulton v. Chouteau County Farmers' Bank Co., 98 Mont. 48, 60, 37 P2d 1025 (1934). Under this case law rule, the trial court has the discretion to admit photographs. Gobel v. Rinio, 122 Mont. 235, 238, 200 P2d 235 (1948); Teesdale v. Anchutz Drilling Co., 138 Mont. 427, 357 P2d 4 (1960); and Hackley v. Waldorf-Hoerner Paper Co., 149 Mont. 286, 297, 425 P2d 712 (1967). For other cases on the admissibility of photographs, see Commission Comments to Rule 901(b)(1).

Case Notes

Unexecuted Copy of Prenuptial Agreement Inadmissible as Representation of Executed Agreement: The husband alleged that he lost or at least could not find an original prenuptial agreement and then offered other evidence that a properly executed prenuptial agreement existed that would determine the rights of the parties. The District Court did not limit the introduction of the evidence pursuant to Rule 1004, M.R.Ev., even though that rule pertains to the contents of rather than the actual existence of a document. To prove the content of a writing under this rule, Montana's best evidence rule, the original writing is required; however, under Rule 1004, M.R.Ev., secondary evidence is admissible over a best evidence objection if the requirements of the rule are met and a proper foundation is laid, so the husband's unsigned copy of the allegedly lost original document was admissible. However, the only evidence that the document was ever signed was the husband's testimony of his own recollection, which was rebutted by the wife's testimony that the signing never occurred. The secondary evidence could not establish that an enforceable prenuptial contract, which by definition requires the signatures of both parties, ever existed. Thus, the District Court did not abuse its discretion in determining that the husband failed to present evidence that an enforceable prenuptial contract was executed. In re Marriage of Gochanour, 2000 MT 156, 300 M 155, 4 P3d 643, 57 St. Rep. 619 (2000).

Testimony of Witness Reading From Inadmissible Writing Allowed: The Williamses argued that the lower court erred in allowing Watkins to read from a document during his testimony when the document had already been held to be inadmissible. The Supreme Court ruled that the best evidence rule is inapplicable when the witness testifies about personal knowledge of a matter, regardless of whether the same information may be contained in an inadmissible writing, and that the witness could use the writing to refresh his memory. Watkins v. Williams, 265 M 306, 877 P2d 19, 51 St. Rep. 489 (1994).

Inventory List — Admission Denied but Then Allowed — Rule Not Violated: Defendant contended that the District Court erred in allowing questioning from an inventory list of his belongings allegedly in a trailer at the time of a fire. Admission of the list into evidence was originally denied but subsequently allowed when the court overruled defendant's objection. The "best evidence rule" set out in this rule was not violated because the aim of the questions was to impeach defendant, rather than identify the drafter, and to show the contradiction between defendant's detailed claim of what was in the trailer and the physical evidence remaining after the fire. St. v. Conrad, 241 M 1, 785 P2d 185, 47 St. Rep. 32 (1990).

Statements Read From Transcript — Tape Destroyed — Error to Admit: A police officer conducted a tape-recorded interview with defendant. The tape was recycled after being transcribed. At trial, the police officer read two statements from the transcript over defendant's best evidence rule objection. The Supreme Court held that the transcript was improperly read from because a foundation was not laid in accordance with St. v. Warwick, 158 M 531, 494 P2d 627 (1972). However, since the two statements read from the transcript were consistent with defendant's own testimony, defendant was not prejudiced by the admission of the statements. St. v. Brodniak, 221 M 212, 718 P2d 322, 43 St. Rep. 755 (1986).

Videotape — "Best Evidence" of Transcript: Defendant was charged with felony assault (now assault with a weapon) and sexual intercourse without consent. The alleged victim was a 4-year-old who had been left in his care for several days. The child was determined to be competent and allowed to testify. A police officer who had interviewed and videotaped the child recounted portions of the videotaped interview. In an effort to refresh the officer's memory, defense counsel read from the transcript of the interview. Later, in an apparent effort to discredit the child's testimony, defense counsel again read from the transcript. Over objection by the prosecution, defense counsel entered the transcript into evidence. Subsequently, the prosecution offered the videotape as the best evidence of the transcript. The videotape was admitted and shown to the jury. Defense counsel contended this was error as he was not present to confront and cross-examine the child at the taping. The court held that 46-15-401 (now repealed) and 46-15-402 apply only when videotaped testimony will be used in lieu of testimony by the witness at trial. Here, the child testified at trial. Once the transcript was admitted, it was within the province of the trial court to admit what it considered a more accurate version of the same thing under the "best evidence" rule. St. v. Rogers, 213 M 302, 692 P2d 2, 41 St. Rep. 2131 (1984).

Electronic Recording — Consent of One Party in Conversation: The recording of a conversation between an undercover officer and defendant during a drug sale using a hidden electronic monitoring device that was authorized by court order as required by St. v. Brackman, 178 M 105, 582 P2d 1216 (1978), is not subject to suppression by virtue of 18 U.S.C. 2511(2)(c) and is permitted by 45-8-213, if one of the parties consents to the recording, as the undercover officer did here. The recording being legal, it is then subject only to ordinary rules of admissibility. St. v. Hanley, 178 M 105, 608 P2d 104, 37 St. Rep. 427 (1980), followed in St. v. Brown, 232 M 1, 755 P2d 1364, 45 St. Rep. 818 (1988).

Best Evidence Rule: The best evidence rule applies only when the terms of a writing are material. Here, the precise terms of a lease were not at issue, thus testimony was sufficient and did not offend the best evidence rule. Fish & Game Comm'n v. Cronin, 179 M 481, 587 P2d 395, 35 St. Rep. 1798 (1978).

Law Review Articles

The Use of Videotaped Child Testimony: Public Policy Implications (Symposium on the Rights of Children), Perry & McAuliff, 7 Notre Dame J.L., Ethics & Pub. Pol'y 387 (1993).

Authentication and the Best Evidence Rule Under the Federal Rules of Evidence, Comment, 16 Wayne L. Rev. 195 (1969).

Collateral References

Criminal Law *key* 398 through 403; Evidence *key* 157 through 187.

32A C.J.S. Evidence §§776 through 850.

29A Am. Jur. 2d Evidence §§1049, 1053.

Admissibility of tape recording or transcript of "911" emergency telephone call. 3 ALR 5th 784, §9 superseded by 125 ALR 5th 357.

Admissibility of visual recording of event or matter other than that giving rise to litigation or prosecution. 41 ALR 4th 877.

Admissibility of visual recording of event or matter giving rise to litigation or prosecution. 41 ALR 4th 812.

Admissibility of computerized private business records. 7 ALR 4th 8.

Admissibility of videotape film in evidence in a criminal trial. 60 ALR 3d 333, §§10 through 14 superseded by 41 ALR 4th 812, 41 ALR 4th 877.

Admissibility in evidence of sound recording as affected by hearsay and best evidence rules. 58 ALR 3d 598.

Omission or inaudibility of portions of sound recording as affecting its admissibility in evidence. 57 ALR 3d 746.

Admissibility in wrongful death action, of photograph of decedent made in his lifetime. 74 ALR 2d 928.

Admissibility in evidence, in civil action, of tachygraph or similar paper or tape recording of speed of motor vehicle, railroad locomotive, or the like. 73 ALR 2d 1025.

Admissibility in civil action of electroencephalogram, cardiogram, or other record made by instrument used in medical test, or of report based upon such test. 66 ALR 2d 536.

Admissibility of sound recordings in evidence. 58 ALR 2d 1024, §7 superseded by 57 ALR 3d 746, §§9, 10 superseded by 58 ALR 3d 598.

4 Wigmore §§1177, 1178.

Rule 1003. Admissibility of duplicates, copies of certain entries.

Commission Comments

This rule is identical to Federal and Uniform Rules (1974) Rule 1003 except for the addition of phrases referring to copies of entries made in the regular course of business, defined in Rule 1001(5), and the third clause, "otherwise provided by statute". These changes were made to retain existing Montana law. (See below.) The effect of this rule is to admit duplicates, as defined in Rule 1001(4), as though they were originals unless the conditions of the three clauses in this rule occur. The definition of "duplicate" in Rule 1001(4) is such that duplicates admissible under this rule are those produced under "a method which insures accuracy and genuineness". Advisory Committee's Note to Federal Rule 1003, 56 F.R.D. 183, 343 (1972). Also see Commission Comments to Rule 1001(4). The first two clauses are those contained in the Federal Rule. Clause (1) refers to the situation where the original's authenticity is in question, which, of course, would make the admissibility of a duplicate as questionable as the admissibility of the original, and so in this instance the court may call for the original. Clause (2) refers to situations where it would be unfair to admit the duplicate, for example "when only a part of the original is reproduced the remainder is needed for cross-examination or may disclose matters qualifying the part offered or otherwise useful to the opposing party". Advisory Committee's Note, *supra* 56 F.R.D. at 343. It is imprecisely worded to allow the court discretion to exclude duplicates.

The admissibility of duplicates under this rule represents an expansion of existing Montana law. As noted in the Commission Comments to Rule 1001(4), Montana law admits photocopies under the Uniform Photographic Copies of Business and Official Records as Evidence Act, Section 93-801-5, R.C.M. 1947 [superseded], only where the photocopy is made in the regular course of business and is a copy of either a business or official record. Duplicates can also be seen as admissible under the duplicate original rule recognized in Morris v. Langhausen, 155 Mont. 314, 318, 78 P 579 (1904).

The changes in this rule from the Federal Rule are intended to retain existing Montana law contained in statutes. The first is concerned with Section 93-1101-18, R.C.M. 1947 [superseded], discussed under the Commission Comments to Rule 1001(5), defining copies of entry in the regular course of business. Montana cases which have been concerned with that statute are: Silver v. Eakins, 55 Mont. 210, 218, 175 P 876 (1918), which held a bank ledger was admissible under the statute, copies of that ledger were not; and Smith v. Sullivan, 58 Mont. 77, 87, 190 P 288 (1920), which held that a ledger made from mechanic's time cards was admissible under the statute. It is not believed by the Commission that the imposition of the conditions in the first clauses in this rule is inconsistent with this statute. Second, the third clause was added to take into account existing Montana probate law which requires the original of a will under informal proceedings (Sections 91A-3-301(2)(a), R.C.M. 1947 [72-3-203], and 91A-3-303(1)(e), R.C.M. 1947 [72-3-212]). It should be noted that the Commission considers this Rule consistent with such sections as Section 87A-3-804, R.C.M. 1947 [30-3-804 repealed], an action on allowing a lost instrument if proof of loss is first made.

Case Notes

Blood Alcohol Tests: Where a technician who performed blood alcohol tests, ascertained readings on graphs made by gas chromatograph, and completed test result forms testified at trial and the result forms were introduced in evidence, it was not error to admit the forms without producing the graphs. The forms were admissible as copies in lieu of the graphs under this rule's provision that a copy made in the regular course of business is admissible to the same extent as the original. McAlpine v. Midland Elec. Co., 194 M 154, 634 P2d 1166, 38 St. Rep. 1577 (1981).

Collateral References

Evidence *key* 174(1), 186(6).

32A C.J.S. Evidence §§815, 816, 821.

29A Am. Jur. 2d Evidence §§1053, 1085 through 1089, 1383 through 1388.

Admissibility of computerized private business records. 7 ALR 4th 8.

Photographic representation or photostat of writing as primary or secondary evidence within best evidence rule. 76 ALR 2d 1356.

Admissibility of duplicates under Rules 1001(4) and 1003 of Federal Rules of Evidence. 72 ALR Fed. 732.

4 Wigmore §§1232 through 1234.

Rule 1004. Admissibility of other evidence of contents.

Commission Comments

This rule is identical to Federal and Uniform Rules (1974) Rule 1004. It sets out conditions under which the rule requiring the production of the original need not be followed. The Advisory Committee's Note to Federal Rule 1004, 56 F.R.D. 183, 344 (1972) explains:

Basically the rule requiring the production of the original as proof of contents has developed as a rule of preference: if failure to produce the original is satisfactorily explained, secondary evidence is admissible. The instant rule specifies the circumstances under which production of the original is excused.

It should be noted that the rule does not require any type of secondary evidence to be produced once the absence of the original is explained; that is, "the rule recognizes no 'degrees' of secondary evidence". *Id.* Therefore, once absence of the original is explained, oral evidence, copies, or memoranda concerning the contents of the writing are all admissible. This is consistent with existing Montana law. R.C.M. 1947, Sections 93-401-12 [superseded], 93-1101-9 [superseded], and 93-1101-10 [superseded], provide the exceptions contained in this rule and do not specify types of secondary evidence which may then be used.

(1) Originals Lost or Destroyed. This paragraph is consistent with existing Montana law. Proof of loss or destruction is provided for in Sections 93-401-12(1), R.C.M. 1947 [superseded], and 93-1101-9, R.C.M. 1947 [superseded]. Each of these statutes provide that proof of loss or destruction must first be made to excuse production of the original; case law has construed this to mean that a diligent search has been made for the original and it could not be found. Territory v. Stocker, 9 Mont. 6, 9, 22 P 496 (1889) and Brooke v. Jordan, 14 Mont. 375, 378, 36 P 450 (1894). The standard established is that proof of the loss should be clear and convincing. St. Martin State Bank v. Steffes, 88 Mont. 85, 88 290 P 259 (1930). The burden is upon the proponent of the secondary evidence to prove loss or destruction. Bond v. Hurd, 31 Mont. 314, 319, 78 P 579 (1904). Language in this paragraph not applying it if the proponent lost or destroyed the original in bad faith is apparently consistent with State v. Welch, 22 Mont. 92, 96, 55 P 927 (1899), which held that there was no error in admitting secondary evidence of letters destroyed by the proponent because a reasonable explanation was given for their destruction.

(2) Original Not Obtainable. The fact that the original is not obtainable is consistent with existing Montana law. An interpretation given Section 93-401-12(1), R.C.M. 1947 [superseded], by Nelson v. Gough, 61 Mont. 301, 304, 202 P 196 (1921), held that when a document is beyond the jurisdiction of the court, it is considered to be lost within the meaning of the statute. This case was followed in Dyle v. Kingsbury, 63 Mont. 145, 150, 206 P 364 (1922). It can be noted that an earlier case allowed copies of documents when the original was not within the power or control of the proponent, without referring to the statute. Montana Mining Co., Ltd. v. St. Louis Mining and Milling Co., 20 Mont. 394, 406, 51 P 824 (1898).

(3) Original in Possession of Opponent. This paragraph is consistent with two statutory provisions. Sections 93-401-12(2), R.C.M. 1947 [superseded], and 93-1101-10, R.C.M. 1947 [superseded]. Each of these provisions calls for notice to the adverse party. The paragraph relieves the proponent of producing the original, which is required to some degree for the protection of the adversary, when the adversary is in control of the document and needs no protection.

(4) Collateral Matters. This paragraph is new to and an expansion of existing Montana law. No statute or case could be found which applied this rule. The Advisory Committee's Note to this paragraph, *supra* 56 F.R.D. at 345, explains its intent:

While difficult to define with precision, situations arise in which no good purpose is served by production of the original. Examples are the newspaper in an action for the price of publishing defendant's advertisement, (cite omitted)...and the streetcar transfer of plaintiff claiming status as a passenger...(cite omitted).

Also see McCormick, Handbook on the Law of Evidence, Section 234 at 565 (2d ed. 1972).

COMMISSION COMMENT TO JUNE 1990 AMENDMENT

The revision establishes gender neutral format only. No substantive change.

Compiler's Comments

1990 Amendment: Substituted gender neutral language for gender specific language. Amendment effective June 7, 1990.

Case Notes

Unexecuted Copy of Prenuptial Agreement Inadmissible as Representation of Executed Agreement: The husband alleged that he lost or at least could not find an original prenuptial

agreement and then offered other evidence that a properly executed prenuptial agreement existed that would determine the rights of the parties. The District Court did not limit the introduction of the evidence pursuant to this rule, even though the rule pertains to the contents of rather than the actual existence of a document. To prove the content of a writing under Montana's best evidence rule, Rule 1002, M.R.Ev., the original writing is required; however, under this rule, secondary evidence is admissible over a best evidence objection if the requirements of the rule are met and a proper foundation is laid, so the husband's unsigned copy of the allegedly lost original document was admissible. However, the only evidence that the document was ever signed was the husband's testimony of his own recollection, which was rebutted by the wife's testimony that the signing never occurred. The secondary evidence could not establish that an enforceable prenuptial contract, which by definition requires the signatures of both parties, ever existed. Thus, the District Court did not abuse its discretion in determining that the husband failed to present evidence that an enforceable prenuptial contract was executed. In re Marriage of Gochanour, 2000 MT 156, 300 M 155, 4 P3d 643, 57 St. Rep. 619 (2000).

Best Evidence of Contract Not in Evidence — Existence of Enforceable Contract Not Proved: A trial court did not err in denying recovery for money paid out on a performance bond when: (1) the bond surety failed to admit the original bond or the original rider into evidence and could offer no certainty as to where the originals were and no reason as to why they were not produced; and (2) all oral testimony offered to prove the contents of the contract was disputed. USF&G Co. v. Cromwell, 237 M 72, 771 P2d 970, 46 St. Rep. 631 (1989).

Collateral References

Evidence *key* 185, 781.

32A C.J.S. Evidence §§781, 832.

29A Am. Jur. 2d Evidence §§1054, 1055.

Admissibility of evidence of other offense where record has been expunged or erased. 82 ALR 4th 913.

4 Wigmore §§1192 through 1231, 1252 through 1254, 1265 through 1275.

Rule 1005. Public records.

Commission Comments

This rule is identical to Federal and Uniform Rules (1974) Rule 1005. The Advisory Committee's Note to Federal Rule 1005, 56 F.R.D. 183, 345 (1972), gives the reasons for this exception to the rule requiring production of the original: "Public records call for somewhat different treatment. Removing them from their usual place of keeping would be attended by serious inconvenience to the public and to the custodian". This rule's allowance of certified or compared copies rather than the original is a recognition of degrees of secondary evidence which occurs only with this rule. Note that the second sentence of the rule allows any other evidence of contents if such copies cannot be obtained.

The rule is generally consistent with existing Montana law. Section 93-401-12(3) and (4), R.C.M. 1947 [superseded], provides that the original need not be produced when the original is a record or other document in the custody of a public officer or when the original has been recorded and a certified copy is made admissible by other statutes. This statute also provides that with these subdivisions, "a copy of the original, or of the record, must be produced...". This is inconsistent with the second sentence of the rule which allows any secondary evidence to be admitted if such copies cannot be obtained. Finally, a statement in Gazette Printing Co. v. Carden, 163 Mont. 401, 406, 571 P2d 361 (1973), that "parol evidence of the contents of public records violates the best evidence rule and is inadmissible", is inconsistent with the second sentence and overruled by it.

Case Notes

Admissibility of Certified Abstract of Driving History and Copy of Suspension Notification Letter: Once certified as set out in 61-11-102(6), the authenticity of motor vehicle license information is established for purposes of admissibility without extrinsic evidence. Therefore, a certified abstract of driving history was admissible as was a certified copy of a suspension notification letter, which fell within the class of self-authenticating documents under Rule 902, M.R.Ev., the public document exception to the hearsay rule under Rule 803, M.R.Ev., and the requirements of the best evidence rule under this rule. Taken together, this evidence was sufficient to sustain a conviction for driving with a suspended license. Billings v. Lindell, 236 M 519, 771 P2d 134, 46 St. Rep. 557 (1989).

Law Review Articles

Retention, Preservation, and Discovery of Electronic Evidence, Schultz & Lange, 73 Hennepin Law. 16 (2004).

The Brave New World of Electronic Evidence Discovery, Halligan, 92 Ill. B.J. 296 (2004).

Collateral References

Evidence *key* 158(5), et seq.

32A C.J.S. Evidence §§807, et seq., 872.

29A Am. Jur. 2d Evidence §§1082, 1085, 1180, et seq., 1321, et seq.; 32 Am. Jur. 2d Federal Practice and Procedure §422.

Admissibility of tape recording or transcript of "911" emergency telephone call. 3 ALR 5th 784, §9 superseded by 125 ALR 5th 357.

4 Wigmore §§1215 through 1222, 1224 through 1227.

Rule 1006. Summaries.

Commission Comments

This rule is identical to Federal and Uniform Rules (1974) Rule 1006. It recognizes, as a matter of practicality and convenience, that summaries of admissible documents which are too lengthy to examine during trial may be admitted. This is consistent with Section 93-401-12(5), R.C.M. 1947 [superseded]. This practice has been commended in McCollum v. O'Neill, 128 Mont. 584, 591, 281 P2d 493 (1954). Note that the rule also contains safeguards which allow the adverse party reasonable time to inspect the summary and its original or duplicates to insure that they are accurate and that in any event the judge may order production of the original or a duplicate in court.

Case Notes

Lay Witness's Explanation of Voluminous Documents Admissible Under Rules 602 and 701 and as Summary Under Rule 1006: Cowles brought an action against Sheeline to quiet title to a Montana mining claim. The District Court awarded both Cowles and Sheeline 50% of the shares in the mining company, based in part on the testimony of Don Cowles, Jr. Sheeline argued that Cowles's testimony concerning the number of shares issued by the mining company should not have been permitted because Cowles was not an expert. The Supreme Court found that the record indicated that Cowles did not testify as an expert but only as to his interpretation of his typewritten copy of his father's handwritten notes from the company stock book and as to Cowles's summaries of exhibits already in evidence. These summaries were helpful in explaining many pages of documents to the District Court. The Supreme Court concluded that Cowles's testimony was admissible under Rules 602, 701, and 1006, M.R.Ev. Cowles v. Sheeline, 259 M 1, 855 P2d 93, 50 St. Rep. 653 (1993).

Damage Summary Properly Admitted: In a case to establish the existence of a partnership, an exhibit that summarized damages based on mortgage, insurance, and tax and utility payments made by the plaintiff, the outstanding taxes, and the outstanding balance on the mortgage loan was properly admitted under this rule. This rule does not require that underlying documents be so voluminous that an in-court examination would be impossible, only that the examination would be inconvenient. Barrett v. Larsen, 256 M 330, 846 P2d 1012, 50 St. Rep. 96 (1993).

Collateral References

Evidence *key* 177, 187.

32A C.J.S. Evidence §789.

29A Am. Jur. 2d Evidence §§1059, 1063, 1064.

Admissibility of evidence summaries under Uniform Evidence Rule 1006. 59 ALR 4th 971.

Admissibility of summaries of writings, recordings, or photographs under Rule 1006 of the Federal Rules of Evidence. 50 ALR Fed. 319, superseded by 198 ALR Fed. 427.

4 Wigmore §1230.

Rule 1007. Testimony or written admission of party.

Commission Comments

This rule is identical to Federal and Uniform Rules (1974) Rule 1007. It is a limited version of the common-law rule which allows proof of contents of a document by any admission of the opponent. Advisory Committee's Note to Federal Rule 1007, 56 F.R.D. 183, 346 (1972). Since there is a substantial risk of inaccuracy and the exception is not consistent with the purposes of the rule requiring the production of the original, limitations are imposed so that the admission

by which contents may be proved includes only those made in writing or while testifying. *Id.* There is no Montana law equivalent to this rule, and so it is new Montana law.

COMMISSION COMMENT TO JUNE 1990 AMENDMENT

The revision establishes gender neutral format only. No substantive change.

Compiler's Comments

1990 Amendment: Substituted gender neutral language for gender specific language. Amendment effective June 7, 1990.

Case Notes

Best Evidence of Contract Not in Evidence — Existence of Enforceable Contract Not Proved: A trial court did not err in denying recovery for money paid out on a performance bond when: (1) the bond surety failed to admit the original bond or the original rider into evidence and could offer no certainty as to where the originals were and no reason as to why they were not produced; and (2) all oral testimony offered to prove the contents of the contract was disputed. USF&G Co. v. Cromwell, 237 M 72, 771 P2d 970, 46 St. Rep. 631 (1989).

Collateral References

Evidence *key* 172.
32A C.J.S. Evidence §788.
29A Am. Jur. 2d Evidence §1049, et seq.
4 Wigmore §§1255 through 1257.

Rule 1008. Functions of court and jury.

Commission Comments

This rule is identical to Federal and Uniform Rules (1974) Rule 1008 except that the word "ordinarily" and a second sentence contained in the Federal and Uniform Rules are deleted. That sentence provides that the jury is to make determinations of admissibility, based on the concept of conditional admissibility found in Federal and Uniform Rules (1974) Rule 104(b), for three areas concerned with the rule requiring the production of the original. The Commission deleted this language so that the rule would be consistent with existing Montana law, as expressed in Rule 104(a), that the judge makes all determinations of admissibility of evidence. The concept of conditional admissibility was rejected in Rule 104(b) because it was confusing and inconsistent with existing Montana law and has been rejected wherever it occurs in the Rules. Therefore, this rule is consistent with existing Montana law contained in Section 93-2501-2, R.C.M. 1947 [25-7-102 and 26-1-201].

Collateral References

Evidence *key* 382; Trial *key* 137.
32 C.J.S. Evidence §716; 88 C.J.S. Trial §206.
75 Am. Jur. 2d Trial §§324, 413, 414, 418, 717, 718, 741, 742.

Exclusion of evidence in state criminal action for failure of prosecution to comply with discovery requirements as to physical or documentary evidence or the like—modern cases. 27 ALR 4th 105.

4 Wigmore §§1192, 1194, 1195; 9 Wigmore §2550.

TITLE 27
CIVIL LIABILITY, REMEDIES, AND LIMITATIONS

CHAPTER 1
AVAILABILITY OF REMEDIES — LIABILITY

Chapter Case Notes

Voluntary Act Precluding False Imprisonment Claim — Lack of Underlying Tort Precluding Civil Conspiracy Claim: A woman with breast cancer was advised by Hughes, a radiation oncologist, to undergo therapeutic radiology for the disease. Prior to radiation, an oncologist makes specific marks on the affected area to identify where to direct radiation beams. However, in addition to the marks directing radiation beams, Hughes drew a "smiley face" on the woman's breast by drawing two dime-sized "eyes" above the nipple of the breast and outlining the scar from the breast biopsy for the "mouth". The woman complained to hospital administration, and an ad hoc investigative committee recommended that Hughes receive a letter of reprimand, have a term of probation, have a chaperone while working, and be evaluated by the Montana Professional Assistance Program (MPAP). Hughes agreed to a medical, psychiatric, or chemical dependency evaluation and voluntarily enrolled in two such programs in Texas and Kansas. After release, Hughes signed an aftercare agreement. Hughes then brought suit against the individual members of the ad hoc committee and MPAP, alleging false imprisonment, civil conspiracy, breach of contract, and civil right violations related to the disciplinary actions. Summary judgment was granted to defendants in federal District Court on the civil rights claims, and the remaining charges were remanded to state District Court, where they were also summarily dismissed. Hughes appealed. The Supreme Court affirmed dismissal of the false imprisonment claim because Hughes voluntarily signed the treatment agreements and submitted to evaluation. Two elements of false imprisonment are the restraint of an individual against the individual's will and the unlawfulness of that restraint, but because no material fact existed as to the voluntariness of Hughes's action, the false imprisonment claim failed as a matter of law. Further, to sustain a civil conspiracy claim, plaintiff must allege a tort committed by one of the conspirators, but because the false imprisonment claim failed, there was no underlying tort action to form a basis for civil conspiracy, so that claim failed as well. Hughes v. Pullman, 2001 MT 216, 306 M 420, 36 P3d 339 (2001).

Civil Conspiracy — Elements — Summary Judgment Properly Granted: David, his wife Susan, their minor child, and the parties' defunct business sued Pierce Flooring and others for civil damages, including damages resulting from a civil conspiracy, stemming from criminal acts of vandalism taken against the plaintiffs' competing business. The District Court granted the defendants' motion for summary judgment against David and the other plaintiffs on the civil conspiracy claim. Citing Duffy v. Butte Teachers' Union No. 332, 168 M 246, 541 P2d 1199 (1975), and Grenz v. Medical Management NW., Inc., 250 M 58, 817 P2d 1151 (1991), the Supreme Court stated that the elements of a cause of action for civil conspiracy are: (1) two people (and, as in this case, a person may be a corporation); (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful acts; and (5) damages as the proximate result. The Supreme Court noted that the District Court had held that there was "probably sufficient evidence of elements 1, 2, 4, and 5" but that the plaintiffs failed to prove a genuine issue of material fact as to element 3. After reviewing the record, the Supreme Court held that the District Court correctly concluded that there was no evidence of a "meeting of the minds on the object or course of action" between the defendants. Rocky Mtn. Enterprises, Inc. v. Pierce Flooring, 286 M 282, 951 P2d 1326, 54 St. Rep. 1410 (1997).

Unjust Enrichment — Misconduct by Defendant Required — Denial of Restitution to Defaulting Purchaser: Upon default by purchasers, seller resold the property. Purchasers sought restitution, contending it was unfair to allow seller to be unjustly enriched by selling the property twice. However, restitution is normally denied to a defaulting purchaser. (See *Contract Damages in Montana Part II: Reliance and Restitution*, Burnham, 45 Mont. L. Rev. 1 (1984).) Further, in order for the equitable doctrine of unjust enrichment to apply, plaintiff must show some element of misconduct or fault on the part of defendant. Schweigert v. Fowler, 240 M 424, 784 P2d 405, 47 St. Rep. 1 (1990).

Abuse of Process — What Constitutes: The tort of abuse of process must be proven by a showing of: (1) an ulterior purpose; and (2) a willful act in the use of the process not proper in the regular conduct of the proceeding. Brault v. Smith, 209 M 21, 679 P2d 236, 41 St. Rep. 527 (1984), followed in St. v. Kandarian, 268 M 408, 886 P2d 954, 51 St. Rep. 1381 (1994).

Unjust Enrichment — Recovery for Repudiated Contract Not Barred by Statute of Frauds: Where the plaintiffs failed to make a final payment to the defendant under a lease of property upon which the plaintiffs had spent considerable time and effort to grow wheat and the defendant thereafter wrongfully terminated the lease and retained the proceeds from the sale of plaintiffs' crop, the District Court erred in holding the plaintiffs' claim of unjust enrichment barred by the Statute of Frauds. Where one party repudiates a contract or breaches it by nonperformance, the injured party may seek restitution of the unjust enrichment whether the Statute of Frauds applies or not. Here the defendant breached the lease, and the theory of unjust enrichment applies. Robertus v. Candee, 205 M 403, 670 P2d 540, 40 St. Rep. 1391 (1983).

Material Misrepresentation in Sale of Real Property — Damages Inadequate: Where seller misrepresents the condition of premises to be sold to the extent that over $27,000 in repairs would be needed to bring the premises up to the condition represented and where repairs would result in a prolonged period during which premises could not be used for business, the misrepresentation is material and damages, as opposed to rescission, would be inappropriate. Moschelle v. Hulse, 190 M 532, 622 P2d 155, 37 St. Rep. 1506 (1980).

Chapter Law Review Articles

Compensation of Emotional Distress in Montana: Distinctions Between Bystanders and Direct Victims, Clinch & Johnson, 47 Mont. L. Rev. 479 (1986).

Part 1
General Provisions

Part Case Notes

State Remedy and State Court Enforcement of Contract Wages Required by Federal Davis-Bacon Act: The District Court had subject matter jurisdiction of state contract law claims against a contractor and subcontractors by workers hired to build housing on Malmstrom Air Force base under a contract between the contractor and the Air Force. The workers claimed that they were not paid the prevailing wages required by the federal Davis-Bacon Act. The defendants claimed that there was no private right of action and that the workers had not exhausted their federal administrative remedies. The evidence showed that the workers extensively used the administrative remedies, taking all proper steps to attempt to administratively resolve the dispute. The workers were not seeking to enforce the Davis-Bacon Act labor standards; they sought to enforce a contract that includes wages required by the Act, a subtle but important distinction. The Act does not preempt the workers' right to a state enforcement action, using state remedies, under the facts of this case. That right is in keeping with Montana's longstanding policy and constitutional guarantee in Art. II, sec. 16, Mont. Const., of citizens' access to Montana courts when they are aggrieved. As third-party beneficiaries of the contract, the workers have the right to sue in state court to enforce the contract under state law. Favel v. Am. Renovation & Constr. Co., 2002 MT 266, 312 M 285, 59 P3d 412 (2002).

Comparative Negligence — Requirement to Allocate Liability of Nonparties Unconstitutional: The portion of 27-1-703 requiring a jury to allocate injuries of a foster child to persons who had been released from liability by the claimant, to persons immune from liability, and to other nonparties without any procedural safeguards was stricken as an unconstitutional violation of substantive due process. (See 1995 amendment to 27-1-703.) Newville v. St., 267 M 237, 883 P2d 793, 51 St. Rep. 758 (1994). The 1995 amendments to 27-1-703 did not cure the due process problem created by the absence of a statutory mechanism by which the negligence of nonparties, including third-party defendants released from liability, can be fairly apportioned by a jury. Here, the District Court properly refused to permit the jury to apportion negligence to third-party defendants who were released from liability by plaintiff and who were impecunious and judgment-proof. Cusenbary v. Mortensen, 1999 MT 221, 296 M 25, 987 P2d 351, 56 St. Rep. 864 (1999), distinguishing Whiting v. St., 248 M 207, 810 P2d 1177, 48 St. Rep. 396 (1991). (See 1997 amendment.)

Rescue Doctrine Not Applicable to Door: Bossard injured his arm while lifting a sliding door on Johnson's property back onto its track. The Supreme Court ruled that Bossard could not base his damages claim on the rescue doctrine because the door off its track did not pose an immediate

threat to persons or property. Bossard v. Johnson, 265 M 272, 876 P2d 627, 51 St. Rep. 494 (1994).

Tort of Malicious Defense Not Recognized in Montana: The plaintiff alleged that the defendant had never intended to engage in litigation yet allowed her attorney to indicate to the plaintiff's bank that litigation was pending. This action resulted in certain funds of the plaintiff being held by the bank, thereby damaging the plaintiff's business relations. The plaintiff argued that the defendant's opposition to the suit against her for tortious interference with a business relation constituted the tort of malicious defense. The Supreme Court held that the tort of malicious defense has never been recognized in Montana. The court stated that it was not deciding if the tort should be recognized but that under the facts, the defendant's actions were not malicious and the tort was not applicable. Smith v. Barrett, 242 M 37, 788 P2d 324, 47 St. Rep. 514 (1990).

Part Law Review Articles

Remedies Available to the Purchaser of a Defective Used Car, Burnham, 47 Mont. L. Rev. 273 (1986).

27-1-101. Judicial remedies defined.

Collateral References

Action *key* 1.

1A C.J.S. Actions §1, et seq.

1 Am. Jur. 2d Actions §§39, 45 through 51.

27-1-102. Actions and special proceedings defined.

Case Notes

Challenge to Driver's License Suspension Considered Special Proceeding — Successful Defendant Entitled to Costs: Neal's driver's license was suspended for failure to take a breath test. Neal challenged the suspension, claiming that he did not refuse to take a breath test, and the District Court agreed. Neal's license was reinstated and Neal was granted costs. The state objected to the award of costs, and the District Court amended the original order and denied costs, so Neal appealed. Neal contended that as the prevailing party, an award of costs was proper under 25-10-101(2) because the license was valued at more than $50 or under 25-10-101(4) because the petition to reinstate the license was a special proceeding. The state contended that the particular provisions of 25-10-711 prevailed over the general provisions of 25-10-101, so 25-10-101 did not apply. The Supreme Court disagreed, finding no inconsistency between the statutes. Section 25-10-711 applies to actions in which a party prevails against a government entity and can establish that the government's claim or defense was frivolous or pursued in bad faith, but no such finding is required for recovery of costs under 25-10-101. The court went on to find that Neal's claim that costs were proper based on the license value was unfounded, because no finding of valuation was ever determined. However, the court concluded that a challenge to a driver's license suspension or revocation was a special proceeding pursuant to this section, and that as the prevailing party in the action, Neal was entitled to costs pursuant to 25-10-101. Neal v. St., 2003 MT 53, 314 M 357, 66 P3d 280 (2003).

Order Granting Temporary Guardianship Held Final Order and Special Proceeding for Purposes of Appeal — Noncompliance With Rule 9, M.R.App.P., Excused — Expiration of Temporary Guardianship Held Not to Render Issue Moot: After a District Court twice appointed the same temporary guardians for Kathleen Klos pursuant to 72-5-317, once in writing and once by making an oral order with no documentation except a minute entry entered by the Clerk of Court, Klos filed a motion to set aside the second order of guardianship. The guardians argued that an order appointing a temporary guardian is not subject to appeal and that Klos had not complied with Rule 9, M.R.App.P. (Title 25, ch. 21), because she did not file a transcript of a hearing appointing the guardians. The Supreme Court held that in as much as Rule 1(b)(3), M.R.App.P. (Title 25, ch. 21), does not differentiate between a permanent order and a temporary order, a temporary order qualified as an appealable order. The Supreme Court also held that the temporary order is a "special proceeding", as defined by subsection (2) of this section, for the purposes of Rule 1(b)(1), M.R.App.P., and therefore appealable for that reason as well. Concerning the argument on noncompliance with Rule 9, M.R.App.P., the Supreme Court noted that no transcript could be provided because none was ever made and held that Klos had substantially complied by notifying the Clerk of the Supreme Court of the lack of a transcript and by providing the District Court Clerk's minute entry. Citing Butte-Silver Bow Local Gov't v. Olsen, 228 M 77, 743 P2d 564 (1987), the Supreme Court also noted that just because the order had expired by operation of law did not mean that the issue of appealability was moot because

the guardians had twice been appointed by a temporary order that expired by operation of law and could be appointed in the same manner again. Thus, if the order was not appealable, it would be "capable of repetition, yet evade review". In re Klos, 284 M 197, 943 P2d 1277, 54 St. Rep. 843 (1997).

Release of Real Estate Commission Dependent Upon Outcome of Property Dispute — No Cause of Action Absent Actual Interest in Property: Goodman Realty placed its $10,000 real estate commission in escrow to indemnify Smiths in the event that a particular drainfield easement did not exist. Because release of the commission depended on the resolution of the easement dispute between Smiths and Monson, Goodman Realty argued that its pecuniary interest in the outcome of the dispute created a cause of action between Goodman Realty and Monson. However, Goodman Realty alleged no interest in the property of either Smiths or Monson, its only interest being the release of the indemnification sum, which was wholly unrelated to the property interests at issue. Goodman Realty's complaint did not allege that any legal duty was breached by Monson. Dismissal of the complaint for failure to clearly state a cause of action was proper. Goodman Realty, Inc. v. Monson, 267 M 228, 883 P2d 121, 51 St. Rep. 1074 (1994).

Fees for Creation of a Trust: Petitions filed pursuant to 82-1-302 and 82-1-305 are "special proceedings" within the meaning of 27-1-102, and as such, a fee of $20 is proper to assess for each such proceeding filed. In re Mont. Pac. Oil & Gas Co., 189 M 11, 614 P2d 1045 (1980).

Remedy for Unlawful Environmental Degradation: Unlawful environmental degradation is within the judicial cognizance of the state, and the courts are open to every person for the remedy of lawfully cognizable injuries, including an environmental organization where an injury to its interests is alleged. Mont. Wilderness Ass'n v. Bd. of Health and Environmental Sciences, 171 M 477, 559 P2d 1157 (1976).

Consortium of Spouse: A wife can maintain an action for loss of consortium when such loss is the result of negligent injury to her husband. Duffy v. Lipsman-Fulkerson & Co., 200 F. Supp. 71 (D.C. Mont. 1961), explained in Dutton v. Hightower & Lubrecht Constr. Co., 214 F. Supp. 298 (D.C. Mont. 1963).

Elements of Cause of Action: A cause of action is ordinarily considered as involving the combination of two elements: first, a right on the part of the plaintiff; and second, the violation or infringement of such right by the defendant. Duffy v. Lipsman-Fulkerson & Co., 200 F. Supp. 71 (D.C. Mont. 1961).

Probate Proceedings — Special Proceeding: The administration of an estate of a deceased person is neither an action at law nor a suit in equity, but it is a special proceeding. State ex rel. Reid v. District Court, 126 M 586, 256 P2d 546 (1953).

Will Contest: A will contest is an action, as defined by this section, so as to entitle contestee to demand security for costs by a nonresident contestant, under 25-10-601. State ex rel. Langan v. District Court, 111 M 178, 107 P2d 880, 131 ALR 1474 (1940).

Constitutionality of Statute — Standing to Challenge: One whose interests have not been or are not about to be prejudicially affected by the operation of a statute may not attack the constitutionality of the statute in a court of justice. Holt v. Custer County, 75 M 328, 243 P 811 (1926).

Disbarment Proceeding: A disbarment proceeding not being an action, it must be classified as a special proceeding, for the reason that every remedy sought or administered under statute is classified as by action or special proceeding. In re Wellcome, 23 M 259, 58 P 711 (1899).

Collateral References

Action *key* 20.

1A C.J.S. Actions §115.

27-1-103. Civil and criminal actions.

Case Notes

Punitive Damages Case Considered Civil Action — Requirement That Punitive Damages Award Be Unanimous Unconstitutional: Under Art. II, sec. 26, Mont. Const., in all civil actions, two-thirds of the jury may render a verdict that has the same force and effect as if the entire jury had concurred in the decision. A civil action is prosecuted for the enforcement or protection of a right or the redress or prevention of a wrong. Here, Finstad was injured by asbestos in defendant's mine and sued for redress and to prevent defendant from committing similar wrongful conduct. Thus, Finstad's suit, including the claim for punitive damages, constituted a civil action. Punitive damages are merely a component of recovery of the underlying civil cause of action, imposed as enlarged damages for a civil wrong, not a substitute for criminal punishment. Because punitive damages are civil actions, the portion of 27-1-221(6) that requires that an award of punitive damages be unanimous as to liability and amount directly conflicts with Art.

II, sec. 26, Mont. Const., and is unconstitutional. Finstad v. W.R. Grace & Co., 2000 MT 228, 301 M 240, 8 P3d 778, 57 St. Rep. 934 (2000).

Attorney General's Opinions

Court Reporter Filing Fee — Clerk of District Court to Collect Fee in Appeal From Justice's Court or City Court — Appeal Is "Civil Action" Under Statutes: The Attorney General was asked whether a Clerk of District Court must collect the $20 filing fee, required by 25-1-202 and used to help pay the salary of the court reporter, in appeals filed in District Court from judgments of a Justice's or City Court. The Attorney General concluded that: (1) a private legal action in a Justice's or City Court is a civil action; (2) an appeal from a Justice's or City Court may include appeal of a civil action; (3) an appeal from either of those courts results in most cases in a new trial in District Court and that the need for a court reporter in that instance is obvious; and (4) the payment of the additional $20 filing fee required by 25-1-202 is mandatory. 48 A.G. Op. 1 (1999).

Collateral References

Action *key* 18; Criminal Law *key* 43.
1A C.J.S. Actions §116.
1 Am. Jur. 2d Actions §§26 through 31.

27-1-104. Bases for civil actions.

Case Notes

Lack of Appeal of Federal Agency Decision Not to Affect Contract Rights: Popp had an oral agreement to plant and harvest land owned by Frank and Gountanis. Popp attempted to enroll the land in the federal payment in kind program (PIK) but was informed by the Agricultural Stabilization and Conservation Service (ASCS) that he must have a written lease to be eligible. He never appealed the ASCS decision. Frank later contended that the failure to appeal precluded Popp from collaterally attacking that determination in District Court. The Supreme Court held that Popp's filing of a lawsuit was not a collateral attack on the ASCS decision but rather that the amended complaint showed it was a breach of contract action. The court supported the finding that the PIK program could not be used to destroy Popp's contract rights. Popp v. Gountanis, 221 M 267, 718 P2d 340, 43 St. Rep. 801 (1986).

27-1-105. Obligation defined.

Case Notes

No Showing That Defendants' Actions in School Bus Incident More Than Likely Caused Student's Physical and Mental Injuries — Factors in Judicial Determination of Duty of Care — Summary Dismissal of School District Liability Proper: A student returning home on a school bus from a performance with the school pep band asked the director to stop the bus so that the student could use the restroom, but the director refused. The student was subsequently disciplined by the school for various actions related to the incident and soon after became seriously ill. The student and his parents filed an action against the school district, the director, and the bus driver, alleging that various breaches of the duty of care triggered or accelerated the student's development of diabetes and caused his posttraumatic stress disorder. The District Court granted summary judgment for defendants, and on appeal, the Supreme Court affirmed. The existence of a duty of care depends on the foreseeability of the risk and on a weighing of the policy considerations for and against the imposition of liability, including: (1) moral blame attributable to defendant's conduct; (2) prevention of future harm; (3) extent of the burden placed on defendant; (4) consequences to the public of imposing a duty; and (5) availability of insurance for the risk involved. Further, the law of torts holds a defendant liable only for injuries to others that were to the defendant at the time reasonably foreseeable. A defendant owes a duty with respect to risks and hazards whose likelihood made the conduct unreasonably dangerous and hence negligent in the first instance. The specific injury need not be foreseeable, rather the question is whether defendant could have foreseen that the conduct would result in injury to plaintiff. The District Court here concluded that defendants owed no duty of care because the student's injuries were not foreseeable, which was an erroneous focus on the particular injury rather than on the foreseeability that defendants' conduct could result in the injury. However, if a plaintiff fails to offer proof of any one of the elements of negligence—duty, breach, causation, and damages—then summary judgment in favor of defendant is proper. The question remained whether plaintiffs' experts adequately established causation, and the Supreme Court held that they did not. The experts testified that defendants' conduct could have caused or accelerated the student's injuries, but under Butler v. Domin, 2000 MT 312, 302 M 452, 15 P3d 1189 (2000), the testimony did not meet the threshold of establishing that defendants' actions more than likely

caused the injuries. Absent a causal connection between defendants' actions and the student's injuries, summary judgment for defendants was proper. Hinkle v. Shepherd School District No. 37, 2004 MT 175, 322 M 80, 93 P3d 1239 (2004), distinguishing Kolar v. Bergo, 280 M 262, 929 P2d 867 (1996).

Three-Year Statute of Limitations Applicable to Breach of Bailment Obligation: Pursuant to a breach of a bailment agreement related to the transfer of 10 horses and tack, plaintiff filed a claim for the value of the property, asserting that under 27-2-202(2), 5 years were allowed to bring the claim as a breach of contract. The District Court concluded that the voluntary bailment agreement was not a contract, but rather an obligation, which was governed by the 3-year statute of limitations in 27-2-202(3), and because the claim was not brought within 3 years, summary judgment for defendants was appropriate. On appeal, the Supreme Court affirmed. Regardless of the fact that plaintiff characterized the claim as a breach of contract, there was no evidence of an expressed agreement for sale of the property, so defendants were obligated but not contractually required to account for the property. Plaintiff's election to sue on a contract theory did not operate to grant 2 additional years for plaintiff to assert her rights. The District Court's conclusion that plaintiff's action was not timely was correct. Demarest v. Broadhurst, 2004 MT 147, 321 M 470, 92 P3d 1168 (2004).

No Prejudicial Error in Failure to Give Negligent Homicide Mental State Instruction in Wrongful Death Action When Other Instructions Adequately Reflect Negligence: Samson's son was killed by Bercier, a youth who walked away from a nonsecure, supervised licensed youth group home. Samson sued the state for foreseeable negligence. To boost the theory of foreseeability, Samson offered a jury instruction that defined Bercier's conduct as reckless and postulated therefrom that the conduct was foreseeable because of Bercier's background, seeking to undermine the state's theory that the shooting was an unforeseeable accident. The District Court refused to offer the instruction, instead instructing the jury on elements of wrongful death, and Samson appealed. The state argued that the mental state of Bercier was not a controlling issue and contended that it was not necessary to instruct the jury on the mental state of negligent homicide because the instructions as a whole properly included the key concepts of a wrongful death action. The Supreme Court agreed with the state. The fundamental issue concerned the state's negligence, not Bercier's mental state. Nevertheless, Samson was still able to present the foreseeability theory under the instructions that were given, so failure to give Samson's offered instruction did not result in prejudice to Samson's case. It is within a District Court's discretion to decide how to instruct the jury, taking into account the theories of the contending parties, and absent an abuse of discretion, the District Court was affirmed. Samson v. St., 2003 MT 133, 316 M 90, 69 P3d 1154 (2003). See also Busta v. Columbus Hosp. Corp., 276 M 342, 916 P2d 122 (1996).

State Not Liable for Unforeseeable Accident — Intervening Criminal Act of Third Person — Expert Testimony on Foreseeability Proper: Samson's son was killed by Bercier, a youth who walked away from a nonsecure, supervised licensed youth group home. Samson sued the state for negligence. The jury returned a verdict for the state, and Samson appealed. Rather than retry the case and evaluate the facts to determine whether the state was negligent, the Supreme Court reviewed the verdict to determine if there was substantial evidence to support it and determined that there was. In order to sustain a negligence action, plaintiff must establish a legal duty on the part of defendant, a breach of that duty, causation, and damages. In cases involving a dispute over the intervening criminal act of a third party, foreseeability must be analyzed twice—first with regard to the existence of a legal duty and second with regard to proximate causation. Samson contended that the District Court erred in allowing the state to present evidence in the form of expert testimony and to argue that the shooting was an unforeseeable accident. The state argued that the expert testimony was relevant and aided the jury. Given the need to determine the foreseeability of Bercier's actions, the expert testimony was properly allowed. Further, in cases alleging an intervening cause, juries must be instructed that the specific injury to plaintiff need not have been foreseen. Samson v. St., 2003 MT 133, 316 M 90, 69 P3d 1154 (2003), affirming Lacock v. 4B's Restaurants, Inc., 277 M 17, 919 P2d 373 (1996). See also Lopez v. Great Falls Pre-Release Serv., Inc., 1999 MT 199, 295 M 416, 986 P2d 1081 (1999), and St. v. LaTray, 2000 MT 262, 302 M 11, 11 P3d 116 (2000).

No Tortious Interference With Business When Sublease Terminated Prior to Alleged Interference: Lessee Anderson filed a counterclaim against lessor Grenfell for tortiously interfering with Anderson's sublease of a portion of the leased property. However, the District Court correctly found that Anderson terminated the sublease prior to Grenfell's actions, so Grenfell could not be found to have interfered with a sublease that was no longer in effect. Grenfell v. Anderson, 2002 MT 225, 311 M 385, 56 P3d 326 (2002).

Mortgage Against Party's Interest in Property Granted Pursuant to Dissolution — No Tortious Interference With Business, Prima Facie Tort, or Intentional Infliction of Emotional Distress: When George and Joyce were divorced, the District Court granted George exclusive possession of the ranch until it could be sold and the proceeds divided between the parties. During the course of the dissolution proceedings, Joyce took out several loans for living expenses. After the dissolution, Joyce consolidated the $150,000 in loans, and the bank executed a mortgage on Joyce's interest in the ranch to secure the loan. When George found out about the mortgage and security interest, he became distraught because he believed that he would not be able to obtain loans on the property to enable him to conduct ranch obligations and meet his operations. George subsequently filed suit against Joyce, the bank, and the bank president, who was Joyce's son-in-law, alleging tortious interference with business relationships, prima facie tort, and intentional infliction of emotional distress. The District Court granted the defendants' motion for summary judgment, and George appealed. The Supreme Court affirmed. Applying Farrington v. Buttrey Food & Drug Stores Co., 272 M 140, 900 P2d 277 (1995), the court concluded that the acts of Joyce and the bank were legal and that, standing alone, the acts did not give rise to any presumption or inference that the acts were done to harm George. The court also declined to recognize a separate cause of action for prima facie tort under the facts of this case. Applying Sacco v. High Country Independent Press, Inc., 271 M 209, 896 P2d 411 (1995), the court further concluded that because the defendants' acts were legal, no claim for emotional distress could arise from those acts. Absent material facts evidencing malicious intent or damages, summary judgment was proper. Pospisil v. First Nat'l Bank of Lewistown, 2001 MT 286, 307 M 392, 37 P3d 704 (2001).

Improper Grant of Motion to Dismiss Legal Malpractice Suit for Failure to State Claim Upon Which Relief Could Be Granted: Hauschulz faced criminal charges in Billings, and while awaiting trial, he was extradited to Idaho on unrelated charges and incarcerated. The Michael Law Firm was hired to represent Hauschulz in the Billings proceedings, which Hauschulz could not attend. Instead of moving for dismissal of the charges unless Montana extradited Hauschulz, the law firm professed not to know where Hauschulz was and negotiated an unauthorized plea agreement on behalf of Hauschulz. Upon learning of the law firm's actions, Hauschulz filed a legal malpractice complaint alleging constitutional violations and requesting damages. The District Court dismissed the action on grounds that Hauschulz had failed to state a claim upon which relief could be granted, reasoning that no damages could be awarded because Hauschulz's problems all stemmed from the failure to appear at trial. Hauschulz appealed, and the Supreme Court reversed. A complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief, and a dismissal will be affirmed by the Supreme Court only if plaintiff is not entitled to relief under any set of facts that would support the claim. As set out in Merzlak v. Purcell, 252 M 527, 830 P2d 1278 (1992), to recover damages in a legal malpractice claim, plaintiff must establish that: (1) the professional owed plaintiff a duty of care; (2) the professional breached the duty of care through failure to use reasonable care and skill; (3) plaintiff suffered an injury; and (4) the professional's conduct was the proximate cause of the injury. In this case, the Supreme Court found that each element was satisfied. Hauschulz might be able to prove a set of facts that would entitle him to relief and has stated a sufficient claim to survive a challenge under Rule 12(b), M.R.Civ.P. (Title 25, ch. 20). Hauschulz v. Michael Law Firm, 2001 MT 160, 306 M 102, 30 P3d 357 (2001). See also Trankel v. St., 282 M 348, 938 P2d 614 (1997).

Double Analysis of Foreseeability in Dispute Over Intervening Act of Third Party — Duty of Police to Protect Hospital Worker From Intoxicated Person in Voluntary Custody: Havre police received a report of two girls fighting downtown. They responded and found two intoxicated women fighting, one of whom appeared to require medical treatment. LaTray was working as a nurse at a hospital emergency room when police officers delivered the woman for treatment, accompanied by her sister. The injured woman was placed in protective custody, but neither woman was arrested. When attempting to administer medical care to the injured woman, LaTray was intentionally assaulted and injured by the sister, and LaTray filed an action against the city police officers for negligently failing to exercise proper control over the sister. The District Court found that because the intentional assault was not reasonably foreseeable as a matter of law, there was no duty owed LaTray by the city, and summary judgment was granted to the city. The Supreme Court held that intervening criminal acts of third persons are not automatically unforeseeable as a matter of law, but rather must be addressed in the foreseeability context on a case-by-case basis (see Starkenburg v. St., 282 M 1, 934 P2d 1018 (1997)). Although foreseeability is ordinarily analyzed only under the duty element of

negligence, in a dispute over intervening criminal acts of a third party, foreseeability must be analyzed twice: first with regard to the existence of a legal duty and, second, with regard to proximate causation (see Lopez v. Great Falls Pre-Release Serv., Inc., 1999 MT 199, 295 M 416, 986 P2d 1081 (1999)). The city relied on Phillips v. Billings, 233 M 249, 758 P2d 772 (1988), arguing that because LaTray did not claim the existence of a special relationship or otherwise show that the officers owed LaTray a greater duty of care than that owed to the general public, the city owed LaTray no duty of care. The Supreme Court noted that Phillips has been clarified in Nelson v. Driscoll, 1999 MT 193, 295 M 363, 983 P2d 972 (1999), which stated that a duty to protect third persons arises only when a police officer actually makes an arrest or otherwise takes possession or custody of an individual. Although the officers did not actually arrest the sister or otherwise have a basis for taking her into custody in this case, the officers voluntarily undertook possession or custody in transporting her to the hospital and consequently harbored the ability to control her actions and prevent an unreasonable risk of harm to third persons like LaTray, who falls within the scope of the risk that negligent supervision would foreseeably entail. Thus, the Supreme Court held that, as a matter of law, the city owed a duty of reasonable care to adequately supervise the sister so as to prevent harm to a third person who would foreseeably be placed within the scope of risk arising from negligent supervision. Whether the city breached that duty is an issue for the jury because the causal issue of intervening acts of third parties normally involves questions of fact. Viewed in the light most favorable to LaTray, there was sufficient evidence of the sister's irascible conduct to raise a jury question as to whether she posed a danger to those around her on the day in question, and reasonable jurors could differ as to whether she presented a foreseeable risk of injury to persons in her immediate vicinity. These contested issues of material fact precluded a grant of summary judgment as a matter of law, and the case was reversed and remanded for a new trial. LaTray v. Havre, 2000 MT 119, 299 M 449, 999 P2d 1010, 57 St. Rep. 497 (2000). See also Morrow v. FBS Ins. Montana-Hoiness LaBar, Inc., 230 M 262, 749 P2d 1073 (1988), and Estate of Strever v. Cline, 278 M 165, 924 P2d 666 (1996).

No Duty Constituting Negligence When Danger or Risk Unforeseeable — Summary Judgment Proper Absent Material Fact Regarding Legal Duty: The father could not reasonably foresee that, by giving his child permission to go to a friend's house to play, the child would go to the house of a different friend, participate along with other children in burning a photograph using gasoline, and be burned when another friend accidentally kicked the container of flaming gasoline onto his child. The duty element of negligence turns primarily on foreseeability, and if a reasonably prudent defendant can foresee neither any danger of direct injury nor any risk from an intervening cause, there is no negligence. Ordinarily, negligence actions involve questions of fact and are not susceptible to summary judgment, but in this case, reasonable minds could not differ regarding the absence of material fact regarding any duty owed by the father, so summary judgment was proper as a matter of law. Poole v. Poole, 2000 MT 117, 299 M 435, 1 P3d 936, 57 St. Rep. 489 (2000), following Busta v. Columbus Hosp. Corp., 276 M 342, 916 P2d 122 (1996). See also Lopez v. Great Falls Pre-Release Serv., Inc., 1999 MT 199, 295 M 416, 986 P2d 1081 (1999).

Tort of Intentional Interference With Business Relations or Prospective Economic Advantage — Contract Between Parties Not Required: The elements of the tort of intentional interference with prospective economic advantage are identical with the tortious or intentional interference with contractual relations, consisting of acts that: (1) are intentional and willful; (2) are calculated to cause damage to plaintiff's business; (3) are done with the unlawful purpose of causing damage or loss without right or justifiable cause on the part of the actor; and (4) result in actual damages or loss. The key difference between the two tort theories is that unlike interference with contractual relations, intentional interference with either business relations or prospective economic advantage does not require that a contract exist between any of the involved parties. Rather, the focus of the legal inquiry is on the intentional acts of the malicious interloper in disrupting a business relationship, and "business" includes the reasonable expectation of entering into a valid business relationship. Under the theory of intentional interference with either business relations or prospective economic advantage, a person who is involved in an economic relationship with another or who is pursuing reasonable and legitimate prospects of entering such a relationship is protected from a third person's wrongful conduct that is intended to disrupt the relationship. Maloney v. Home & Inv. Center, Inc., 2000 MT 34, 298 M 213, 994 P2d 1124, 57 St. Rep. 144 (2000). See also Buckaloo v. Johnson, 537 P2d 865 (Calif. 1975), Bolz v. Myers, 200 M 286, 651 P2d 606 (1982), Ellis v. Valdez, 686 P2d 700 (Alaska 1984), and Sebena v. Am. Auto. Ass'n, 280 M 305, 930 P2d 51 (1996).

Special Relationship of Custody or Control by Prerelease Center — Responsibility for Public Safety Within Zone of Risk — Foreseeability: A prerelease center entered a contract with the Department of Corrections to supervise residents like Gardipee, who walked away from the center and subsequently injured Lopez. The District Court granted summary judgment for the center on grounds that the attack on Lopez was unforeseeable. Generally, there is no duty to protect others against harm by third persons, but in this case, the contract created a special relationship of custody or control, in turn creating a special responsibility upon the center to protect those members of the public who would be placed within the foreseeable zone of risk created by negligent supervision of a prerelease resident. As a matter of law, the center owed a duty of reasonable care to all persons present within the zone of danger created by the center's failure to exercise reasonable care in supervising Gardipee. Here, reasonable minds could differ as to whether it was reasonably foreseeable by the center that a failure to supervise Gardipee could pose an unreasonable risk of harm to Lopez in particular. There was a genuine issue of material fact as to whether the center knew or should have known that there was enmity between Gardipee and Lopez and a possibility of violence if Gardipee escaped, as well as whether Gardipee's attack was a superseding cause of the harm to Lopez. Both questions were suitable for resolution by a trier of fact, precluding summary judgment. The Supreme Court reversed and remanded for a trial on the merits. Lopez v. Great Falls Pre-Release Serv., Inc., 1999 MT 199, 295 M 416, 986 P2d 1081, 56 St. Rep. 771 (1999).

Foreseeability to Be Considered Part of Analysis of Duty: The trial court refused to give Columbus Hospital's proposed jury instruction on proximate cause and also did not instruct the jury on foreseeability even though the hospital contended that the Supreme Court had included foreseeability as an element of proximate cause in Kitchen Krafters, Inc. v. Eastside Bank of Mont., 242 M 155, 789 P2d 567 (1990). The Supreme Court, after a lengthy discussion of duty, proximate cause, and foreseeability and after examining the statutory definitions of duty and proximate cause, held that foreseeability is to be considered as part of the analysis of duty rather than proximate cause. The Supreme Court further held that it was reversing that part of Kitchen Krafters that requires a two-tiered analysis of causation that includes consideration of foreseeability in cases other than those cases in which there has been an allegation that the chain of causation is severed by an independent, intervening cause. Busta v. Columbus Hosp. Corp., 276 M 342, 916 P2d 122, 53 St. Rep. 428 (1996), followed in Lopez v. Great Falls Pre-Release Serv., Inc., 1999 MT 199, 295 M 416, 986 P2d 1081, 56 St. Rep. 771 (1999), and Poole v. Poole, 2000 MT 117, 299 M 435, 1 P3d 936, 57 St. Rep. 489 (2000).

Failure of Attorney to Obtain Title Report: The plaintiffs had retained the defendant to draft a real estate purchase agreement for them. The attorney (defendant) suggested that the seller place a title report in escrow. The buyers (plaintiffs) failed to obtain the title report, and subsequently they lost the property when they were unable to refinance it because of a defect in the legal description. The Supreme Court affirmed that the attorney owed no duty to the plaintiffs beyond drafting the purchase agreement. Boles v. Simonton, 242 M 394, 791 P2d 755, 47 St. Rep. 793 (1990).

Oral Lease as Contract Establishing Obligations: An oral farm lease under which both parties recognized and fulfilled responsibilities relating to crop sharing, farming methods, and farm subsidy programs for 15 years was a sufficient contract through which each party acquired its respective obligations and breach of which formed a proper basis for award of damages and costs of suit. Albers v. Bar ZF Ranch, Inc., 229 M 396, 747 P2d 1347, 44 St. Rep. 2081 (1987).

Proper Quantum for Architect's Services: Under a contract with a landowner who wished to build housing units on the land, an architect prepared plans and specifications that were approved by landowner. Under the contract, the architect was to receive 5% of the construction cost. Following abandonment of the project, he was entitled to a fee based on quantum meruit. The proper recovery was the number of hours of service, 600, times the architect's hourly rate, $30, or $18,000. It was improper for the court to hold that the architect was entitled to only $10,000 based on the value of his services. Kenneth D. Collins Agency v. Hagerott, 211 M 303, 684 P2d 487, 41 St. Rep. 1375 (1984).

Breach of Contract — Interference With Business: Defendant breached a contract to sell business property to plaintiff and not to compete and subsequently interfered with the conduct of plaintiff's business. Defendant is liable not only for breach of the contract between himself and plaintiff but also for the tort of intentional interference with a contractual or business relationship between plaintiff and his potential customers. Bolz v. Myers, 200 M 286, 651 P2d 606, 39 St. Rep. 1747 (1982), followed in Farrington v. Buttrey Food & Drug Stores Co., 272 M 140, 900 P2d 277, 52 St. Rep. 667 (1995).

Attorney General's Opinions

Encumbrance of Funds — Valid Obligation: The Coal Board may encumber funds at the close of a fiscal year only by incurring a "valid obligation" against them under 17-7-302. The Coal Board does not incur a valid obligation against its appropriation by inviting a full application for a grant after screening a preapplication since it is not legally bound to approve the application. 40 A.G. Op. 4 (1983).

27-1-106. Injury defined.

Case Notes

Interest Properly Imposed on Restitution Obligation: Brewer embezzled over $96,000 and was ordered to pay restitution to the employer, including 10% interest on the restitution obligation. Brewer contended that interest in this case was per se an abuse of discretion insofar as it exceeded the employer's pecuniary loss. The issue of whether interest may be properly applied to restitution under 46-18-241 was a case of first impression in Montana. Interest is not expressly provided for by the restitution statute, which provides for restitution to a victim who suffers a pecuniary loss, defined in 46-18-243 as special damages, but not general damages, that a person could recover in a civil action arising out of the facts constituting the criminal activity. Interest is a special damage available in a civil action under 27-1-210 and thus was properly applied to Brewer's restitution. However, interest is not allowed on damages such as pain and suffering, mental anguish or suffering, or punitive damages. St. v. Brewer, 1999 MT 269, 296 M 453, 989 P2d 407, 56 St. Rep. 1090 (1999).

Liability for Issuance of Conflicting Title Insurance Policies — Due Diligence Standard Applicable to Title Examination Resulting in Loss: Based on information in Realty Title Company's (Realty's) own records and abstract plant, a reasonably diligent inquiry would have disclosed that a survey had been completed and filed of record for purposes of defining the tract of land covered by the Turks' policy. When Realty later insured Weibert for the same tract, it violated the rule in Lipinski v. Title Ins. Co., 202 M 1, 655 P2d 970, 39 St. Rep. 2283 (1982). Realty's own record and abstract plant put it on sufficient notice of a possible defect in Weibert's title, and Realty was therefore obligated to inquire further prior to issuing a title insurance policy insuring the same tract. Failing twice to do so, Realty breached the obligation under the agency contract to exercise due diligence in the title examination and was liable for the subsequent loss. Old Republic Nat'l Title Ins. Co. v. Realty Title Co., 1999 MT 69, 294 M 6, 978 P2d 956, 56 St. Rep. 286 (1999).

Title Insurers' Failure to Disclose Easements — Insured's Pecuniary Loss: Landowner suffered a substantial pecuniary loss when his title insurers failed to inform him of ditch rights and easements that landowner had to pay $46,000 to purchase in order to remove the defects to his title. Lipinski v. Title Ins. Co., 202 M 1, 655 P2d 970, 39 St. Rep. 2283 (1982). The Lipinski rule, requiring due diligence in title examination, was applied in Old Republic Nat'l Title Ins. Co. v. Realty Title Co., 1999 MT 69, 294 M 6, 978 P2d 956, 56 St. Rep. 286 (1999).

Breach of Contract — Interference With Business: Defendant breached a contract to sell business property to plaintiff and not to compete and subsequently interfered with the conduct of plaintiff's business. Defendant is liable not only for breach of the contract between himself and plaintiff but also for the tort of intentional interference with a contractual or business relationship between plaintiff and his potential customers. Bolz v. Myers, 200 M 286, 651 P2d 606, 39 St. Rep. 1747 (1982), followed in Farrington v. Buttrey Food & Drug Stores Co., 272 M 140, 900 P2d 277, 52 St. Rep. 667 (1995).

27-1-107. Kinds of relief — when given.

Case Notes

Available Remedies When No Contractual Limitation: In the absence of a contractual provision expressly limiting the remedies available, a party may pursue any remedy that law or equity affords, as well as the remedies specified in the contract. Glacier Campground v. Wild Rivers, Inc., 182 M 389, 597 P2d 689 (1978).

Unlicensed Photographers: The taking of photographs, either by licensed or unlicensed photographers, not being a nuisance, an injunction could not be had to prevent the activities of unlicensed photographers. St. Bd. of Examiners v. Keller, 120 M 364, 185 P2d 503 (1947).

Collateral References

Action *key* 16.

1A C.J.S. Actions §27, et seq.

Part 2
Damages

Part Case Notes

Violation of Federal Railroad Safety Regulations Negligence Per Se — Evidence of Contributory Negligence Disallowed: Railroad employee Woods accompanied track supervisor Holloway to inspect a section of track. Holloway exceeded the authorized limits of the track warrant and proceeded another 4 miles down the track where the inspection vehicle was struck by a train and Woods was killed. Following an investigation, the railroad concluded that Holloway's violation of the working limits caused Woods's death. Woods's widow moved for partial summary judgment that the railroad was negligent per se, but the motion was denied. The widow then requested a ruling that Woods was not contributorily negligent, but the motion was denied as untimely. The jury found that Woods was 50% negligent, and the award to the widow was reduced by half. On appeal, the Supreme Court reversed. The Federal Employers' Liability Act (FELA) governing the case is a remedial statute, the specific intent of which is to prevent railroad accidents and casualties. Federal railroad administration regulations are reviewed and construed as a comprehensive scheme of protection for railroad workers, and an interpretation of federal railroad administration regulations that leads to an unreasonable or absurd result will be rejected in favor of an interpretation that leads to a reasonable result. To conclude that federal railroad administration regulations define working limits but do not prohibit exceeding them would lead to an absurd result. Thus, the trial court erred in concluding that violation of the working limits of the track warrant was not negligence per se. FELA also provides that an employee will not be held liable for contributory negligence when a railroad's violation of any statute enacted for the safety of employees contributed to an employee's injury or death, and the restriction against the use of contributory negligence as a defense applies to regulation violations as well, so it was also error for the trial court to allow the railroad to argue Woods's contributory negligence. The case was remanded for judgment reinstating the entire jury award. Woods v. Burlington N. & Santa Fe Ry., 2004 MT 332, 324 M 151, 104 P3d 1037 (2004), following Bevacqua v. Union Pac. RR Co., 1998 MT 120, 289 M 36, 960 P2d 273 (1998).

Award of Injunction and Damages in Same Case — No Error: A subdivision developer was found to have been negligent and in breach of contract with the purchaser of two subdivision lots for failing to record a restrictive covenant prohibiting commercial use and for the resulting diminution in property value when another subdivision tenant operated an auto body shop in the subdivision. The jury held the developer liable for damages, and a permanent injunction was issued against the auto body shop operator, who complained that the award of both damages and an injunction resulted in double recovery. The Supreme Court disagreed. Montana law does not prohibit awarding money damages and an injunction in the same case. Both were justified here, and the award of both was affirmed. Rice v. C.I. Lanning, 2004 MT 237, 322 M 487, 97 P3d 580 (2004).

No Duty to Defend Property Damage or Fraud Claim When No Property Damage or Fraud Asserted: Defendant contended that plaintiff insurer had a duty to defend and provide coverage under defendant's commercial general liability policy, which provided coverage for property damages. However, the claim did not seek compensation for property damages for physical injury to tangible property, but rather for sums fraudulently paid to defendant based on a breach of contract. Because allegations in the complaint did not set forth facts that brought the event within the policy provisions and specifically excluded coverage for a fraud claim, the insurer had no duty to defend the claim. Generali-U.S. Branch v. Alexander, 2004 MT 81, 320 M 450, 87 P3d 1000 (2004), following Graber v. St. Farm Fire & Cas. Co., 244 M 265, 797 P2d 214 (1990).

No Error in Giving Jury Instructions Regarding Intervening Cause When Jury Did Not Consider Issue: Pula sued the state for negligence related to an incident of rape of Pula by another inmate while Pula was incarcerated in Blaine County jail. The District Court's special verdict form required jurors to answer a series of questions on breach of duty, causation, and damages, and then, depending on the answers, to move on to succeeding questions, one of which was the issue of whether there was an intervening cause. Pula asserted error in that the instructions on independent intervening causation were incorrect statements of the law. However, the first question for the jury was whether the state was negligent, which was answered affirmatively, so the jury moved on to the second question, which was whether the negligence resulted in Pula's injuries. The answer was negative, so the jury was instructed not to consider the third question, which was whether there was an intervening cause. Because the jury never considered the issue of intervening cause in reaching its verdict, the instructions on intervening cause had no effect on the outcome of the trial. The Supreme Court declined to assign

reversible error to instructions addressing an issue that was never reached. Pula v. St., 2002 MT 9, 308 M 122, 40 P3d 364 (2002). See also Stenberg v. Neel, 188 M 333, 613 P2d 1007 (1980).

Improper Grant of Motion to Dismiss Legal Malpractice Suit for Failure to State Claim Upon Which Relief Could Be Granted: Hauschulz faced criminal charges in Billings, and while awaiting trial, he was extradited to Idaho on unrelated charges and incarcerated. The Michael Law Firm was hired to represent Hauschulz in the Billings proceedings, which Hauschulz could not attend. Instead of moving for dismissal of the charges unless Montana extradited Hauschulz, the law firm professed not to know where Hauschulz was and negotiated an unauthorized plea agreement on behalf of Hauschulz. Upon learning of the law firm's actions, Hauschulz filed a legal malpractice complaint alleging constitutional violations and requesting damages. The District Court dismissed the action on grounds that Hauschulz had failed to state a claim upon which relief could be granted, reasoning that no damages could be awarded because Hauschulz's problems all stemmed from the failure to appear at trial. Hauschulz appealed, and the Supreme Court reversed. A complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief, and a dismissal will be affirmed by the Supreme Court only if plaintiff is not entitled to relief under any set of facts that would support the claim. As set out in Merzlak v. Purcell, 252 M 527, 830 P2d 1278 (1992), to recover damages in a legal malpractice claim, plaintiff must establish that: (1) the professional owed plaintiff a duty of care; (2) the professional breached the duty of care through failure to use reasonable care and skill; (3) plaintiff suffered an injury; and (4) the professional's conduct was the proximate cause of the injury. In this case, the Supreme Court found that each element was satisfied. Hauschulz might be able to prove a set of facts that would entitle him to relief and has stated a sufficient claim to survive a challenge under Rule 12(b), M.R.Civ.P. (Title 25, ch. 20). Hauschulz v. Michael Law Firm, 2001 MT 160, 306 M 102, 30 P3d 357 (2001). See also Trankel v. St., 282 M 348, 938 P2d 614 (1997).

FELA — Stipulation That Jury Awards Not Be Added Together — Greater Award Subsuming Smaller Awards: Under the Federal Employers' Liability Act (FELA), 45 U.S.C. 51 through 60, an injured railroad worker is entitled to recover damages if the negligence of the railroad played any part, no matter how slight, in causing the injury or death for which damages are sought. In the present case, the jury found independent railroad negligence and causation in each of three work-related incidents that played a part in the condition of Bevacqua's knee. Under FELA, Bevacqua was entitled to judgment of $200,000 for a 1973 injury, $320,000 for a 1980 injury, and $40,000 for a 1990 injury. However, the parties stipulated that the jury awards for each incident would not be added together, precluding any double recovery. The Supreme Court held that Bevacqua was entitled to $320,000, the greatest of the jury awards, and that under the terms of the stipulation, the smaller awards were subsumed in the greater award. Bevacqua v. Union Pac. RR Co., 1998 MT 120, 289 M 36, 960 P2d 273, 55 St. Rep. 469 (1998), following Rogers v. Mo. Pac. RR Co., 352 US 500, 1 L Ed 2d 493, 77 S Ct 443 (1957).

Injury to Tangible Property Required Before Economic Loss Covered — Plagiarism: After arriving at a settlement agreement based on a charge of plagiarism, an insured sought recovery from his insurance company under a business policy that provided that the company would "pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, property damage or personal injury caused by an occurrence to which the insurance applies". When the insurer refused to pay, the District Court properly granted summary judgment to the company because the charges of plagiarism did not allege direct physical injury to tangible property, but alleged only economic loss. The longstanding rule in Montana is that in order for economic losses to be covered by insurance, a direct physical injury to tangible property must occur. Graber v. St. Farm Fire & Cas. Co., 244 M 265, 797 P2d 214, 47 St. Rep. 1595 (1990).

Damaged Party to Mitigate Damages — Reasonable Expectations: A damaged party is only expected to do what is reasonable under the circumstances to mitigate his damages and need not embark on a course of action that may cause further detriment to him. Romain v. Earl Schwartz Co., 238 M 500, 779 P2d 54, 46 St. Rep. 1450 (1989).

Duty of Plaintiff When Multiple Causes of Damage Appear: The Supreme Court cited Valley Inland Pac. Constructors, Inc. v. Clackamas Water District, 603 P2d 1381 (Oreg. 1979), in holding that when more than one possible cause of damage appears, the plaintiff must eliminate causes other than those for which the defendant is responsible. Failure to separate causes and damage barred plaintiff from arguing proximate cause. Young v. Flathead County, 232 M 274, 757 P2d 772, 45 St. Rep. 1047 (1988), followed in USF&G v. Camp, 253 M 64, 831 P2d 586, 49 St. Rep. 372 (1992).

Comparison of Conduct in Ascertaining Damages: Willful or wanton conduct may be compared with like conduct for the purpose of ascertaining damages. Refusing an offered instruction on comparing like conduct was error. Gurnsey v. Conklin Co., Inc., 230 M 42, 751 P2d 151, 45 St. Rep. 1 (1988), citing Simonson v. White, 220 M 14, 713 P2d 983, 43 St. Rep. 133 (1986).

Award of Grossly Excessive and Disproportionate Damages — Based on Passion or Prejudice: A jury award of $5 million in punitive damages, which was found to be 20,000% above the award for economic damage caused insured and 5,000% more than the maximum of the insurance policy, was held to be so grossly excessive and disproportionate to the injury as to shock one's conscience. Noting that appellate courts in most jurisdictions, including Montana, ordinarily defer to the discretion of the factfinder when reviewing punitive damage awards, the court found that as a matter of law this award must have been determined by passion or prejudice. On remittitur, the judgment was modified to an award of $1 million total. Safeco Ins. Co. v. Ellinghouse, 223 M 239, 725 P2d 217, 43 St. Rep. 1689 (1986). In a strong dissent, Mr. Justice Morrison noted no reversible error on any liability question and pointed out that up to this time "there is little, if any, precedent supporting the Montana Supreme Court substituting its judgment for that of the jury. Unfortunately that strong support for the jury system has now been dynamited. The majority announces loud and clear that from this day forward, four justices, robed in judicial omniscience, will replace our jury." Mr. Justice Sheehy, also dissenting, said that the "deleterious effect of the opinion in this case is its announcement that the right of a jury to set damages is hereafter subject to the consent of the majority of this Court".

Overgrazing Damages Remanded — No Offset — Open Range Law: The District Court ruled that Helehan was liable for $3,000 in overgrazing damages caused to Ueland's property by horses allowed on Helehan's land and that Ueland was not entitled to reimbursement for a $3,000 fence. The court offset these amounts. The Supreme Court remanded, finding that the costs did not offset since damages flowed from Helehan to Ueland but not from Ueland to Helehan. However, the error was harmless since under Montana's open range law Helehan could not be legally obligated to restrain the horses and could not be held liable for damages occurring prior to the time the fence was built. Helehan v. Ueland, 223 M 228, 725 P2d 1192, 43 St. Rep. 1679 (1986).

Determination of Damages — "Good Sense": A District Court faced with widely varying estimates of value for services performed on an oral contact "split the difference" as a setoff to a recovery. The Supreme Court, recalling its decision in Spackman v. Ralph M. Parsons Co., 147 M 500, 414 P2d 918 (1966), found that formulas may serve as useful guides in determining damages, but that the final answer rests in good sense rather than mechanical application of formulas. The "compromise" developed by the District Court was found to be well in line with contract principles. Hostetter v. Donlan, 221 M 380, 719 P2d 1243, 43 St. Rep. 909 (1986).

Loss of Future Profits — Breach of Contract: Although determination of loss of future profits is often speculative, when injury caused by a breach of contract is certain, damages for lost profits may be awarded even though the amount of damages is uncertain. Hostetter v. Donlan, 221 M 380, 719 P2d 1243, 43 St. Rep. 909 (1986), followed in Van Riper v. Ford New Holland, Inc., 261 M 206, 862 P2d 47, 50 St. Rep. 1289 (1993).

Duty to Mitigate Damages — Procedure at Trial: A nondefaulting party in a contractual arrangement must act reasonably under the circumstances so as not to unnecessarily enlarge damages caused by a default. Whether the duty to mitigate damages was violated is for the trier of fact when the evidence conflicts, and the Supreme Court's function is to review the record to determine if there is substantial credible evidence to support the trial court's finding. Since the trial court's order and supporting memo did not include findings on the duty to mitigate or the reasonableness of the nondefaulting party's actions in consuming or destroying wine he did not sell after wine broker terminated wine distributorship contract, the damages award to nondefaulting party for unsold wine it consumed or destroyed was vacated and the issue remanded for further consideration. Bronken's Good Time Co. v. J. W. Brown & Associates, 203 M 427, 661 P2d 861, 40 St. Rep. 549 (1983), followed in Fordyce v. Musick, 245 M 315, 800 P2d 1045, 47 St. Rep. 2137 (1990).

Mitigation of Damages — Instruction Not Warranted: State Farm brought suit against Shahrokhfar in connection with an auto accident. Shahrokhfar notified State Farm that he was the wrong person and failed to defend the action. State Farm pursued the suit to a default judgment that resulted in Shahrokhfar losing his driver's license. Shahrokhfar then sued State Farm. The jury was instructed on the issue of plaintiff's comparative negligence for failure to retain counsel and defend the suit brought by State Farm. The court properly refused to instruct

on mitigation of damages; such an instruction would be repetitious and potentially confusing. Shahrokhfar v. St. Farm Mut. Auto. Ins. Co., 194 M 76, 634 P2d 653, 38 St. Rep. 1669 (1981).

No Reversible Error on Damage Instructions When Jury Does Not Reach Issue: When the jury does not reach the issue of damages, on appeal no reversible error can be predicated on damage instructions. Stenberg v. Neel, 188 M 133, 613 P2d 1007 (1980). See also Pula v. St., 2002 MT 9, 308 M 122, 40 P3d 364 (2002).

Part Law Review Articles

Getting Physical: Excluding Personal Injury Awards Under the New Section 104(a)(2), Burke & Friel, 58 Mont. L. Rev. 167 (1997).

Boldly Into the Fog: Limiting Rights of Recovery for Infliction of Emotional Distress, Cox & Shott, 53 Mont. L. Rev. 197 (1992).

Civil RICO: Pleading Fraud for Treble Damages, Dzivi, 45 Mont. L. Rev. 87 (1984).

Montana Supreme Court Survey, Hursh, 43 Mont. L. Rev. 279, 334 (1982).

Part Collateral References

"Total cost method (or approach)" and "modified total cost method (or approach)" to proving damages in state contract cases. 124 ALR 5th 375.

Exemplary or punitive damages for pharmacist's wrongful conduct in preparing or dispensing medical prescription—cases not under Consumer Product Safety Act (15 U.S.C.A. §2072). 109 ALR 5th 397.

Recovery of damages for emotional distress due to treatment of pets and animals. 91 ALR 5th 545.

Nonuse of seatbelt as reducing amount of damages recoverable. 62 ALR 5th 537.

Damages for killing or injuring dog. 61 ALR 5th 635.

Recovery of damages for loss of consortium resulting from death of child—modern status. 77 ALR 4th 411.

Business interruption, without physical damage, as actionable. 65 ALR 4th 1126.

Damages for killing or injuring dog. 61 ALR 5th 635, superseded in part by 91 ALR 5th 545.

Parent's right to recover for loss of consortium in connection with injury to child. 54 ALR 4th 112.

Sexual child abuser's civil liability to child's parent. 54 ALR 4th 93.

Equipment leasing expense as element of construction contractor's damages. 52 ALR 4th 712.

Excessiveness or inadequacy of compensatory damages for malicious prosecution. 50 ALR 4th 843.

Recovery of damages for grief or mental anguish resulting from death of child—modern cases. 45 ALR 4th 234.

Punitive damages for interference with contract or business relationship. 44 ALR 4th 1078.

Construction contract—modern status of rule as to whether cost of correction or difference in value of structures is proper measure of damages for breach of construction contract. 41 ALR 4th 131.

Amount of appropriation as limitation on damages for breach of contract recoverable by one contracting with government agency. 40 ALR 4th 998.

Recovery of punitive damages for breach of building or construction contract. 40 ALR 4th 110.

Liability for false arrest or imprisonment under warrant as affected by mistake as to identity of person arrested. 39 ALR 4th 705.

Value of insured's assets as limitation, in action by insured or insured's assignee for liability insurer's wrongful failure to defend, on recovery of amount of judgment against insured in excess of policy amount. 36 ALR 4th 922.

Proof of injury to reputation as prerequisite to recovery of damages in defamation action—post-Gertz cases. 36 ALR 4th 807.

Provocation as basis for mitigation of compensatory damages in action for assault and battery. 35 ALR 4th 947.

Allowance of attorneys' fees in mandamus proceedings. 34 ALR 4th 457.

Effect of anticipated inflation on damages for future losses—modern cases. 21 ALR 4th 21.

Propriety of taking income tax into consideration in fixing damages in personal injury or death action. 16 ALR 4th 589.

Special or consequential damages recoverable, on account of delay in delivering possession, by purchaser of real property awarded specific performance. 11 ALR 4th 891.

Proper measure and elements of damages for misappropriation of trade secret. 11 ALR 4th 12.

Damages recoverable for real estate mortgagee's refusal to discharge mortgage or give partial release therefrom. 8 ALR 4th 853.

Damages recoverable for wrongful dishonor or letter of credit under U.C.C. §5-115. 2 ALR 4th 665.

Measure of damages for landlord's breach of implied warranty of habitability. 1 ALR 4th 1182.

Liability for interference with invalid or unenforceable contract. 96 ALR 3d 1294.

Measure and elements of damages recoverable from vendor where there has been mistake as to amount of land conveyed. 94 ALR 3d 1091.

Measure of damages in action for breach of warranty of title to personal property under U.C.C. §2-714. 94 ALR 3d 583.

Insured's right to recover attorneys' fees incurred in declaratory judgment action to determine existence of coverage under liability policy. 87 ALR 3d 429.

Damage liability of state or local public employees' union or union officials for unlawful work stoppage. 84 ALR 3d 336.

Recovery of damages for mental anguish, distress, suffering, or the like, in action for wrongful attachment, garnishment, sequestration, or execution. 83 ALR 3d 598.

Good will as element of damages for condemnation of property on which private business is conducted. 81 ALR 3d 198.

Injured person's hospitalization or medical insurance as affecting damages recoverable. 77 ALR 3d 415.

Liability for damages to adjacent land or building caused by dredging. 62 ALR 3d 526.

Injury to credit standing, reputation, solvency, or profit potential as elements of damage resulting from wrongful execution against business property. 55 ALR 3d 911.

Remedies and measure of damages for wrongful cancellation of liability and property insurance. 34 ALR 3d 385.

Remedies and measure of damages for wrongful cancellation of life, health, and accident insurance. 34 ALR 3d 245.

Measure of damages for conversion of corporate stock or certificate. 31 ALR 3d 1286.

Right to maintain malpractice suit against injured employee's attending physician notwithstanding receipt of workmen's compensation award. 28 ALR 3d 1066.

Pretrial discovery of defendant's financial worth on issue of damages. 27 ALR 3d 1375.

Medical malpractice, and measure and element of damages, in connection with sterilization or birth control procedures. 27 ALR 3d 906.

Elements and measure of damages in action by schoolteacher for wrongful discharge. 22 ALR 3d 1047.

Tenant's right to damages for landlord's breach of tenant's option to purchase. 17 ALR 3d 976.

Prime contractor's liability to subcontractor for delay in performance. 16 ALR 3d 1252.

Defaulting defendant's right to notice and hearing as to determination of amount of damages. 15 ALR 3d 586.

Recovery for loss of profits from contemplated sale or use of land, where vendor fails or refuses to convey. 11 ALR 3d 719.

Zoning as a factor in determination of damages in eminent domain. 9 ALR 3d 291.

Restrictive covenant or right to enforcement thereof as compensable property right. 4 ALR 3d 1137.

Injured person's receipt of statutory disability unemployment benefits as affecting recovery against tortfeasor. 4 ALR 3d 535.

Right and measure of recovery for breach of obligation to drill exploratory oil or gas wells. 4 ALR 3d 284.

Overhead expenses as recoverable element of damages. 3 ALR 3d 689.

Measure of damages for wrongful removal of earth, sand, or gravel from land. 1 ALR 3d 801.

Mitigation of damages in landlord's action for waste against tenant. 82 ALR 2d 1106.

Measure and elements of damages, in action other than one against a carrier for injury, loss, or destruction of livestock. 79 ALR 2d 677.

Measure of evicted tenant's recovery for improvements made by him on premises for lease uses. 71 ALR 2d 1104.

Right to recover attorneys' fees for wrongful attachment. 65 ALR 2d 1426.

Damages to land as affected by permanence of nuisance in operation of sewage disposal plant. 40 ALR 2d 1200.

Cost of hiring substitute or assistant during incapacity of injured party as proof of damages for loss of time in action for personal injury. 37 ALR 2d 364.

Measure of damages for loss of or interference with lateral support. 36 ALR 2d 1253.

Purchaser's use or attempted use of articles known to be defective as affecting damages recoverable for breach of warranty. 33 ALR 2d 511.

Pain and suffering of parent on account of personal injury to infant as recoverable item of damages. 32 ALR 2d 1060.

Exemplary damages in action for tenant's failure to surrender possession of rented premises. 32 ALR 2d 611.

Damages for violation of reemployment rights of discharged servicemen. 29 ALR 2d 1335.

Recovery from mental shock or distress in connection with injury or interference with tangible property. 28 ALR 2d 1070.

Elements and measure of damages for procuring breach of contract. 26 ALR 2d 1227, §§6, 7 superseded by 96 ALR 3d 1294, §45 superseded by 44 ALR 4th 1078.

Measure and elements of damages for personal injury resulting in death of infant. 14 ALR 2d 485, §5 superseded by 45 ALR 4th 234, §6 superseded by 77 ALR 4th 411.

Changes in cost of living or in purchasing power of money as affecting damages for personal injuries or death. 12 ALR 2d 611, superseded in part by 21 ALR 4th 21.

Loss of profits of a business in which plaintiff is interested as a factor in determining damages for impairment of earning capacity in action for personal injuries. 12 ALR 2d 288.

Damages for diminution of value of use of property as recoverable for a permanent nuisance affecting real property. 10 ALR 2d 669.

Part Collateral References

"Total cost method (or approach)" and "modified total cost method (or approach)" to providing damages in state contract cases. 124 ALR 5th 375.

Exemplary or punitive damages for pharmacist's wrongful conduct in preparing or dispensing medical prescription—cases not under Consumer Product Safety Act (15 U.S.C.A. §2072). 109 ALR 5th 397.

Recovery of damages for emotional distress due to treatment of pets and animals. 91 ALR 5th 545.

Nonuse of seatbelt as reducing amount of damages recoverable. 62 ALR 5th 537.

Damages for killing or injuring dog. 61 ALR 5th 635.

Recovery of damages for loss of consortium resulting from death of child—modern status. 77 ALR 4th 411.

Business interruption, without physical damage, as actionable. 65 ALR 4th 1126.

Damages for killing or injuring dog. 61 ALR 5th 635, superseded in part by 91 ALR 5th 545.

Parent's right to recover for loss of consortium in connection with injury to child. 54 ALR 4th 112.

Sexual child abuser's civil liability to child's parent. 54 ALR 4th 93.

Equipment leasing expense as element of construction contractor's damages. 52 ALR 4th 712.

Excessiveness or inadequacy of compensatory damages for malicious prosecution. 50 ALR 4th 843.

Recovery of damages for grief or mental anguish resulting from death of child—modern cases. 45 ALR 4th 234.

Punitive damages for interference with contract or business relationship. 44 ALR 4th 1078.

Construction contract—modern status of rule as to whether cost of correction or difference in value of structures is proper measure of damages for breach of construction contract. 41 ALR 4th 131.

Amount of appropriation as limitation on damages for breach of contract recoverable by one contracting with government agency. 40 ALR 4th 998.

Recovery of punitive damages for breach of building or construction contract. 40 ALR 4th 110.

Liability for false arrest or imprisonment under warrant as affected by mistake as to identity of person arrested. 39 ALR 4th 705.

Value of insured's assets as limitation, in action by insured or insured's assignee for liability insurer's wrongful failure to defend, on recovery of amount of judgment against insured in excess of policy amount. 36 ALR 4th 922.

Proof of injury to reputation as prerequisite to recovery of damages in defamation action—post-Gertz cases. 36 ALR 4th 807.

Provocation as basis for mitigation of compensatory damages in action for assault and battery. 35 ALR 4th 947.

Allowance of attorneys' fees in mandamus proceedings. 34 ALR 4th 457.

Effect of anticipated inflation on damages for future losses—modern cases. 21 ALR 4th 21.

Propriety of taking income tax into consideration in fixing damages in personal injury or death action. 16 ALR 4th 589.

Special or consequential damages recoverable, on account of delay in delivering possession, by purchaser of real property awarded specific performance. 11 ALR 4th 891.

Proper measure and elements of damages for misappropriation of trade secret. 11 ALR 4th 12.

Damages recoverable for real estate mortgagee's refusal to discharge mortgage or give partial release therefrom. 8 ALR 4th 853.

Damages recoverable for wrongful dishonor or letter of credit under U.C.C. §5-115. 2 ALR 4th 665.

Measure of damages for landlord's breach of implied warranty of habitability. 1 ALR 4th 1182.

Liability for interference with invalid or unenforceable contract. 96 ALR 3d 1294.

Measure and elements of damages recoverable from vendor where there has been mistake as to amount of land conveyed. 94 ALR 3d 1091.

Measure of damages in action for breach of warranty of title to personal property under U.C.C. §2-714. 94 ALR 3d 583.

Insured's right to recover attorneys' fees incurred in declaratory judgment action to determine existence of coverage under liability policy. 87 ALR 3d 429.

Damage liability of state or local public employees' union or union officials for unlawful work stoppage. 84 ALR 3d 336.

Recovery of damages for mental anguish, distress, suffering, or the like, in action for wrongful attachment, garnishment, sequestration, or execution. 83 ALR 3d 598.

Good will as element of damages for condemnation of property on which private business is conducted. 81 ALR 3d 198.

Injured person's hospitalization or medical insurance as affecting damages recoverable. 77 ALR 3d 415.

Liability for damages to adjacent land or building caused by dredging. 62 ALR 3d 526.

Injury to credit standing, reputation, solvency, or profit potential as elements of damage resulting from wrongful execution against business property. 55 ALR 3d 911.

Remedies and measure of damages for wrongful cancellation of liability and property insurance. 34 ALR 3d 385.

Remedies and measure of damages for wrongful cancellation of life, health, and accident insurance. 34 ALR 3d 245.

Measure of damages for conversion of corporate stock or certificate. 31 ALR 3d 1286.

Right to maintain malpractice suit against injured employee's attending physician notwithstanding receipt of workmen's compensation award. 28 ALR 3d 1066.

Pretrial discovery of defendant's financial worth on issue of damages. 27 ALR 3d 1375.

Medical malpractice, and measure and element of damages, in connection with sterilization or birth control procedures. 27 ALR 3d 906.

Elements and measure of damages in action by schoolteacher for wrongful discharge. 22 ALR 3d 1047.

Tenant's right to damages for landlord's breach of tenant's option to purchase. 17 ALR 3d 976.

Prime contractor's liability to subcontractor for delay in performance. 16 ALR 3d 1252.

Defaulting defendant's right to notice and hearing as to determination of amount of damages. 15 ALR 3d 586.

Recovery for loss of profits from contemplated sale or use of land, where vendor fails or refuses to convey. 11 ALR 3d 719.

Zoning as a factor in determination of damages in eminent domain. 9 ALR 3d 291.

Restrictive covenant or right to enforcement thereof as compensable property right. 4 ALR 3d 1137.

Injured person's receipt of statutory disability unemployment benefits as affecting recovery against tortfeasor. 4 ALR 3d 535.

Right and measure of recovery for breach of obligation to drill exploratory oil or gas wells. 4 ALR 3d 284.

Overhead expenses as recoverable element of damages. 3 ALR 3d 689.

Measure of damages for wrongful removal of earth, sand, or gravel from land. 1 ALR 3d 801.

Mitigation of damages in landlord's action for waste against tenant. 82 ALR 2d 1106.

Measure and elements of damages, in action other than one against a carrier for injury, loss, or destruction of livestock. 79 ALR 2d 677.

Measure of evicted tenant's recovery for improvements made by him on premises for lease uses. 71 ALR 2d 1104.

Right to recover attorneys' fees for wrongful attachment. 65 ALR 2d 1426.

Damages to land as affected by permanence of nuisance in operation of sewage disposal plant. 40 ALR 2d 1200.

Cost of hiring substitute or assistant during incapacity of injured party as proof of damages for loss of time in action for personal injury. 37 ALR 2d 364.

Measure of damages for loss of or interference with lateral support. 36 ALR 2d 1253.

Purchaser's use or attempted use of articles known to be defective as affecting damages recoverable for breach of warranty. 33 ALR 2d 511.

Pain and suffering of parent on account of personal injury to infant as recoverable item of damages. 32 ALR 2d 1060.

Exemplary damages in action for tenant's failure to surrender possession of rented premises. 32 ALR 2d 611.

Damages for violation of reemployment rights of discharged servicemen. 29 ALR 2d 1335.

Recovery from mental shock or distress in connection with injury or interference with tangible property. 28 ALR 2d 1070.

Elements and measure of damages for procuring breach of contract. 26 ALR 2d 1227, §§6, 7 superseded by 96 ALR 3d 1294, §45 superseded by 44 ALR 4th 1078.

Measure and elements of damages for personal injury resulting in death of infant. 14 ALR 2d 485, §5 superseded by 45 ALR 4th 234, §6 superseded by 77 ALR 4th 411.

Changes in cost of living or in purchasing power of money as affecting damages for personal injuries or death. 12 ALR 2d 611, superseded in part by 21 ALR 4th 21.

Loss of profits of a business in which plaintiff is interested as a factor in determining damages for impairment of earning capacity in action for personal injuries. 12 ALR 2d 288.

Damages for diminution of value of use of property as recoverable for a permanent nuisance affecting real property. 10 ALR 2d 669.

27-1-201. Detriment defined.

Case Notes

Emotional Distress Over Loss of Adult Child Not So Severe as to Be Compensable: Plaintiff argued that she suffered extreme emotional distress as the result of her son's death, allegedly caused by defendant's negligence. Applying the test for emotional distress in Sacco v. High Country Independent Press, Inc., 271 M 209, 896 P2d 411 (1995), the District Court held that plaintiff's emotional distress was insufficiently severe to support her claim, so defendant's motion for summary judgment was granted. On appeal, the Supreme Court concluded that plaintiff's testimony that "life goes on" and that it was a loss that she "must learn to deal with" showed a philosophical strength that would likely be absent in a case of severe emotional distress. Plaintiff's emotional distress was not so severe as to rise to the level of a compensable claim, so the District Court was affirmed. Renville v. Fredrickson, 2004 MT 324, 324 M 86, 101 P3d 773 (2004).

Marital Status Discrimination — Award for Emotional Damages Affirmed: For the most part, federal case law involving antidiscrimination statutes draws a distinction between emotional distress claims in tort versus those in discrimination complaints (see Bolden v. SE. Pa. Transp. Authority, 21 F3d 29 (3rd Cir. 1994), Walz v. Town of Smithtown, 46 F3d 162 (2nd Cir. 1995), and Chatman v. Slagle, 107 F3d 380 (6th Cir. 1997)). The standard of proof of independent actions for emotional distress in Sacco v. High Country Independent Press, Inc., 271 M 209, 896 P2d 411 (1995), that emotional distress damages may be awarded only if there is a substantial invasion of a legally protected interest that causes a significant impact upon the claimant, does not apply in a discrimination context pursuant to Title 49, ch. 2, commonly known as the Montana Human Rights Act. Rather, compensatory damages for human rights claims may be awarded for humiliation and emotional distress established by testimony or inferred from the circumstances, and the severity of the harm should govern the amount, not the availability, of recovery. Here, the record revealed that the claimant had difficulty finding employment after being illegally denied employment based on marital status, lost sleep because of economic hardship, had to move in with relatives, was hounded by collection agencies, had to borrow money, and had to sell an automobile for sustenance. The Commission for Human Rights' award of $2,500 for emotional damages was adequately supported by the record and was affirmed. Vortex Fishing Sys., Inc. v. Foss, 2001 MT 312, 308 M 8, 38 P3d 836 (2001).

Independent Claim for Infliction of Emotional Distress Sufficient to Satisfy Good Cause Requirement for Ordering Medical Evaluation: Winslow contended that the District Court

improperly ordered him to submit to a psychiatric evaluation pursuant to Rule 35, M.R.Civ.P. (Title 25, ch. 20), after finding that the good cause requirement under the Rule was satisfied by the fact that Winslow had asserted an independent claim for intentional or negligent infliction of emotional distress. The Supreme Court affirmed. The independent claim placed Winslow's mental condition in controversy, and under Schlagenhauf v. Holder, 379 US 104 (1964), the pleadings themselves can establish good cause for ordering a mental examination. Further, under Sacco v. High Country Independent Press, Inc., 271 M 209, 896 P2d 411 (1995), an independent cause of action for intentional infliction of serious or severe emotional distress will arise when the distress was the reasonably foreseeable consequence of the negligent act or omission. The pleading of Winslow's independent Sacco claim was sufficient to satisfy the good cause requirement of Rule 35. Winslow v. Mont. Rail Link, Inc., 2001 MT 269, 307 M 269, 38 P3d 148 (2001), distinguishing In re Marriage of Binsfield, 269 M 336, 888 P2d 889 (1995).

Damages Proper for Emotional Distress Based on Sale of Real Estate — Punitive Damages Appropriate: The Maloneys were promised an option to purchase property adjacent to their own, hoping to build their retirement home near Glacier Park. The real estate agent who listed the property was aware of the Maloneys' option but sold to another instead. That person then developed the property, building a 3,000-square-foot home on the very site that the Maloneys had desired and within sight of the Maloneys' residence, and then listed the newly developed property for almost six times what the Maloneys could have paid had the option been properly offered. A special master concluded, and the District Court agreed, that the Maloneys had suffered and were entitled to compensation for the shock, worry, anger, disappointment, and frustration that they had suffered and would continue to suffer in light of the inherent duration of the Maloneys' adjacent ownership. The Supreme Court affirmed, noting that under French v. Ralph E. Moore, Inc., 203 M 327, 661 P2d 844, 40 St. Rep. 481 (1983), emotional distress damages may result from negligent or intentional damage to property arising from interference with the use and enjoyment of land and that under Johnson v. Murray, 201 M 495, 656 P2d 170, 39 St. Rep. 2257 (1982), compensatory damages could include compensation for humiliation, embarrassment, distress, and ridicule associated with interference with plaintiffs' use of their private property. The private property interest at issue here sufficiently involved the use and enjoyment of land to fall within these holdings. Further, the award of punitive damages was also affirmed in this instance despite defendant's claims of the special master's improper estimation of net worth, a syntax error, and the special master's improper recognition of punitive damages assessed against defendant in a prior case. Maloney v. Home & Inv. Center, Inc., 2000 MT 34, 298 M 213, 994 P2d 1124, 57 St. Rep. 144 (2000), followed in May v. ERA Landmark Real Estate of Bozeman, 2000 MT 299, 302 M 326, 15 P3d 1179, 57 St. Rep. 1256 (2000). See also Recovery for Negligent Infliction of Emotional Distress Attendant to Economic Loss: A Reassessment, Sandor & Berry, 37 Ariz. L. Rev. 1247 (1995).

New Standard for Negligent or Intentional Infliction of Emotional Distress — Proof of Serious or Severe Emotional Stress Required: A photographer for a Belgrade newspaper sued the newspaper and a city police officer, alleging that both falsely and maliciously conspired to criminally prosecute the photographer for stealing photographs from the newspaper. After the District Court granted the newspaper and officer a summary judgment motion, the Supreme Court, after reviewing cases using the traditional approach, reversed and remanded the case for determination under a new standard for negligent or intentional infliction of emotional distress. Applying the new standard, the Supreme Court held that an independent cause of action for infliction of emotional distress will arise in circumstances in which serious or severe emotional distress to a claimant, as defined in Comment j of the Restatement (Second) of Torts, was the reasonably foreseeable consequence of a negligent or intentional act or omission. The difference between negligent infliction and intentional infliction lies not in the elements of the tort but in the nature and culpability of the defendant's conduct. Punitive damages may be requested in a cause of action for intentional infliction of emotional distress. It is for the court to determine whether the evidence of serious or severe emotional distress can be found; it is for the jury to determine whether, on the evidence, it has in fact existed. Sacco v. High Country Independent Press, Inc., 271 M 209, 896 P2d 411, 52 St. Rep. 407 (1995), followed in Maloney v. Home & Inv. Center, Inc., 2000 MT 34, 298 M 213, 994 P2d 1124, 57 St. Rep. 144 (2000), Winslow v. Mont. Rail Link, Inc., 2000 MT 292, 302 M 289, 16 P3d 992, 57 St. Rep. 1238 (2000), Winslow v. Mont. Rail Link, Inc., 2001 MT 269, 307 M 269, 38 P3d 148 (2001), Pospisil v. First Nat'l Bank of Lewistown, 2001 MT 286, 307 M 392, 37 P3d 704 (2001), and McConkey v. Flathead Elec. Co-op, 2005 MT 334, 330 M 48, 125 P3d 1121 (2005), distinguished, with regard to the inapplicability of the standard to civil rights cases brought under Title 49, ch. 2, commonly known as the Montana Human Rights Act, in Vortex Fishing Sys., Inc. v. Foss, 2001 MT 312, 308 M 8, 38 P3d 836 (2001),

and clarified in Henricksen v. St., 2004 MT 20, 319 M 307, 84 P3d 38 (2004), to the extent that when there is a physical manifestation of bodily harm resulting from emotional distress, such as posttraumatic stress disorder, this bodily harm is sufficient evidence that the emotional distress is genuine and severe. See also May v. ERA Landmark Real Estate of Bozeman, 2000 MT 299, 302 M 326, 15 P3d 1179, 57 St. Rep. 1256 (2000), and Turner v. Burlington N. Santa Fe RR Co., 338 F3d 1058 (9th Cir. 2003).

Presumption of Damages When Elements of Conversion Proved: A detriment is a loss suffered in person or property, and a person who suffers a detriment from another's wrongful acts is entitled to damages. Under 27-1-320, the detriment caused by wrongful conversion of personal property is presumed to be the value of the property at the time of conversion, plus interest from that time, and fair compensation for the time and money expended to pursue recovery of the property. Therefore, in conversion claims, damages are presumed once the other elements of conversion are established. Eatinger v. Johnson, 269 M 99, 887 P2d 231, 51 St. Rep. 1484 (1994).

Title Insurers' Failure to Disclose Easements — Insured's Pecuniary Loss: Landowner suffered a substantial pecuniary loss when his title insurers failed to inform him of ditch rights and easements that landowner had to pay $46,000 to purchase in order to remove the defects to his title. Lipinski v. Title Ins. Co., 202 M 1, 655 P2d 970, 39 St. Rep. 2283 (1982). The Lipinski rule, requiring due diligence in title examination, was applied in Old Republic Nat'l Title Ins. Co. v. Realty Title Co., 1999 MT 69, 294 M 6, 978 P2d 956, 56 St. Rep. 286 (1999).

Collateral References

Damages *key* 4.

27-1-202. Right to compensatory damages.

Case Notes

General 540
Emotional Distress 545
Products Liability 550
Contractual Interference 551
Measure of Damages 551

GENERAL

Award of Injunction and Damages in Same Case — No Error: A subdivision developer was found to have been negligent and in breach of contract with the purchaser of two subdivision lots for failing to record a restrictive covenant prohibiting commercial use and for the resulting diminution in property value when another subdivision tenant operated an auto body shop in the subdivision. The jury held the developer liable for damages, and a permanent injunction was issued against the auto body shop operator, who complained that the award of both damages and an injunction resulted in double recovery. The Supreme Court disagreed. Montana law does not prohibit awarding money damages and an injunction in the same case. Both were justified here, and the award of both was affirmed. Rice v. C.I. Lanning, 2004 MT 237, 322 M 487, 97 P3d 580 (2004).

Negligence During House Moving — Breach of House Moving Agreement — Remand for Determination of Causation and Damages: Kelly entered an agreement with Hall to move four of Kelly's housing units. Hall agreed to obtain cargo insurance on each unit but did not do so. During the move, two units were damaged, and Kelly filed a claim against Hall's insurer for remuneration. The claim was denied, and the insurer sought a declaratory judgment against both Hall and Kelly. Kelly filed negligence and breach of contract claims against Hall, and Hall counterclaimed for breach of contract against Kelly. The District Court concluded that Kelly failed to establish negligence, that both parties breached the contract, and that neither party could recover against the other. On appeal, the Supreme Court affirmed the finding that Hall breached the contract by failing to obtain cargo insurance and that, based on the presumption against conditions precedent and inconclusive evidence, Kelly also breached the contract and thus could not recover breach of contract damages. However, there was no evidence to rebut Kelly's negligence claim, nor did the District Court address the damages that Hall conceded occurred during the move. Because it was error to find that Kelly failed to establish negligence, the case was remanded for trial on causation and damages. Scottsdale Ins. Co. v. Hall, 2003 MT 188, 316 M 460, 73 P3d 819 (2003).

Jury Finding That Accident Did Not Result in Injury Supported by Substantial Evidence: Ele alleged that he was injured in a low-impact motor vehicle accident for which Ehnes admitted liability. The jury, however, found that Ele was not injured as a result of the accident, and Ele appealed, requesting that the zero damage award be set aside, in part based on a medical bill

from the emergency room where Ele went after the accident and on the fact that Ehnes failed to refute the attending physician's testimony that Ele was injured and sustained damages. The Supreme Court declined to disturb the jury decision. The emergency room bill was not direct evidence that the visit was caused by the accident, but merely showed that Ele went to the emergency room. Also, notwithstanding that the physician found evidence of injury, the doctor's testimony showed that he was not aware of Ele's preexisting medical condition. Further, testimony at trial from several of Ele's coworkers showed that Ele had engaged in numerous activities following the accident that Ele later testified he was unable to do because of pain. It is the trier of fact that weighs the credibility of witnesses, and there was sufficient credible evidence for the jury to conclude that Ele had prior back problems and could do more than he claimed, that the doctor's opinion relied on an inaccurate medical history supplied by Ele, and that the accident was so minor that Ele suffered no injury necessitating an emergency room visit. Ele v. Ehnes, 2003 MT 131, 316 M 69, 68 P3d 835 (2003), following Magart v. Schank, 2000 MT 279, 302 M 151, 13 P3d 390 (2000), and distinguishing Thompson v. Bozeman, 284 M 440, 945 P2d 48 (1997), and Renville v. Taylor, 2000 MT 217, 301 M 99, 7 P3d 400 (2000).

Dismissal of Insurer Improper in Light of Dispute Over Amount of Damages Owing in Excess of Liability Limits: Following a vehicle accident, a couple sought recovery for injuries and loss of consortium and also alleged that the damages exceeded the limits of defendants' coverage, entitling them to recover from their own policy. The District Court bifurcated the claims and then sua sponte dismissed the insurer from the action without prejudice. The couple sought to reverse the dismissal order, and the Supreme Court obliged. The District Court held that because a jury had not determined the couple's damages and because the insurer had agreed to pay the amount of the verdict up to the policy limits, there was no dispute between the couple and the insurer. However, the Supreme Court noted that the couple and the insurer disagreed on the amount of damages in excess of the amount that was payable under the liability limits of the policy. This was a dispute that the couple was entitled to litigate, so dismissal of the insurer was improper, and the case was remanded for further proceedings. State ex rel. Gadbaw v. District Court, 2003 MT 127, 316 M 25, 75 P3d 1238 (2003), following Dill v. District Court, 1999 MT 85, 294 M 134, 979 P2d 188 (1999). See also Dias v. Healthy Mothers, Healthy Babies, Inc., 2002 MT 323, 313 M 172, 60 P3d 986 (2002).

Action for Damages Allowed Against Local Peace Officers Violating Person's Self-Executing State Constitutional Rights to Privacy, Due Process, and Freedom From Unreasonable Searches and Seizures: Plaintiffs filed a civil action against the Sheriff and two deputies for damages for violation of plaintiffs' Montana constitutional rights to privacy, due process, and freedom from unreasonable searches and seizures. The court held that those three rights are self-executing. The court also held that plaintiffs were entitled to damages. The court based the right to recover damages on: (1) federal cases allowing damage suits for violation of rights under the U.S. Constitution; (2) Restatement (Second) of Torts 874A (1979), which follows the principle in those federal cases by stating that when a constitutional provision protects a class of persons and does not provide a remedy for a violation of the provision, the court may, if appropriate, allow an action under an existing tort or a new cause of action similar to an existing tort; (3) 1-1-109 providing that the common law of England is the rule of decision in Montana courts to the extent that it is not repugnant to or inconsistent with the U.S. or Montana Constitution or Montana statutes, and cases from other states using the English common law as a basis for granting a remedy for a state official's violation of a person's state constitutional rights; (4) this section allowing recovery of damages by a person who suffers detriment from the unlawful act or omission of another; and (5) the Montana Constitution, Art. II, sec. 16, right to a remedy for every injury. The court stated that there is a great distinction between wrongs, such as assault, conversion, and trespass, by a private individual against another private individual and wrongs against a private individual by a person acting under authority of the state in violation of a person's constitutional rights and stated that common-law causes of action remedying the former are not adequate to remedy the latter. Dorwart v. Caraway, 2002 MT 240, 312 M 1, 58 P3d 128 (2002).

Reasonable General Damages for Personal Injury Appropriate When Liability Established: Albinger and Harris were engaged to be married, but the engagement was troubled and resulted in Harris being injured during a domestic dispute. During a suit over ownership of the engagement ring, Harris counterclaimed for personal injuries stemming from the domestic dispute, seeking $35,000 to cover medical and psychiatric treatment, lost wages, emotional distress, pain, and suffering. Albinger admitted liability for the incident and paid Harris's resulting medical bills shortly after the incident. Harris was not employed at the time, so there was no loss of earnings, and there was no evidence of past or anticipated psychiatric counseling

needs and expenses, so the District Court awarded Harris $2,500 in general damages for emotional distress, pain, and suffering. Albinger appealed the award, but the Supreme Court affirmed. Once liability is established, it is the duty of the factfinder to award damages for pain and suffering when the evidence clearly establishes that plaintiff suffered painful injury and defendant presents no evidence to the contrary. In personal injury actions, there is no measuring stick by which to determine the amount of damages, other than the intelligence of a fair and impartial trier of fact governed by a sense of justice. Each case depends on its own facts, and the Supreme Court will not disturb a damage award on appeal unless the award is so grossly out of proportion to the injury as to shock the conscience, or is found to be the product of passion or prejudice. Here, the $2,500 award was not excessive and did not shock the conscience. The District Court legitimately acted upon its legal duty to award general damages. Albinger v. Harris, 2002 MT 118, 310 M 27, 48 P3d 711 (2002).

Improper Grant of Motion to Dismiss Legal Malpractice Suit for Failure to State Claim Upon Which Relief Could Be Granted: Hauschulz faced criminal charges in Billings, and while awaiting trial, he was extradited to Idaho on unrelated charges and incarcerated. The Michael Law Firm was hired to represent Hauschulz in the Billings proceedings, which Hauschulz could not attend. Instead of moving for dismissal of the charges unless Montana extradited Hauschulz, the law firm professed not to know where Hauschulz was and negotiated an unauthorized plea agreement on behalf of Hauschulz. Upon learning of the law firm's actions, Hauschulz filed a legal malpractice complaint alleging constitutional violations and requesting damages. The District Court dismissed the action on grounds that Hauschulz had failed to state a claim upon which relief could be granted, reasoning that no damages could be awarded because Hauschulz's problems all stemmed from the failure to appear at trial. Hauschulz appealed, and the Supreme Court reversed. A complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief, and a dismissal will be affirmed by the Supreme Court only if plaintiff is not entitled to relief under any set of facts that would support the claim. As set out in Merzlak v. Purcell, 252 M 527, 830 P2d 1278 (1992), to recover damages in a legal malpractice claim, plaintiff must establish that: (1) the professional owed plaintiff a duty of care; (2) the professional breached the duty of care through failure to use reasonable care and skill; (3) plaintiff suffered an injury; and (4) the professional's conduct was the proximate cause of the injury. In this case, the Supreme Court found that each element was satisfied. Hauschulz might be able to prove a set of facts that would entitle him to relief and has stated a sufficient claim to survive a challenge under Rule 12(b), M.R.Civ.P. (Title 25, ch. 20). Hauschulz v. Michael Law Firm, 2001 MT 160, 306 M 102, 30 P3d 357 (2001). See also Trankel v. St., 282 M 348, 938 P2d 614 (1997).

Equitable Estoppel Defense Defeated — Failure of Counterclaim to State Claim for Which Relief May Be Granted: The city of Whitefish sought and obtained a permanent injunction against Troy Town Pump, Inc. (Town Pump), requiring removal of a sign that violated the city's ordinance. Town Pump's defense was that the city's approval of the original building plan equitably estopped the city's claim. Alternatively, Town Pump counterclaimed for the costs of remodeling the building. In order for the city to obtain a permanent injunction, it first had to overcome Town Pump's counterclaim that it was equitably estopped from doing so. The city successfully defeated the counterclaim. Absent a legal theory upon which to base damages, the city could not be held liable, so the District Court did not err in dismissing Town Pump's counterclaim for damages on grounds that it failed to state a claim for which relief could be granted. Whitefish v. Troy Town Pump, Inc., 2001 MT 58, 304 M 346, 21 P3d 1026 (2001).

Interpleader Purporting to Release Potentially Liable Individuals Remanded for Clarification That Only Insurer Released Upon Payment of Policy Limits: The District Court granted an insurer's request in a prayer for interpleader for an order "enjoining and restraining each and all of the defendants from instituting or prosecuting further any proceeding on account of the incident or the insurance policy". Defendants claimed that the order infringed on their right to seek further relief from other potentially liable persons individually after the maximum policy limits were distributed. The Supreme Court noted that the measure of damages for negligence, notwithstanding available insurance proceeds, is the amount that will compensate the injured for all detriment proximately caused, but in this instance, it was not clear whether the insurer specifically requested additional relief for other parties or intended such a comprehensive exclusion of remedies. Pursuant to the principles of subject matter jurisdiction, the District Court should have released only the insurer from further claims, not the other potentially liable individuals involved. The case was remanded for a clarification of the order. Infinity Ins. Co. v. Dodson, 2000 MT 287, 302 M 209, 14 P3d 487, 57 St. Rep. 1196 (2000).

Question of Fault and Question of Entitlement to Collect Damages Separate: Dill suffered damages after being hit as a pedestrian by a vehicle operated by Jardine. State Farm Mutual Automobile Insurance Company (State Farm) provided both liability insurance for Jardine and underinsured motorist coverage for Dill. Meeting all the conditions precedent in the policy, Dill recovered the maximum policy amount from Jardine pursuant to Jardine's policy, then, consistent with the general release executed on Dill's behalf in settling with Jardine, Dill demanded underinsured motorist benefits under Dill's policy, which State Farm refused to pay. The District Court held that Dill's claim against State Farm would not be ripe for adjudication until after Jardine's fault was established and damages assessed in a negligence action. However, the question of whether anyone was at fault and the question of whether an insured is legally entitled to collect damages from an underinsured driver are not the same. A person can be legally entitled to collect damages without first proving fault in court, as Dill did here; conversely, an insured might prove fault on the part of the defendant and yet not be entitled to collect damages. Once an insured demonstrates a legal entitlement to damages, principles of contract law define the coverage afforded by an underinsured motorist policy; tort law is relevant only as far as fault is concerned. Under a writ of supervisory control, the Supreme Court looked to the clear language of the policy and found no issues of fault for a factfinder to resolve. The only questions remaining were whether Dill was legally entitled to collect damages and, if so, in what amount. Regardless of whether anyone was at fault, having already received money from State Farm, Dill was obviously legally entitled to receive damages. Thus, the case was reversed for a trial to determine the amount of damages, if any, that Dill was entitled to under the underinsured motorist policy. Dill v. District Court, 1999 MT 85, 294 M 134, 979 P2d 188, 56 St. Rep. 350 (1999).

Award of Liquidated Damages Under Fair Labor Standards Act — Findings Regarding Damage Amount Proper: Absent a showing by the state that its act or omission giving rise to a violation of the Fair Labor Standards Act of 1938 (FLSA) was in good faith and that the state had reasonable grounds for believing that the act or omission was not a violation of the FLSA, the award of liquidated damages under 29 U.S.C. 216(b) and 29 U.S.C. 260 by the District Court was not error or an abuse of discretion. Further, evidence by plaintiffs that they had worked hours for which they were not properly compensated, based on reasonable inferences, entitled them to damages based on a reasonable approximation. Tefft v. St., 271 M 82, 894 P2d 317, 52 St. Rep. 357 (1995).

Presumption of Damages When Elements of Conversion Proved: A detriment is a loss suffered in person or property, and a person who suffers a detriment from another's wrongful acts is entitled to damages. Under 27-1-320, the detriment caused by wrongful conversion of personal property is presumed to be the value of the property at the time of conversion, plus interest from that time, and fair compensation for the time and money expended to pursue recovery of the property. Therefore, in conversion claims, damages are presumed once the other elements of conversion are established. Eatinger v. Johnson, 269 M 99, 887 P2d 231, 51 St. Rep. 1484 (1994).

Failure of Bicyclist to Wear Helmet — Evidence Inadmissible on Question of Negligence or Damages: Applying the rationale set out in Kopischke v. First Cont. Corp., 187 M 471, 610 P2d 668 (1980), the Supreme Court held that because Montana law does not require a bicyclist to wear a helmet, the bicyclist's failure to wear a helmet ordinarily does not constitute negligence on the part of the state. Therefore, the jury was properly instructed that the bicyclist's failure to wear a helmet was not a legal cause of the accident and did not constitute negligence on the part of the state. The evidence was not admissible on the question of damages under the Kopischke rationale. Walden v. St., 250 M 132, 818 P2d 1190, 48 St. Rep. 893 (1991).

No Damages for Loss of Established Way of Life: Although evidence was conflicting, the jury properly denied an award of damages for loss of established way of life to plaintiffs whose restaurant was destroyed in a natural gas explosion upon a showing that: (1) the restaurant never did more than break even since it was purchased; (2) plaintiffs paid their living expenses from proceeds received from the sale of another cafe; (3) the restaurant lost $53,667 in the period immediately preceding the explosion; (4) plaintiffs never received a salary the entire time the restaurant was operating; and (5) plaintiff was required to leave the restaurant business because of a preexisting heart condition and high blood pressure. Day v. Mont. Power Co., 242 M 145, 789 P2d 1224, 47 St. Rep. 626 (1990), cited in Marazzato v. Burlington N. RR Co., 249 M 487, 817 P2d 672, 48 St. Rep. 804 (1991).

Attorney Fees Denied to Governmental Agencies: Several state agencies were successful in securing the dissolution of an injunctive order and sought attorney fees from the other party, a private company. The agencies sought attorney fees on the basis that the attorneys involved could have been working on other projects and therefore reasonable fees were due the agencies

as an element of damages. The Supreme Court ruled that since the agencies' attorneys were salaried employees, attorney fees were not incurred because no additional financial burden was placed on the taxpayers. N. Border Pipeline Co. v. St., 237 M 133, 772 P2d 839, 46 St. Rep. 681 (1989).

Damages Admitted — Award Upheld: Defendant admitted causing damages but did not offer any amount contrary to the actual figures presented by plaintiff. The Supreme Court affirmed the award of damages upon finding a reasonable certainty that damages were sustained by the wrongful act or breach of defendant and by rational support of the evidence, despite the lack of calculation of a precise amount of damages. Vinion v. The Wood Yard, Inc., 232 M 110, 755 P2d 31, 45 St. Rep. 919 (1988).

Demand for Compensatory Damages Dropped by Plaintiffs — Award as Abuse of Discretion: It was an abuse of discretion for the District Court to award compensatory damages when plaintiffs conceded in a posttrial motion that they were unable to provide sufficient evidence to justify such an award and dropped their demand for the award. Reintsma v. Lawson, 223 M 520, 727 P2d 1323, 43 St. Rep. 1962 (1986).

Attorney Fees as Element of Compensatory Damages — Limited to Contingent Fee Agreement: Jury awarded appellant attorney fees as an element of compensatory damages and deferred to the District Court to assess appropriate attorney fees and costs. The court arrived at a sum based on a contingent fee agreement entered into by appellant and his attorney rather than using a lodestar determination based on reasonable hours expended times a reasonable hourly fee. Appellant contended on appeal that this was an incorrect method of calculation. The Supreme Court held that: (1) the provisions of the contingent fee agreement were controlling in computing the amount of attorney fees; (2) the contract fixed the damages appellant sustained; and (3) to allow appellant to recover attorney fees based on an hourly fee would change the issue from what amount would compensate him for actual damages he sustained in the form of attorney fees to what amount would reasonably compensate his attorney for services rendered. Morris v. Nationwide Ins. Co., 222 M 399, 722 P2d 628, 43 St. Rep. 1363 (1986).

Wrongful Denial of School Transportation Money: Denial of transportation money to an eligible transportee of a school district is an "unlawful act" within the meaning of 27-1-202 for purposes of receiving compensatory damages. School District v. Simonsen, 210 M 100, 683 P2d 471, 41 St. Rep. 944 (1984).

Employee Suit Against Employer's Parent Corporation — Mere Holding Company Not Liable: Under the workers' compensation law provision that an employee may sue a third party in tort for causing injury to an employee, the employee may sue the parent corporation of a subsidiary corporation for which the employee works but must establish that the parent corporation had an independent duty toward the employee. In the present case, the facts failed to establish that any duty was breached by the parent corporation. The parent corporation was simply a holding company that carried on no business other than operating through its subsidiaries. Any negligence of the subsidiary employer in regard to employee's products liability theory could not be passed on to the parent corporation. Mitchell v. Shell Oil Co., 579 F. Supp. 1326, 41 St. Rep. 278 (D.C. Mont. 1984).

No Interspousal Immunity for Property Damages: There is no interspousal tort immunity for property damage claims by one spouse against the other. Norick v. Dove Constr., 204 M 57, 662 P2d 1318, 40 St. Rep. 660 (1983).

Limitations on Certain Types of Government Tort Damages — Constitutionality: Article II, sec. 16, Mont. Const., guarantees that all persons shall have a speedy remedy for every injury to person, property, or character. The constitution's language "every injury" embraces all recognized compensable components of injury, including the right to be compensated for physical pain, mental anguish, and the loss of enjoyment of living. The right to bring a civil action for personal injury is a fundamental right. Subsection (1) of 2-9-104 (repealed, 1983) provided that neither the state, a county, municipality, taxing district nor any other political subdivision of the state was liable in tort for: (1) noneconomic damages; or (2) economic damages in excess of $300,000 a claimant and $1 million an occurrence. The state argued a compelling state interest in insuring that there would be sufficient funds to supply needed services to those governed by state and local government and that government has to engage in a wide range of activities, some extremely dangerous and not confronted by private industry. This bare assertion fell far short of justifying the subsection (1)(a) class discrimination that infringed upon fundamental rights. Denying noneconomic damages while allowing economic damages was unconstitutional under the strict scrutiny equal protection test. Furthermore, to strike (1)(a) and leave (1)(b) intact would create new discrimination problems in that those with economic loss could get only limited damages, while those with noneconomic loss would have no limit imposed; and since the state

failed to demonstrate a compelling state interest justifying any limitation, subsection (1) was unconstitutional in its entirety. Though some liability limit may comport with equal protection, the limitation could not discriminate between those suffering pain and loss of life quality and those suffering primarily economic loss. White v. St., 203 M 363, 661 P2d 1272, 40 St. Rep. 507 (1983).

Damage to Prescriptive Easement — Injunction Denied: The District Judge properly denied the plaintiffs' request for an injunction and their claim for damages for rutting and disrepair of the roadway where the testimony showed that plaintiffs kept the roadway up despite use of it by defendants and defendants' use of the roadway was consistent with defendants' interest in the land. Marta v. Smith, 191 M 179, 622 P2d 1011, 38 St. Rep. 28 (1981).

Negligence in Maintenance of an Irrigation Ditch: Although plaintiffs' contention that an owner of an irrigation ditch is not an absolute insurer is correct, where the testimony shows: (1) that there were erosion and cutting away of the cross-claimants' soil on both sides of the ditch; (2) that there had been "bad washing"; and (3) that it would take $5,500 to make the irrigation system suitable to prevent further washing on cross-claimants' land and to repair past damage, there was substantial evidence to support the findings of negligence and damages of $5,500. Marta v. Smith, 191 M 179, 622 P2d 1011, 38 St. Rep. 28 (1981).

Automobile Accident: In an action for damages to an automobile, it was not a condition precedent to recovery that the plaintiff should have first incurred an indebtedness or that he should actually have paid the sum claimed for the repairs. Hoenstine v. Rose, 131 M 557, 312 P2d 514 (1957).

Malicious Prosecution: In action for malicious prosecution where jury finds for plaintiff, he is entitled to damages. Fauver v. Wilkoske, 123 M 228, 211 P2d 420, 17 ALR 2d 518 (1949).

Application of Section: Any person who suffers detriment by reason of another's failure to perform an act imposed by law may recover damages. Conway v. Monidah Trust, 47 M 269, 132 P 26 (1913).

EMOTIONAL DISTRESS

Emotional Distress Over Loss of Adult Child Not So Severe as to Be Compensable: Plaintiff argued that she suffered extreme emotional distress as the result of her son's death, allegedly caused by defendant's negligence. Applying the test for emotional distress in Sacco v. High Country Independent Press, Inc., 271 M 209, 896 P2d 411 (1995), the District Court held that plaintiff's emotional distress was insufficiently severe to support her claim, so defendant's motion for summary judgment was granted. On appeal, the Supreme Court concluded that plaintiff's testimony that "life goes on" and that it was a loss that she "must learn to deal with" showed a philosophical strength that would likely be absent in a case of severe emotional distress. Plaintiff's emotional distress was not so severe as to rise to the level of a compensable claim, so the District Court was affirmed. Renville v. Fredrickson, 2004 MT 324, 324 M 86, 101 P3d 773 (2004).

No Contemporaneous Impact Requirement for Determining Negligent Infliction of Emotional Distress — Sacco Rule Applicable: Wages' son was injured by a vehicle driven by defendant's insured. Although Wages did not witness the accident, he sued defendant insurer for severe emotional distress as a result of the insured's negligent operation of the vehicle. Both parties moved for summary judgment. The District Court cited Treichel v. St. Farm Mut. Auto. Ins. Co., 280 M 443, 930 P2d 661 (1997), for the proposition that an individual who witnesses a family member sustain injury or death states a claim for negligent infliction of emotional distress, but an individual who is not at the scene to witness the accident may state a claim for loss of consortium. The court granted summary judgment to defendant. Wages appealed, and the Supreme Court reversed. The court distinguished Treichel and held that the District Court should instead have applied the rule from Sacco v. High Country Independent Press, Inc., 271 M 209, 896 P2d 411 (1995), that an independent cause of action for infliction of emotional distress will arise in circumstances in which serious or severe emotional distress to a claimant was the reasonably foreseeable consequence of a negligent or intentional act or omission. Duty and foreseeability are inextricably linked, and both must be determined by the trial court. The case was remanded for further proceedings in light of Sacco. Wages v. First Nat'l Ins. Co. of America, 2003 MT 309, 318 M 232, 79 P3d 1095 (2003).

Marital Status Discrimination — Award for Emotional Damages Affirmed: For the most part, federal case law involving antidiscrimination statutes draws a distinction between emotional distress claims in tort versus those in discrimination complaints (see Bolden v. SE. Pa. Transp. Authority, 21 F3d 29 (3rd Cir. 1994), Walz v. Town of Smithtown, 46 F3d 162 (2nd Cir. 1995), and Chatman v. Slagle, 107 F3d 380 (6th Cir. 1997)). The standard of proof of independent

actions for emotional distress in Sacco v. High Country Independent Press, Inc., 271 M 209, 896 P2d 411 (1995), that emotional distress damages may be awarded only if there is a substantial invasion of a legally protected interest that causes a significant impact upon the claimant, does not apply in a discrimination context pursuant to Title 49, ch. 2, commonly known as the Montana Human Rights Act. Rather, compensatory damages for human rights claims may be awarded for humiliation and emotional distress established by testimony or inferred from the circumstances, and the severity of the harm should govern the amount, not the availability, of recovery. Here, the record revealed that the claimant had difficulty finding employment after being illegally denied employment based on marital status, lost sleep because of economic hardship, had to move in with relatives, was hounded by collection agencies, had to borrow money, and had to sell an automobile for sustenance. The Commission for Human Rights' award of $2,500 for emotional damages was adequately supported by the record and was affirmed. Vortex Fishing Sys., Inc. v. Foss, 2001 MT 312, 308 M 8, 38 P3d 836 (2001).

Mortgage Against Party's Interest in Property Granted Pursuant to Dissolution — No Tortious Interference With Business, Prima Facie Tort, or Intentional Infliction of Emotional Distress: When George and Joyce were divorced, the District Court granted George exclusive possession of the ranch until it could be sold and the proceeds divided between the parties. During the course of the dissolution proceedings, Joyce took out several loans for living expenses. After the dissolution, Joyce consolidated the $150,000 in loans, and the bank executed a mortgage on Joyce's interest in the ranch to secure the loan. When George found out about the mortgage and security interest, he became distraught because he believed that he would not be able to obtain loans on the property to enable him to conduct ranch obligations and meet his operations. George subsequently filed suit against Joyce, the bank, and the bank president, who was Joyce's son-in-law, alleging tortious interference with business relationships, prima facie tort, and intentional infliction of emotional distress. The District Court granted the defendants' motion for summary judgment, and George appealed. The Supreme Court affirmed. Applying Farrington v. Buttrey Food & Drug Stores Co., 272 M 140, 900 P2d 277 (1995), the court concluded that the acts of Joyce and the bank were legal and that, standing alone, the acts did not give rise to any presumption or inference that the acts were done to harm George. The court also declined to recognize a separate cause of action for prima facie tort under the facts of this case. Applying Sacco v. High Country Independent Press, Inc., 271 M 209, 896 P2d 411 (1995), the court further concluded that because the defendants' acts were legal, no claim for emotional distress could arise from those acts. Absent material facts evidencing malicious intent or damages, summary judgment was proper. Pospisil v. First Nat'l Bank of Lewistown, 2001 MT 286, 307 M 392, 37 P3d 704 (2001).

Independent Claim for Infliction of Emotional Distress Sufficient to Satisfy Good Cause Requirement for Ordering Medical Evaluation: Winslow contended that the District Court improperly ordered him to submit to a psychiatric evaluation pursuant to Rule 35, M.R.Civ.P. (Title 25, ch. 20), after finding that the good cause requirement under the Rule was satisfied by the fact that Winslow had asserted an independent claim for intentional or negligent infliction of emotional distress. The Supreme Court affirmed. The independent claim placed Winslow's mental condition in controversy, and under Schlagenhauf v. Holder, 379 US 104 (1964), the pleadings themselves can establish good cause for ordering a mental examination. Further, under Sacco v. High Country Independent Press, Inc., 271 M 209, 896 P2d 411 (1995), an independent cause of action for intentional infliction of serious or severe emotional distress will arise when the distress was the reasonably foreseeable consequence of the negligent act or omission. The pleading of Winslow's independent Sacco claim was sufficient to satisfy the good cause requirement of Rule 35. Winslow v. Mont. Rail Link, Inc., 2001 MT 269, 307 M 269, 38 P3d 148 (2001), distinguishing In re Marriage of Binsfield, 269 M 336, 888 P2d 889 (1995).

Jury Award of Compensatory Damages Proportionate to Posttraumatic Stress Injuries — Affirmed: Onstad was assaulted on the job and sued the employer, Payless Shoesource (Payless), for failure to provide a safe workplace. The jury held Payless liable and awarded Onstad $500,000 in compensatory damages. On appeal, Payless contended that the award was excessive and unsupported by the evidence. However, Onstad was entitled to reasonable compensation for any pain and suffering that she experienced and would reasonably probably experience in the future, and the law does not set a definite standard by which to calculate compensation for mental pain and suffering. Only when the amount awarded is so grossly out of proportion as to shock the conscience will an appellate court intervene. In this case, Onstad was terrified during the attack and subsequently became withdrawn; her sense of safety, security, and self was violated; she felt extremely powerless; and her whole sense of self-esteem and self-confidence was affected. The amount of compensatory damages awarded was not so grossly

disproportionate to Onstad's posttraumatic stress injury as to shock the conscience, and the Supreme Court declined to alter the award. Onstad v. Payless Shoesource, 2000 MT 230, 301 M 259, 9 P3d 38, 57 St. Rep. 943 (2000).

Damages Proper for Emotional Distress Based on Sale of Real Estate — Punitive Damages Appropriate: The Maloneys were promised an option to purchase property adjacent to their own, hoping to build their retirement home near Glacier Park. The real estate agent who listed the property was aware of the Maloneys' option but sold to another instead. That person then developed the property, building a 3,000-square-foot home on the very site that the Maloneys had desired and within sight of the Maloneys' residence, and then listed the newly developed property for almost six times what the Maloneys could have paid had the option been properly offered. A special master concluded, and the District Court agreed, that the Maloneys had suffered and were entitled to compensation for the shock, worry, anger, disappointment, and frustration that they had suffered and would continue to suffer in light of the inherent duration of the Maloneys' adjacent ownership. The Supreme Court affirmed, noting that under French v. Ralph E. Moore, Inc., 203 M 327, 661 P2d 844, 40 St. Rep. 481 (1983), emotional distress damages may result from negligent or intentional damage to property arising from interference with the use and enjoyment of land and that under Johnson v. Murray, 201 M 495, 656 P2d 170, 39 St. Rep. 2257 (1982), compensatory damages could include compensation for humiliation, embarrassment, distress, and ridicule associated with interference with plaintiffs' use of their private property. The private property interest at issue here sufficiently involved the use and enjoyment of land to fall within these holdings. Further, the award of punitive damages was also affirmed in this instance despite defendant's claims of the special master's improper estimation of net worth, a syntax error, and the special master's improper recognition of punitive damages assessed against defendant in a prior case. Maloney v. Home & Inv. Center, Inc., 2000 MT 34, 298 M 213, 994 P2d 1124, 57 St. Rep. 144 (2000), followed in May v. ERA Landmark Real Estate of Bozeman, 2000 MT 299, 302 M 326, 15 P3d 1179, 57 St. Rep. 1256 (2000). See also Recovery for Negligent Infliction of Emotional Distress Attendant to Economic Loss: A Reassessment, Sandor & Berry, 37 Ariz. L. Rev. 1247 (1995).

Business Retaliation — Lack of Evidence as to Emotional Distress of Minor Child: David, his wife Susan, their minor child, and the parties' defunct business sued Pierce Flooring and others for damages stemming from criminal acts taken against the plaintiffs' competing business. The District Court granted the defendants' motion for a directed verdict against the plaintiffs' minor child on the issue of emotional distress. The Supreme Court, after reviewing the record, held that the motion was correctly granted because there was no evidence that the child suffered any emotional distress from the actions taken against her parents. Rocky Mtn. Enterprises, Inc. v. Pierce Flooring, 286 M 282, 951 P2d 1326, 54 St. Rep. 1410 (1997).

Intentional Infliction of Emotional Distress Extended to Negligent Handling of Dead Bodies — Standing to Sue: The family of the deceased, when viewing the body, observed a stain on the clothing that was determined to be caused by leaking embalming fluid. The Supreme Court, in reversing the District Court, held that one who negligently handles a dead body is liable to the family for emotional distress and that the test for emotional distress is that established in Sacco v. High Country Independent Press, Inc., 271 M 209, 896 P2d 411, 52 St. Rep. 407 (1995). The Supreme Court also held that the children and the grandchildren of the deceased had standing to sue based on a factual showing of their closeness to the deceased and that having seen the stain was not a prerequisite to their right to sue. Contreraz v. Michelotti-Sawyers & Nordquist Mortuary, Inc., 271 M 300, 896 P2d 1118, 52 St. Rep. 454 (1995).

New Standard for Negligent or Intentional Infliction of Emotional Distress — Proof of Serious or Severe Emotional Stress Required: A photographer for a Belgrade newspaper sued the newspaper and a city police officer, alleging that both falsely and maliciously conspired to criminally prosecute the photographer for stealing photographs from the newspaper. After the District Court granted the newspaper and officer a summary judgment motion, the Supreme Court, after reviewing cases using the traditional approach, reversed and remanded the case for determination under a new standard for negligent or intentional infliction of emotional distress. Applying the new standard, the Supreme Court held that an independent cause of action for infliction of emotional distress will arise in circumstances in which serious or severe emotional distress to a claimant, as defined in Comment j of the Restatement (Second) of Torts, was the reasonably foreseeable consequence of a negligent or intentional act or omission. The difference between negligent infliction and intentional infliction lies not in the elements of the tort but in the nature and culpability of the defendant's conduct. Punitive damages may be requested in a cause of action for intentional infliction of emotional distress. It is for the court to determine whether the evidence of serious or severe emotional distress can be found; it is for the jury to

determine whether, on the evidence, it has in fact existed. Sacco v. High Country Independent Press, Inc., 271 M 209, 896 P2d 411, 52 St. Rep. 407 (1995), followed in Treichel v. St. Farm Mut. Auto. Ins. Co., 280 M 443, 930 P2d 661, 54 St. Rep. 1 (1997), Maloney v. Home & Inv. Center, Inc., 2000 MT 34, 298 M 213, 994 P2d 1124, 57 St. Rep. 144 (2000), Winslow v. Mont. Rail Link, Inc., 2000 MT 292, 302 M 289, 16 P3d 992, 57 St. Rep. 1238 (2000), Winslow v. Mont. Rail Link, Inc., 2001 MT 269, 307 M 269, 38 P3d 148 (2001), Pospisil v. First Nat'l Bank of Lewistown, 2001 MT 286, 307 M 392, 37 P3d 704 (2001), Wages v. First Nat'l Ins. Co. of America, 2003 MT 309, 318 M 232, 79 P3d 1095 (2003), and McConkey v. Flathead Elec. Co-op, 2005 MT 334, 330 M 48, 125 P3d 1121 (2005), distinguished, with regard to the inapplicability of the standard to civil rights cases brought under Title 49, ch. 2, commonly known as the Montana Human Rights Act, in Vortex Fishing Sys., Inc. v. Foss, 2001 MT 312, 308 M 8, 38 P3d 836 (2001), and clarified in Henricksen v. St., 2004 MT 20, 319 M 307, 84 P3d 38 (2004), to the extent that when there is a physical manifestation of bodily harm resulting from emotional distress, such as posttraumatic stress disorder, this bodily harm is sufficient evidence that the emotional distress is genuine and severe. See also May v. ERA Landmark Real Estate of Bozeman, 2000 MT 299, 302 M 326, 15 P3d 1179, 57 St. Rep. 1256 (2000), and Turner v. Burlington N. Santa Fe RR Co., 338 F3d 1058 (9th Cir. 2003).

No Direct Relationship Between Outrageous Event and Third Party — No Extension of Liability for Emotional Distress: Maguire's mentally disabled daughter was raped and impregnated while a resident at the Montana Developmental Center (MDC). The District Court allowed Maguire to maintain an action in tort for emotional distress related to the stress caused by Maguire's being required to make her daughter's pregnancy decisions. Applying the guidelines in Versland v. Caron Transport, 206 M 313, 671 P2d 583 (1983), for determining whether there was a negligent infliction of emotional distress, the Supreme Court held that because no direct relationship existed between any outrageous act and Maguire, to find an independent cause of action went beyond the rationale of Versland and the requirement of the victim's physical presence at the accident or event. Faced with the question of whether the causation and the foreseeability requirements were met when the presence requirement was not, the court found that MDC did not assume a duty of care toward Maguire. Refusing to increase the spiral of liability beyond that determined by other jurisdictions, the court declined to extend liability to allow Maguire to recover for either negligent or intentional infliction of severe emotional distress. Maguire v. St., 254 M 178, 835 P2d 755, 49 St. Rep. 688 (1992), followed in Estate of Strever v. Cline, 278 M 165, 924 P2d 666, 53 St. Rep. 576 (1996).

Intentional Infliction of Emotional Distress — Test: In determining whether a claim for intentional infliction of emotional distress was valid, the Supreme Court adopted the guideline in Comment d, Restatement (Second) of Torts 46, noting that "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community". The court further applied the standard in Comment g, Restatement of Torts 46, that "The actor is never liable when he has done no more than to insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress". Lachenmaier v. First Bank Sys., Inc., 246 M 26, 803 P2d 614, 47 St. Rep. 2244 (1990).

Emotional Distress Damages Inapplicable to Case of Negligent Damages Resulting in No Physical Injury: The Supreme Court has adopted only Comment j to Restatement (Second) of Torts 46 (1965), defining severe emotional distress, but has not recognized the tort of intentional infliction of emotional distress as a cause of action. Therefore, the court declined to extend recovery for emotional distress to cases in which the defendant negligently damages or destroys real property but plaintiff suffers no physical injury. Day v. Mont. Power Co., 242 M 145, 789 P2d 1224, 47 St. Rep. 626 (1990), followed in McNeil v. Currie, 253 M 9, 830 P2d 1241, 49 St. Rep. 312 (1992). However, see Sacco v. High Country Independent Press, Inc., 271 M 209, 896 P2d 411, 52 St. Rep. 407 (1995).

Damages for Emotional Distress Denied to Third Party Not a Victim of Tort: Although Montana case law has established that a cause of action for emotional distress to a third party can arise when a close relative witnesses a death or physical injury to the victim of a tort, the District Court properly dismissed wife's claim for loss of consortium and consequential intentional infliction of emotional distress when she did not allege to be a victim of a tort but rather that distress resulted from her husband being a victim of a tort. Anderson v. TW Corp., 228 M 1, 741 P2d 397, 44 St. Rep. 1293 (1987).

"Johnson" Instruction Not Given — Award Upheld When No Objection Made: Jury instructions regarding award for emotional distress failed to state the requirement in Johnson v.

Supersave Mkt., Inc., 211 M 465, 686 P2d 209, 41 St. Rep. 1495 (1984), that there must be a substantial invasion of a legally protected interest causing a substantial impact upon plaintiff. However, an award was upheld when defendant failed to object to the incomplete instructions at trial court level, complaining instead that the standard of proof in Johnson was not met. Tynes v. Bankers Life Co., 224 M 350, 730 P2d 1115, 43 St. Rep. 2243 (1986).

No Invasion of Legally Protected Interest — Damage Award Reversed: The Supreme Court, applying the test outlined in Johnson v. Super Save Mkt., Inc., 211 M 465, 686 P2d 209, 41 St. Rep. 1495 (1984), reversed the award of damages as they related to emotional distress because the evidence failed to disclose any invasion of a legally protected interest in bringing about the severe emotional distress. Proto v. Elliot, 222 M 393, 722 P2d 625, 43 St. Rep. 1358 (1986).

Submissible Jury Issue — Proximate Cause: The Supreme Court found a submissible jury issue on mental and emotional distress when the jury was properly instructed on proximate cause and damages were related to a franchisor's unreasonable failure to evaluate relocation of a franchise, causing franchisees' sense of loss and devastation, loss of self-esteem, and feeling of shame at being recognized in the community as a failure. Dunfee v. Baskin-Robbins, Inc., 221 M 447, 720 P2d 1148, 43 St. Rep. 964 (1986).

Award of Damages for Mental Anguish — Findings Required — Improper Jury Instruction: One instruction given to the jury stated that if they found for plaintiffs, the jury "must award them damages for all emotional distress and mental anguish suffered as a result of the defendants' conduct". In effect, this instruction directed a verdict on damages for emotional distress even if plaintiffs recovered only on their contract claim. In Johnson v. Supersave Markets, Inc., 211 M 465, 686 P2d 209, 41 St. Rep. 1495 (1984), the Supreme Court set out the criteria for determining whether distress is compensable absent a showing of physical or mental injury, which included whether the tortious conduct "caused a significant impact upon the person of the plaintiff". In the present case, McGregor testified that his financial problems bothered him a lot, but the record disclosed no serious emotional distress or anxiety as required by the holding in Johnson. The court held that the jury instruction improperly required an award of damages for emotional distress and mental anguish without finding a significant impact on the plaintiffs. The judgment awarding damages for mental anguish was reversed. McGregor v. Cushman/Mommer, 220 M 98, 714 P2d 536, 43 St. Rep. 206 (1986), followed in Noonan v. First Bank Butte, 227 M 329, 740 P2d 631, 44 St. Rep. 1124 (1987).

Negligence Resulting in Imprisonment — Damages for Emotional Distress: Plaintiff brought an action for damages resulting from appellant's negligence in causing an arrest and imprisonment. Plaintiff's wife issued a check on his account to Super Save without plaintiff's knowledge. The check was dishonored for insufficient funds. Super Save referred the matter to a collection agency. Although plaintiff later paid Super Save, the collection agency and County Attorney's office were never so apprised by Super Save. Almost a year after writing the check, plaintiff was arrested, handcuffed, frisked, booked, and fingerprinted. The District Court, in a jury trial, awarded $17,000 in damages. The Supreme Court held that Super Save owes its patrons the duty to exercise reasonable care to avoid arrest and criminal charges for nonpayment of a bad check for which restitution has been made. It breached that duty by cashing the check without requiring the proper identification and by failing to terminate the collection process. Damages for emotional distress were upheld in spite of the fact that there was no injury. Johnson v. Super Save Markets, Inc., 211 M 465, 686 P2d 209, 41 St. Rep. 1495 (1984).

Test of Whether Emotional Distress Merits Compensation: The Supreme Court adopted the species of case approach that requires a factual analysis of each case to determine whether the alleged "emotional distress" merits compensation. In determining whether the distress is compensable absent a showing of physical or mental injury, the court looks to whether tortious conduct results in a substantial invasion of a legally protected interest and causes a significant impact upon the person of plaintiff. In the instant case, plaintiff's right to liberty was violated when he was arrested, handcuffed, frisked, booked, and charged for issuing a bad check for which he had made restitution months before. Johnson v. Super Save Markets, Inc., 211 M 465, 686 P2d 209, 41 St. Rep. 1495 (1984), followed in Gurnsey v. Conklin Co, Inc., 230 M 42, 751 P2d 151, 45 St. Rep. 1 (1988), and in Niles v. Big Sky Eyewear, 236 M 455, 771 P2d 114, 46 St. Rep. 504 (1989). See also Zugg v. Ramage, 239 M 292, 779 P2d 913, 46 St. Rep. 1693 (1989), and Day v. Mont. Power Co., 242 M 145, 789 P2d 1224, 47 St. Rep. 626 (1990). However, see Maguire v. St., 254 M 178, 835 P2d 755, 49 St. Rep. 688 (1992), in which case recovery for emotional distress was denied when the victim was a third party who was not present during the accident or event.

Infliction of Emotional Distress — No Strict Liability: When the issue was certified to it by the U.S. District Court, the Montana Supreme Court ruled that there is no strict liability for the infliction of emotional distress. Versland v. Caron Transp., 206 M 313, 671 P2d 583, 40 St. Rep.

1681 (1983), distinguished in Treichel v. St. Farm Mut. Auto. Ins. Co., 280 M 443, 930 P2d 661, 54 St. Rep. 1 (1997).

Negligent Infliction of Emotional Distress — Elements: Plaintiff filed an action against defendant in U.S. District Court for damages arising out of an automobile accident in which plaintiff's husband was killed. The federal court certified the action to the Montana Supreme Court for a determination of issues of state law. The Montana Supreme Court ruled that an injured plaintiff may recover damages for the negligent infliction of emotional distress when: (1) the shock results from a direct emotional impact upon the plaintiff from the sensory and contemporaneous perception of the accident; (2) the plaintiff and the victim are closely related; and (3) death or serious injury results from defendant's negligence. Versland v. Caron Transp., 206 M 313, 671 P2d 583, 40 St. Rep. 1681 (1983), followed in Frigon v. Morrison-Maierle, Inc., 233 M 113, 760 P2d 57, 45 St. Rep. 1344 (1988), Maguire v. St., 254 M 178, 835 P2d 755, 49 St. Rep. 688 (1992), and in Lence v. Hagadone Inv., 258 M 433, 853 P2d 1230, 50 St. Rep. 601 (1993). However, see Contreraz v. Michelotti-Sawyers & Nordquist Mortuary, Inc., 271 M 300, 896 P2d 1118, 52 St. Rep. 454 (1995).

PRODUCTS LIABILITY

Indemnification Action — Defense of Contributory Negligence Unavailable: Contributory negligence is not available in Montana as a defense in an action for indemnification. Jones v. Aero-Chem Corp., 680 F. Supp. 338, 45 St. Rep. 360 (D.C. Mont. 1987).

Dual Capacity Doctrine — Products Liability Suit by Employee Against Employer: A workman injured on an oil rig sued his employer, the owner of the rig, for products liability, claiming the rig was defective. The dual capacity doctrine is invoked in workers' compensation cases when the employer may be said to owe some duty to an injured employee distinct from his duties as an employer, commonly, when an employee is injured by a piece of equipment manufactured by the employer. Whether this doctrine exists in Montana is not clear; but the question need not be answered because, even assuming that the doctrine applies in Montana, the facts do not support products liability as to the employer. The employer did not manufacture oil rigs to sell to the public and did not place in the stream of commerce the rig involved or any other rig. Montana law requires one held liable for products liability to have been a seller of the defective product. Mitchell v. Shell Oil Co., 579 F. Supp. 1326, 41 St. Rep. 278 (D.C. Mont. 1984).

Products Liability — When Only Damage Done Is to Defective Product Itself: Six years after she had purchased a mobile home, appellant filed an action against the seller for damages for breach of warranty and for property damages based on strict liability in tort, alleging that the mobile home had been defective and unfit for use from the time of sale. The trial judge dismissed the strict liability claim, and the jury found for the defendants on all other counts. The Supreme Court reversed the dismissal and remanded to the trial court, holding that a claim of strict liability in tort can be maintained when the only injury suffered is to the defective product itself. Thompson v. Nebr. Mobile Homes Corp., 198 M 461, 647 P2d 334, 39 St. Rep. 1094 (1982).

Products Liability — Indemnity — Third-Party Actions: Plaintiff was injured when a pickup truck in which he was riding rolled over. Plaintiff sued General Motors and also the manufacturer of the pants he was wearing. Plaintiff alleged the pants were defective and increased the severity of his injuries by melting onto his skin. The pants manufacturer filed a third-party complaint against Burlington Industries, who had manufactured the pants material and supplied it to Corbin, Ltd., the maker of the pants. Burlington moved for dismissal of the third-party complaint, saying that indemnity for tort liability cannot be sought in a third-party action when the primary complaint sounds in strict products liability, indemnity being antithetical to and inapplicable in strict liability actions. Corbin argued that such indemnity is permissible through a process of weighing the comparative fault of two potentially liable parties, despite the fact the action was in strict liability, not in negligence. The U.S. District Court agreed with the Burlington arguments, observing that Corbin offered little supporting authority while Burlington cited ample authority. The court also noted that Montana has adopted section 402A of the Restatement of Torts, including the conclusion that the doctrine of strict liability was evolved to place liability on the party primarily responsible for the injury occurring, that is, the manufacturer of the defective product, a position based on public policy arguments. The question in Montana is the condition of the product in the hands of the injured party, not the ultimate fault of any given defendant arising from such defendant's conduct. Kelly v. Gen. Motors Corp., 487 F. Supp. 1041 (D.C. Mont. 1980), distinguished in Jones v. Aero-Chem Corp., 680 F. Supp. 338, 45 St. Rep. 360 (D.C. Mont. 1987).

CONTRACTUAL INTERFERENCE

Sufficient Allegations for Pursuit of State Claim for Violation of Federal Wage Standards Absent Remedy Under Federal Davis-Bacon Act: Plaintiff construction workers on a public works project brought a state action against a school district for alleged violation of wage standards established by the federal Davis-Bacon Act. The District Court held that before the workers could maintain a private cause of action in state court, the four-part test in St. Medical Oxygen & Supply, Inc. v. Am. Medical Oxygen Co., 230 M 456, 750 P2d 1085 (1988), must be met. The first prong requires a showing that the Davis-Bacon Act created a federal right in favor of plaintiffs. The District Court held that it did but then found that because there was no indication in the Act that Congress intended to create a remedy against the owner of the project and that implying such a remedy was inconsistent with the Act, a state action could not be maintained. The Supreme Court disagreed and reversed. Absent both a federal wage provision and a federal contracting party, the workers could invoke no federal regulatory remedy under 40 U.S.C. 3142(a), so a state court action was logical for pursuit of a remedy. Because the workers were not seeking a remedy under the Act, analysis under St. Medical Oxygen was unnecessary and inappropriate. The allegations in the workers' state claim were sufficient to survive the school district's claim for dismissal and to vest the District Court with subject matter jurisdiction, so the case was remanded to allow the workers to proceed with their negligence and breach of contract action against the school district. Herrmann v. Wolf Point School District, 2004 MT 10, 319 M 231, 84 P3d 20 (2004). See also Favel v. Am. Renovation & Constr. Co., 2002 MT 266, 312 M 285, 59 P3d 412 (2002).

No Private Cause of Action Under Social Security Act:

Further, there is no conflict between state law allowing legal action for tortious interference with a business relationship and the purpose of the federal Social Security Act, particularly 42 U.S.C. 1395a. That section simply allows a recipient of Social Security benefits to choose the provider from whom to obtain benefits. It does not operate to bar a cause of action under state law between competing interests as to that class of customers. There was no reliable indicium of congressional intent to supplant state law in this case. St. Medical Oxygen & Supply, Inc. v. Am. Medical Oxygen Co., 256 M 38, 844 P2d 100, 49 St. Rep. 1126 (1992), following Cipollone v. Liggett Group, Inc., 505 US 504, 120 L Ed 2d 407, 112 S Ct 2608 (1992).

An alleged breach of an employment contract pursuant to sec. 1877(b) of the federal Social Security Act, 42 U.S.C. 1395(nn), does not give rise to a private civil cause of action under this section. St. Medical Oxygen & Supply, Inc. v. Am. Medical Oxygen Co., 230 M 456, 750 P2d 1085, 45 St. Rep. 349 (1988).

Tort of Contract Interference: In a case in which a former state employee sued the state for violations of his civil rights, the Federal District Court indicated that Montana law recognizes that it is a legal wrong for a person to break up or interfere with any contract relationship between other persons. This tort of contract interference, however, lies only against a third person and not against a party to the contract. The court did not find a tort remedy lying in one party to the contract against another. Holladay v. St., 506 F. Supp. 1317, 38 St. Rep. 285 (D.C. Mont. 1981), followed in King v. St., 259 M 393, 856 P2d 954, 50 St. Rep. 848 (1993).

Breach of Contract: Where a stranger to a contract without justification induces a party thereto to break it, he is responsible in damages to the other party to it. Burden v. Elling St. Bank, 76 M 24, 245 P 958, 46 ALR 906 (1926); Simonsen v. Barth, 64 M 95, 208 P 938 (1922).

MEASURE OF DAMAGES

Court Reinstatement of Emotional Damage Award Following Arbitrary Reduction by Commission on Human Rights Affirmed: After finding that plaintiff was subjected to employment discrimination, the hearings examiner concluded that plaintiff was entitled to $75,000 in compensatory damages for emotional distress. The Commission on Human Rights reduced the award to $40,000, but the Commission did not cite any evidence to support the reduction, aside from the vague feeling of some Commissioners that the initial award was too high. The District Court reinstated the $75,000 award, and on appeal, the Supreme Court affirmed. The hearings examiner had authority to award compensatory damages, and the hearings examiner's findings were supported by testimony from plaintiff, plaintiff's experts, and others. The Commission's reduction was arbitrary, and the District Court did not err in reinstating the original compensatory award. Benjamin v. Anderson, 2005 MT 123, 327 M 173, 112 P3d 1039 (2005).

No Error in Failure to Reduce Wage Loss Recovery in Human Rights Case for Failure to Mitigate: After finding that plaintiff was subjected to employment discrimination, the hearings examiner concluded that plaintiff was entitled to recover lost wages. Defendants contended that

the wage loss should be reduced because plaintiff failed to take reasonable steps to mitigate the damages. The Supreme Court agreed that in a claim for lost wages before the Commission on Human Rights, a claimant must take reasonable steps toward mitigating damages. Citing Hulett v. Bozeman School District, 228 M 71, 740 P2d 1132 (1987), the court noted that plaintiff was not obligated to seek out all possible employment opportunities, but needed only to be reasonable in pursuing offers of employment. In this case, it was undisputed that plaintiff was emotionally debilitated, and although there was evidence of other reasons why plaintiff did not immediately seek new employment, plaintiff's medical testimony and testimony concerning plaintiff's loss of confidence, anxiety, and reluctance to meet new people supported the hearings examiner's findings, and the Supreme Court declined to disturb those findings. Benjamin v. Anderson, 2005 MT 123, 327 M 173, 112 P3d 1039 (2005).

Failure to Provide Documentation of Damages Precluding Damage Award: A settlement agreement provided that the wife would be sole owner of a house and be responsible for indebtedness on the property. The husband contended that he should have been credited for additional interest that he was charged on loans unrelated to the marriage because the wife defaulted on the mortgage after the final decree was entered and hurt the husband's credit rating. However, even though the wife breached the settlement agreement, the husband did not submit documentation to prove damages related to the loss of credit, and absent proof, the damage request was properly denied. In re Marriage of Mease, 2004 MT 59, 320 M 229, 92 P3d 1148 (2004).

Jury Award Based on Contested Expenses — Sufficient Evidence to Support Verdict: Plaintiffs asserted that a new trial was warranted because the jury in a personal injury case returned a verdict of $9,873, which amounted to significantly less than plaintiffs' evidence of past and future medical expenses, loss of past and future wages, and pain and suffering. However, the District Court denied a new trial, and the Supreme Court affirmed, noting that if a jury award is insufficient to cover uncontested expenses, then it is not supported by substantial evidence, but that was not the case here. Evidence presented by both parties revealed a significant dispute in the nature, cause, and severity of the injury, the need for future treatment, the existence and amount of past and future wage loss, and pain and suffering. Based on the record of disputed expenses, there was substantial evidence to support the jury award, and the Supreme Court declined to retry the case or disturb the judgment, especially when the District Court had already upheld the sufficiency of the evidence on motion for a new trial. Jenks v. Bertelsen, 2004 MT 50, 320 M 139, 86 P3d 24 (2004).

Award of Compensatory Damages Not Disproportionate to Injury From Sexual Assault Affirmed: Following a sexual assault by a coworker, the District Court awarded Beaver $9,095 in compensatory damages, including $3,095 for expenses incurred in therapy, $1,000 for future therapy, and $5,000 for emotional distress. Beaver contended that the amount was incomplete and inadequate, citing cases in which plaintiffs received higher awards in compensation for sexual crimes. The Supreme Court distinguished those cases and affirmed. The amount awarded for compensatory damages rests in the sound discretion of the trier of fact, and only when the judgment is the product of passion or prejudice or the amount awarded is so grossly out of proportion to the injury as to shock the conscience will an appellate court intervene. Although the award in this case was relatively small by comparison, there was no showing of passion or prejudice or that the amount awarded was disproportionate to the injury, so the award was not disturbed. Beaver v. Dept. of Natural Resources and Conservation, 2003 MT 287, 318 M 35, 78 P3d 857 (2003).

Failure to Prove Amount of Damages for Replacement Tail Insurance Coverage: A doctor was suspended from employment with a health care facility and was informed that the facility had removed her from the medical malpractice insurance that covered the clinic doctors. There was no immediate indication whether the doctor continued to be covered under the facility's policy for tail coverage, which is the portion of the policy that would cover any potential claims made against the doctor in the future related to the doctor's practice while employed at the facility, although the facility later contended that the doctor was in fact covered by the facility's tail insurance. Nevertheless, in order to cover her tail insurance, the doctor subsequently purchased her own malpractice insurance that included tail insurance for the time that she was employed at the clinic and later contended that the facility should be liable in damages for the cost of the replacement insurance. However, no evidence was presented to indicate a specific amount in the doctor's replacement insurance that related to the cost of tail insurance. Unable to prove that she incurred damages when she believed that she was without tail coverage, no damages were awarded. Marias Healthcare Serv., Inc. v. Turenne, 2001 MT 127, 305 M 419, 28 P3d 491 (2001).

State Agricultural Lease — Negligent Misrepresentation That State Land Available for Lease — Lost Profits Not Recoverable: The Department of Natural Resources and Conservation (DNRC) informed Bokma Farms, Inc. (Bokma), by telephone and certified letter that certain agricultural property was available for lease after Maclean failed to make a lease payment to the DNRC. Bokma made expenditures in reliance upon the DNRC's statement that the property was available for lease. The DNRC later determined that Maclean did make the lease payment and therefore renewed the lease with Maclean. Bokma sued the DNRC, alleging breach of contract and negligent misrepresentation, and asked for damages for lost profits. The Supreme Court held that the District Court properly dismissed the breach of contract claim because no lease had been signed. The Supreme Court also held, citing the Restatement (Second) of Torts 552B (1976), that although damages for lost profits may be awarded as consequential damages for negligent misrepresentation, lost profits could not be awarded in this case because the loss of profits was not caused by the misrepresentation but by the fact that Bokma did not have an enforceable lease with the DNRC. Bokma Farms, Inc. v. St., 2000 MT 298, 302 M 321, 14 P3d 1199, 57 St. Rep. 1253 (2000).

Commission for Human Rights Discretion to Award Compensatory Damages in Mixed Motives Cases: Laudert suffered liver failure while employed by the Richland County Sheriff's Department (RCSD) and had to resign. Following Laudert's full recovery, his former position came open again and he applied but was not rehired. He filed a discrimination charge on grounds of age and disability. The hearings examiner found that questions asked by the RCSD interview panel constituted direct evidence that RCSD had unlawfully considered Laudert's disability, but did not award damages because Laudert would not have been hired even in the absence of any unlawful consideration of his disability. RCSD maintained that Laudert was not hired because of his employment history. The hearings examiner properly determined that this was a "mixed motive" case. Whether Laudert was entitled to compensatory damages depended on whether RCSD proved by a preponderance of the evidence that it would have made the same decision in the absence of Laudert's disability, and Laudert's employment history provided substantial evidence proving that Laudert would not have been hired in any event. The Supreme Court found that the hearings examiner properly exercised the statutory discretion to preclude damages, and the court affirmed the authority of the Commission for Human Rights to limit compensatory damages in mixed motive cases pursuant to ARM 24.9.611 and Price Waterhouse v. Hopkins, 490 US 228 (1989). Laudert v. Richland County Sheriff's Dept., 2000 MT 218, 301 M 114, 7 P3d 386, 57 St. Rep. 872 (2000).

Insufficient Evidence to Support Jury Verdict Limiting Damages to Past Medical Expenses but Not Pain and Suffering: Renville was injured as a passenger in an automobile accident in 1995, and liability was not contested. Evidence was uncontroverted that Renville had subsequently experienced pain and suffering as a result of the accident. The jury was instructed to award damages for past and future medical expenses, loss of earnings and earning capacity, pain and suffering, and loss of the ability to pursue an occupation and an established course of life. However, the jury limited its verdict to only past medical expenses, so Renville sought a new trial on grounds of insufficient evidence to support the award and irregularities in the proceedings. On review, the Supreme Court noted that a jury may not disregard uncontradicted, credible, nonopinion evidence. The court applied Thompson v. Bozeman, 284 M 440, 945 P2d 48 (1997), in holding that if a jury fails to award damages when the only evidence of record supports an award, that verdict is not supported by substantial evidence and may be set aside. Renville was entitled to some award for damages for proved pain and suffering, and the Supreme Court remanded for new trial limited to the issue of damages. Renville v. Taylor, 2000 MT 217, 301 M 99, 7 P3d 400, 57 St. Rep. 864 (2000). On remand, the District Court concluded that factual issues still existed as to the amount of Renville's past medical expanses and that the issues must be determined by a jury on retrial. The court found that the effect of the decision in Renville I, id., was to remand the entire issue of damages for a new trial. The Supreme Court disagreed. The decision in Renville I clearly stated that the award was limited to Renville's past medical expenses, which had been proved and awarded. Therefore, the law of the case precluded the District Court from revisiting the issue of Renville's past medical expenses on remand. It was an abuse of discretion for the District Court to deny Renville's motion for summary judgment and request for declaratory judgment on the issue of past medical expenses. Renville v. Farmers Ins. Exch., 2003 MT 103, 315 M 295, 69 P3d 217 (2003). See also St. v. Gilder, 2001 MT 121, 305 M 362, 28 P3d 488 (2001).

Trial Court Discretion to Determine Appropriateness of Interest Award — No Award of Prejudgment Interest Until Underlying Monetary Obligation Established: H-D Irrigating, Inc. (H-D), bought land and irrigation equipment from Hobble Diamond Cattle Company (Hobble)

and Kimble Properties, Inc. (Kimble Properties), respectively, then sued both companies for constructive fraud when the land eroded and caused damage to the irrigation system. The District Court concluded that defendants were entitled to a net payment on the promissory note for the sale, less damages for defendant's misrepresentations, plus interest from the date of judgment. Defendants contended that the court subtracted an offset before calculating interest, calculated interest from a date 5 years later than should have been applied, and failed to award interest on the promissory note from the date on which the first payment was due. Plaintiffs contended that accrual of all interest should be suspended pending resolution of the dispute and that they should be entitled to prejudgment interest for their damages. Distinguishing Sjoberg v. Kravik, 233 M 33, 759 P2d 966 (1988), which involved a breach of contract rather than constructive fraud, the Supreme Court noted that H-D was obligated to make timely payments on the promissory note, but not entitled to damages until the District Court adjudicated the fraud issue, and that H-D was not entitled to offset its promissory note obligation until the time of judgment because defendants did not have an underlying monetary obligation to H-D until liability was ascribed for constructive fraud. The District Court should have offset H-D's obligation by the damages resulting from the constructive fraud at the time of judgment. It was within the discretion of the judge as factfinder to determine whether interest was appropriate, and the court did not err in refusing to award prejudgment interest to H-D. Judgment was reversed for a recalculation of damages. H-D Irrigating, Inc. v. Kimble Properties, Inc., 2000 MT 212, 301 M 34, 8 P3d 95, 57 St. Rep. 832 (2000).

Damages for Tort of Spoliation of Evidence: The speculative nature of damages is inherent in the uncertainties of proof relevant to the tort of spoliation of evidence, but the speculative nature of such damages should not bar recovery. Thus, the interest of plaintiff to recover the entire amount of damages that would have been received if the underlying action had been pursued successfully must be balanced with defendant's interest in not providing plaintiff with a windfall. Taking these interests into consideration, it is necessary that damages be discounted to account for the uncertainties. Therefore, damages arrived at through reasonable estimation based on relevant data should be multiplied by the significant possibility that plaintiff would have won the underlying suit had the spoliated evidence been available. Oliver v. Stimson Lumber Co., 1999 MT 328, 297 M 336, 993 P2d 11, 56 St. Rep. 1303 (1999). See also Holmes v. Amerex Rent-A-Car, 710 A2d 846 (D.C. 1998).

Agreed Coverage Minus Agreed Premiums as Damages for Insurance Fraud: An insurance agent fraudulently misrepresented that a $150,000 whole life policy converted from term life would only require 3 years of premium payments by the insured and after that would be self-sustained by the payment of premiums out of dividends and other earnings. When the insured discovered the facts, he failed to make the third payment, the policy was canceled, and at the time of the verdict in his favor he was uninsurable. The insured's damages were properly calculated at the agreed coverage minus the 3 years of premiums that he agreed to pay. Cartwright v. Equitable Life Assurance Soc'y, 276 M 1, 914 P2d 976, 53 St. Rep. 268 (1996).

Amount by Which Fraudulent Loans Against Policy to Pay Premiums Decreased Its Coverage as Proper Damages: An insurance agent fraudulently misrepresented that after the insured paid premiums for 4 or 5 years, the policy would be self-sustained by the payment of premiums out of dividends and other earnings. Without the insured's knowledge, after the 4 or 5 years passed, the agent fraudulently had the premiums paid by loans against the policy. The insured's damages were properly calculated to be the amount by which the loans against the policy decreased the coverage amount. Cartwright v. Equitable Life Assurance Soc'y, 276 M 1, 914 P2d 976, 53 St. Rep. 268 (1996).

Cost of Paying for Same Coverage as Damages for Insurance Canceled After Insured Discovered Insurance Agent Fraud and Failed to Pay Further Premiums: An insurance agent fraudulently misrepresented that after the insured paid premiums for 3 years, the policy would be self-sustained by the payment of premiums out of dividends and other earnings. Without the insured's knowledge, after the 3 years passed, the agent fraudulently had the premiums paid by loans against the policy. When the insured discovered the fraud and refused to make further payments, the policy was canceled. The insured's damages were properly calculated to be the amount that it would cost her to purchase the same amount of coverage and pay the premiums until the policy was self-sustaining. Cartwright v. Equitable Life Assurance Soc'y, 276 M 1, 914 P2d 976, 53 St. Rep. 268 (1996).

Cost of Similar Policy as Damages for Fraudulently Inducing Purchase of Policy Canceled When Fraud Was Discovered and Insured Failed to Make Further Payments: An insurance agent fraudulently misrepresented that after the insured paid premiums for 4 or 5 years, the policy would be self-sustained by the payment of premiums out of dividends. Without the insured's

knowledge, after the time period passed, the agent fraudulently had the premiums paid by loans against the policy. The policy was canceled when the insured discovered the fraud and refused to make further premium payments. The insured's damages were properly calculated as the cost of paying for a similar policy. Cartwright v. Equitable Life Assurance Soc'y, 276 M 1, 914 P2d 976, 53 St. Rep. 268 (1996).

Fraudulent Statement That Policy Would Be Self-Sustaining After Three Years — Damages as Cost of Future Premiums and of Repaying Loans Fraudulently Made Against Policy to Pay Past Premiums: An insurance agent fraudulently misrepresented that after the insured paid premiums for 3 years, the policy would be self-sustained by the payment of premiums out of dividends and other earnings. Without the insured's knowledge, after the 3 years passed, the agent fraudulently had the premiums paid by loans against the policy. The insured's damages were properly calculated as the cost of paying back the loans and of making future premium payments. Cartwright v. Equitable Life Assurance Soc'y, 276 M 1, 914 P2d 976, 53 St. Rep. 268 (1996).

Plaintiff Entitled to Damages for Pain and Suffering: When a jury found defendant liable for assault and battery and awarded damages for plaintiff's medical expenses, it was the jury's duty to award damages for pain and suffering for plaintiff's serious injuries. There was not substantial evidence to support the jury's failure to award damages for pain and suffering and hearing loss. Lee v. Kane, 270 M 505, 893 P2d 854, 52 St. Rep. 268 (1995).

Improper Award of Contractual Interest in Case of Negligent Misrepresentation of Real Property Appraisal: A professional appraiser prepared appraisal reports on two properties, which a lender reviewed and relied on in its decision to make loans at 61% to 62% of appraised market value and secured by the appraised properties. When the borrower defaulted, the lender foreclosed. After the Sheriff's sale, a deficiency judgment of $848,067, including $241,333.02 in contractual interest on the note, was entered against the borrower. The lender later sued the appraiser for damages arising from negligent misrepresentation of the appraisals, seeking an additional $620,572 in lost earnings on the deficiency. Under section 552B, Restatement (Second) of Torts, damages recoverable for a negligent misrepresentation are those necessary to compensate the plaintiff for the pecuniary loss of which the misrepresentation is a legal cause, including: (1) the difference between the value of what has been received in the transaction and its purchase price or other value given for it; and (2) pecuniary loss suffered otherwise as a consequence of the plaintiff's reliance on the misrepresentation. Under this rationale, the District Court erred in awarding the contractual interest but properly denied the award for lost earnings. United First Fed. S&L Ass'n v. White-Stevens, Ltd., 253 M 242, 833 P2d 170, 49 St. Rep. 490 (1992).

Limitation of Future Lost Profits to Period Set in Implied Contract: The District Court properly limited recovery of compensatory damages for future lost profits, in both a breach of contract action and a breach of implied covenant of good faith and fair dealing action, to the extension period of the implied contract. Zeke's Distrib. Co. v. Brown-Forman Corp., 239 M 272, 779 P2d 908, 46 St. Rep. 1678 (1989), distinguishing St. Bank of Townsend v. Maryann's, Inc., 204 M 21, 664 P2d 295 (1983).

Reduction of Compensatory Damages to Precise Amount in Record: A company had over $1 million annual gross income at the time its bank exercised a setoff, leaving the company with no operating cash or line of credit. The record showed company assets valued at $312,000, but as a result of the bank's action, the company lost all its employees, was sued many times, had its corporate goodwill destroyed, and had to enter into joint venture agreements with general contractors in order to stay in business. There was no clear indication in the record as to the company's profits following the setoff. The jury awarded the company $500,000 compensatory damages. However, rather than resort to speculation to establish the amount of lost profit reasonable to be ascribed as damages, the Supreme Court reduced the jury award to $312,000, the only positive figure in the record and the figure most favorable to the company. Bottrell v. Am. Bank, 237 M 1, 773 P2d 694, 46 St. Rep. 561 (1989).

Damage Award for Loss of Income: A jury award of $5,000 for loss of income was supported by evidence plaintiff lost $4,309.21 because he was unable to invest income from oil royalties and bonds that were wrongfully attached and because he had to borrow money to live on at 7.5% to 8.5% interest during the period of attachment. Stensvad v. Towe, 232 M 378, 759 P2d 138, 45 St. Rep. 1129 (1988).

Compensatory Award Reasonably Computed and Supported by Credible Evidence: A bank attacked a compensatory award on the grounds that the amount included for excessive interest paid by plaintiffs was wrong on its face and that the amounts awarded for crop loss and other expenses were speculative. The Supreme Court found that although the compensatory award

was in the nature of general damages and not broken down as to items used by the jury to compute the award, it was clear from the record that the award was based on amounts claimed by plaintiffs as items of damage. Further, although crop loss amounts were gross rather than net amounts, evidence of the losses appeared to be reasonably computed. Weinberg v. Farmers St. Bank of Worden, 231 M 10, 752 P2d 719, 45 St. Rep. 391 (1988).

Verdict of Zero Damages — No Abuse of Discretion: In a wrongful termination suit against newspaper, reporter Dawson appealed a District Court award of zero damages after the jury found in his favor on the issues of liability and proximate cause. The Supreme Court affirmed, ruling that although the newspaper had breached its duty of good faith and fair dealing and was the proximate cause of Dawson's damages, the reporter had three other sources of income and had failed to mitigate his damages by accepting comparable journalism work. Thus, the jury was justified in awarding zero damages. Dawson v. The Billings Gazette, 223 M 415, 726 P2d 826, 43 St. Rep. 1838 (1986).

Damages for Injury to Vegetation — Market Value: The Supreme Court held that, on cross-motions in limine, the District Court correctly ruled that the proper measure of damages for the injury by fire to growing vegetation was the difference between the market value of the real property before and after the fire. On appeal, plaintiff raised the issue of whether the District Court's ruling, with the resulting limitation of evidence at trial, was correct as a matter of law. Appraisers for both parties testified that the market value of the land was not diminished as a result of the fire; therefore, no damages were awarded. The District Court judgment was affirmed. Kebschull v. Nott, 220 M 64, 714 P2d 993, 43 St. Rep. 176 (1986).

Builder Entitled to Lost Profits: A builder who was not in breach and who did not cause the breach of a construction contract was entitled to the full amount of his lost profits. A nonbreaching party should be placed in as good a position as if the contract had been performed. Martin Dev. Co. v. Keeney Constr. Co., 216 M 212, 703 P2d 143, 42 St. Rep. 752 (1985). On a later appeal, the parties were bound by the facts and law established in this prior case. Relitigation of issues was barred by collateral estoppel, and claims of legal malpractice were barred by the statute of limitations. Peschel v. Jones, 232 M 516, 760 P2d 51, 45 St. Rep. 1244 (1988).

Corporate Profits as Basis for Lost Earnings: Given the nature of the business of plaintiff injured in auto accident (he was the majority shareholder) and the fact that it was a Subchapter S corporation, it was not an abuse of discretion to allow testimony of an expert on lost earnings based on the profits of the corporation. Ewing v. Esterholt, 210 M 367, 684 P2d 1053, 41 St. Rep. 1095 (1984).

Lost Future Earnings — Testimony on Worklife Expectancy From Date of Trial Admissible: In determining plaintiff's lost future earnings, an expert's testimony on plaintiff's worklife expectancy from the date of the trial instead of from the date of the accident that was the basis of the suit was properly allowed, even though the damages accrued from the date of the accident. Plaintiff also presented evidence of his worklife expectancy from the date of the accident. Ewing v. Esterholt, 210 M 367, 684 P2d 1053, 41 St. Rep. 1095 (1984).

Costs of Lawsuit Allowed to Enforce Water Rights: In a water rights dispute, upstream junior appropriators damaged downstream senior appropriators' headgate. A lawsuit over their respective water rights ensued, and the senior appropriators were successful both at trial and on appeal. At trial, the jury awarded the senior appropriators their court costs and attorney fees as damages. The Supreme Court refused to overturn the award, ruling that the costs of the lawsuit were consequential to the interference with the headgate and not so remote as to preclude recovery. Cate v. Hargrave, 209 M 265, 680 P2d 952, 41 St. Rep. 697 (1984), distinguished in Tanner v. Dream Island, Inc., 275 M 414, 913 P2d 641, 53 St. Rep. 208 (1996).

Measure of Damages:

When overhead or operating expenses are saved as a result of a breach of contract, the proper measure of damages is net, not gross profit. Overhead attributable to a particular contract may be found to be an avoided cost of performance following a contractual breach. However, when overhead costs are ongoing, negligible, or otherwise unaffected by a particular performance, they need not be considered when a contractual breach prevents performance. E.C.A. Envtl. Management Serv., Inc. v. Toenyes, 208 M 336, 679 P2d 213, 41 St. Rep. 388 (1984).

It is not the theory of our Code, as evidenced by this section, 27-1-201, 27-1-317, and 27-1-320, that substantial damage suffered by one through the fault of another shall be unredressed but that in all such cases the damaged party shall have full compensation. Chesnut v. Sales, 49 M 318, 141 P 986 (1914).

The measure of damages for wrongfully procuring the appointment of a receiver for a going and solvent corporation is the amount which will afford compensation for the detriment proximately caused by defendants' wrongful act, which, in case of the wrongful conversion of

personal property, is presumed to be the value of the property at the time of conversion, with interest from that time, or the highest market value of the property at any time between conversion and the verdict, without interest, and a fair compensation for the time and money properly expended in pursuit of the property. Thornton-Thomas Mercantile Co. v. Bretherton, 32 M 80, 80 P 10 (1905).

Plaintiffs Injured by Defendants' Intentionally Tortious Conduct Entitled to Damages for Pain and Suffering: In a dispute over who was entitled to lease a parcel of agricultural land, defendants intentionally interfered with plaintiffs' livestock and intentionally injured plaintiffs themselves. Plaintiffs sued defendants, and the jury found that the defendants had committed wrongful acts toward the plaintiffs which were the cause of the injuries sustained by the plaintiffs. The jury awarded plaintiffs their medical expenses and $10,000 each in punitive damages. On appeal, the Supreme Court ruled that because liability had been established, the jury should have awarded compensatory damages for pain and suffering for the serious injuries suffered. The case was remanded for trial on the damages issue. Gehnert v. Cullinan, 211 M 435, 685 P2d 352, 41 St. Rep. 372 (1984), opinion withdrawn for en banc rehearing and same opinion reissued at 211 M 435, 685 P2d 352, 41 St. Rep. 1474 (1984), distinguished in Walls v. Rue, 233 M 236, 759 P2d 169, 45 St. Rep. 1451 (1988), and followed in Thompson v. Bozeman, 284 M 440, 945 P2d 48, 54 St. Rep. 957 (1997).

Compensatory Damages Reduced by Contributory Negligence Even Though Not Proximate Cause: Compensatory damages award was reduced on appeal by the 16% that plaintiff was found to be contributorily negligent, even though his negligence was found not to be a proximate cause of his injury. Shahrokhfar v. St. Farm Mut. Auto. Ins. Co., 194 M 76, 634 P2d 653, 38 St. Rep. 1669 (1981).

Adverse Possession — Sufficiency of Damages: The appellants in an adverse possession case alleged there was insufficient evidence of the amount of damages to sustain the verdict against them. The Supreme Court considered delay rental receipts and lost profits. A judgment for damages must be supported by substantial evidence that it is not the product of mere guess or speculation. Substantial damages exist whenever the owner of property is deprived of the use of that property. Recovery of damages would not be denied provided the evidence was sufficient to afford a reasonable basis for determining the specific amount awarded. The court held that there was no uncertainty about the existence of substantial damages here. Cremer v. Cremer Rodeo Land & Livestock Co., 192 M 208, 627 P2d 1199, 38 St. Rep. 574 (1981).

Exemplary Damages for Unlawful Act — No Underlying Tort Liability: Exemplary damages may be awarded to a plaintiff under 27-1-221 even though plaintiff did not suffer any emotional distress and even though there was no underlying tort negligence found by the jury. Under 27-1-202, plaintiff is entitled to compensation since defendant knowingly attempted to obliterate evidence of the cause of a car accident, and it is equally apparent under 27-1-221 that a jury may award exemplary damages where the defendant has been guilty of either actual or implied malice. The statutory framework of 27-1-221 sets forth no specific requirement of an underlying tort or mental distress, nor will the Supreme Court imply such requirements through judicial construction. A plaintiff need only show actual damages pursuant to 27-1-202. Lauman v. Lee, 192 M 84, 626 P2d 830, 38 St. Rep. 499 (1981).

Failure of Jury to Fix Monetary Value on Actual Damages Not to Preclude Exemplary Damages: The failure of a jury to fix a monetary value as plaintiff's damages does not of necessity indicate an absence of actual damages so as to preclude an award of exemplary damages. Although the precise extent of damages attributable to the destruction of physical evidence by defendant may be elusive, an identifiable basis for actual damages exists which arises from the deprivation to plaintiff of tests and results necessary to prove his case. Lauman v. Lee, 192 M 84, 626 P2d 830, 38 St. Rep. 499 (1981).

Determination of Damages: When a hospital interferes with its employee's statutory right under 50-5-503 to refuse to participate in a sterilization operation, its violation of 50-5-504 may entitle the employee to damages to be determined by a compensation theory, including reasonably certain future damages, and possibly exemplary damages. Swanson v. St. John's Lutheran Hosp., 189 M 259, 615 P2d 883, 37 St. Rep. 1420 (1980).

Review of Damage Award: The amount to be awarded as damages is properly left to the jury, and the court on appeal will not substitute its judgment for that of the jury, particularly where, as here, the trial court has approved the verdict by denying a new trial. It is only where the amount awarded is so grossly out of proportion to the injury as to shock the conscience that the appellate court will intervene. Frisnegger v. Gibson, 183 M 57, 598 P2d 574 (1979), following Salvail v. Great N. Ry., 156 M 12, 473 P2d 549 (1970), and followed in Hansen v. Hansen, 254 M

152, 835 P2d 748, 49 St. Rep. 677 (1992). See also Cechovic v. Hardin & Associates, Inc., 273 M 104, 902 P2d 520, 52 St. Rep. 854 (1995).

Damages for Blocked Ditch: When plaintiffs built an apartment house on property through which ran an irrigation ditch to which defendants had a water right, the Supreme Court reversed the District Court and awarded attorney fees and damages to defendant for costs incurred in renting a sprinkler to compensate for the blocked ditch. Boz-Lew Builders v. Smith, 174 M 448, 571 P2d 389 (1977).

Disability Insurance Policy: Insured was entitled to sue insurance company for actual damages for default on policy requiring it to pay car installments upon insured's disability as well as for exemplary damages since default was oppressive, malicious, or fraudulent and in violation of statute requiring prompt payment of claim. State ex rel. Larson v. District Court, 149 M 131, 423 P2d 598 (1967), distinguished in State ex rel. Cashen v. District Court, 157 M 40, 482 P2d 567 (1971).

Value of Vehicle: Where plaintiff showed the value of damaged vehicle plus the cost of repairs and defendant failed to overcome the preponderance of evidence by showing truck's value by comparable and available units, the measure of damages was determined by plaintiff's evidence and not by the bluebook list value. Favero v. Culhane, 142 M 69, 381 P2d 487 (1963).

Value of the Use: The value of the use is the value to the owner of the property, not the value to the wrongdoer. The value of the use is ordinarily held to be the reasonable rental value of the premises withheld. In action to recover the value of the use and occupancy of a tract of land which had been used as a filling station, it was proper to sustain objection to testimony as to the value of the use of land with respect to each gallon of gasoline and each pound of grease sold, since it is not the withholder's gain but the rental value that measures the compensation. Pritchard Petroleum Co. v. Farmers Co-op Oil & Supply Co., 121 M 1, 190 P2d 55 (1948).

Amount and Extent of Damage — Must Prove: One injured through the unlawful act of another may recover compensation for damages that directly flow from the act of the person causing them. To justify recovery, there must be proof of the extent and amount of the damages claimed. Recovery is limited to the amount pleaded. A car owner, deprived of it unlawfully, is entitled to the value of its use less depreciation if he desires to use it; if he wants to sell it, depreciation by age is the proper measure of damages. Rigney v. Swingley, 112 M 104, 113 P2d 344 (1941).

Lump-Sum Damages, Apportionment Unauthorized: In the absence of statute authorizing a jury to apportion compensatory damages against joint tortfeasors, damages must be assessed in one sum against those found liable. When the jury in its verdict finds a lump sum and then attempts to divide it among certain of the defendants, the division should be stricken out as surplusage and judgment entered for the lump sum or the verdict should be sent back to the jury with instruction to correct it. The jury may apportion exemplary damages between joint tortfeasors if actual damages have been assessed. Bowman v. Lewis, 110 M 435, 102 P2d 1 (1940), overruled on another point in Fauver v. Wilkoske, 123 M 228, 211 P2d 420 (1949).

Law Review Articles

Tort Liability for Serving Alcohol: An Expanding Doctrine (4. The Provider's Willful Misconduct), Bender, 46 Mont. L. Rev. 395 (1985).

Contract Damages in Montana Part II: Reliance and Restitution, Burnham, 45 Mont. L. Rev. 1 (1984).

The Warranty of Habitability: A Bill of Rights for Homebuyers, Toole & Habein, 44 Mont. L. Rev. 159 (1983).

Contract Damages in Montana Part I: Expectancy Damages, Burnham, 44 Mont. L. Rev. 1 (1983).

Collateral References

Action *key* 13; Damages *key* 1.

1A C.J.S. Actions §27, et seq.; 25 C.J.S. Damages §§1, 6, 17.

22 Am. Jur. 2d Damages §24, et seq.

Inflation: effect of anticipated inflation on damages for future losses—modern cases. 21 ALR 4th 21.

27-1-203. Right to damages for detriment resulting after suit brought and for future detriment.

Case Notes

Loss of Consortium Claim Independent as to Damages, but Derivative as to Liability: Mickelson was injured when the fire truck that he was driving was struck by a Montana Rail

Link (MRL) train. His spouse and children sought damages for loss of consortium. The District Court held that the loss of consortium claims should be reduced by the percentage of negligence attributed to Mickelson. When a plaintiff's contributory negligence is determined to be not greater than the tortfeasor's negligence, then damages for loss of consortium, being independent and not contingent upon the rights or liabilities of a parent or spouse, may not be reduced by the other spouse's negligence. However, because the language in 27-1-702 provides that any damages allowed must be diminished in the proportion to the amount of negligence attributable to the person recovering, a loss of consortium claim is considered independent as to damages and derivative as to liability. In other words, a defendant must be more liable for a plaintiff's injuries than the plaintiff before there can be any recovery, whether it is on the plaintiff's personal injury claim or on a loss of consortium claim stemming from those injuries. For example, if plaintiff is determined to be 50% or less contributorily negligent for plaintiff's injuries, then a spouse or child could recover 100% of a loss of consortium claim; however, if plaintiff is determined to be 51% or more contributorily negligent for plaintiff's injuries, then a spouse or child would recover nothing on a loss of consortium claim. Therefore, the Supreme Court directed that, on retrial, any contributory negligence attributable to Mickelson could not be imputed to the spouse and children to reduce a loss of consortium award, but if Mickelson was found more liable than MRL, there could be no recovery for loss of consortium. Mickelson v. Mont. Rail Link, Inc., 2000 MT 111, 299 M 348, 999 P2d 985, 57 St. Rep. 446 (2000), following Herold v. Burlington N., Inc., 761 F2d 1241 (8th Cir. 1985).

Elements Necessary for Minor Child to Establish Claim for Loss of Parental Consortium: In Montana, the elements necessary for a minor child to establish a claim for loss of parental consortium are: (1) a third party tortiously causes the parent to suffer a serious, permanent, and disabling mental or physical injury compensable under Montana law; and (2) the parent's ultimate condition of mental or physical impairment must be so overwhelming and severe that it causes the parent-child relationship to be destroyed or nearly destroyed. If the tortfeasor is not subject to liability to the parent under tort principles, the child cannot sustain a cause of action for loss of parental consortium. If the parent could not recover from the tortfeasor for purely mental or emotional injury absent a physical component, the child cannot bring an action for consortium loss resulting from that injury. The destruction or near destruction of the parent-child relationship is a necessary element in establishing the cause of action, not merely a factor in computing damages. Keele v. St. Vincent Hosp. & Health Care Center, 258 M 158, 852 P2d 574, 50 St. Rep. 475 (1993), following Villareal v. St. Dept. of Transportation, 774 P2d 213 (Ariz. 1989).

Right of Child to Cause of Action for Loss of Parental Consortium — Injury by Third Party: Minor children are entitled to the support, aid, protection, affection, society, discipline, guidance, and training of their parents. Therefore, a minor child who has been deprived of these rights by the tortious injury to a parent by a third party has a separate cause of action for loss of parental consortium. However, any one element of damages for the injury may be recovered only once. Pence v. Fox, 248 M 521, 813 P2d 429, 48 St. Rep. 550 (1991).

Damages for Lost Crops Held as Double Recovery: The plaintiff's land was damaged when a dam gave way and his property was flooded. The jury awarded him damages for the decreased value of his property and lost future crop production. The Supreme Court held that when a landholder recovers damages based on the decreased value of his real property, damages for lost crops constitute double damages and are not recoverable. Burk Ranches, Inc. v. St., 242 M 300, 790 P2d 443, 47 St. Rep. 520 (1990).

Damages for Permanent Injury to Real Property: The plaintiff's ranch was damaged when a dam gave way and his property was flooded. The Supreme Court held that the question of whether the property was permanently damaged was for the jury to determine but that the measure of damages for permanent injury to real property was the difference between the appraised value of the property before and after the injury. Burk Ranches, Inc. v. St., 242 M 300, 790 P2d 443, 47 St. Rep. 520 (1990).

Future Earnings: Where expert testified as to plaintiff's loss of future earnings reduced by her present wages, evidence was properly presented to the jury to uphold the jury's finding of compensatory damages. Kerr v. Gibson's Prod. Co. of Bozeman, Inc., 226 M 69, 733 P2d 1292, 44 St. Rep. 462 (1987), followed in Martinell v. Mont. Power Co., 268 M 292, 886 P2d 421, 51 St. Rep. 1329 (1994).

Corporate Profits as Basis for Lost Earnings When Plaintiff the Majority Shareholder: Given the nature of the business of plaintiff injured in auto accident (he was the majority shareholder) and the fact that it was a Subchapter S corporation, it was not an abuse of discretion to allow

testimony of an expert on lost earnings based on the profits of the corporation. Ewing v. Esterholt, 210 M 367, 684 P2d 1053, 41 St. Rep. 1095 (1984).

Lost Future Earnings — Testimony on Worklife Expectancy From Date of Trial Admissible: In determining plaintiff's lost future earnings, an expert's testimony on plaintiff's worklife expectancy from the date of the trial instead of from the date of the accident that was the basis of the suit was properly allowed, even though the damages accrued from the date of the accident. Plaintiff also presented evidence of his worklife expectancy from the date of the accident. Ewing v. Esterholt, 210 M 367, 684 P2d 1053, 41 St. Rep. 1095 (1984).

Inferring Injury Caused by Auto Accident: Jury trying personal injury action could properly choose to infer from the evidence presented that an auto accident allegedly caused by negligence of defendant was the direct cause of plaintiff's injuries, and Supreme Court would not supplant jury's findings with one of its own. Allers v. Willis, 197 M 499, 643 P2d 592, 39 St. Rep. 745 (1982).

Future Detriment — Reasonable Certainty: Future damages need only be reasonably certain and not absolutely certain, as the statute seems to imply. In determining an award for future damages, a jury or an expert testifying on the subject must to some degree engage in conjecture and speculation. Graham v. Clarks Fork Nat'l Bank, 193 M 282, 631 P2d 718, 38 St. Rep. 1140 (1981).

Compensation for Loss of Capacity to Pursue an Established Career — Present Cash Value of Future Damages: A plaintiff who has been permanently injured as a result of the negligence of the defendant may recover such sum as will compensate him reasonably for the destruction of his capacity to pursue an established course of life as an element of damages distinct from plaintiff's loss of earning capacity. Damages for loss of future earning capacity and future medical supplies, hospital expenses, and medical expenses must be reduced to the present cash value of such future damages. Johnson v. U.S., 510 F. Supp. 1039, 38 St. Rep. 599 (D.C. Mont. 1981).

Failure to Award Future Damages — Discretion of the District Court: When a hospital interferes with its employee's statutory right under 50-5-503 to refuse to participate in a sterilization operation, its violation of 50-5-504 may entitle the employee to damages to be determined by a compensation theory, including reasonably certain future damages, and possibly exemplary damages. The District Court did not award future damages. The Montana Supreme Court concluded that the District Court did not feel that the future damages claimed by the plaintiff were reasonably certain to occur and held that it was properly within the District Court's discretion to make that determination and to refuse to grant future damages. Swanson v. St. John's Lutheran Hosp., 189 M 259, 615 P2d 883, 37 St. Rep. 1420 (1980).

Detriment "Certain to Result" Construed — Reasonable Certainty: In construing the language of this section relating to detriment "certain to result in the future", the Supreme Court held that future damages need only be reasonably certain under the evidence and not absolutely certain as the statute seems to imply. In determining an award for future damages, a jury or an expert testifying on the subject must to some degree engage in conjecture and speculation. When the conjecture and speculation are based upon reasonably certain human experience as to future events, the jury or trier of fact is entitled to rely on that degree of reasonable certainty in fixing and awarding future damages. Frisnegger v. Gibson, 183 M 57, 598 P2d 574 (1979), followed in Stark v. The Circle K Corp., 230 M 468, 751 P2d 162, 45 St. Rep. 371 (1988).

Application of Section — Assault and Battery: Under this section proof of damages may extend to all facts that occur and grow out of the injury after the commencement of the action and up to the date of trial. In action for assault and battery, if injury to eye and ear developed after the commencement of the action, evidence as to such injuries was admissible. Kornec v. Mike Horse Min. & Mill. Co., 120 M 1, 180 P2d 252 (1947).

Law Review Articles

Boldly Into the Fog: Limiting Rights of Recovery for Infliction of Emotional Distress, Cox & Shott, 53 Mont. L. Rev. 197 (1992).

Collateral References

Damages *key* 26, 225.

25 C.J.S. Damages §42.

22 Am. Jur. 2d Damages §489, et seq.

What items of damages on account of personal injury to infant belong to him and what to parent. 32 ALR 2d 1060.

Recovery by contractor or artisan, suing for breach of warranty, of damages for loss of future profits occasioned by use in his business of unfit materials. 28 ALR 2d 591.

27-1-204. Nominal damages when no appreciable detriment.

Case Notes

Damages for Injury to Vegetation — Market Value: The Supreme Court held that, on cross-motions in limine, the District Court correctly ruled that the proper measure of damages for the injury by fire to growing vegetation was the difference between the market value of the real property before and after the fire. On appeal, plaintiff raised the issue of whether the District Court's ruling, with the resulting limitation of evidence at trial, was correct as a matter of law. Appraisers for both parties testified that the market value of the land was not diminished as a result of the fire; therefore, no damages were awarded. The District Court judgment was affirmed. Kebschull v. Nott, 220 M 64, 714 P2d 993, 43 St. Rep. 176 (1986).

Measure of Damages When Operating Costs Saved Due to Breach: When overhead or operating expenses are saved as a result of a breach of contract, the proper measure of damages is net, not gross profit. Overhead attributable to a particular contract may be found to be an avoided cost of performance following a contractual breach. However, when overhead costs are ongoing, negligible, or otherwise unaffected by a particular performance, they need not be considered when a contractual breach prevents performance. E.C.A. Envtl. Management Serv., Inc. v. Toenyes, 208 M 336, 679 P2d 213, 41 St. Rep. 388 (1984).

Collateral References

Damages *key* 8.

25 C.J.S. Damages §§12 through 20.

22 Am. Jur. 2d Damages §8, et seq.

Nominal damages for conversion or loss of commercial paper. 85 ALR 2d 1349.

Nominal damages as recoverable for attorney's negligence with respect to maintenance or prosecution of litigation or appeal. 45 ALR 2d 69.

Nominal damages in action for tenant's failure to surrender possession of rented premises. 32 ALR 2d 611.

Nominal damages as recoverable in action of trespass by tenant against stranger wrongfully interfering with his possession. 12 ALR 2d 1210.

27-1-210. Interest on torts.

Case Notes

Prejudgment Interest Properly Denied When Costs Not Calculable Prior to Trial: Prejudgment interest is only allowed for claims that are capable of being made certain by calculation and is inappropriate when the amount of a party's damages is uncertain or disputed. In the present case, much evidence was presented concerning defendant's general liability for defective construction of a tennis facility, but the only evidence of costs for remediating the problem was disputed. Additionally, no standards of computation or calculation were fixed in the construction contract, so any determination of the amount owed to plaintiff depended on a judicial determination after considering the conflicting evidence. Further, there was a considerable difference between the amount of damages claimed by plaintiff and the amount actually awarded by the jury, so the damages were not capable of being made certain by calculation. Thus, denial of prejudgment interest was not erroneous. Glacier Tennis Club at The Summit, LLC v. Treweek Constr. Co, Inc., 2004 MT 70, 320 M 351, 87 P3d 431 (2004), following Jim's Excavating Serv., Inc. v. HKM Associates, 265 M 494, 878 P2d 248 (1994).

Judge as Well as Jury May Award Prejudgment Interest Under 27-1-212: The Logans argued that the lower court erred in awarding prejudgment interest on a judgment against them for negligent misrepresentation in their selling of a house to the Stroms. The Logans argued that the applicable statute was this section, which allows a court to award prejudgment interest on damages made certain by calculation, and that an award of interest in a negligence case does not meet that standard. The Supreme Court held that the applicable statute was 27-1-212 and that although it speaks of prejudgment interest being awarded by the jury in certain cases, the statutory discretion granted to a jury to award interest also applies to a judge sitting as the trier of fact. Strom v. Logan, 2001 MT 30, 304 M 176, 18 P3d 1024 (2001).

Standard of Review: The reduction of a jury award on the basis of a collateral source statute, an award of judgment interest on the basis of a statute, or an offset of a judgment based on a plaintiff's prior settlement with another tortfeasor is a question of law and is reviewed to decide whether the lower court correctly applied the law. Schuff v. A.T. Klemens & Son, 2000 MT 357, 303 M 274, 16 P3d 1002, 57 St. Rep. 1499 (2000).

Date for Beginning of Prejudgment Interest on Damaged Crops: In an action for negligent damage to crops caused by improper spraying, which caused a smaller crop, the date on which

prejudgment interest began on damages for the lost part of the crops was properly determined to be a date 30 days after the plaintiffs' attorney sent a letter to the defendants' insurance company stating the amount of the initial damage calculation. Semenza v. Bowman, 268 M 118, 885 P2d 451, 51 St. Rep. 1209 (1994).

Claims Not Capable of Being Made Certain by Calculation — Prejudgment Interest Properly Denied: In construing the meaning of the phrase "capable of being made certain by calculation" in subsection (1) of this section, the Supreme Court held that when a claimant alleges an award that is substantially different from the amount ultimately awarded by the trial court, those damages are not capable of being made certain by calculation. Lacking that certainty, the denial of prejudgment interest was not error. Jim's Excavating Serv., Inc. v. HKM Associates, 265 M 494, 878 P2d 248, 51 St. Rep. 623 (1994).

Failure to File Brief in Support of Motion for Interest — Right Waived to Appeal Interest: Lumber Enterprises, Inc. received a judgment on a contract against Hansens, but the District Court refused to award prejudgment interest. The Supreme Court affirmed the denial of interest based on the failure of Lumber Enterprises to file a brief in support of its motion to amend the findings of the District Court to allow the award of interest. By failing to abide by Rule 2(b), M.U.D.C.R. (Title 25, ch. 19), the Supreme Court held that Lumber Enterprises waived its right to bring a request to the Supreme Court to award that interest. Lumber Enterprises, Inc. v. Hansen, 257 M 11, 846 P2d 1046, 50 St. Rep. 138 (1993).

Award of Prejudgment Interest Reversed: In a suit against an accountant for negligence, the lower court allowed the plaintiff to recover prejudgment interest. The Supreme Court reversed on the grounds that the cause of action arose prior to the statute's enactment. The Supreme Court held that the statute created a new obligation and could not be applied retroactively without specific language authorizing such an application. Thayer v. Hicks, 243 M 138, 793 P2d 784, 47 St. Rep. 1082 (1990).

Collateral References

Validity and construction of state statute or rule allowing or changing rule of prejudgment interest in tort actions. 40 ALR 4th 147.

Running of interest on judgment where both parties appeal. 11 ALR 4th 1099.

27-1-211. Right to interest.

Case Notes

General 562
When Interest to Be Allowed 564
When Interest Commences Running 568
Interest Rate 570

GENERAL

Dissolution Decree Granting Ranch to Husband — Wife Not Entitled to Appreciation or Subject to Liability Accruing on Property — Judgment Interest Owing on Money Judgment: A dissolution decree entered in 1996 granted ranch property to the husband and a liquidated money judgment of $305,855 to the wife. When the remainder of the issues concerning the marital estate was finally addressed in 1999, the wife contended that the subsequent appreciation of the ranch marital assets must be accounted for in determining the final disposition of the 1996 decree. The Supreme Court held that the wife was not entitled either to appreciation or, conversely, to any liability that may have accrued on the property because the ranch was exclusively awarded to the husband. However, the wife was entitled to judgment interest on the money as a statutory right pursuant to 25-9-205. On remand, the Supreme Court applied the statutory 10% interest rate to the balance of the wife's money judgment that remained unpaid following entry of the decree, not including interest accruing during the pendency of the appeal. The Supreme Court refigured the dollar amount due the wife after adjusting the figure, which had been incorrectly offset by the District Court because of the wife's alleged receipt of livestock and sales and an interest debt allegedly due to the husband's mother under a "conspiratorial sham" designed to deprive the wife of her interest in the farm property and to directly benefit the husband. In re Marriage of Pospisil, 2000 MT 132, 299 M 527, 1 P3d 364, 57 St. Rep. 547 (2000).

Defendant Not Allowed to Characterize Damages: Shilhaneks were injured in a vehicle accident, and defendants were ordered to pay more than $3 million in damages, including punitive damages. Defendants requested that the $750,000 tendered to Shilhaneks to date be allocated toward payment of the punitive award and that Shilhaneks be required to file a corresponding satisfaction of judgment with respect to the punitive damages award, in essence

asserting that a defendant has the power to specifically designate payment toward a particular award. Defendants cited 25-9-311 for the rule that a satisfaction of judgment must be provided by the party in whose favor judgment is entered and contended that under 28-1-1106 and 28-1-1225, the power lies with the debtor, not the creditor, when it comes to designating to which particular obligation a payment should be credited. The District Court denied the request, noting that Title 28 applies only to contractual obligations and that Title 25 governs obligations arising from judgments. The District Court did not abuse its discretion, given defendants' failure to provide a legal basis that would allow them to dictate how damages owed are characterized, the fact that defendants owed more than double the available insurance coverage and were obligated to pay the policy limits to satisfy the verdict, and that allocating 22% of the available insurance proceeds to the punitive damage award would have harsh tax consequences on Shilhaneks. Shilhanek v. D-2 Trucking, Inc., 2000 MT 16, 298 M 101, 994 P2d 1105, 57 St. Rep. 89 (2000).

Insured Entitled to Recover Attorney Fees, Costs, and Interest, Including Prejudgment Interest, Before Insurer May Recover Pursuant to Subrogation Rights: Park Plaza Hotel suffered extensive property damage when a train wrecked in subzero weather, causing a power outage during which the hotel's pipes burst. The hotel's insurer paid the hotel the limits of its policy, and the hotel sued the railroad for damages in excess of the policy limits. The insurer joined in the suit. The hotel cross-claimed against its insurer for attorney fees and costs expended in recovering its excess damages from the railroad. The Supreme Court affirmed the lower court and held that the insured must recover all that it has lost, including attorney fees and costs expended in an attempt to recover sums over and above those received under its policy with the insurer, before the insurer may recover pursuant to its subrogation rights. The Supreme Court also held that the insurer was obligated to pay any prejudgment interest to which the lower court determined the insured was entitled. DeTienne Associates Ltd. Partnership v. Farmers Union Mut. Ins. Co., 266 M 184, 879 P2d 704, 51 St. Rep. 730 (1994), following and clarifying Skauge v. Mtn. St. Tel. & Tel. Co., 172 M 521, 565 P2d 628 (1977).

Contract Interest Proper: Although the District Court did not state the basis for the award, the award of interest on fees due and unpaid as stipulated in a contract was proper. Taylor, Thon, Thompson & Peterson v. Cannaday, 230 M 151, 749 P2d 63, 45 St. Rep. 102 (1988).

Breach in Sale of Restaurant — Measure of Damages and Interest: Where restaurant buyers breached a sales contract, the trial court properly granted sellers the amount expended on outstanding accounts payable incurred by the buyers, such as power service, garbage service, and advertising debts, as well as interest at 10% from the date of judgment. Stevens v. Abbott, 228 M 101, 740 P2d 1136, 44 St. Rep. 1374 (1987).

Deputy Sheriffs' Retroactive Overtime — Conflict of Laws: Since deputies' award of retroactive overtime compensation was grounded in federal rather than state law, the state laws relating to penalties, interest, attorney fees, and costs did not apply. Phillips v. Lake County, 222 M 42, 721 P2d 326, 43 St. Rep. 1046 (1986).

Contract Interest Rate for Particular Item — Statutory Rate Applied to Other Items: Plaintiff received damages for the value of a lease breached by defendant and for plaintiff's costs in renovating the premises as required by the lease. The lease provided that lessee would indemnify lessor for finance costs of the renovation at an 18% rate. The court properly gave plaintiff interest at the statutory 10% rate instead of the 18% rate. An interest rate in one relatively minor and discrete part of the lease should not be an umbrella over the entire obligation, and it is contrary to the parties' legitimate expectations to allow such an umbrella where the lease is otherwise complete in almost every detail. If the parties intended the 18% rate to apply to all obligations arising from the contract, including breach, they could have easily so provided in the lease. Nicholson v. United Pac. Ins. Co., 219 M 32, 710 P2d 1342, 42 St. Rep. 1822 (1985).

Bond Covering Judgment — Use of Bond in Companion Case: District Court did not abuse its discretion in requiring a supersedeas bond in an amount large enough to cover the judgment, including interest, or in concluding that a bond deposited in companion cases was not available to satisfy the judgment in this case. Safeco Ins. Co. v. Lovely Agency, 215 M 420, 697 P2d 1354, 42 St. Rep. 509 (1985).

Award of Prejudgment Interest Favored: The Legislature intended prejudgment interest under this section to be the rule rather than the exception. Price Bldg. Serv., Inc. v. Holms, 214 M 456, 693 P2d 553, 42 St. Rep. 84 (1985).

Conversion: This section does not alter the statutory damages for conversion as prescribed by 27-1-320. Galbreath v. Armstrong, 121 M 387, 193 P2d 630 (1948).

WHEN INTEREST TO BE ALLOWED

Conditions for Award of Prejudgment Interest: A person is entitled to prejudgment interest when the person possesses a right to recover damages that vests upon a particular day. Three criteria must be satisfied for an award of prejudgment interest: (1) there must be an underlying monetary obligation; (2) the amount of recovery must be certain or capable of being made certain by calculation; and (3) the right to recover must vest upon a certain day. In re Wage Claim of Ramsey v. Yellowstone Neurosurgical Associates, P.C., 2005 MT 317, 329 M 489, 125 P3d 1091 (2005).

Prejudgment Interest on Damages Not Capable of Calculation Improper — Jury Award Less Than Claim — No Explanation of Offset: Plaintiff presented a claim for actual damages of $208,222, representing the amount that defendants underpaid a profit share obligation under a contract. The jury returned a verdict on the claim for $82,000, and the District Court held that plaintiff was entitled to prejudgment interest on $82,000. On appeal, defendants contended that prejudgment interest was not owing on grounds that the amount of recovery was not capable of being made certain prior to the jury's verdict and that the awarded damages were less than what plaintiff requested. The Supreme Court agreed and reversed. The Supreme Court has repeatedly declined to allow an award of prejudgment interest when the judgment awarded is less than the claimant sought in damages and was not the result of a readily calculable offset. In this case, the difference between the amount plaintiff requested and the actual award did not correlate to any offset advanced by defendants. Because the award was less than plaintiff requested and there was no explanation for the offset applied by the jury, damages were not capable of being made certain by calculation and the award of prejudgment interest was error. Am. Music Co. v. Higbee, 2004 MT 349, 324 M 348, 103 P3d 518 (2004). See also Morning Star Enterprises, Inc. v. R.H. Grover, Inc., 247 M 105, 805 P2d 553 (1991).

No Error in Disallowing Prejudgment Interest When Amounts Owed Not Ascertainable Until Differences in Compensation Determined at Trial: After sorting through years of partnership transactions and property accumulations, the District Court found that one partner, Otto, owed the other partner, William, $94,607 and that Otto also owed William additional money because Otto had received excess compensation from a partnership construction project. William requested prejudgment interest on the amounts owed, but the request was denied. On appeal, the Supreme Court affirmed, noting that a person's right to receive a sum certain in damages does not necessarily vest before judgment. The District Court did not abuse its discretion by declining to award prejudgment interest in this case because it was not until all the evidence was heard that the court could determine who was entitled to certain property and evaluate any discrepancies in total amounts owed. Baltrusch v. Baltrusch, 2003 MT 357, 319 M 23, 83 P3d 256 (2003).

Repayment of Funds Because of Reversal of Court Decision Not Award of Damages Subject to Interest: In an initial action, the District Court ordered the state to pay to the plaintiff contractors payments withheld by the state pursuant to a contract dispute. The District Court's decision was set aside upon appeal, and upon receipt of a notice of remittitur, the District Court ordered the contractors to reimburse the state, pay costs, and pay interest from the date on which payment was tendered. The contractors refused to pay interest for the period between when they received the money as a result of the lower court's first decision and the date when the final judgment ordering them to reimburse the state was entered. The Supreme Court held that the lower court incorrectly determined that the state was entitled to interest because the order requiring the contractors to pay the state was an order to reimburse the state for payments made by the state to the contractors and was not an award of damages subject to prejudgment interest. Idaho Asphalt Supply v. Dept. of Transportation, 2001 MT 27, 304 M 157, 18 P3d 1018 (2001).

Trial Court Discretion to Determine Appropriateness of Interest Award — No Award of Prejudgment Interest Until Underlying Monetary Obligation Established: H-D Irrigating, Inc. (H-D), bought land and irrigation equipment from Hobble Diamond Cattle Company (Hobble) and Kimble Properties, Inc. (Kimble Properties), respectively, then sued both companies for constructive fraud when the land eroded and caused damage to the irrigation system. The District Court concluded that defendants were entitled to a net payment on the promissory note for the sale, less damages for defendant's misrepresentations, plus interest from the date of judgment. Defendants contended that the court subtracted an offset before calculating interest, calculated interest from a date 5 years later than should have been applied, and failed to award interest on the promissory note from the date on which the first payment was due. Plaintiffs contended that accrual of all interest should be suspended pending resolution of the dispute and that they should be entitled to prejudgment interest for their damages. Distinguishing Sjoberg v. Kravik, 233 M 33, 759 P2d 966 (1988), which involved a breach of contract rather than

constructive fraud, the Supreme Court noted that H-D was obligated to make timely payments on the promissory note, but not entitled to damages until the District Court adjudicated the fraud issue, and that H-D was not entitled to offset its promissory note obligation until the time of judgment because defendants did not have an underlying monetary obligation to H-D until liability was ascribed for constructive fraud. The District Court should have offset H-D's obligation by the damages resulting from the constructive fraud at the time of judgment. It was within the discretion of the judge as factfinder to determine whether interest was appropriate, and the court did not err in refusing to award prejudgment interest to H-D. Judgment was reversed for a recalculation of damages. H-D Irrigating, Inc. v. Kimble Properties, Inc., 2000 MT 212, 301 M 34, 8 P3d 95, 57 St. Rep. 832 (2000).

Dissolution Decree Granting Ranch to Husband — Wife Not Entitled to Appreciation or Subject to Liability Accruing on Property — Judgment Interest Owing on Money Judgment: A dissolution decree entered in 1996 granted ranch property to the husband and a liquidated money judgment of $305,855 to the wife. When the remainder of the issues concerning the marital estate was finally addressed in 1999, the wife contended that the subsequent appreciation of the ranch marital assets must be accounted for in determining the final disposition of the 1996 decree. The Supreme Court held that the wife was not entitled either to appreciation or, conversely, to any liability that may have accrued on the property because the ranch was exclusively awarded to the husband. However, the wife was entitled to judgment interest on the money as a statutory right pursuant to 25-9-205. On remand, the Supreme Court applied the statutory 10% interest rate to the balance of the wife's money judgment that remained unpaid following entry of the decree, not including interest accruing during the pendency of the appeal. The Supreme Court refigured the dollar amount due the wife after adjusting the figure, which had been incorrectly offset by the District Court because of the wife's alleged receipt of livestock and sales and an interest debt allegedly due to the husband's mother under a "conspiratorial sham" designed to deprive the wife of her interest in the farm property and to directly benefit the husband. In re Marriage of Pospisil, 2000 MT 132, 299 M 527, 1 P3d 364, 57 St. Rep. 547 (2000).

Payment of Ex-Husband's Debts — Wife Entitled to Interest: Although the divorce decree required the husband to pay medical and credit card debts upon the sale of the couple's home, the wife voluntarily made partial payments of the overdue bills to avoid damage to a good credit history. When the wife sued for damages plus interest, the District Court ruled that the wife was not entitled to receive interest because payments had been made voluntarily. On appeal, the Supreme Court reversed, holding that the wife's decision to preserve existing relationships with doctors and creditors by making partial payments was not wholly voluntary. The wife was entitled to interest on the debt owed as the result of the husband's nonpayment from the date on which each debt was paid. In re Marriage of Boyer, 274 M 282, 908 P2d 665, 52 St. Rep. 1233 (1995).

Punitive Damages Awarded — Prejudgment Interest Disallowed: Dees was awarded compensatory and punitive damages against his insurance company for the company's failure to settle his claim for hail damage to his crops. The District Court awarded prejudgment interest at the rate of 10% a year on both the compensatory and punitive damages, beginning with the date of the jury verdict up until the date of the final judgment. Citing Maddux v. Bunch, 241 M 61, 784 P2d 936 (1990), the Supreme Court held that prejudgment interest should not have been granted on the punitive damages. Because punitive damages must be reviewed and approved by the District Court, they neither vest nor are capable of being made certain until the trial court completes its review and issues a final judgment. Dees v. Am. Nat'l Fire Ins. Co., 260 M 431, 861 P2d 141, 50 St. Rep. 1068 (1993).

Prejudgment Interest Not Proper: Because damage sums awarded by the court were not for items set forth in the contract, the damages were not certain until the court delivered its judgment and prejudgment interest was not proper. Morning Star Enterprises, Inc. v. R.H. Grover, Inc., 247 M 105, 805 P2d 553, 48 St. Rep. 112 (1991).

Court Determination of Grazing Fees — Prejudgment Interest Inapplicable Prior to Judgment: The amount of rent due for grazing cattle was certain under an oral contract, but the amount due for grazing horses with the cattle was only determined after trial. Therefore, grazing fees for the horses were not subject to prejudgment interest. Heitz v. Heitz, 244 M 12, 795 P2d 486, 47 St. Rep. 1393 (1990).

Interest Precluded — Failure to Submit to Appraisal: The plaintiffs' insurance policy contained a clause that required implementing an appraisal procedure if the parties could not agree on the amount of loss. The policy also stated that no legal action could be initiated until there was full compliance with the terms of the policy. The insurer invoked the appraisal clause,

but the plaintiffs refused to submit to the procedure and instead filed suit for damages and bad faith against the insurer. The Supreme Court held that summary judgment in favor of the insurer was appropriate in light of the clear language of the policy, and the court further held that no interest was due the plaintiffs because the amount of damages was not fixed. Dunn v. Way, 241 M 208, 786 P2d 649, 47 St. Rep. 213 (1990).

Certainty of Calculation of Damages:

The plaintiff sued his insurance company for failure to pay a claim in the amount of $35,614.08. In addition, he claimed prejudgment interest. The jury returned a verdict for the plaintiff in the amount of $23,378.95, and the Supreme Court held that the difference in the amount requested from the amount awarded demonstrated that the amount of damages was not so clear as to justify an award of prejudgment interest. Maddux v. Bunch, 241 M 61, 784 P2d 936, 47 St. Rep. 82 (1990).

In a counterclaim, defendants asked for $2 million in contract damages; at trial, they asked for $3 million; the jury awarded $300,000. These were not the type of contract damages that are certain or capable of being made certain by calculations; therefore, prejudgment interest was not available. NW. Nat'l Bank of Great Falls v. Weaver-Maxwell, Inc., 224 M 33, 729 P2d 1258, 43 St. Rep. 1995 (1986).

Insurance agent made misrepresentations on insurance application and forged insured's signature. Insurer found this out while handling a claim against insured. Insurer settled the claim for $300,000, then successfully sued the agent and his agency for damages for wrongfully issuing the policy and recovered a $300,000 judgment. The damages were certain or capable of being made certain by calculation as of the day insurer settled the claim against insured. That the amount of a claim is disputed does not make it uncertain. Safeco Ins. Co. v. Lovely Agency, 215 M 420, 697 P2d 1354, 42 St. Rep. 509 (1985).

In an action for breach of contract for sale of land, award of prejudgment interest on damages for loss of hay crops was improper because the damages for loss of hay crops were uncertain until the court made its determination as to the amount. Castillo v. Franks, 213 M 232, 690 P2d 425, 41 St. Rep. 2071 (1984).

Where plaintiff claimed a property loss by fire of $43,917.15, witnesses testified to the value of the lost property, and the jury awarded $25,000, the Supreme Court could not find that plaintiff showed damages capable of being made certain by calculation as required by this section and the award of prejudgment interest to plaintiff was error and was reversed. Swenson v. Buffalo Bldg. Co., 194 M 141, 635 P2d 978, 38 St. Rep. 1588 (1981).

Fixed Amount of Previous Judgment on Particular Day: In this action by the holder of a certificate of professional liability insurance against the insurer for negligence, the parties stipulated during trial as to the amount of plaintiff's damages on the underlying suit. The three criteria of this section were met when the fixed amount of the underlying judgment on a particular day was determined. Interest is allowed from that date. R.H. Grover, Inc. v. Flynn Ins. Co., 238 M 278, 777 P2d 338, 46 St. Rep. 1266 (1989).

Contention of Error in Award of Prejudgment Interest — Faulty Waiver Argument: Defendant argued that plaintiff's waiver of payments availed defendant of a defense to interest on the difference between the contract amount due and the amount actually paid. However, the Supreme Court discounted the waiver argument and noted that defendant did not pay the whole principal; therefore, interest was proper under this section. Pipe Indus. Ins. Fund Trust v. Consol. Pipe Trades Trust, 233 M 162, 760 P2d 711, 45 St. Rep. 1392 (1988).

Interest Due on Commission Fees: On appeal of a judgment awarding commission fees as detailed in a signed note but specifically denying award of interest on the debt, the Supreme Court found that the criteria to be eligible for prejudgment interest were met, that under 27-1-312 the remedy for breach of an obligation to pay money is "the terms of the obligation with interest thereon", and that the appropriate interest to be charged was ascertainable under 31-1-106. Byrne v. Terry, 228 M 387, 741 P2d 1341, 44 St. Rep. 1620 (1987), followed in Johnson v. Nyhart, 269 M 379, 889 P2d 1170, 52 St. Rep. 37 (1995).

No Prejudgment Interest on Business Liabilities Satisfied by Buyer, Which Were Later Ruled Responsibility of Sellers: Sellers reassumed possession of their former business after buyer defaulted on the sales contract. A dispute between buyer and sellers over who was responsible for the payment of accounts payable incurred by buyer was eventually resolved by the District Court in favor of buyer. Buyer then claimed he was entitled to prejudgment interest on the payments he had made after default. He was not entitled to interest under 27-1-211 because the award to buyer was one of reimbursement, not damages, nor was buyer entitled to interest under 27-1-212 because the money paid by buyer after default does not represent a breach of any obligation on the part of sellers. The District Court properly held that 31-1-106 applied. Heine v.

Seibert, 217 M 224, 703 P2d 865, 42 St. Rep. 1152 (1985), followed in Idaho Asphalt Supply v. Dept. of Transportation, 2001 MT 27, 304 M 157, 18 P3d 1018 (2001).

Interest in Tort Actions: Insurance agent made misrepresentations on insurance application and forged insured's signature. Insurer found this out while handling a claim against insured. Insurer settled the claim for $300,000, then sued the agent and his agency for damages for wrongfully issuing the policy and recovered a $300,000 judgment. On appeal, defendants' claim that this section did not apply because the case was in tort was unsuccessful. Safeco Ins. Co. v. Lovely Agency, 215 M 420, 697 P2d 1354, 42 St. Rep. 509 (1985).

Failure to Prosecute Diligently Irrelevant: Lack of diligence in taking a case to trial is not one of the conditions which excuses the payment of interest under this statute. Price Bldg. Serv., Inc. v. Holms, 214 M 456, 693 P2d 553, 42 St. Rep. 84 (1985).

Interest on Damages for Unjust Enrichment — Damages Incapable of Being Made Certain: Where the plaintiffs brought an action for damages against the defendant on the theory of unjust enrichment, the District Court erred in awarding prejudgment interest to the plaintiffs. In this case there was no ascertained or ascertainable amount of damages as the plaintiffs sought equitable restitution for an unquantified measure of unjust enrichment. Robertus v. Candee, 205 M 403, 670 P2d 540, 40 St. Rep. 1391 (1983).

No Authority for Prejudgment Interest on Discretionary Attorney Fees in Mandamus: In a prior decision, this case was remanded for a hearing on attorney fees. The District Court awarded fees, and plaintiffs appealed. Plaintiffs contend that the District Court should have awarded prejudgment interest on the award of attorney fees. In this case, the award of attorney fees is an award of damages under 27-26-402. The determination of reasonable attorney fees was within the discretion of the District Court, and the amount was not definite or capable of being calculated with certainty prior to judgment. Therefore, 27-1-211 did not provide authority for awarding interest. Kadillak v. Dept. of State Lands, 198 M 70, 643 P2d 1178, 39 St. Rep. 773 (1982).

Lessee Prevented by Lessor From Paying Rent — No Interest Allowed: The landlord unlawfully increased the rent from $650 a month to $1,175 a month. The tenant tendered $650, but payment was refused. The tenant then filed a lawsuit and tendered the $650 monthly payment into the court. Payments were made each month to the court while the lawsuit continued. The Supreme Court held that the District Court erred in awarding the landlord interest on the rental payments. The tenant should not be penalized for attempting to comply with the terms of the lease agreement, nor should the landlord be rewarded for unjustifiably refusing to accept the payments. Kosena v. Eck, 195 M 12, 635 P2d 1287, 38 St. Rep. 1736 (1981).

Interest on Unpaid Balance of Contract: Plaintiff was entitled to interest on the unpaid balance of the contract as a matter of law since there was an underlying monetary obligation, the recovery was certain or capable of being made certain by calculation, and the right to recover vested on a particular day. Agrilease, Inc. v. Gray, 173 M 151, 566 P2d 1114 (1977), followed in Albers v. Bar ZF Ranch, Inc., 229 M 396, 747 P2d 1347, 44 St. Rep. 2081 (1987).

Reimbursement Award Not Damages: Trial court properly allowed interest from filing of claim in divorce action where wife was merely reimbursed for her cash outlay from her separate property, which directly benefited her husband and his children by a former marriage because this section relates only to damages, not an equitable amount awarded for reimbursement. Rogers v. Rogers, 169 M 403, 548 P2d 141 (1976).

Prejudgment Interest: Prejudgment interest on a wrongful death claim is forbidden. Ryan v. Ford Motor Co., 334 F. Supp. 674 (D.C. Mont. 1971); Wyant v. Dunn, 140 M 181, 368 P2d 917 (1962); Daly v. Swift & Co., 90 M 52, 300 P 265 (1931).

Interest Added to Judgment: Where plaintiff in an action for breach of contract is entitled to interest under statutory authority as a legal incident to his claim and he asks for interest in his complaint and his claim is one which is certain or capable of being made certain by calculation, then the trial court may add the interest to the judgment when there is no controversy on the facts giving rise to the right to interest that should have been, but was not, submitted to the jury. W. J. Lake & Co. v. Mont. Horse Prod. Co., 109 M 434, 97 P2d 590 (1939).

Liens — After Judgment: A materialman who secured judgment for the enforcement of his mechanics' lien (now construction lien) was entitled to interest under this section on the entire amount thereof, notwithstanding he had overstated the amount, where the correct amount was readily ascertainable by consulting the owner and there was no offer of payment so as to stop the running of interest under 28-1-1202 and 28-1-1225. Fed. Land Bank of Spokane v. Green, 108 M 56, 90 P2d 489 (1939), explained in U.S. v. Fuller, 250 F. Supp. 649 (D.C. Mont. 1965), followed in Price Bldg. Serv., Inc. v. Holms, 214 M 456, 693 P2d 553, 42 St. Rep. 84 (1985).

Interest Exceeding Amount of Liability Fixed by Statute: Where a creditor of an insolvent bank is forced to bring suit to enforce the statutory liability of a stockholder, he is entitled to interest on his claim from the time of the commencement of the action even though the interest, when added to the principal, exceeds the amount of the liability fixed by the statute. Mitchell v. Banking Corp. of Mont., 94 M 165, 22 P2d 175 (1933).

Employee Suing for Services Rendered: Interest was properly allowed on the amount awarded an employee suing for services rendered under an oral agreement. Albertini v. Linden, 45 M 398, 123 P 400 (1912).

Balance Due a Physician: Interest on a balance due a physician for medical services seems to be properly allowable, under this section, in an action to recover such balance. Leggat v. Gerrick, 35 M 91, 88 P 788 (1907).

Party Prevented Performance — Interest Not Allowed: Where plaintiff gave defendant an option to buy a mine but, before the payment agreed upon became due, denied the existence of the contract and sued to recover the property, he was not entitled to interest on the purchase money, on specific performance being decreed against him, for the reason that he himself prevented defendant from making the payments. Finlen v. Heinze, 32 M 354, 80 P 918 (1905), overruled as to interest in Hughes v. Melby, 139 M 308, 362 P2d 1014 (1961).

Interest on Open Account From Demand: This section authorizes a recovery of interest on an open account from demand, and the institution of a suit on an open account for goods sold is a demand. Hefferlin v. Karlman, 29 M 139, 74 P 201 (1903). See also Clifton, Applegate & Toole v. Big Lake Drain District, 82 M 312, 267 P 207 (1928).

WHEN INTEREST COMMENCES RUNNING

Stipulated Judgment as Basis for Debt of Guarantors — Vesting Date of Right to Interest — Prejudgment and Postjudgment Interest Awarded: Chicago Mining Corporation (CMC) made a contract with Western for the purchase of mining equipment, and when CMC did not make payments as required by the contract, Western filed a construction lien to collect the amount of $232,730.04. In January 1991, individuals acting as guarantors executed personal guaranties for that amount, and Western promised that it would not institute foreclosure proceedings to enforce its lien until February 1, 1991. In 1994, Western and the guarantors stipulated to entry of judgment in the amount of $196,849.72, and judgment was entered for that amount. Following a bankruptcy proceeding and pursuant to a motion for summary judgment, the District Court awarded Western $232,730.04 and prejudgment interest from February 1, 1991, to February 22, 1996. The Supreme Court held that the stipulated judgment conclusively established CMC's obligation and that because the obligation of guarantors cannot exceed the obligation of the principal debtor, the amount of the stipulated judgment is also the amount owed by the guarantors. The Supreme Court also held that because Western's right to recover from the guarantors vested on February 1, 1991, the day CMC failed to make payments and the date upon which the guarantors agreed to make payment, that date is the date upon which prejudgment interest was due and that postjudgment interest was due from the date of the judgment to the date upon which the judgment is satisfied. W. Indus., Inc. v. Chicago Min. Corp., 279 M 105, 926 P2d 737, 53 St. Rep. 1071 (1996).

Interest Not Allowable Until Amount Due Ascertained: The rule in this jurisdiction, as set out in Daly v. Swift & Co., 90 M 52, 300 P 265 (1931), is that interest is not allowable until the exact amount due is ascertained or is ascertainable. In re Marriage of Gerhart, 245 M 279, 800 P2d 698, 47 St. Rep. 2106 (1990).

Interest Paid From Date of Filing of Construction Lien: When a construction lien was found to be enforceable, the award of prejudgment interest on the contract price was proper from the date the construction lien was filed. DeVoe v. Gust. Lagerquist & Sons, Inc., 244 M 141, 796 P2d 579, 47 St. Rep. 1527 (1990).

Prejudgment Interest on Attorney Fees Disallowed: The sum awarded by the jury for attorney fees included $8,021 in prejudgment interest. However, a stipulation signed by the attorneys did not establish who would pay the fees. Only when the jury determined plaintiff was entitled to damages did the liability for those damages become fixed; therefore, interest on prejudgment attorney fees was inappropriate. Stensvad v. Towe, 232 M 378, 759 P2d 138, 45 St. Rep. 1129 (1988).

Standard for Interest Award Not Met — Contested Liability: Because liability was contested, no monetary obligation existed until the jury determined the degree of comparative negligence. The right to recover vested only on the date of the jury verdict, not on an earlier date certain; therefore, the District Court properly denied award of prejudgment interest. McPherson v.

Schlemmer, 230 M 81, 749 P2d 51, 45 St. Rep. 33 (1988), followed in Palmer v. Farmers Ins. Exch., 233 M 515, 761 P2d 401, 45 St. Rep. 1694 (1988).

Right to Damage Interest Accrues From Date of Decision: In order following petition for rehearing on judgment by trial court awarding prejudgment interest on damages granted a commercial trout farm, the Supreme Court reversed, holding that interest accrues from and after the date the decision of the trial court is rendered. Crystal Springs Trout Co. v. First State Bank of Froid, 225 M 122, 732 P2d 819, 44 St. Rep. 90 (1987).

Accrued Interest on Loan as Part of Damages: The District Court awarded a two-thirds share of payment in kind (PIK) benefits to a tenant, plus accrued interest on his outstanding bank loan dating from the failure of the landlords to pay his share of PIK benefits. On appeal, one landlord asserted this was error because the tenant maintained only one account that covered living expenses as well as other farming operations; therefore, the loan balance was not solely attributable to the farming of the landlord's property. The Supreme Court disagreed, noting that had the tenant received his share of PIK benefits at the proper time, he would have been able to pay the loan entirely and avoid further interest charges. The accrued interest on the loan balance from that date was held to be clearly part of his damages. Popp v. Gountanis, 221 M 267, 718 P2d 340, 43 St. Rep. 801 (1986).

Interest to Commence From Date of Judgment: This section allows interest only from the date of judgment, as that is the day the damages are capable of being made certain, citing Wyant v. Dunn, 140 M 181, 368 P2d 917 (1962). Callihan v. Burlington N., Inc., 201 M 350, 654 P2d 972 (1982), followed in In re Custody & Support of B.T.S., 219 M 391, 712 P2d 1298, 43 St. Rep. 37 (1986), and Plouffe v. Burlington N., Inc., 224 M 467, 730 P2d 1148, 43 St. Rep. 2341 (1986).

Reversal of Judgment for Defendants — When Interest Commences: Insurance agent made misrepresentations on insurance application and forged insured's signature. Insurer found this out while handling a claim against insured. Insurer settled the claim for $300,000, then sued the agent and his agency for damages for wrongfully issuing the policy and recovered a $300,000 judgment. Judgment for defendants was reversed on appeal, the Supreme Court holding plaintiff entitled to recover as a matter of law and remanding for trial on damages. Defendants' claim that because of the reversal prejudgment interest should run from the date judgment was entered following reversal was denied. The right of insurer to recover vested on the date the settlement was made. Defendants' argument that the right to recover cannot vest until it is reduced to judgment leads to the absurd conclusion that there can never be an award of prejudgment interest, since the right to recover would never vest before judgment. Safeco Ins. Co. v. Lovely Agency, 215 M 420, 697 P2d 1354, 42 St. Rep. 509 (1985).

When Interest on Wrongfully Withheld Attorney Fees Commences: In an action by an attorney to secure attorney fees from the state compensation insurance fund, the Workers' Compensation Court improperly denied jurisdiction. The attorney now claims that interest should accrue on the fees wrongfully withheld by the court's denial of jurisdiction. A claim becomes liquidated, for the purpose of allowing prejudgment interest, when the amount due and the date on which it becomes due are fixed and certain. In the present case, the attorney fees could be computed to a certain amount upon the issuance of the state warrant establishing the specific amount of the attorney's client's compensation benefits. Thus, prejudgment interest on the attorney fees is allowed from the date the warrant was issued. Kelleher Law Office v. St. Comp. Ins. Fund. 213 M 412, 691 P2d 823, 41 St. Rep. 2203 (1984).

Breach of a Contract — Interest From Date of Judgment: In a breach of contract, the trial court awarded interest from the date of the breach. The Supreme Court held that the trial court erred in applying 27-1-211 to the case. The amount of the damages due upon breach was not clearly ascertainable until determined by the trial court. Since this was not an action on a negotiable instrument or for the definite unpaid balance of a contract or account, in which the damages would be a sum certain, 27-1-211 was not applicable. Interest from the date of judgment at the legal rate of 10% a year was allowable under 25-9-204 and 25-9-205. Carriger v. Ballenger, 192 M 479, 628 P2d 1106, 38 St. Rep. 864 (1981), followed in N. Mont. Hosp. v. Knight, 248 M 310, 811 P2d 1276, 48 St. Rep. 444 (1991).

Interest on Liability for Payment of Dishonored Checks: Determination by the Supreme Court that the bank was liable for payment of dishonored checks, under 30-4-302, was based on contract law of negotiable instruments, and interest was ordered from the second day after the bank's receipt of the checks. Sun River Cattle Co. v. Miners' Bank of Mont., 164 M 479, 525 P2d 19 (1974).

Upon Filing of Complaint Against Surety Company: Interest commenced running upon filing of complaint against surety company on bond where no demand had been made on surety until filing of complaint; such interest was due notwithstanding surety's contention that since

damages were not certain until time of filing of judgment, it could not be charged with interest from time of filing of complaint. Lapke v. Hunt, 151 M 450, 443 P2d 493 (1968).

Allowed From Date of Court Decision:

Where school district, contrary to an appraisal clause in insurance contract, brought suit to determine amount of damage caused by fire to an abandoned school, even though judgment was overruled and subsequent appraisal was ordered, interest on any amount later determined was to begin from the time a definite amount had been fixed by the jury. School District v. Globe & Republic Ins. Co., 146 M 208, 404 P2d 889 (1965).

Where a mechanics' lien (now construction lien) claimant considerably overstated the amount of his claim in the lien filed so that it required the judgment of the District Court in an action to foreclose the lien to decide the correct amount due, interest, a creature of statute, was allowable only from the date of the decision, and the District Court in allowing it from the date of the completion of the work committed error. Eskestrand v. Wunder, 94 M 57, 20 P2d 622 (1933), distinguished in Fed. Land Bank of Spokane v. Green, 108 M 56, 90 P2d 489 (1939), explained in Price Bldg. Serv., Inc. v. Holms, 214 M 456, 693 P2d 553, 42 St. Rep. 84 (1985).

Bankruptcy Claim: Where materialmen included items to which they were not entitled in their claim against surety in bankruptcy proceedings, interest could only be allowed from the time the District Court ascertained the exact amount of the claim. U.S. for Use and Benefit of Chemetron Corp. v. George A. Fuller Co., 250 F. Supp. 649 (D.C. Mont. 1965).

No Demand Necessary When Debtor Knows His Obligations: When a debtor knows what he is to pay and when he is to pay it, no demand is necessary to start the running of interest from the date the payment should have been made. W. J. Lake & Co. v. Mont. Horse Prod. Co., 109 M 434, 97 P2d 590 (1939).

Interest From Date of Completion of Services: As respects liability of contractor's surety, subcontractors were entitled to interest from date of completion of services rendered under fixed price contract. Am. Sur. Co. of New York v. Cove Irrigation District, 54 F2d 197 (9th Cir. 1931).

Not Entitled to Interest Before Judgment: Subcontractors were held not entitled to interest on quantum meruit claim from principal contractor or its surety before judgment determining such claim. Am. Sur. Co. of New York v. Cove Irrigation District, 54 F2d 197 (9th Cir. 1931).

Insolvent Bank — Interest From Date Doors Closed: If a person with money in a bank, part of which is subject to check, the remainder being shown by a passbook, is indebted on a note to the bank in excess of the amount of such money, the effect of the suspension and declared insolvency of the bank is to make the deposits due and actionable; the depositor is, therefore, entitled to interest on the deposits from the time that the bank's doors were closed until the date of the judgment on the note. Williams v. Johnson, 50 M 7, 144 P 768 (1914).

INTEREST RATE

Rate for Prejudgment Interest Same as Rate for Postjudgment Interest: Although the rate of postjudgment interest is statutorily established in 25-9-205, there is no comparable statutory provision for the rate of prejudgment interest. The Supreme Court concluded that, in the best interest of parties trying to anticipate their rights or obligations in an effort to avoid litigation and to provide guidance to District Courts for awards of prejudgment interest, the appropriate rate for prejudgment interest when it is awarded should be the same as the rate awarded for postjudgment interest. In re Marriage of DeBuff, 2002 MT 159, 310 M 382, 50 P3d 1070 (2002).

Interest on Judgment Not Compound Interest: In its initial summary judgment order, the District Court awarded a real estate broker the commission due plus interest at 6% on that amount from date of breach to date of judgment, pursuant to 27-1-211. On a second summary judgment dismissing a counterclaim, the court found the broker entitled to judgment at 10% on the initial judgment. The Supreme Court found this award was not compound interest in violation of 25-9-205, but was interest on the judgment, a correct calculation of interest due. Ellingson Agency, Inc. v. Baltrusch, 228 M 360, 742 P2d 1009, 44 St. Rep. 1598 (1987).

Breach of Oral Contract — Interest Rate: Plaintiff agreed to remodel a prefab home for defendant. He also built a foundation, added a bedroom and deck, and built a double garage. Plaintiff completed the basement and sent a bill to defendant. The bill was paid. The remainder of the work was completed, but defendant refused to pay, contending the oral agreement between the parties contained a "cap" of $30,000. Plaintiff contended the agreement was on a cost-plus basis, the unpaid portion of which was $63,310. The District Court found for plaintiff and awarded the amount due with interest at 6% from the completion date. Defendant contended the award of damages was unreasonable. The amount awarded was the amount owed on the contract, not damages for breach. The award merely compensated plaintiff for what he was owed. Pursuant to 27-1-211, plaintiff was entitled to interest from the date he was entitled to payment.

That was the date the District Court determined the work was completed. Since the parties had not agreed on an interest rate, the District Court used the legal rate stated in 31-1-106. This was within the court's reasonable discretion. Frank L. Pirtz Constr., Inc. v. Hardin Town Pump, Inc., 214 M 141, 692 P2d 460, 41 St. Rep. 2366 (1984).

Rate of Interest and Expenses Allowable: Plaintiff entered a buy-sell to purchase defendants' ranch. One of his major considerations was gaining investment tax credits. Defendants refused to perform, and plaintiff filed a breach of contract action. The District Court found for plaintiff and awarded him prejudgment interest at 10% on his state and federal income tax obligation, the earnest money, and his capital expenditures on the ranch. On appeal, the Supreme Court held that interest on the earnest money was all that should be allowed as prejudgment interest under 27-1-211. Prejudgment interest should be 6% under 31-1-106. Interest should then be allowed on the judgment according to 27-1-211 at the amount of 10% under 25-9-205. The expenses that are allowable to a plaintiff are found in 25-10-201, and 25-10-101 outlines when costs are allowed. The cost of depositions not used during trial is not allowed. Various travel expenditures would not have been chargeable to defendants if the contract had been performed. The portion of capital expenditures allowed should be only the loss plaintiff suffered as a result of expenditures from the time of signing the buy-sell to the time of breach. Ehly v. Cady, 212 M 82, 687 P2d 687, 41 St. Rep. 1611 (1984).

Law Review Articles

Contract Damages in Montana Part II: Reliance and Restitution, Burnham, 45 Mont. L. Rev. 1 (1984).

Contract Damages in Montana Part I: Expectancy Damages, Burnham, 44 Mont. L. Rev. 1 (1983).

Collateral References

Damages *key* 66 through 69; Interest *key* 19, 39(1) through (3).

25 C.J.S. Damages §§80 through 88; 47 C.J.S. Interest and Usury §19.

22 Am. Jur. 2d Damages §462, et seq.

27-1-212. When award of interest discretionary.

Case Notes

No Error in Disallowing Prejudgment Interest When Amounts Owed Not Ascertainable Until Differences in Compensation Determined at Trial: After sorting through years of partnership transactions and property accumulations, the District Court found that one partner, Otto, owed the other partner, William, $94,607 and that Otto also owed William additional money because Otto had received excess compensation from a partnership construction project. William requested prejudgment interest on the amounts owed, but the request was denied. On appeal, the Supreme Court affirmed, noting that a person's right to receive a sum certain in damages does not necessarily vest before judgment. The District Court did not abuse its discretion by declining to award prejudgment interest in this case because it was not until all the evidence was heard that the court could determine who was entitled to certain property and evaluate any discrepancies in total amounts owed. Baltrusch v. Baltrusch, 2003 MT 357, 319 M 23, 83 P3d 256 (2003).

Judge as Well as Jury May Award Prejudgment Interest Under This Section: The Logans argued that the lower court erred in awarding prejudgment interest on a judgment against them for negligent misrepresentation in their selling of a house to the Stroms. The Logans argued that the applicable statute was 27-1-210, which allows a court to award prejudgment interest on damages made certain by calculation, and that an award of interest in a negligence case does not meet that standard. The Supreme Court held that this section was the applicable statute and that although it speaks of prejudgment interest being awarded by the jury in certain cases, the statutory discretion granted to a jury to award interest also applies to a judge sitting as the trier of fact. Strom v. Logan, 2001 MT 30, 304 M 176, 18 P3d 1024 (2001).

Prejudgment Certainty of Damages Not Required in Damaged Crops Case: In an action for negligent damage to crops caused by improper spraying, which caused a smaller crop, prejudgment interest on damages for the lost part of the crops was properly granted even though plaintiffs did not reduce damages to a sum certain prior to judgment. Semenza v. Bowman, 268 M 118, 885 P2d 451, 51 St. Rep. 1209 (1994).

Authority of Trial Court Acting as Trier of Fact to Award Prejudgment Interest — Certainty Requirements Inapplicable in Fraud Cases: While this section grants authority to award prejudgment interest only to the jury, the trial court, when acting as the trier of fact, may award prejudgment interest under this section. Contrary to 27-1-211, the award of interest under this

section is discretionary and does not specify rigid certainty requirements. In contested fraud cases the right to recover a sum certain in damages does not vest until the date of the court's judgment. Therefore, to interpret this section as requiring absolute certainty as to the specific time a sum certain in damages vests would render the statute inoperative as to fraud cases. Further, the trier of fact may award prejudgment interest whether or not the plaintiff's right to receive a sum certain in damages has vested before judgment. Dew v. Dower, 258 M 114, 852 P2d 549, 50 St. Rep. 454 (1993). See also Redke v. Silvertrust, 490 P2d 805 (Calif. 1971), and Bullis v. Sec. Pac. Nat'l Bank, 582 P2d 109 (Calif. 1978).

No Prejudgment Interest on Business Liabilities Satisfied by Buyer, Which Were Later Ruled Responsibility of Sellers: Sellers reassumed possession of their former business after buyer defaulted on the sales contract. A dispute between buyer and sellers over who was responsible for the payment of accounts payable incurred by buyer was eventually resolved by the District Court in favor of buyer. Buyer then claimed he was entitled to prejudgment interest on the payments he had made after default. He was not entitled to interest under 27-1-211 because the award to buyer was one of reimbursement, not damages, nor was buyer entitled to interest under 27-1-212 because the money paid by buyer after default does not represent a breach of any obligation on the part of sellers. The District Court properly held that 31-1-106 applied. Heine v. Seibert, 217 M 224, 703 P2d 865, 42 St. Rep. 1152 (1985).

No Authority for Prejudgment Interest on Discretionary Attorney Fees in Mandamus: In a prior decision, this case was remanded for a hearing on attorney fees. The District Court awarded fees, and plaintiffs appealed. Plaintiffs contend that the District Court should have awarded prejudgment interest on the award of attorney fees. Interest was not properly awardable under 27-1-212 because it does not authorize a discretionary award of prejudgment interest since the award of attorney fees is itself discretionary under 27-26-402. In this case, plaintiffs entered into a contingent fee agreement with their attorneys. No attorney fees were owing prior to judgment; therefore, plaintiffs suffered no detriment in the nature of prejudgment interest on attorney fees since no prejudgment interest was owing. The Supreme Court held that there is no authority in Montana for an award of prejudgment interest on the discretionary award of attorney fees arising from a mandamus action. Kadillak v. Dept. of State Lands, 198 M 70, 643 P2d 1178, 39 St. Rep. 773 (1982).

Conflicts: The conflicts principle requiring application of the law of the place of the tort for questions of prejudgment interest has been followed by most courts. Ryan v. Ford Motor Co., 334 F. Supp. 674 (D.C. Mont. 1971).

Recovery of Unlawful Tax: Chapter 142, L. 1925 (15-1-402 and 15-1-403, 15-1-403 now repealed), providing that when taxes paid under protest may be recovered, recovery shall be had without interest, has no application to an action based on 15-16-601 (now repealed), authorizing refund of a tax "paid more than once"; in such an action plaintiff is entitled to interest on the unlawful tax from the date of payment, even though plaintiff, to avoid the imputation that the payment made was voluntary, made it under protest. Williams v. Harvey, 91 M 168, 6 P2d 418 (1931).

Section Not Applicable to Personal Injury Actions: This section, authorizing the jury "in an action for the breach of an obligation not arising from contract", and in certain others, to award interest in their verdict, while applicable in actions for the destruction of property, has no application to personal injury actions. Daly v. Swift & Co., 90 M 52, 300 P 265 (1931).

Federal Employers' Liability Act: Interest was not allowable on recovery in personal injury action under Federal Employers' Liability Act (45 U.S.C. §§51 through 59), this section not being controlling. Chicago, Milwaukee, St. Paul & Pac. R.R. v. Busby, 41 F2d 617 (9th Cir. 1930).

Wrongful Death: Under this section, providing that in an action for the breach of an obligation not arising from contract, interest may be awarded in the discretion of the jury, interest may be allowed on amount awarded in an action for death caused by the negligence, especially where the damages awarded do not include compensation for suffering extending for an indefinite period after the injury, but the time of the accrual of the right is fixed by death from which date interest may run. Burns v. Eminger, 84 M 397, 276 P 437 (1929), distinguished in Marinkovich v. Tierney, 93 M 72, 17 P2d 93 (1932).

Jury to Be Instructed on Interest: While, under this section, interest may be allowed in an action for damages to livestock shipments due to the carriers' negligence, the jury should be instructed that the question of interest is left to its discretion, and refusal to so instruct is error. Phelps v. Great N. Ry., 66 M 198, 213 P 610 (1923), reversed on other grounds in Great N. Ry. v. Galbreath Cattle Co., 271 US 99, 70 L Ed 954, 46 S Ct 439 (1926).

Property Injured by Grading Street: In an action against a city for damages caused to plaintiff's property by the grading of a street, the jury may, in its discretion, allow interest on the

amount awarded from the time of the completion of the work, under this section. Wright v. Butte, 64 M 362, 210 P 78 (1922).

Livestock Killed by Railroad: In an action against a railroad company for the value of livestock killed on the track, the plaintiff, if successful, has a statutory right to interest. Dewell v. N. Pac. Ry., 54 M 350, 170 P 753 (1918).

Assignable Interest: The right to recover damages for the negligent destruction of property by fire, together with interest recoverable under this section in the discretion of the jury, is assignable and passes by subrogation to an insurance company to the extent of the proportion of the loss paid by it to the owner of the property destroyed. Caledonia Ins. Co. v. N. Pac. Ry., 32 M 46, 79 P 544 (1905), distinguished in Cascade County v. U.S., 75 F. Supp. 850 (D.C. Mont. 1948). See Gaugler v. Chicago, Milwaukee & Puget Sound Ry., 197 F 79 (D.C. Mont. 1912).

Collateral References

Damages *key* 66, 67, 69.
25 C.J.S. Damages §§81, 85 through 88.
22 Am. Jur. 2d Damages §473, et seq.

27-1-213. Validity of interest rate set by contract.

Case Notes

Contract Interest Proper: Although the District Court did not state the basis for the award, the award of interest on fees due and unpaid as stipulated in a contract was proper. Taylor, Thon, Thompson & Peterson v. Cannaday, 230 M 151, 749 P2d 63, 45 St. Rep. 102 (1988).

Contract Interest Rate for Particular Item — Statutory Rate Applied to Other Items: Plaintiff received damages for the value of a lease breached by defendant and for plaintiff's costs in renovating the premises as required by the lease. The lease provided that lessee would indemnify lessor for finance costs of the renovation at an 18% rate. The court properly gave plaintiff interest at the statutory 10% rate instead of the 18% rate. An interest rate in one relatively minor and discrete part of the lease should not be an umbrella over the entire obligation, and it is contrary to the parties' legitimate expectations to allow such an umbrella where the lease is otherwise complete in almost every detail. If the parties intended the 18% rate to apply to all obligations arising from the contract, including breach, they could have easily so provided in the lease. Nicholson v. United Pac. Ins. Co., 219 M 32, 710 P2d 1342, 42 St. Rep. 1822 (1985).

Collateral References

Interest *key* 68.
47B C.J.S. Interest and Usury §§38, 39.
22 Am. Jur. 2d Damages §467; 45 Am. Jur. 2d Interest and Usury §64, et seq.

27-1-214. Waiver of interest by accepting principal.

Case Notes

Contention of Error in Award of Prejudgment Interest — Faulty Waiver Argument: Defendant argued that plaintiff's waiver of payments availed defendant of a defense to interest on the difference between the contract amount due and the amount actually paid. However, the Supreme Court discounted the waiver argument and noted that defendant did not pay the whole principal; therefore, interest was proper under 27-1-211. Pipe Indus. Ins. Fund Trust v. Consol. Pipe Trades Trust, 233 M 162, 760 P2d 711, 45 St. Rep. 1392 (1988).

Application of Section: This section has no application to money deposited to indemnify sureties on a bond against loss. Leggat v. Palmer, 39 M 302, 102 P 327 (1909).

Collateral References

Interest *key* 26; Payment *key* 82(7).
47 C.J.S. Interest and Usury §33.

27-1-220. Punitive damages — when allowed — limitation.

Compiler's Comments

2003 Amendment: Chapter 457 in (1) in exception clause inserted reference to subsection (3); and inserted (3) limiting awards of punitive damages in civil cases other than class action lawsuits. Amendment effective October 1, 2003.

1987 Amendment: Substituted language describing the purpose of punitive damages and prohibiting such damages in contract actions (see 1987 Session Law for full text) for former section that read: "The purpose of 27-1-221 is to deter claims for punitive or exemplary damages that are not clearly based in fact, and to that end, the legislature intends for 27-1-221 to be used in combination with early and ready application and granting of motions for summary judgment

pursuant to Rule 56 of the Montana Rules of Civil Procedure where such claims are not based in fact, and the application of the sanctions provided for in Rule 11 of the Montana Rules of Civil Procedure against those parties responsible for making such claims."

Applicability: Section 5, Ch. 627, L. 1987, provided: "This act applies to claims arising after the effective date of this act, except that subsections (6), (7), and (8) of 27-1-221 apply to trials that begin after the effective date of this act whether or not the claim arose after the effective date of this act." Pursuant to 1-2-201, the act was effective October 1, 1987.

Case Notes

Punitive Damages Owing for Fraud Connected With Sexual Assault: Following a sexual assault by a coworker, Beaver sought punitive damages. The District Court held that the coworker was unable to control his impulses, but was not guilty of fraud or malice and thus was not liable for punitive damages. The Supreme Court disagreed and reversed. The record showed that the coworker's actions were not a spur-of-the-moment development but that the coworker had worked for several hours to place Beaver in a position in which she would be vulnerable to sexual advances, including making false representations of work-related necessity. These acts constituted actual fraud, and the coworker was liable for punitive damages under 27-1-221 and this section. Beaver v. Dept. of Natural Resources and Conservation, 2003 MT 287, 318 M 35, 78 P3d 857 (2003).

Punitive Damages From Breach of Contract Prohibited Absent Showing of Actual Fraud or Malice: Under this section, punitive damages arising from a breach of contract are prohibited, although 27-1-221 does permit an award of punitive damages if the claimant proves by clear and convincing evidence that defendant is guilty of actual fraud or malice outside the contract context. Here, plaintiff contended that defendants filed malicious claims and defenses in the present case and in other civil proceedings including tribal court, but presented insufficient evidence that defendants acted with actual malice toward plaintiff. Thus, the District Court correctly concluded that punitive damages were not owing. Weter v. Archambault, 2002 MT 336, 313 M 284, 61 P3d 771 (2002).

No Award for Punitive Damages in Contract Action Absent Evidence of Tortious Conduct: Lessee Anderson filed counterclaims against lessor Grenfell for tortious interference with business or contractual relations and for punitive damages. The alleged tortious interference occurred after Anderson's business or contractual relationship was terminated, so the tortious interference claim was properly dismissed. Absent evidence of any traditional contract-related tort, the counterclaim for punitive damages was also properly dismissed. Grenfell v. Anderson, 2002 MT 225, 311 M 385, 56 P3d 326 (2002).

No Error in Failure of Trial Court to Detail From Bench Its Analysis of Statutory Factors Regarding Award of Punitive Damages: Onstad was assaulted on the job and sued the employer, Payless Shoesource (Payless), for failure to provide a safe workplace. The jury held Payless liable and awarded Onstad $500,000 in compensatory damages, plus an additional $1 million in punitive damages. On appeal, Payless contended that the trial court erred in approving punitive damages, asserting that Onstad did not prove actual malice, thereby failing to establish a necessary foundation for punitive damages, and that the court failed to adequately review the support for the award by enumerating from the bench its consideration of the statutory factors for approving punitive damages. The Supreme Court affirmed. The jury was instructed on malice and specifically found that Payless's conduct amounted to malice, a conclusion that was supported by the evidence. Further, it was immaterial that the trial court did not detail from the bench its analysis of each of the statutory factors as to the award of punitive damages. It was sufficient that the court made individual findings on each of the statutory factors in its subsequent written findings. Onstad v. Payless Shoesource, 2000 MT 230, 301 M 259, 9 P3d 38, 57 St. Rep. 943 (2000).

Damages Proper for Emotional Distress Based on Sale of Real Estate — Punitive Damages Appropriate: The Maloneys were promised an option to purchase property adjacent to their own, hoping to build their retirement home near Glacier Park. The real estate agent who listed the property was aware of the Maloneys' option but sold to another instead. That person then developed the property, building a 3,000-square-foot home on the very site that the Maloneys had desired and within sight of the Maloneys' residence, and then listed the newly developed property for almost six times what the Maloneys could have paid had the option been properly offered. A special master concluded, and the District Court agreed, that the Maloneys had suffered and were entitled to compensation for the shock, worry, anger, disappointment, and frustration that they had suffered and would continue to suffer in light of the inherent duration of the Maloneys' adjacent ownership. The Supreme Court affirmed, noting that under French v. Ralph E. Moore, Inc., 203 M 327, 661 P2d 844, 40 St. Rep. 481 (1983), emotional distress

damages may result from negligent or intentional damage to property arising from interference with the use and enjoyment of land and that under Johnson v. Murray, 201 M 495, 656 P2d 170, 39 St. Rep. 2257 (1982), compensatory damages could include compensation for humiliation, embarrassment, distress, and ridicule associated with interference with plaintiffs' use of their private property. The private property interest at issue here sufficiently involved the use and enjoyment of land to fall within these holdings. Further, the award of punitive damages was also affirmed in this instance despite defendant's claims of the special master's improper estimation of net worth, a syntax error, and the special master's improper recognition of punitive damages assessed against defendant in a prior case. Maloney v. Home & Inv. Center, Inc., 2000 MT 34, 298 M 213, 994 P2d 1124, 57 St. Rep. 144 (2000). See also Recovery for Negligent Infliction of Emotional Distress Attendant to Economic Loss: A Reassessment, Sandor & Berry, 37 Ariz. L. Rev. 1247 (1995).

Standard of Review for Clear and Convincing Evidence Standard of Proof: In an insurance fraud action, each element of a punitive damages claim had to be proved by clear and convincing evidence, a standard that is more than a preponderance of the evidence but less than beyond a reasonable doubt. Addressing the standard of review for the first time, the court stated that the standard was whether there was substantial evidence to support the award of punitive damages, the same standard of review as when the standard of proof is a preponderance of the evidence. Cartwright v. Equitable Life Assurance Soc'y, 276 M 1, 914 P2d 976, 53 St. Rep. 268 (1996).

Award of Punitive Damages Against Estate of Deceased Tortfeasor: In a case of first impression, the Supreme Court noted that because under 27-1-501 a cause of action or defense does not abate because of the death of a party but survives and may be maintained by the party's representatives, punitive damages may be assessed against the estate of a deceased tortfeasor. Whether it is appropriate to assess punitive damages to set an example is a question for the trier of fact. Tillett v. Lippert, 275 M 1, 909 P2d 1158, 53 St. Rep. 1 (1996).

New Standard for Negligent or Intentional Infliction of Emotional Distress — Proof of Serious or Severe Emotional Stress Required: A photographer for a Belgrade newspaper sued the newspaper and a city police officer, alleging that both falsely and maliciously conspired to criminally prosecute the photographer for stealing photographs from the newspaper. After the District Court granted the newspaper and officer a summary judgment motion, the Supreme Court, after reviewing cases using the traditional approach, reversed and remanded the case for determination under a new standard for negligent or intentional infliction of emotional distress. Applying the new standard, the Supreme Court held that an independent cause of action for infliction of emotional distress will arise in circumstances in which serious or severe emotional distress to a claimant, as defined in Comment j of the Restatement (Second) of Torts, was the reasonably foreseeable consequence of a negligent or intentional act or omission. The difference between negligent infliction and intentional infliction lies not in the elements of the tort but in the nature and culpability of the defendant's conduct. Punitive damages may be requested in a cause of action for intentional infliction of emotional distress. It is for the court to determine whether the evidence of serious or severe emotional distress can be found; it is for the jury to determine whether, on the evidence, it has in fact existed. Sacco v. High Country Independent Press, Inc., 271 M 209, 896 P2d 411, 52 St. Rep. 407 (1995), followed in Maloney v. Home & Inv. Center, Inc., 2000 MT 34, 298 M 213, 994 P2d 1124, 57 St. Rep. 144 (2000), Winslow v. Mont. Rail Link, Inc., 2000 MT 292, 302 M 289, 16 P3d 992, 57 St. Rep. 1238 (2000), Winslow v. Mont. Rail Link, Inc., 2001 MT 269, 307 M 269, 38 P3d 148 (2001), Pospisil v. First Nat'l Bank of Lewistown, 2001 MT 286, 307 M 392, 37 P3d 704 (2001), Wages v. First Nat'l Ins. Co. of America, 2003 MT 309, 318 M 232, 79 P3d 1095 (2003), and McConkey v. Flathead Elec. Co-op, 2005 MT 334, 330 M 48, 125 P3d 1121 (2005), distinguished, with regard to the inapplicability of the standard to civil rights cases brought under Title 49, ch. 2, commonly known as the Montana Human Rights Act, in Vortex Fishing Sys., Inc. v. Foss, 2001 MT 312, 308 M 8, 38 P3d 836 (2001), and clarified in Henricksen v. St., 2004 MT 20, 319 M 307, 84 P3d 38 (2004), to the extent that when there is a physical manifestation of bodily harm resulting from emotional distress, such as posttraumatic stress disorder, this bodily harm is sufficient evidence that the emotional distress is genuine and severe. See also Turner v. Burlington N. Santa Fe RR Co., 338 F3d 1058 (9th Cir. 2003).

Punitive Damages Not Allowed for Breach of Commercial Lease: The lower court determined that the tenant, Rogers, had remained in possession of the property for 6 days for which he owed rent in the amount of $95.85. The court awarded the landlord treble damages in the amount of $95.85 x 3 and $95.85 as rent for the 6-day period. The Supreme Court ruled that the landlord was entitled to only $95.85 x 3 and was not entitled to the additional $95.85. The Supreme Court also held that the additional $95.85 could not be characterized as exemplary damages because

exemplary damages are punitive in nature and punitive damages cannot be given for a breach of contract. Sage v. Rogers, 257 M 229, 848 P2d 1034, 50 St. Rep. 244 (1993).

Tortious Interference With Business as Creating Liability for Punitive Damages Over and Above Contract Damages: The Supreme Court, relying on Bolz v. Meyers, 200 M 286, 651 P2d 606 (1982), held that a party may breach a contract and may also separately and distinctly engage in conduct, outrageous in nature, that tortiously interferes with the other party's business relations. A prima facie case of interference with contractual or business relations requires intentional and willful acts: (1) calculated to cause damage to the plaintiff or the plaintiff's business; (2) done with the unlawful purpose of causing damage or loss, without justifiable cause on the part of the actor; and (3) resulting in actual damages and loss. Defendants' tortious interference with plaintiff's business relationships entitled plaintiff to punitive damages. Daniels v. Dean, 253 M 465, 833 P2d 1078, 49 St. Rep. 535 (1992).

Punitive Damages Awarded Despite Underlying Contract: The defendant argued that the lower court had erred in awarding punitive damages because the action was based upon breach of contract. The Supreme Court held that the statute precluding punitive damages for breach of contract did not apply to causes of action arising before the law's passage in 1987. The Supreme Court also held that if the conduct of a defendant is found to be fraudulent, an underlying contract will not defeat the award of punitive damages. Lee v. Armstrong, 244 M 289, 798 P2d 84, 47 St. Rep. 1421 (1990).

Closing Argument Seeking Punitive Damages — Not Prejudicial: In his closing argument, the plaintiff's attorney urged the jury to award the plaintiff the amount requested so that the defendant would not continue to engage in the same kind of activity in the future. The defendant argued that the plaintiff's attorney's statements sought punitive damages that were not an issue in the case and therefore prejudiced the defendant. The Supreme Court held that the statement was not so prejudicial as to deny the defendant a fair trial and that there was no evidence that the verdict was inflated in any way. Kalanick v. Burlington N. RR Co., 242 M 45, 788 P2d 901, 47 St. Rep. 532 (1990).

Award of Punitive Damages in Conversion Action: Defendant contended that punitive damages were improper in a case where he was convicted of conversion of an employee's commission checks because the employment was based on a contractual relationship. The Supreme Court noted that conversion is a tort, that the breach of contract argument was not supported by evidence or the verdict, and that in light of substantial evidence of malice or oppression, punitive damages were warranted. Lane v. Dunkle, 231 M 365, 753 P2d 321, 45 St. Rep. 686 (1988).

No Entitlement to Exemplary Damages as Matter of Right: No plaintiff is ever entitled to exemplary damages as a matter of right, regardless of the situation or the sufficiency of the facts. Spackman v. Ralph M. Parsons Co., 147 M 500, 414 P2d 918 (1966), followed in Davis v. Sheriff, 234 M 126, 762 P2d 221, 45 St. Rep. 1783 (1988).

Law Review Articles

Intentional Infliction of Mental Distress in Montana, Tobias, 57 Mont. L. Rev. 99 (1996).

27-1-221. Punitive damages — liability — proof — award.

Compiler's Comments

2003 Amendment: Chapter 121 in (6) deleted former second sentence that read: "An award of punitive damages must be unanimous as to liability and amount." Amendment effective March 25, 2003.

Preamble: The preamble attached to Ch. 121, L. 2003, provided: "WHEREAS, in Finstad v. W.R. Grace & Co., 2000 MT 228, 301 Mont. 240, 8 P.3d 778 (2000), the Montana Supreme Court held that the portion of section 27-1-221(6), MCA, which requires that an award of punitive damages must be unanimous as to liability and amount, violates Article II, section 26, of the Montana Constitution, guaranteeing a verdict by a two-thirds majority in all civil cases."

1997 Amendment: Chapter 328 in (6) inserted last sentence relating to unanimous punitive damage awards; and made minor changes in style. Amendment effective April 21, 1997.

Applicability: Section 2, Ch. 328, L. 1997, provided: "[This act] applies to causes of action that arise after [the effective date of this act]." Effective April 21, 1997.

1991 Amendment: In (1) substituted reference to "this section" for reference to "subsection (2)"; and made minor changes in style.

1987 Amendment: In (1) substituted "Subject to subsection (2) and the provisions of 27-1-220, reasonable punitive damages may be awarded where the defendant has been guilty of actual fraud or actual malice" for former (1) that read: "Subject to subsection (2), in any action for a breach of an obligation not arising from contract where the defendant has been guilty of

oppression, fraud, or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example and by way of punishing the defendant"; inserted (2) through (4) defining actual fraud and actual malice; in (5) substituted "All elements of the claim for punitive damages must be proved by clear and convincing evidence" for "The jury may not award exemplary or punitive damages unless the plaintiff has proved all elements of the claim for exemplary or punitive damages by clear and convincing evidence"; deleted former (3) through (7) that read: "(3) Presumed malice exists when a person has knowledge of facts, intentionally avoids learning of facts, or recklessly disregards facts, knowledge of which may be proven by direct or circumstantial evidence, which creates a high degree of risk of harm to the substantial interests of another, and either deliberately proceeds to act in conscious disregard of or indifference to that risk or recklessly proceeds in unreasonable disregard of or indifference to that risk.

(4) The plaintiff may not present, with respect to the issue of exemplary or punitive damages, any evidence to the jury regarding the defendant's financial affairs or net worth unless the judge first rules, outside the presence of the jury, that the plaintiff has presented a prima facie claim for exemplary or punitive damages.

(5) A defendant is guilty of oppression if he intentionally causes cruel and unjust hardship by:

(a) misuse or abuse of authority or power; or

(b) taking advantage of some weakness, disability, or misfortune of another person.

(6) (a) In cases of actual fraud or actual malice, the jury may award reasonable punitive damages after considering the circumstances of the case.

(b) In all other cases where punitive damages are awarded, punitive damages may be in an amount up to but no greater than $25,000 or 1% of the defendant's net worth, whichever is greater.

(7) In cases where punitive damages may be awarded, the jury shall not be instructed, informed, or advised in any manner as to the limitations on the amount of exemplary or punitive damages as set forth in subsection (6)(b)"; and inserted (6) through (8) providing procedure to be used in determining punitive damage award.

Applicability: Section 5, Ch. 627, L. 1987, provided: "This act applies to claims arising after the effective date of this act, except that subsections (6), (7), and (8) of 27-1-221 apply to trials that begin after the effective date of this act whether or not the claim arose after the effective date of this act." Pursuant to 1-2-201, the act was effective October 1, 1987.

1985 Amendment: At beginning of (1) inserted "Subject to subsection (2)"; inserted (2) through (7) defining basis for liability, proof requirements, and setting liability limit.

Severability: Section 3, Ch. 507, L. 1985, is a severability clause.

Applicability — Effective Date: Section 4, Ch. 507, L. 1985, provided: "This act applies to any claim arising after the effective date of this act." Pursuant to sec. 6, Ch. 507, L. 1985, the act was effective on passage and approval, which was April 16, 1985.

Case Notes

General 577
Oppression, Fraud, or Malice 585
Damages 596
Jury Question and Instruction 600

GENERAL

Sufficient Evidence to Support Jury Verdict Awarding Punitive Damages for Breach of Fiduciary Duty by Insurer in Dealings With Its Agent: An insured brought an action against Deonier, an insurance agent, and Paul Revere Life Insurance Company (Revere) to recover benefits and damages after the insured's claim was denied on grounds of a preexisting condition, despite the incontestability clause in the policy. The agent cross-claimed against the company for indemnity and breach of fiduciary duty, contending that there was a significant amount of evidence that Revere planned to assert the Forman defense in Montana (see Mass. Cas. Ins. Co. v. Forman, 516 F2d 425 (5th Cir. 1975), in which an insurer asserted a legal defense to the incontestability clause based on its definition of sickness as excluding disabilities that manifested themselves prior to the date of issue of the policy) and that Revere's failure to inform Deonier of its intention to invoke the defense was a clear breach of Revere's duty to inform its agents of a risk of pecuniary loss from potential lawsuits. Revere asserted that pursuant to Doettl v. Colonial Life & Accident Ins. Co., 505 F. Supp. 127 (D.C. Mont. 1981), in which a Montana federal District Court endorsed the Forman defense, it had no reason to believe that its policy interpretation might be in violation of Montana law and therefore did not breach its duty

to inform its agents of risk of pecuniary loss. Revere argued that punitive damages were inappropriate as a matter of law because it was entitled to assert any defense, including the Forman defense, that had a reasonable basis in the law. Deonier countered by pointing out that she had introduced evidence that by 1994 when Revere first used the Forman defense in Montana, it knew that its selling agents had been sued in at least 20% of the previous lawsuits and the company nevertheless refused to inform its agents of the risk of pecuniary loss if Revere decided to assert that defense. The Supreme Court held that based on the evidence alone, it could conclude that there was a complete absence of any evidence that would justify submitting the issue of punitive damages to the jury and therefore the lower court did not err in denying the motion for judgment as a matter of law on punitive damages. Deonier & Associates v. Paul Revere Life Ins. Co., 2004 MT 297, 323 M 387, 101 P3d 742 (2004).

Punitive Damages From Breach of Contract Prohibited Absent Showing of Actual Fraud or Malice: Under 27-1-220, punitive damages arising from a breach of contract are prohibited, although this section does permit an award of punitive damages if the claimant proves by clear and convincing evidence that defendant is guilty of actual fraud or malice outside the contract context. Here, plaintiff contended that defendants filed malicious claims and defenses in the present case and in other civil proceedings including tribal court, but presented insufficient evidence that defendants acted with actual malice toward plaintiff. Thus, the District Court correctly concluded that punitive damages were not owing. Weter v. Archambault, 2002 MT 336, 313 M 284, 61 P3d 771 (2002).

State Law Tort Claims Not Protected or Prohibited by FELA — Dismissal for Failure to State Claim Improper: Reidelbach worked for the railroad for about 20 years but was forced to stop working because of job-related disabling cumulative spinal injuries. Reidelbach reached an agreement with the railroad's claim representatives under which he would forego pursuing a claim under the Federal Employers' Liability Act (FELA) and the railroad would propose a fair settlement for the injuries. After 2 years, no settlement was offered, and ultimately the parties exchanged counteroffers, but no agreement on an amount was reached. Reidelbach then filed a timely FELA claim and also brought several state claims, alleging that the railroad had engaged in unfair, dilatory, and fraudulent claims practices. The District Court concluded that all the postinjury state claims were preempted by FELA and dismissed them pursuant to Rule 12(b), M.R.Civ.P. (Title 25, ch. 20), so Reidelbach appealed. Following an extensive analysis of federal law related to preemption in its various forms, the Supreme Court held that Reidelbach's state claims were neither expressly nor impliedly preempted by FELA and did not conflict with or stand as an obstacle to the accomplishment and execution of FELA. Therefore, the District Court erred in dismissing Reidelbach's state claims on grounds of FELA preemption, and the case was reversed and remanded for trial in state court. Reidelbach v. Burlington N. & Santa Fe Ry. Co., 2002 MT 289, 312 M 498, 60 P3d 418 (2002).

Claim for Punitive Damages Not Precluded by Estoppel — Issues of Previous Litigation Not Identical: Finstad was injured by asbestos in defendant's mine. A jury trial resulted in a verdict for Finstad and an award of $400,000 in compensatory damages, as well as a determination that punitive damages were warranted. The District Court conducted a minitrial on the issue of punitive damages, and the jury awarded $83,000. Defendant contested the award of punitive damages and moved for dismissal on grounds that Finstad's claim was barred by collateral estoppel by virtual representation because the issue had already been litigated in two previous Lincoln County cases against defendant. Defendant contended that the issues were identical, that final judgment had been rendered, and that Finstad was a party to or in privity with a party in the previous cases and thus was virtually represented by those parties in the previous cases. The District Court denied the motion to dismiss, finding that the issues were not identical, and also ruled for Finstad on the question of estoppel by virtual representation. On appeal, the Supreme Court reviewed the record, noting that although some of the evidence and witnesses regarding the punitive damages claim were the same as in the previous cases, several significant factual distinctions and legal claims existed. Because the first element of collateral estoppel regarding identical parties was not met, the Supreme Court affirmed without reaching the question of estoppel by virtual representation. Finstad v. W.R. Grace & Co., 2000 MT 228, 301 M 240, 8 P3d 778, 57 St. Rep. 934 (2000), following Holtman v. 4-G's Plumbing & Heating, Inc., 264 M 432, 872 P2d 318 (1994).

Error in Allowing Evidence of Other Litigation and Fictional Average Amounts for Each Pending Claim: Finstad was injured in defendant's Lincoln County asbestos mine and was awarded compensatory damages. In a minitrial on the issues of punitive damages, the District Court allowed evidence from defendant's economic expert regarding the number of asbestos claims pending in Lincoln County, as well as nationwide, and fictional average amounts for each

of those claims. Finstad alleged that the evidence was irrelevant, misleading, and prejudicial, and the Supreme Court agreed. Although this section allows consideration of any other circumstances that may operate to increase or reduce punitive damages, this was not the kind of evidence intended by the Legislature to be allowed, given the purpose for punitive damages and the factors for reviewing punitive damage awards, especially considering that this section specifically mandates consideration of previous punitive damage awards against a defendant. Finstad v. W.R. Grace & Co., 2000 MT 228, 301 M 240, 8 P3d 778, 57 St. Rep. 934 (2000).

Punitive Damages Case Considered Civil Action — Requirement That Punitive Damages Award Be Unanimous Unconstitutional: Under Art. II, sec. 26, Mont. Const., in all civil actions, two-thirds of the jury may render a verdict that has the same force and effect as if the entire jury had concurred in the decision. A civil action is prosecuted for the enforcement or protection of a right or the redress or prevention of a wrong. Here, Finstad was injured by asbestos in defendant's mine and sued for redress and to prevent defendant from committing similar wrongful conduct. Thus, Finstad's suit, including the claim for punitive damages, constituted a civil action. Punitive damages are merely a component of recovery of the underlying civil cause of action, imposed as enlarged damages for a civil wrong, not a substitute for criminal punishment. Because punitive damages are civil actions, the portion of subsection (6) of this section that requires that an award of punitive damages be unanimous as to liability and amount directly conflicts with Art. II, sec. 26, Mont. Const., and is unconstitutional. (See 2003 amendment.) Finstad v. W.R. Grace & Co., 2000 MT 228, 301 M 240, 8 P3d 778, 57 St. Rep. 934 (2000).

Burden on Defendant to Show That Financial Condition Does Not Warrant Punitive Damages: This section requires that following a verdict of punitive damages against a defendant, a separate proceeding must be held to determine the amount and that a defendant's financial condition must be considered. The defendant is required to show that the defendant's financial condition does not support an award. The plaintiff need not show that the defendant's financial condition supports an award. Therefore, the District Court's failure to completely set aside defendant's punitive damages was not error when defendant offered no evidence of his financial condition. Cartwright v. Equitable Life Assurance Soc'y, 276 M 1, 914 P2d 976, 53 St. Rep. 268 (1996).

Standard of Review for Clear and Convincing Evidence Standard of Proof: In an insurance fraud action, each element of a punitive damages claim had to be proved by clear and convincing evidence, a standard that is more than a preponderance of the evidence but less than beyond a reasonable doubt. Addressing the standard of review for the first time, the court stated that the standard was whether there was substantial evidence to support the award of punitive damages, the same standard of review as when the standard of proof is a preponderance of the evidence. Cartwright v. Equitable Life Assurance Soc'y, 276 M 1, 914 P2d 976, 53 St. Rep. 268 (1996).

Test for Whether Principal Is Subject to Punitive Damages for Acts of Its Agent: Punitive damages were awarded against an insurance agent, who fraudulently misled insureds, and his company. The jury was instructed that the Restatement (Second) of Torts 909 (1979) is the law in Montana on whether punitive damages can be awarded against a principal for the acts of its agent. Neither party objected to the instruction. Therefore, the Supreme Court, although expressing no opinion on whether the Restatement was the law, reviewed the evidence to determine whether the evidence supported punitive damages under the Restatement. Cartwright v. Equitable Life Assurance Soc'y, 276 M 1, 914 P2d 976, 53 St. Rep. 268 (1996).

Punitive Damages Awarded — Prejudgment Interest Disallowed: Dees was awarded compensatory and punitive damages against his insurance company for the company's failure to settle his claim for hail damage to his crops. The District Court awarded prejudgment interest at the rate of 10% a year on both the compensatory and punitive damages, beginning with the date of the jury verdict up until the date of the final judgment. Citing Maddux v. Bunch, 241 M 61, 784 P2d 936 (1990), the Supreme Court held that prejudgment interest should not have been granted on the punitive damages. Because punitive damages must be reviewed and approved by the District Court, they neither vest nor are capable of being made certain until the trial court completes its review and issues a final judgment. Dees v. Am. Nat'l Fire Ins. Co., 260 M 431, 861 P2d 141, 50 St. Rep. 1068 (1993).

Reduction of Punitive Damages Upheld — Role of Passion and Prejudice: Dees was awarded compensatory and punitive damages against his insurance company for the company's failure to settle his claim for hail damage to his crops. The District Court reduced the amount of punitive damages awarded by the jury from $575,000 to $300,000, noting the existence of "passion and prejudice" and saying that the wrong committed by the insurer "certainly does not justify that [Dees] should receive a half million dollar windfall" but also saying that the punitive damages should be "large enough to get the company's attention". Citing Safeco Ins. Co. v. Ellinghouse,

223 M 239, 725 P2d 217 (1986), the Supreme Court upheld the reduction in punitive damages, saying that the District Court performed its duty of reviewing the damages and reducing them when it found passion and prejudice. Dees v. Am. Nat'l Fire Ins. Co., 260 M 431, 861 P2d 141, 50 St. Rep. 1068 (1993).

Clear and Convincing Evidence Required — Allegation in Complaint, Statements in Judgment, and Unqualified Expert Medical Opinion Insufficient: Because of allegations that alcohol was involved in a car accident, the District Court awarded $25,000 for punitive damages to Maulding as part of a default judgment against Hardman. The Supreme Court noted that the only evidence of the use of alcohol was an unsubstantiated allegation in the complaint and that the only rationale by the District Court was a statement in the judgment that "evidence showed" that the accident was caused by the use of alcohol. The Supreme Court also noted that at the hearing on the matter, Maulding's counsel was allowed to give unqualified expert medical opinion, which the District Court should not have accepted. For these reasons, the Supreme Court reversed the denial of a motion to set aside the default. Maulding v. Hardman, 257 M 18, 847 P2d 292, 50 St. Rep. 141 (1993).

Award of Punitive Damages Reserved Pending Violation of Final Judgment: In a prescriptive easement case, the District Court granted injunctive relief and nominal compensatory damages but reserved imposition of punitive damages pending any violation of the final judgment and order keeping a road open. In light of the fact that the earlier injunction was not disobeyed, reserving the award of punitive damages was not clearly erroneous. Rasmussen v. Fowler, 245 M 308, 800 P2d 1053, 47 St. Rep. 2134 (1990).

Separate Hearing to Be Held to Determine Amount of Punitive Damages: The jury found that the plaintiffs were entitled to receive punitive damages from the defendant bank. Upon the defense counsel's suggestion that a hearing to determine the amount of damages based on the bank's finances would precipitate a run on the bank, the lower court held that the plaintiffs were not entitled to punitive damages. The Supreme Court held that once a jury finds that punitive damages should be awarded, the law requires the lower court to conduct a separate proceeding in which the jury is to decide the amount of damages. Prior to that time, any decision by the lower court to increase or decrease the award is premature. First Sec. Bank of Glendive v. Gary, 245 M 394, 798 P2d 523, 47 St. Rep. 1646 (1990).

No Clear and Convincing Evidence Justifying Punitive Damages: The plaintiff maintained that his insurance company intentionally avoided learning facts pertaining to coverage of his claim. The Supreme Court held that there was a great amount of conflicting evidence concerning the degree of risk of harm to the plaintiff created by the defendant's lack of factfinding and that therefore punitive damages were inappropriate. Maddux v. Bunch, 241 M 61, 784 P2d 936, 47 St. Rep. 82 (1990).

Failure to Present Prima Facie Case — Punitive Damages Denied: The District Court did not err in striking a claim for punitive damages after finding plaintiff failed to present a prima facie case, including clear and convincing evidence of all elements of the claim as required in this section. Niles v. Big Sky Eyewear, 236 M 455, 771 P2d 114, 46 St. Rep. 504 (1989), followed in Barnes v. United Indus., Inc., 275 M 25, 909 P2d 700, 53 St. Rep. 17 (1996).

Failure to Present Findings Regarding Punitive Damages — Remand for Presentation of Evidence: The District Court erred by not presenting findings pursuant to this section regarding punitive damages. The Supreme Court remanded so that evidence could be presented in order to consider the statutory requirements. Ward v. Vibrasonic Laboratories, Inc., 236 M 314, 769 P2d 1229, 46 St. Rep. 387 (1989).

Evidence of Witness' Misrepresentations and Omissions Improperly Excluded — "Collateral Matters" Rule Incorrectly Applied: The District Court excluded evidence of a witness' misrepresentations and omissions after holding that the evidence constituted impeachment on collateral matters. The Supreme Court found the exclusion of evidence improper on two issues: the issue of the credibility of the witness and the issue of punitive damages. Further, the Supreme Court noted that the rule on collateral matters was abolished in favor of the relevancy approach contained in Rule 607, M.R.Ev. Cooper v. Rosston, 232 M 186, 756 P2d 1125, 45 St. Rep. 978 (1988), followed in St. v. Kowalski, 252 M 166, 827 P2d 1253, 49 St. Rep. 197 (1992).

Award of Punitive Damages in Conversion Action: Defendant contended that punitive damages were improper in a case where he was convicted of conversion of an employee's commission checks because the employment was based on a contractual relationship. The Supreme Court noted that conversion is a tort, that the breach of contract argument was not su, ported by evidence or the verdict, and that in light of substantial evidence of malice or oppression, punitive damages were warranted. Lane v. Dunkle, 231 M 365, 753 P2d 321, 45 St. Rep. 686 (1988).

Award of Punitive Damages Without Showing of Underlying Actual Damages: Just as punitive damages may be awarded where plaintiff is granted nominal damages, so may punitive damages be awarded where no monetary value has been assigned to the actual damages suffered. Weinberg v. Farmers St. Bank of Worden, 231 M 10, 752 P2d 719, 45 St. Rep. 391 (1988).

Punitive Damages Not Recoverable Under FELA: The remedial provisions of the Federal Employers' Liability Act (FELA) are comprehensive and exclusive, and the congressional intent to preempt the application of state remedial tort law to all cases falling within the ambit of FELA is implicit in the structure and purpose of the Act. Therefore, the holding in Kozar v. Chesapeake & Ohio Ry. Co., 449 F2d 1238 (6th Cir. 1971), that punitive damages, being nonpecuniary in nature, are not recoverable under FELA was applicable to a claim for punitive damages under Montana law. Toscano v. Burlington N. RR Co., 678 F. Supp. 1477, 45 St. Rep. 367 (D.C. Mont. 1987), distinguishing Silkwood v. Kerr-McGee Corp., 464 US 238, 78 L Ed 2d 443, 104 S Ct 615 (1984).

Failure to Assign Lease — Damages Proper: Punitive damages were proper where defendant breached his duty to assign a lease over to landlords and attempted to avoid the duty to assign by interposing in bad faith and without justifiable cause various defenses to the assignment of the lease. Moore v. Hardy, 230 M 158, 748 P2d 477, 45 St. Rep. 108 (1988).

Burden of Proving Net Worth in Determination of Punitive Damages: In a case in which a defendant's net worth does not support an award of punitive damages in an amount the plaintiff seeks, it is up to the defendant to bring in evidence of net worth if the plaintiff does not do so. Gurnsey v. Conklin Co., Inc., 230 M 42, 751 P2d 151, 45 St. Rep. 1 (1988).

Recovery Limited in Fraudulent Sale of Securities — Punitive Damages Claim Dismissed: In a case alleging breach of contract for sale of a security by means of fraud, recovery was limited under 30-10-307 to consideration paid for the security plus interest, costs, and attorney fees. A claim for punitive damages was properly dismissed. State ex rel. Vranish v. District Court, 228 M 59, 741 P2d 412, 44 St. Rep. 1341 (1987).

Award of Attorney Fees and Costs as Punitive Damages — Award Vacated: A District Court award of punitive damages by way of compensating plaintiffs for one-half their attorney fees plus costs was held inappropriate. The award was vacated and case remanded to determine if a proper punitive damage award was warranted. Reintsma v. Lawson, 223 M 520, 727 P2d 1323, 43 St. Rep. 1962 (1986).

Covenant of Good Faith and Fair Dealing — General Test for Contracts Covered: Plaintiff, who owned a building and two construction companies, and defendant insurance company signed a lease for office space in a building. Plaintiff was to renovate the space, and the two were to confer on and mutually approve the renovation plans. Disagreements arose on the plans. Plaintiff claimed he had difficulties contacting defendant. Defendant rescinded the lease on the ground that it had continually invested more time and money than plaintiff and that from a business standpoint the lease was no longer feasible. After failing in an attempt to contact defendant's president, plaintiff sent a notice of default and sued. The court affirmed an award of punitive damages to plaintiff. The court declined to extend the tort of breach of an implied covenant of good faith and fair dealing to all contracts of any type, including arms-length and substantially equal bargaining power contracts, but stated that: (1) whether breach of a contract constitutes the tort depends on whether there has been some impermissible activity; (2) the nature and extent of an implied covenant of good faith and fair dealing is measured in a particular contract by the justifiable expectations of the parties and, whether performing or breaching, each party has a justifiable expectation that the other will act as a reasonable person; (3) a party who acts arbitrarily, capriciously, or unreasonably exceeds the justifiable expectations of the other party, and the other party should be compensated for damages resulting from the culpable conduct; and (4) for punitive damages to be awarded for breach of an implied covenant of good faith and fair dealing in a contract breach situation, the breach must amount to oppression, fraud, or malice. Nicholson v. United Pac. Ins. Co., 219 M 32, 710 P2d 1342, 42 St. Rep. 1822 (1985), followed in McJunkin v. Kaufman, 229 M 432, 748 P2d 910, 44 St. Rep. 2111 (1987), and in Tresch v. Norwest Bank of Lewistown, 238 M 511, 778 P2d 874, 46 St. Rep. 1459 (1989), and distinguished and limited to contracts involving special relationships in Story v. Bozeman, 242 M 436, 791 P2d 767, 47 St. Rep. 850 (1990).

Amount Awarded — Trial Court Discretion: The amount of punitive damages to be awarded is within the sound discretion of the trier of fact. Castillo v. Franks, 213 M 232, 690 P2d 425, 41 St. Rep. 2071 (1984) (decided prior to 1985 amendment of 27-1-221).

Insurance Contract Language Excluding Payment of Punitive Damage Award Not Effective: Following the award of general, special, and punitive damages to the plaintiff for injuries

suffered in a car accident, the insurance company refused to pay the punitive damages, whereupon the plaintiff sued the insurance company. On appeal from a summary judgment for the plaintiff, the Supreme Court held that the language in the insurance policy relied on by the company to deny the payment of punitive damages was ambiguous and should be construed against the company to allow payment of those damages. Fitzgerald v. W. Fire Ins. Co., 209 M 213, 679 P2d 790, 41 St. Rep. 654 (1984).

Insurance Coverage of Punitive Damages — Not Violative of Public Policy: Punitive damages may be insured against in Montana, and insurance coverage of such damages does not violate public policy. First Bank of Billings v. Transamerica Ins. Co., 209 M 93, 679 P2d 1217, 41 St. Rep. 573 (1984), followed in Fitzgerald v. W. Fire Ins. Co., 209 M 213, 679 P2d 790, 41 St. Rep. 654 (1984).

Causal Relationship for Relevance — Watergate and Split Tire Rim: In a tort action relating to the explosive failure of a Goodyear K-type split tire rim, it was error to admit material relating to Watergate in an attempt to receive exemplary damages. The Supreme Court held that the Watergate material was irrelevant under Rule 402, M.R.Ev., because the record showed only a speculative connection between the incident complained of and allegations by the plaintiff that political activities by defendant Goodyear Tire and Rubber Company during Watergate included an illegal political contribution by Goodyear in an attempt to avoid the recall of the K-type rims by the Nixon administration. Kuiper v. Goodyear Tire & Rubber Co., 207 M 37, 673 P2d 1208, 40 St. Rep. 1861 (1983).

Tort of Breach of Duty to Deal Fairly and in Good Faith in Employment Relationship — Punitive Damages Recoverable: This section only exempts breach of contract actions from its provisions. Breach of the duty owed to deal fairly and in good faith in the employment relationship is a tort for which punitive damages may be recovered if defendant's conduct is sufficiently culpable. Gates v. Life of Montana, 205 M 304, 668 P2d 213, 40 St. Rep. 1287 (1983).

Prior Guilty Plea — Irrelevant to Misconduct or Punitive Damages: Defendant and plaintiff, who was 16, were drinking and driving at a high rate of speed in Anaconda. Defendant was driving plaintiff's car when he lost control and hit a house. Plaintiff was severely injured. At a trial for damages based on negligence, plaintiff's counsel sought to introduce evidence of defendant's having pleaded guilty to two prior incidents of supplying intoxicating beverages to minors. Defendant's attorney moved for a motion in limine, which was denied. The jury awarded compensatory and punitive damages. On appeal the Supreme Court reversed, holding that the evidence of appellant's prior guilty pleas did not have the tendency to make the existence of his alleged willful and wanton misconduct on the night in question more or less probable. The evidence was irrelevant to establishing misconduct on the night in question or for establishing a basis for punitive damages. The fact that defendant had purchased alcohol for minors did not go toward establishing his operation of the vehicle in a reckless fashion, the act complained of. Therefore the evidence was also irrelevant toward showing a basis for punitive damages. Derenberger v. Lutey, 207 M 1, 674 P2d 485, 40 St. Rep. 902 (1983), followed in Maurer v. Clausen Distrib. Co., 275 M 229, 912 P2d 195, 53 St. Rep. 78 (1996).

Government Punitive Damages Immunization — Constitutionality: Plaintiff had a constitutional right to redress against the state for all of her injuries but did not have a constitutional right to punitive damages. Thus the rational basis test, rather than the strict scrutiny test, was applied to equal protection review of 2-9-105, immunizing the state and other governmental entities from exemplary and punitive damages. There is a rational basis for distinguishing governmental from other entities in the grant of punitive damages, in that such damages are to punish the wrongdoer and deter future similar conduct of the wrongdoer and others similarly disposed. The deterrent effect upon a government is extremely small, and innocent taxpayers are the persons punished. Therefore, 2-9-105 is not unconstitutional. White v. St., 203 M 363, 661 P2d 1272, 40 St. Rep. 507 (1983).

Lessor's Interference With Leased Property: Lessor sued for failure of lessee to vacate, and lessee counterclaimed that lessor converted the premises to his own use and interrupted her peaceful possession. Lessee could not get punitive damages under the conversion theory because conversion is a tort applicable to personal chattels and a leasehold interest is not a personal chattel. Nor could punitive damages be granted for interruption of peaceful possession, as it was not proven. In the absence of a showing of tortious conduct, it was error to grant lessee punitive damages in a simple contract action. Lemley v. Allen, 203 M 37, 659 P2d 262, 40 St. Rep. 279 (1983).

Punitive Damage — Tort Not Shown: Lessor sued for failure of lessee to vacate, and lessee counterclaimed that lessor converted the premises to his own use and interrupted her peaceful possession. Lessee could not get punitive damages under the conversion theory because

conversion is a tort applicable to personal chattels and a leasehold interest is not a personal chattel. Nor could punitive damages be granted for interruption of peaceful possession, as it was not proven. In the absence of a showing of tortious conduct, it was error to grant lessee punitive damages in a simple contract action. Lemley v. Allen, 203 M 37, 659 P2d 262, 40 St. Rep. 279 (1983).

Title Insurers' Liability for Failure to Defend Suits Against Insured: Adjoining landowner sued insured for interference with his easement rights, title insurance companies refused to defend, insured hired his own counsel, the suit was settled, and adjoining landowner again sued insured when insured refused to abide by the settlement. The insurers again refused to defend. The policy obligated insurers to defend any litigation founded upon a defect, lien, encumbrance, or other matter insured against. Insurers had failed to disclose and insure against the easements, though they were contained in the title records. The insurers acted in bad faith in refusing to defend the first suit but not in refusing to defend the second suit, since it arose from insurers' refusal to abide by the settlement in the first suit. Insurers were liable to insured for his costs in defending the first suit, and punitive damages could be imposed for failure to defend. Lipinski v. Title Ins. Co., 202 M 1, 655 P2d 970, 39 St. Rep. 2283 (1982).

Purpose of Punitive Damages: The defendants have been victims of false accusations which the plaintiff knew to be false. Each of the allegations was made maliciously and viciously. The defendant was accused of criminal conduct, which seriously and directly affected his business reputation. The award of punitive damages is meant to make an example and punish a person so that he will cease this type of conduct in the future. An award of $50,000 punitive damages in this case is proper. Miller v. Watkins, 200 M 455, 653 P2d 126, 39 St. Rep. 1867 (1982).

No Actual Damages Awarded — Liability of Insurance Company for Punitive Damages: Where the owner of a car, arriving on the scene of an accident involving his car driven by another with his permission, intentionally tampered with physical evidence at the scene and was thereafter found liable for punitive damages by a state court, but neither he nor the driver were liable for actual damages, under the policy in question the insurance company was not liable for either the punitive damages or attorney's fees. Lee v. St. Farm Mut. Auto. Ins. Co., 39 St. Rep. 1761 (D.C. Mont. 1982) (apparently not reported in Federal Supplement).

Tort of "Bad Faith" — Punitive Damages Recoverable: Since violation of the implied-in-law duty of good faith and fair dealing is tortious in nature, notwithstanding that it may also constitute a breach of contract, punitive damages are recoverable in an action founded on such a violation. In a "bad faith" tort action, failure of a complaint to allege violation of the insurance code (33-1-101, et seq.) did not preclude a claim for punitive damages. Bostwick v. Foremost Ins. Co., 539 F. Supp. 517, 39 St. Rep. 980 (D.C. Mont. 1982).

Limits on State Liability Not to Be Applied Retroactively: Irrigation district, a state governmental entity, was subject to punitive damages in tort action where action arose in and was limited to summer of 1974. The 1972 Montana Constitution provided that state governmental entities have no immunity from suit for injury to person or property except as may be specifically provided by law. The Legislature did not provide immunity for certain governmental entities until 1977 when it enacted 2-9-104 (repealed, 1983) and 2-9-105. Those sections cannot be retroactively applied. Dvorak v. Huntley Project Irrigation District, 196 M 167, 639 P2d 62, 38 St. Rep. 2176 (1981).

Exemplary Damages for Unlawful Act — No Underlying Tort Liability: Exemplary damages may be awarded to a plaintiff under 27-1-221 even though plaintiff did not suffer any emotional distress and even though there was no underlying tort negligence found by the jury. Under 27-1-202, plaintiff is entitled to compensation since defendant knowingly attempted to obliterate evidence of the cause of a car accident, and it is equally apparent under 27-1-221 that a jury may award exemplary damages where the defendant has been guilty of either actual or implied malice. The statutory framework of 27-1-221 sets forth no specific requirement of an underlying tort or mental distress, nor will the Supreme Court imply such requirements through judicial construction. A plaintiff need only show actual damages pursuant to 27-1-202. Lauman v. Lee, 192 M 84, 626 P2d 830, 38 St. Rep. 499 (1981).

Town Meeting Minutes and Related Documents: The Troy Town Council had passed a resolution requesting a speed limit of 25 miles per hour on trains passing through town, due to the hazardous nature of the crossing where the accident in question occurred. The minutes of the Town Council, letters between the Town Council and the railroad, and intercorporate memoranda between railroad officials on the subject matter of the crossing should have been admitted into evidence. They were relevant to show notice of the claimed hazardous conditions and the intent of the railroad with respect to the same. These documents go to the issue of ordinary care to be exercised by the railroad and may go to the issue of punitive damages as an

indication of wantonness or oppressiveness. The intercorporate memoranda are also relevant as possible admissions of a party opponent. Runkle v. Burlington N., Inc., 188 M 286, 613 P2d 982 (1980).

Quiet Title Action — Punitive Damages and Attorney Fees Awards: Lack of good faith in an adverse possession case will not necessarily support a punitive damages award for slander of title. Testimony of failure to recognize the opposing party in a quiet title action from a previous business transaction and of reliance on the Secretary of State's information that the party corporation had no registered agent for service of process, although part of the determination of a lack of good faith, was sufficient to rebut an allegation of malice as required for the award of punitive damages. There being no statutory or contractual provision for attorney fees in this case, a common-law exception would be required for such an award. Without proof that the defendant acted fraudulently, maliciously, or with bad faith toward the plaintiff in a quiet title action, attorney fees will not be awarded. A decision denying attorney fees will not be disturbed absent abuse of discretion by the trial court. Russell Realty v. Kenneally, 185 M 496, 605 P2d 1107 (1980).

Closing Argument — Punitive Damages: When punitive damages were held impermissible in a prior appeal of this case, plaintiff's counsel did not make arguments for punitive damages in closing statements at retrial as defendant alleged. McGee v. Burlington N., Inc., 174 M 466, 571 P2d 784 (1977).

Punitive Damages Not Allowable Under Federal Employers' Liability Act: Court erred in allowing plaintiff to amend his complaint alleging willful and wanton conduct as a basis for punitive damages because only compensatory damages are the measure of damages recoverable under the Federal Employers' Liability Act. State ex rel. Burlington N., Inc. v. District Court, 169 M 480, 548 P2d 616 (1976).

Fraud in Contract: Fact that alleged trickery by carpet seller arose during the contracting for the sale and installation of the carpeting did not make it "arise from the contract" within this section; the action was in tort, independent of the contract, and exemplary damages were not barred by this section. Paulson v. Kustom Enterprises, Inc., 157 M 188, 483 P2d 708 (1971).

Attractive Nuisance: In attractive nuisance case, parents of deceased child were not entitled to exemplary damages in absence of proof of willful disregard of duty or indifference on part of contractor which would permit inference of malice; exemplary damages are extraordinary in nature and are allowed as punishment where something more than mere negligence is alleged and proven. Gagnier v. Curran Constr. Co., 151 M 468, 443 P2d 894 (1968).

Counterclaim: On counterclaim by debtor against bank suing on note of debtor, evidence showing that bank converted funds and property of debtor to satisfy obligations of debtor's son for which debtor was not responsible and evidence showing bona fide intent of debtor to pay note was sufficient to warrant award of exemplary damages to debtor. Sec. St. Bank of Harlem v. Kittleson, 149 M 183, 425 P2d 72 (1967).

Breach of Contract:

Under this section an insurer is not liable for exemplary damages for willful or fraudulent breaches of contract. Wade v. Great Am. Ins. Co., 255 F. Supp. 735 (D.C. Mont. 1966).

Punitive damages could not be allowed on a contract between laundromat owner and company that sold washing machines and dryers, where laundromat owner relied on the contract rather than on prior oral promises to help install the machines. Ryan v. Ald, Inc., 146 M 299, 406 P2d 373 (1965).

Plaintiff was not entitled to exemplary damages in action for allegedly fraudulent representations by defendant's insurance adjuster inducing execution of a contract of release by the plaintiff. Westfall v. Motors Ins. Corp., 140 M 564, 374 P2d 96 (1962).

Exemplary Damages — Not a Right: The plaintiff is never entitled to exemplary damages as a matter of right, regardless of the situation or the sufficiency of the facts, and something more than mere negligence must be alleged and proved. Spackman v. Ralph M. Parsons Co., 147 M 500, 414 P2d 918 (1966).

Inadmissibility of Oral Statements: Since punitive damages cannot be awarded on obligations arising out of contract, evidence outside the agreement that attempts to prove a basis for such damages is inadmissible as falling within the parol evidence rule. Ryan v. Ald, Inc., 146 M 299, 406 P2d 373 (1965), followed, with respect to photographic evidence, in Barnes v. United Indus., Inc., 275 M 25, 909 P2d 700, 53 St. Rep. 17 (1996).

Auto Collision — Evidence Insufficient — No Exemplary Damages: Complaint in an action arising out of an automobile collision, alleging that defendant was driving at the rate of 40 miles an hour and on the wrong side of the road, was sufficient to sustain a charge of mere negligence but insufficient to warrant recovery of exemplary damages. Thompson v. Shanley, 93 M 235, 17

P2d 1085 (1932), distinguished in Linney v. Chicago, Milwaukee, St. Paul & Pac. R.R., 94 M 229, 21 P2d 1101 (1933).

When Supreme Court Will Interfere on Appeal: Unless an alleged excessive award of punitive damages appears to have been influenced by passion, prejudice, or some improper motive or is outrageously disproportionate either to the wrong done or the situation or circumstances of the parties, the Supreme Court will not generally interfere; there is no established rule to be followed for ascertaining whether such an award is excessive. Johnson v. Horn, 86 M 314, 283 P 427 (1929).

Conversion of Personal Property:

Where the jury in an action in conversion found in favor of plaintiff's contention that defendant chattel mortgagee, in violation of his agreement extending the time within which plaintiff could pay his debt, caused an officer to seize the chattel, thus acting maliciously and oppressively, an award of exemplary damages was justified. Ramsbacher v. Hohman, 80 M 480, 261 P 273 (1927).

In cases of conversion of personal property, the statute authorized the imposition of punitive damages where the defendant acted maliciously, fraudulently, or oppressively, either in taking or detaining the property in controversy. De Celles v. Casey, 48 M 568, 139 P 586 (1914).

The complaint in an action for damages for a conversion, which alleged, among other things, that defendants "did unlawfully, maliciously, fraudulently, and oppressively take and carry away" the property in controversy and refused restitution of the same after repeated demands, was broad enough to warrant inquiry into the motives and behavior of defendants and to justify the giving of an instruction that exemplary damages might be awarded for oppressively, fraudulently, or maliciously withholding the chattels after demand. Shandy v. McDonald, 28 M 393, 100 P 203 (1909).

Malicious Prosecution: It is within the province of the jury to allow exemplary as well as compensatory damages in an action for malicious prosecution, and unless its determination appears to have been influenced by passion, prejudice, or some other improper motive or the amount is outrageously disproportionate to the wrong done or the situation or circumstances of the parties, the award will not generally be disturbed. Cornner v. Hamilton, 62 M 239, 204 P 489 (1922).

Exemplary Damages to Be Separately Stated: Where in an action in claim and delivery exemplary damages were not authorized upon any theory and the jury allowed $500 damages in a lump sum without designating what part was intended as actual and what part as punitive damages, the cause will be remanded for a new trial, it being impossible to determine from the verdict the amount intended to be allowed as damages by way of punishment. Luther v. Lee, 62 M 174, 204 P 365 (1922).

Wrongful Death: Damages by way of punishment, in addition to those actually sustained, may be recovered in an action against a mining company for the negligent and wrongful killing of plaintiff, a miner, where the complaint charges that the defendant company was primarily responsible for the death of decedent. Olsen v. Mont. Ore Purchasing Co., 35 M 400, 89 P 731 (1907).

OPPRESSION, FRAUD, OR MALICE

No Genuine Issue Whether Employer Acted With Intention or Malice in Employee's Injury — Summary Judgment Proper Under Sherner Standard: Roy contended that his employer was liable for damages beyond workers' compensation coverage by failing to provide training in ladder safety, having no policy concerning the use of safety belts on aerial ladders, and failing to abide by a letter from the federal Occupational Safety and Health Administration (OSHA) giving notice that there was a high probability that employees would be injured while performing midline work on aerial ladders without a safety belt. The District Court summarily dismissed the claims, and on appeal, the Supreme Court affirmed. Although the employer did not provide training in the use of safety belts, there was no evidence that the employer failed to train Roy in the face of knowledge that Roy would be injured if a safety belt was not used, nor was there a genuine issue of fact whether the employer had a policy requiring the use of safety belts on aerial ladders. Roy also failed to show that the employer was aware of the OSHA letter, and given the unclear language of federal regulations on the issue, Roy could not prove that the employer acted with malice, as defined in this section. Applying Sherner v. Conoco, Inc., 2000 MT 50, 298 M 401, 995 P2d 990 (2000), the Supreme Court concluded that absent a showing that the employer had knowledge of a high probability of injury and acted with intentional indifference to or disregard of that knowledge, summary judgment was proper. Roy v. Blackfoot Tel. Co-op, Inc., 2004 MT 316, 324 M 30, 101 P3d 301 (2004). See also Gee v. Egbert, 209 M 1, 679 P2d 1194 (1984).

Employer Unaware That Employee Would Be Injured During Routine Job Activity — No Showing of Employer Malice Under Sherner Standard: Olszewski was seriously injured while loading building trusses onto a flatbed truck. Olszewski recovered workers' compensation benefits but also brought an action alleging that the injury was covered under the 1999 intentional act exception in 39-71-413, which was in effect when the injury occurred. The District Court found no showing of malicious action on the part of the employer or foreman and granted summary judgment to the employer and foreman. On appeal, the Supreme Court applied the malicious intent standard in Sherner v. Conoco, Inc., 2000 MT 50, 298 M 401, 995 P2d 990 (2000), and affirmed. Olszewski was unable to provide evidence that the employer knew that employees would actually be injured by a routine that was usually performed without incident, and absent a showing of that material fact, the statutory exception did not apply and summary judgment was proper. Olszewski v. BMC W. Corp., 2004 MT 187, 322 M 192, 94 P3d 739 (2004).

No Showing of Malicious Act or Omission by Coworker in Death of Employee — Workers' Compensation Exclusivity Doctrine Applicable under 1999 Statute: Under the 1999 version of 39-71-413 and Sherner v. Conoco, Inc., 2000 MT 50, 298 M 401, 995 P2d 990 (2000), a plaintiff was required to show both an intentional and malicious act or omission in order to avoid the workers' compensation exclusivity doctrine (revised in 2001 to require only the showing of an intentional act or omission). Here Everhard, a mine worker, was killed by a train driven by Aafedt after signaling that Aafedt could proceed. Everhard's estate sued Aafedt and the mining company. The District Court concluded that Aafedt's conduct was intentional when he moved the train without seeing Everhard, but there was no showing that Everhard suffered an injury caused by actual malice by Aafedt or the company, so summary judgment was granted to defendants. The Supreme Court affirmed. As a matter of law, it could not be said that Aafedt deliberately proceeded to act in conscious or intentional disregard or even indifference to the high probability of injury to Everhard under the definition of actual malice, so the estate failed to overcome the workers' compensation exclusive remedy rule, and summary judgment was proper. Blain v. Stillwater Min. Co., 2004 MT 141, 321 M 403, 92 P3d 4 (2004).

Punitive Damages Owing for Fraud Connected With Sexual Assault: Following a sexual assault by a coworker, Beaver sought punitive damages. The District Court held that the coworker was unable to control his impulses, but was not guilty of fraud or malice and thus was not liable for punitive damages. The Supreme Court disagreed and reversed. The record showed that the coworker's actions were not a spur-of-the-moment development but that the coworker had worked for several hours to place Beaver in a position in which she would be vulnerable to sexual advances, including making false representations of work-related necessity. These acts constituted actual fraud, and the coworker was liable for punitive damages under 27-1-220 and this section. Beaver v. Dept. of Natural Resources and Conservation, 2003 MT 287, 318 M 35, 78 P3d 857 (2003).

Erroneous Conclusion That Elements of Malicious Prosecution by State Not Established — Judgment as Matter of Law Improper: Plaintiffs were cited by the state for various water quality violations related to their public swimming pools, drinking water, and discharge from a sewage lagoon. The charges were ultimately dropped, and both plaintiffs filed separate actions that were settled, except for plaintiffs' malicious prosecution claims against the state, which were joined for trial by jury. At the close of plaintiffs' case, the state's motion for judgment as a matter of law was granted, so plaintiffs appealed. As set out in Orser v. St., 178 M 126, 582 P2d 1227 (1978), in a civil action for malicious prosecution, plaintiff must introduce sufficient proof of the following elements: (1) a judicial proceeding has been commenced and prosecuted against the plaintiff; (2) the defendant was responsible for litigating, prosecuting, or continuing the proceeding; (3) there is lack of probable cause for the defendant's acts; (4) the defendant was actuated by malice; (5) the proceeding terminated in favor of the plaintiff; and (6) the plaintiff suffered damages. Here, the District Court found that plaintiffs had not met their burden of proof regarding elements three, four, and five. The Supreme Court examined each of those elements—lack of probable cause, malice, and favorable termination of the underlying suit—and concluded that the elements were met, warranting reversal for trial on the merits. Judgment as a matter of law averts trial by jury and is proper only in rare cases when undisputed evidence admits of only one conclusion. Although the proceedings to date in this case did not demonstrate guilt or innocence, plaintiffs nevertheless made out a prima facie case that warranted jury determination. Plouffe v. Dept. of Public Health and Human Services, 2002 MT 64, 309 M 184, 45 P3d 10 (2002), following McGuire v. Armitage, 184 M 407, 603 P2d 253 (1979), Miller v. Watkins, 200 M 455, 653 P2d 126 (1982), and Sacco v. High Country Independent Press, Inc., 271 M 209, 896 P2d 411 (1995).

New Standard for Determining Whether Intentional or Malicious Act by Employer Constitutes Tortious Conduct — Summary Judgment Improper: Sherner was injured on the job and sued his

employer, Conoco, Inc. (Conoco), for damages on grounds that Conoco was guilty of malicious acts or omissions that caused the injuries. The District Court ruled that the tort claim against Conoco was barred by the exclusivity provision in 39-71-411. Citing Calcaterra v. Mont. Resources, 1998 MT 187, 289 M 424, 962 P2d 590 (1998), the court concluded that Sherner was required to allege and establish that Conoco had actual knowledge that Sherner was being harmed in order to establish that Conoco's acts were malicious and, absent sufficient facts to raise a genuine issue of material fact that Conoco directed intentional harm at Sherner, granted summary judgment for Conoco. In District Court, Sherner sufficiently raised the issue of the proper standard for determining whether Conoco's act was malicious to allow the Supreme Court to address the issue on appeal, so the court proceeded to create a new standard, applying the plain meaning of the statutory definitions, by which to judge whether an act or omission is intentional or malicious. Applying common definitions of "intentional" and "act" and the appropriate definition of "malice" for use in 39-71-413—the one provided in this section, rather than the one in 1-1-204—the Supreme Court reversed, finding that genuine issues of material facts existed, regarding whether Conoco acted maliciously, as to preclude summary judgment. A worker need show only that an employer's act or omission, which caused the injury, was intentional or malicious to bring a tort action against the employer under 39-71-413. Sherner v. Conoco, Inc., 2000 MT 50, 298 M 401, 995 P2d 990, 57 St. Rep. 241 (2000), following Sitzman v. Schumaker, 221 M 304, 718 P2d 657, 43 St. Rep. 831 (1986). See also Enberg v. Anaconda Co., 158 M 135, 489 P2d 1036 (1971). See also Olszewski v. BMC W. Corp., 2004 MT 187, 322 M 192, 94 P3d 739 (2004), in which summary judgment was held to be proper under the Sherner standard absent evidence that an employer knew that an employee would actually be injured by a routine that was usually performed without incident.

Tort of Intentional Interference With Business Relations or Prospective Economic Advantage — Contract Between Parties Not Required: The elements of the tort of intentional interference with prospective economic advantage are identical with the tortious or intentional interference with contractual relations, consisting of acts that: (1) are intentional and willful; (2) are calculated to cause damage to plaintiff's business; (3) are done with the unlawful purpose of causing damage or loss without right or justifiable cause on the part of the actor; and (4) result in actual damages or loss. The key difference between the two tort theories is that unlike interference with contractual relations, intentional interference with either business relations or prospective economic advantage does not require that a contract exist between any of the involved parties. Rather, the focus of the legal inquiry is on the intentional acts of the malicious interloper in disrupting a business relationship, and "business" includes the reasonable expectation of entering into a valid business relationship. Under the theory of intentional interference with either business relations or prospective economic advantage, a person who is involved in an economic relationship with another or who is pursuing reasonable and legitimate prospects of entering such a relationship is protected from a third person's wrongful conduct that is intended to disrupt the relationship. Maloney v. Home & Inv. Center, Inc., 2000 MT 34, 298 M 213, 994 P2d 1124, 57 St. Rep. 144 (2000). See also Buckaloo v. Johnson, 537 P2d 865 (Calif. 1975), Bolz v. Myers, 200 M 286, 651 P2d 606 (1982), Ellis v. Valdez, 686 P2d 700 (Alaska 1984), and Sebena v. Am. Auto. Ass'n, 280 M 305, 930 P2d 51 (1996).

Bank Loan for Purchase of Contaminated Real Property — Negligent Misrepresentation, Constructive Fraud, and Punitive Damages — Summary Judgment Reversed: After the Department of Health and Environmental Sciences (now Department of Environmental Quality) discovered that soil had been contaminated with gasoline leaking from Habets' and other service station gas tanks in violation of 75-10-715, Habets entered into a buy-sell agreement for sale of his service station to Mattingly. Mattingly then met with First Bank Vice President Joe Dolan to secure financing. Dolan conducted a physical inspection of the service station property in order to obtain an impression of the value of the property and to determine whether First Bank would be secure in its loan. At the time of his inspection, Dolan was aware of the contamination caused by the service station gas tanks. The loan was approved by the First Bank loan committee made up of Dolan, Susan Hemmer, the bank president, and John Mulcare, an owner of another service station, all three of whom were aware of the contamination but did not discuss it with Mattingly or the loan committee. Mattingly learned of the contamination much later when he tried to sell the station. He then brought an action against Habets, Habets' realtor, and First Bank, alleging constructive fraud, negligence, and negligent misrepresentation by First Bank and seeking punitive damages. The District Court granted summary judgment to First Bank on all issues. The Supreme Court, following Kitchen Krafters, Inc. v. Eastside Bank of Mont., 242 M 155, 789 P2d 567 (1990), stated that a threshold issue in a claim of negligent misrepresentation is whether the defendant made a representation as to a past or existing material fact upon which

the claim is based. The Supreme Court pointed out that except for some basic facts involving the existence of the contamination, Dolan's visit to the gas station, and the action of the loan committee, the parties disagreed over the nature, scope, and import of the valuation of the property; disagreed whether First Bank's appraisal of the property and approval of the Mattingly loan constituted a representation as to the value of the property; and, if it was a representation, disagreed over whether Mattingly relied upon that representation. Citing McGregor v. Cushman/Mommer, 220 M 98, 714 P2d 536 (1986), the Supreme Court also stated that special circumstances may support a claim for constructive fraud when a party makes misleading statements concerning the physical condition or commercial value of real estate and pointed out that a jury might find that representations by First Bank with regard to the property would constitute these "special circumstances". Concerning the requirement of 28-2-406 that in a claim for constructive fraud one party must gain an advantage over the other, the Supreme Court cited the fact that upon closing the sale of the station to Mattingly, First Bank was able to pay off a loan for the property made to Habets and that in making the loan to Mattingly, First Bank was able to collect interest income from the loan. Because there were facts in dispute as to the foregoing issues, the Supreme Court held that summary judgment was not appropriate and that the District Court erred in granting summary judgment in favor of First Bank. Because this section allows punitive damages against a party guilty of actual fraud or malice, the Supreme Court also reversed the District Court on the issue of punitive damages. Mattingly v. First Bank of Lincoln, 285 M 209, 947 P2d 66, 54 St. Rep. 1116 (1997).

Punitive Damages Properly Denied: When defendant insurance company was found not liable for fraud or actual malice, punitive damages were properly denied. Bartlett v. Allstate Ins. Co., 280 M 63, 929 P2d 227, 53 St. Rep. 1300 (1996).

Fraudulent Insurance Agent Whose Company Knew of and Did Nothing About Fraud — Punitive Damages Justified Against Both: An insurance agent was found to have fraudulently misled the plaintiff insureds, and compensatory damages were granted against the agent and his company. The agent's conduct was described by coworkers as unethical and by various managers as fraudulent and was repeatedly reported to higher executive personnel. Regional and national personnel knew about it. One manager frequently made such disparaging remarks as "piss on 'em" in reference to customers. Two managers told another, who complained to the two about the agent, that he should mind his own business, and one of the managers told the complaining manager that they operated under the "buyer beware" theory. Nothing was done about the agent's fraudulent practices, and when he was terminated, it was for lack of production, not the fraudulent practices. There was substantial credible evidence clearly and convincingly supporting an award of $30,000 in punitive damages against the agent and $6,127,845 in punitive damages against the company. Cartwright v. Equitable Life Assurance Soc'y, 276 M 1, 914 P2d 976, 53 St. Rep. 268 (1996).

Sufficiency of Defrauded Insureds' Testimony When Supported by Defrauding Insurance Agent's Superior and When Largely Supported by Agent: In an insurance fraud action, four other insureds testified that the insurance agent misled them in the same way as he did plaintiffs and the agent's testimony corroborated plaintiffs' testimony in many particulars. A superior of the agent, who was responsible for Montana, Colorado, and Wyoming, wrote memos reviewing the agent's misrepresentations and referring, among other things, to that "mess up in Montana", meaning complaints against the agent, and to "another policy holder being raped by" the agent. He testified that he developed no evidence that would refute any of the complaints, and that after reviewing the complaints, he concluded that it was the agent's common practice to mislead people, thereby destroying the value of their policies, in order to sell them more life insurance. This met the clear and convincing evidence standard of proof at trial and the standard of review that the lower court's award must be supported by substantial credible evidence. Cartwright v. Equitable Life Assurance Soc'y, 276 M 1, 914 P2d 976, 53 St. Rep. 268 (1996).

Substantial Evidence of Malicious Conduct in Conversion Action — Punitive Damages Proper: Evidence that a corporate secretary intentionally filed a false police report in an attempt to convert a truck from the lessor to the corporation was sufficient to support a jury finding of malicious conduct, warranting the award of punitive damages. King v. Zimmerman, 266 M 54, 878 P2d 895, 51 St. Rep. 659 (1994).

Malice as Applied to Intentional Injury: The definition of actual malice in this section, adopted in 1987 for purposes of punitive damages, did not change the standard used to determine whether an injury was intentional for purposes of the exclusivity provision of the Workers' Compensation Act. The definition of malice in 1-1-204 is still applicable to workers' compensation cases. Blythe v. Radiometer America, Inc., 262 M 464, 866 P2d 218, 50 St. Rep. 1640 (1993).

No Error in Court's Refusal to Strike Punitive Damages Award — Interpretation of Testimony Sustained: Dees sued American National Fire Insurance Company, alleging that the insurer was guilty of actual malice in failing to settle his claim for crop damage caused by hail. Testimony at trial showed that the insurance adjusters did not examine adjacent fields to determine whether any damage had occurred there, nor did they consult experts to determine how Dees' variety of wheat differed in hail damage compared to other varieties of wheat. An executive officer of the insurer also testified on the issue of punitive damages by using language that could be interpreted to mean that in a future similar situation, the insurer would take action to get the attention of its adjusters to change their investigation and adjustment procedures. The Supreme Court held that the jury could have concluded that there was clear and convincing evidence that American National was guilty of malice as defined in subsection (2) of this section. The Supreme Court also held that the District Court Judge was in the best position to hear and evaluate the testimony of the insurer's executive and to determine whether the requirements for punitive damages had been met. The District Court therefore did not err in refusing to strike the award of punitive damages. Dees v. Am. Nat'l Fire Ins. Co., 260 M 431, 861 P2d 141, 50 St. Rep. 1068 (1993).

Salesman Personally Liable for Negligent Misrepresentation: Plaintiffs purchased a subdivision parcel from defendant and subsequently contracted with defendant, a sales agent for a home center, to purchase a modular home to be placed on the parcel. Relying on defendant's advice and assurance that the property would be properly prepared, plaintiffs installed the home on concrete piers instead of a full foundation. Upon learning from engineering reports that extensive water damage to the home was caused by foundation instability, plaintiffs filed an action, alleging that the defendant had falsely misrepresented that the land had been properly prepared prior to installation of the home. Affirming the District Court decision, the Supreme Court ruled that the defendant was personally liable for selling property as appropriate for a modular home and for unreasonably representing to plaintiffs that the home was suitable for the pier-type foundation. Williams v. DeVinney, 259 M 354, 856 P2d 546, 50 St. Rep. 831 (1993).

Requisite Criteria Followed — Punitive Damage Award Proper: Appellant was found guilty of both actual fraud and actual malice, and in a separate hearing, punitive damages of $30,000 were awarded. Appellant argued that the award was inappropriate because there was no basis for a finding of actual fraud. However, the uncontested finding of actual malice was a sufficient basis for the award. Because the District Court followed the requisite criteria in determining the award and stated the reasons for making it, the punitive damages award was affirmed. Flikkema v. Kimm, 255 M 34, 839 P2d 1293, 49 St. Rep. 880 (1992).

Punitive Damages Awarded Despite Underlying Contract: The defendant argued that the lower court had erred in awarding punitive damages because the action was based upon breach of contract. The Supreme Court held that the statute precluding punitive damages for breach of contract did not apply to causes of action arising before the law's passage in 1987. The Supreme Court also held that if the conduct of a defendant is found to be fraudulent, an underlying contract will not defeat the award of punitive damages. Lee v. Armstrong, 244 M 289, 798 P2d 84, 47 St. Rep. 1421 (1990).

Malicious Interference With Another's Business — Punitive Damages Justified: The defendant claimed to have a personal service contract with the plaintiff. When the plaintiff refused to honor the alleged service contract, the defendant contacted the lessee of a gravel pit owned by the defendant and ordered the lessee to refuse to honor a contract the lessee had with the plaintiff to sell gravel to the plaintiff. The plaintiff had to obtain the needed gravel elsewhere at an additional cost of $7,500. The Supreme Court affirmed the lower court's award of $7,500 compensatory damages and $8,500 punitive damages on the basis that the defendant's action was intentional and malicious. Tindall v. Konitz Contracting, Inc., 240 M 345, 783 P2d 1376, 46 St. Rep. 2182 (1989).

Intentional Interference With Prospective Economic Advantage: Plaintiff alleged that defendant knew plaintiff needed to receive a subcontract award to avoid financial ruin and that defendant intentionally pressured the contractor into accepting another party's bid. The Supreme Court reversed the lower court and remanded for a new trial, ruling that the issue of punitive damages should have been submitted to the jury and that the jury could find that defendant had intentionally taken advantage of plaintiff's financial disability in order to cause cruel and unjust hardship. Phillip R. Morrow, Inc. v. FBS Ins. Mont.-Hoiness Labar, Inc., 236 M 394, 770 P2d 859, 46 St. Rep. 455 (1989).

Sufficient Evidence of Malice in Wrongful Attachment: Defendants contended that evidence was insufficient to support a verdict that they were guilty of malice in a wrongful attachment case. However, evidence showed that defendants must have been aware from the time of

attachment that it was probably wrongful, yet they perfected and maintained attachment for some 8 years. Such evidence was sufficient to support the finding of malice or oppression, justifying the award of punitive damages. Stensvad v. Towe, 232 M 378, 759 P2d 138, 45 St. Rep. 1129 (1988).

Jury Finding of Fraud and Breach of Good Faith and Fair Dealing in Contract Action — Punitive Damages Warranted: Defendant contended a tort recovery was incorrectly allowed in a breach of contract action because the case dealt with an ordinary commercial setting in which two parties negotiated with relatively equal bargaining power and without any special relationship that would generate an exceptional duty. The Supreme Court noted that the jury found not only a breach of contract and good faith but also actions constituting fraud. The court held that when both fraud and a breach of the implied covenant of good faith and fair dealing are found, the plaintiff is free to pursue punitive damages. Webcor Electronics, Inc. v. Home Electronics, Inc., 231 M 377, 754 P2d 491, 45 St. Rep. 695 (1988).

Refusal to Instruct on Punitive Damages Proper Absent Demonstration of Oppression, Fraud, or Malice: Plaintiffs seeking punitive damages on a claim of negligence in purchase of a mobile home were able to show, at most, that defendant's repeated attempts to repair defects were ineffective. The District Court correctly refused to instruct on punitive damages because plaintiffs failed to demonstrate oppression, fraud, or malice, actual or presumed, by clear and convincing evidence. McJunkin v. Kaufman, 229 M 432, 748 P2d 910, 44 St. Rep. 2111 (1987). (See 1987 amendment.)

Punitive Damages Proper in Action to Quiet Title: In this action to quiet title to certain real property, the defendants ignored the plaintiffs' request to negotiate the boundary line and destroyed plaintiffs' fences. Punitive damages therefore were recoverable for these tortious acts of malice and oppression. Bollinger v. Hollingsworth, 227 M 454, 739 P2d 962, 44 St. Rep. 1228 (1987). (See 1987 amendment.)

Fraud and Misrepresentation — Punitive Damages Proper: Bank appealed a judgment awarding compensatory and punitive damages to a commercial trout company upon a finding that a breach of contract and misrepresentation by the bank and its agent proximately caused the trout farm's failure. The Supreme Court ruled that punitive damages were properly awarded upon a sufficient showing of fraud and misrepresentation. Crystal Springs Trout Co. v. First State Bank of Froid, 225 M 122, 732 P2d 819, 44 St. Rep. 90 (1987).

Punitive Damages for Malicious Conduct Not Arising From Contract: Plaintiff's amended complaint requested punitive damages for the removal of a sprinkler from his property. The District Court awarded $5,000 punitive damages as a punishment for the "breach of defendant's obligation, not arising from the contract she broke, to allow the Plaintiff peaceable occupation of his home and property" and for "Defendant's refusal to return either the spray system or the money ($5,000) paid down on it", both of which the court found "oppressive and malicious". On appeal, defendant argued that the award of punitive damages was improper because this was a contract action. The Supreme Court affirmed the award, holding that there was substantial evidence that the defendant's trespass on plaintiff's property constituted malicious conduct not arising from contract under 27-1-221. Rauch v. Michel, 221 M 1, 716 P2d 617, 43 St. Rep. 587 (1986).

Commission of Bad Faith Tort Against Depositor by Bank: The District Court did not err in instructing the jury to consider recovery by bank depositor against the bank under bad faith tort principles and to accordingly consider punitive damages. The depositor and his nephew opened a checking account with a card requiring the signatures of both on checks. They then formed a partnership. The nephew induced the bank to change the card so that he could issue checks without the depositor's signature. The bank did not notify the depositor of the change or obtain his authorization for it. The bank told depositor his signature was not needed but did not tell him about the new card, and depositor disagreed. Later the bank told him it would not change its policy of honoring checks signed only by the nephew. When depositor's attorney told bank not to do so, the bank stated the card required only one signature and the bank would not change the card unless both the nephew and the depositor requested it. The bank then told depositor the card was lost but later that day produced both cards. Depositor sued, and the bank subsequently took various negative and detrimental actions against his credit status, refused loans of a type formerly granted, canceled his ready reserve account, and refused to pay several items presented before he was notified that the account had been canceled. Tribby v. NW. Bank of Great Falls, 217 M 196, 704 P2d 409, 42 St. Rep. 1133 (1985). See also Flanigan v. Prudential Fed. S&L Ass'n, 221 M 419, 720 P2d 257, 43 St. Rep. 941 (1986).

Punitive Damages Proper in Action for Breach of Implied Covenant of Good Faith and Fair Dealing and for Negligent Investigation: The plaintiff was properly granted punitive damages

for the hospital's breach of implied covenant of good faith and fair dealing and for negligence in investigating the charges for which plaintiff was dismissed from employment as a probationary employee. Crenshaw v. Bozeman Deaconess Hosp., 213 M 488, 693 P2d 487, 41 St. Rep. 2251 (1984).

Lender's Failure to Honor Renegotiated Loan Payments: Bank's employee, Johnson, told defendants that their note with the bank would be renegotiated to allow further time for payment. Another employee then refused to renegotiate, and he offset defendants' checking account balance against the note without telling defendants, after defendants told him they had relied on Johnson and would not be able to pay on the note's due date. Several of defendants' checks were then dishonored due to insufficient funds. If a duty to exercise good faith is imposed by law rather than by a contract, breach of the duty is tortious and punitive damages are thus recoverable if the conduct is sufficiently culpable. Here, punitive damages could have been granted on the basis of malice, fraud, oppression, or all three, and a new trial was granted because the judge refused to submit the punitive damages issue to the jury. First Nat'l Bank of Libby v. Twombly, 213 M 66, 689 P2d 1226, 41 St. Rep. 1948 (1984). See also Flanigan v. Prudential Fed. S&L Ass'n, 221 M 419, 720 P2d 257, 43 St. Rep. 941 (1986), Dunfee v. Baskin-Robbins, Inc., 221 M 447, 720 P2d 1148, 43 St. Rep. 964 (1986), Cooper v. Rosston, 232 M 186, 756 P2d 1125, 45 St. Rep. 978 (1988), and Bottrell v. Am. Bank, 237 M 1, 773 P2d 694, 46 St. Rep. 561 (1989).

Bad Faith — Allowance of Punitive Damages Proper: Plaintiff, a Kalispell ophthalmologist, pierced Frisnegger's eyeball with a needle while administering a local anesthetic to his eyelid. A cataract formed on the eye. Plaintiff notified his local insurance agent and on his direction notified defendant in writing that defendant was entirely at fault. Frisnegger filed suit against plaintiff. Defendant did not feel the claim was worth over $45,000 and refused to settle within the policy limits of $100,000. A jury verdict was returned for Frisnegger in the amount of $175,000. Plaintiff then brought suit against defendant alleging negligence and bad faith on the part of defendant for failure to settle the claim within policy limits. A jury verdict awarding plaintiff compensatory damages of $250,000 and punitive damages of $300,000 was returned. On appeal, defendant contended that the award of punitive damages was unsupportable, as there was no evidence of intentional wrongdoing, a desire to injure plaintiff, or any illegal withholding of policy benefits. Plaintiff contended the award was proper in light of defendant's failure to investigate, evaluate, or negotiate the claim in good faith and failure to disclose matters of material interest to the insured. The Supreme Court stated that presumed malice sufficient to justify punitive damages includes unjustifiable conduct. In Owens v. Parker Drilling Co., 207 M 446, 676 P2d 162, 41 St. Rep. 66 (1984), the court defined unjustifiable conduct to include reckless disregard of duty. The testimony in this case was such that the jury could find defendant was recklessly indifferent to the risk to which it was putting plaintiff. Gibson v. W. Fire Ins. Co., 210 M 267, 682 P2d 725, 41 St. Rep. 1048 (1984) (decided prior to 1985 and 1987 amendments).

Auto Accident — Gross Negligence and Recklessness: Failure to yield to oncoming traffic that constitutes gross negligence and recklessness supports an award of punitive damages. It is not necessary to show actual malice to recover punitive damages. The District Court's findings meet the standard for presumed malice. Eliason v. Wallace, 209 M 358, 680 P2d 573, 41 St. Rep. 758 (1984) (decided prior to 1985 and 1987 amendments).

Actual or Implied Malice — Jury Question: Scaffolding was needed elsewhere, so Lins used a ladder to remove the coverings from ceiling sprinkler nozzles. The ladder was leaned against the sprinkler pipes. The ladder slipped, and Lins was injured when he fell. Mydlarz was later directed to complete the removal of the nozzle covers using the ladder. He also fell and was seriously injured. A jury can award exemplary damages if the defendant has been found guilty of either actual or implied malice. The defendants were arguably guilty of actual or implied malice, and the issue of punitive damages should not have been taken from the jury. When deciding a motion for directed verdict by the defendants, the trial judge must view the evidence in a light most favorable to the plaintiff. Mydlarz v. Palmer/Duncan Constr. Co., 209 M 325, 682 P2d 695, 41 St. Rep. 738 (1984) (decided prior to 1985 and 1987 amendments).

Punitive Damages Recoverable for Employment Discrimination Against Handicapped: A violation of 49-4-101 warrants a claim for punitive damages if such violation is shown to be intentional or reckless. Owens v. Parker Drilling Co., 207 M 446, 676 P2d 162, 41 St. Rep. 66 (1984). (See 1987 amendment.)

Standard for Presumed Malice: When a person knows or has reason to know of facts which create a high degree of risk of harm to the substantial interests of another, and either deliberately proceeds to act in conscious disregard of or indifference to that risk or recklessly proceeds in unreasonable disregard of or indifference to that risk, his conduct meets the

standard of willful, wanton, and/or reckless to which the law of this state will allow imposition of punitive damages on the basis of presumed malice. Owens v. Parker Drilling Co., 207 M 446, 676 P2d 162, 41 St. Rep. 66 (1984) (decided prior to 1985 and 1987 amendments), followed in Hart-Anderson v. Hauck, 230 M 63, 748 P2d 937, 45 St. Rep. 18 (1988), and Cooper v. Rosston, 232 M 186, 756 P2d 1125, 45 St. Rep. 978 (1988).

Constructive Fraud as Basis for Punitive Damages: Section 27-1-221 allows punitive damages for fraud. Section 28-2-404 specifically defines fraud as including constructive fraud. The breach of a fiduciary relationship constituting a constructive fraud forms the basis for an award of punitive damages. Purcell v. Automatic Gas Distrib., Inc., 207 M 223, 673 P2d 1246, 40 St. Rep. 1997 (1983). (See 1987 amendment.)

Fraud Involving Underlying Contract — Exemplary Damages Allowed: If the conduct of a defendant is tortious, the fact that there was an underlying contract does not defeat an award of punitive damages. In this case, the trial court found fraud, which would constitute a tort and provide a basis for an award of exemplary damages. Purcell v. Automatic Gas Distrib., Inc., 207 M 223, 673 P2d 1246, 40 St. Rep. 1997 (1983).

Punitive Damages — Insurance Settlement Practice of Restrictive Endorsement: Plaintiff's son purchased life insurance, including an accidental death rider, from defendant. The son was found dead in a Bozeman motel room. The death was determined to be an overdose of chloroform through inhalation. The policy rider excluded payment on death due to suicide or drug overdose. On June 11, 1980, defendant sent plaintiff a check for the basic policy amount with a restrictive endorsement on the back. Plaintiff contested the denial of accidental death benefits. On August 20, plaintiff returned the tendered check, and on September 5, 1980, filed suit against defendant seeking actual and punitive damages. On September 9, 1980, defendant mailed the same check without the restrictive endorsement. A jury found that the plaintiff was not entitled to the accidental death benefits but awarded $30,000 in punitive damages. Defendant appealed. In order to award punitive damages there would have had to be a violation of the insurance laws for which a penalty is prescribed and actual damages. The court found that a restrictive endorsement as a general business practice in contested settlements was an unfair claim settlement practice. The actual damages were lost interest earnings and out-of-pocket expenses for legal counsel. Actual damages need only be nominal in order to award punitive damages. Harris v. Am. Gen. Life Ins. Co., 202 M 393, 658 P2d 1089, 40 St. Rep. 164 (1983).

General Rule:

When punitive damages are given for the sake of example and to punish the defendant, to sustain an award against the objection that the evidence is insufficient, there must be substantial evidence in the record of oppression, fraud, or malice, actual or presumed, toward the plaintiff. Johnson v. Murray, 201 M 495, 656 P2d 170, 39 St. Rep. 2257 (1982). (See 1987 amendment.)

To warrant the recovery of punitive damages, the act complained of must not only be unlawful but must also partake somewhat of a criminal or wanton nature. It is an almost universally recognized rule that such damages may be recovered only in cases where the wrongful act complained of is characterized by some such circumstances of aggravation as willfulness, wantonness, malice, oppression, brutality, insult, recklessness, gross negligence, or gross fraud on the part of the defendant. Graham v. Clarks Fork Nat'l Bank, 193 M 282, 631 P2d 718, 38 St. Rep. 1140 (1981). (See 1987 amendment.)

Harassing Persons by Legal Processes: A peace officer gave defendant a speeding ticket with a maximum $5 fine. Defendant sued officer's supervisor and supervisor's wife for $1,050,007 by way of a "counterclaim" to the ticket, charging the supervisor and his wife with intimidation, compounding a felony, attempting to take money under false pretenses, using unauthorized police powers, operating a radio transmitter without an FCC license, and failure to display such a license. He also filed purported common-law liens against their personal property, crops, machinery, motor vehicles, estates, checking and savings accounts, stocks and bonds, bank safe deposit boxes, real property, and "signatures". He notified local banks of the liens and told supervisor and his wife the liens would not be removed until they satisfied his demands. The supervisor and his wife sued defendant. Defendant refused to settle, delayed the proceeding, did not hire an attorney to represent him, disregarded the Court Clerk's bill for filing his answer until default against him was requested, ignored a notice for hearing on damages, and showed utter disregard for plaintiff's rights and the proceedings of the courts. Malice was shown, and the evidence sustained award of $100,000 general damages and $100,000 punitive damages. No society governed by law and not by men could tolerate his deliberate and unprincipled actions. Johnson v. Murray, 201 M 495, 656 P2d 170, 39 St. Rep. 2257 (1982).

Exemplary Damages — Intentional Interference With Business Relationships of Another: When defendant committed the tort of intentional interference with business relationships of another and was guilty of fraud, oppression, or malice, actual or presumed, exemplary damages may be given in addition to actual damages. Bolz v. Myers, 200 M 286, 651 P2d 606, 39 St. Rep. 1747 (1982). (See 1987 amendment.)

Malice Not Required in Contract Rescission Action: In an action to rescind a contract to purchase an automobile, there was no requirement that plaintiff show malice, oppression, or fraud on the part of the seller in order to recover exemplary damages under 30-14-133. T & W Chevrolet v. Darvial, 196 M 287, 641 P2d 1368, 39 St. Rep. 112 (1982).

Implied Malice — Proof: It is not necessary to show actual malice to recover punitive damages, as malice may be actual or presumed. Implied malice may be shown by proof that defendant engaged in a course of conduct knowing it to be harmful and unlawful. Dvorak v. Huntley Project Irrigation District, 196 M 167, 639 P2d 62, 38 St. Rep. 2176 (1981). (See 1987 amendment.)

Malice Presumed: In awarding exemplary damages, the jury may take into account whether the acts complained of are "of such nature as to demonstrate a reckless disregard of the rights of others". (Butcher v. Petranek, 181 M 358, 593 P2d 743 (1979).) The record amply supports a determination that the defendant evinced a reckless disregard for the rights of the plaintiffs. Under this section, the malice required for exemplary damages to be awarded may be actual or presumed. Where defendant's conduct is unjustifiable, "malice in law" is presumed. Defendant's use of force was unjustifiable. Magnuson v. Billmayer, 189 M 458, 616 P2d 368, 37 St. Rep. 1597 (1980). (See 1987 amendment.)

Duress Upon Official: The District Court erred in excluding the testimony of a former Town Councilman and railroad employee regarding the railroad's reaction to his motion to reduce the speed of trains at the crossing. If the railroad in fact utilized its position as employer to exert a form of duress upon its employee acting in an official capacity, such evidence might have a bearing in the mind of the jury to demonstrate wantonness or oppressiveness sufficient to establish a basis for punitive damages. Runkle v. Burlington N., Inc., 188 M 286, 613 P2d 982 (1980). (See 1987 amendment.)

Willful and Malicious Deprivation of Use of Property — Damages: In an action for actual and punitive damages for removal of a gate and approach to property of which plaintiff was a cotenant with defendant's wife, the Supreme Court found substantial evidence to support the findings of fact and conclusions of law determining the existence of a willful and malicious deprivation of the use of the property as well as the amount of damages (actual damages of $230 and punitive damages of $1,000). Toeckes v. Baker, 188 M 109, 611 P2d 609 (1980).

Quiet Title Action — Punitive Damages and Attorney Fees Awards: Lack of good faith in an adverse possession case will not necessarily support a punitive damages award for slander of title. Testimony of failure to recognize the opposing party in a quiet title action from a previous business transaction and of reliance on the Secretary of State's information that the party corporation had no registered agent for service of process, although part of the determination of a lack of good faith, was sufficient to rebut an allegation of malice as required for the award of punitive damages. There being no statutory or contractual provision for attorney fees in this case, a common-law exception would be required for such an award. Without proof that the defendant acted fraudulently, maliciously, or with bad faith toward the plaintiff in a quiet title action, attorney fees will not be awarded. A decision denying attorney fees will not be disturbed absent abuse of discretion by the trial court. Russell Realty v. Kenneally, 185 M 496, 605 P2d 1107 (1980).

Punitive Damages — Malice Implied: The insurer's conduct was both harmful to the insured and unlawful because it violated a statute. Its malice will therefore be implied because its actions were unjustifiable. Punitive damages are justified in such a case. First Sec. Bank of Bozeman v. Goddard, 181 M 407, 593 P2d 1040 (1979). (See 1987 amendment.)

Exemplary Damages — Wrongful Attachment: The trial judge, without putting a money value on the damages, found "that the defendant incurred expenses and interruption of his business affairs caused by his having to stay in Montana to initiate legal proceedings to release the attachment . . ." and that defendant suffered embarrassment when served with the Writ of Attachment at a fairground grandstand in the presence of his friends, wife, and child. Therefore, exemplary damages were properly awarded in an action for wrongful attachment. Miller v. Fox, 174 M 504, 571 P2d 804 (1977), followed in McNeil v. Currie, 253 M 9, 830 P2d 1241, 49 St. Rep. 312 (1992). (See 1987 amendment.)

Misrepresentation in Sale of Home: Where the seller of a house represented that it had "two bathrooms" and showed buyers a room on the second floor equipped with the usual

accoutrements of a bathroom, which buyer later discovered were not connected to any plumbing, and where shortly after buyers took possession the main sewerline burst due to faulty materials and installation, the buyer is not precluded from choosing to affirm the contract of sale and suing in tort seeking actual and punitive damages for fraud and deceit. State ex rel. Dimler v. District Court, 170 M 77, 550 P2d 917 (1976). (See 1987 amendment.)

When Exemplary Damages Not Recoverable: Taking possession of hay crop in exercise of rights under security agreement is not a ground for finding malice justifying assessment of exemplary damages. Fairchild v. Williams Feed, Inc., 169 M 18, 544 P2d 1216 (1976).

Slander of Title: In a slander of title action, where the defendant did not survey the lots which he claimed, never studied the abstract of title, and attempted to rely on a quitclaim deed from his secretary on the basis of her maiden name, there was a showing of malice that would entitle the plaintiff to punitive damages. Jumping Rainbow Ranch v. Conklin, 167 M 367, 538 P2d 1027 (1975).

Insurance Settlement: Where fraud of the insurer and agent in settling an automobile insurance claim by "cost of repair" and not "total loss" is alleged but no provision of the insurance code was violated, the insured was not entitled to exemplary damages. State ex rel. Cashen v. District Court, 157 M 40, 482 P2d 567 (1971), distinguished in Firestone v. Bradshaw, 157 M 181, 483 P2d 709 (1971).

Water Rights Dispute: In action concerning disputed water rights, plaintiff was not entitled to punitive damages under this section since defendants were not found to be guilty of oppression, fraud, or malice; further, exemplary or punitive damages cannot be recovered in absence of award of actual damages. Smith v. Krutar, 153 M 325, 457 P2d 459 (1969).

Slander: Where home owner's slanderous statements that builder had cheated him were made to numerous people in community over 2-year period and where speaker stated that "he was going to tack his [builder's] hide to the wall", jury had basis for finding sufficient malice to justify award of punitive damages. McCusker v. Roberts, 152 M 513, 452 P2d 408 (1969).

Insurance Policy Default: Insured was entitled to sue insurance company for actual damages for default on policy requiring it to pay car installments upon insured's disability as well as for exemplary damages since default was oppressive, malicious, or fraudulent and in violation of statute requiring prompt payment of claim. State ex rel. Larson v. District Court, 149 M 131, 423 P2d 598 (1967), distinguished in State ex rel. Cashen v. District Court, 157 M 40, 482 P2d 567 (1971).

Eviction of Tenant:

Where a landlord, in doing an act which constructively evicts the tenant, is motivated by a desire to vex, injure, or annoy the tenant, the act is done maliciously and a jury may award punitive damages. Cruse v. Clawson, 137 M 439, 352 P2d 989 (1960).

A hotel proprietor who wrongfully forces an entry into the room of a guest and without just cause ejects him from it and from the house is liable not only for compensatory but also exemplary damages if the ejection is accompanied by circumstances indicating that it was prompted by malice, fraud, or a spirit of oppression. Jones v. Shannon, 55 M 225, 175 P 882 (1918). (See 1987 amendment.)

Malice in Law: "Malice in law" justifying an award of exemplary damages will be implied where defendant's conduct is unjustifiable. Evidence that overtaking automobile without warning, during severe snowstorm, seeking to pass, and, in so doing, sideswiping automobile in which accident victim rode would warrant finding that conduct of driver of overtaking automobile was unjustifiable, authorizing an implication of malice as basis for an award of exemplary damages. Cherry-Burrell Co. v. Thatcher, 107 F2d 65 (9th Cir. 1939). See also Dvorak v. Huntley Project Irrigation District, 196 M 167, 639 P2d 62, 38 St. Rep. 2176 (1981). (See 1987 amendment.)

Not Necessary to Claim Eo Nomine:

In an action for damages for the fraudulent use of a trademark, complaint asking exemplary damages need not set them out eo nomine but must allege that the acts of defendant were characterized by fraud, oppression, malice, or the like under this section. Truzzolino Food Prod. Co. v. F. W. Woolworth Co., 108 M 408, 91 P2d 415 (1939), overruled on another point in Fauver v. Wilkoske, 123 M 228, 211 P2d 420 (1949). (See 1987 amendment.)

To entitle plaintiff to recover punitive damages in an action for malicious prosecution, in addition to those actually sustained, it is not necessary that he claim them eo nomine in his complaint. Martin v. Corscadden, 34 M 308, 86 P 33 (1906).

Guilty Intent Required:

To warrant the recovery of exemplary damages in a tort action, the complaint must allege either that the act complained of was done maliciously, willfully, or wantonly or the facts

surrounding its commission must be set forth with such particularity as that one or more of such elements may be inferred therefrom. Thompson v. Shanley, 93 M 235, 17 P2d 1085 (1932). (See 1987 amendment.)

To warrant the recovery of exemplary damages, defendant must have entertained a guilty intent, the wrongful acts being characterized by circumstances of aggravation, malice, oppression, and the like. Luther v. Lee, 62 M 174, 204 P 365 (1922). (See 1987 amendment.)

Conversion of Personal Property:

Where the jury in an action in conversion found in favor of plaintiff's contention that defendant chattel mortgagee, in violation of his agreement extending the time within which plaintiff could pay his debt, caused an officer to seize the chattel, thus acting maliciously and oppressively, an award of exemplary damages was justified. Ramsbacher v. Hohman, 80 M 480, 261 P 273 (1927). (See 1987 amendment.)

In cases of conversion of personal property, the statute authorized the imposition of punitive damages where the defendant acted maliciously, fraudulently, or oppressively, either in taking or detaining the property in controversy. De Celles v. Casey, 48 M 568, 139 P 586 (1914). (See 1987 amendment.)

The complaint in an action for damages for a conversion, which alleged, among other things, that defendants "did unlawfully, maliciously, fraudulently, and oppressively take and carry away" the property in controversy and refused restitution of the same after repeated demands, was broad enough to warrant inquiry into the motives and behavior of defendants and to justify the giving of an instruction that exemplary damages might be awarded for oppressively, fraudulently, or maliciously withholding the chattels after demand. Shandy v. McDonald, 28 M 393, 100 P 203 (1909). (See 1987 amendment.)

Malice Actual or Presumed: In an action in conversion in which exemplary damages were asked, an instruction defining the terms "actual" and "presumed" malice was not open to the objection that it authorized an award of punitive damages for malice in law as well as malice in fact. Wray v. Great Falls Paper Co., 72 M 461, 234 P 486 (1925). (See 1987 amendment.)

Trespass: Where acts constituting a trespass are shown to be wanton, malicious, or oppressive and of such a character as to indicate a reckless disregard of the rights of the plaintiff, the jury in its discretion may award a reasonable amount as punitive damages in addition to compensatory damages. Mosback v. Smith Bros. Sheep Co., 65 M 42, 210 P 910 (1922). (See 1987 amendment.)

Malicious Prosecution: It is within the province of the jury to allow exemplary as well as compensatory damages in an action for malicious prosecution, and unless its determination appears to have been influenced by passion, prejudice, or some other improper motive or the amount is outrageously disproportionate to the wrong done or the situation or circumstances of the parties, the award will not generally be disturbed. Cornner v. Hamilton, 62 M 239, 204 P 489 (1922).

Alienation of Affections: Punitive damages may be awarded in an action for the alienation of a husband's affections, even though the evidence furnishes no basis for a finding of malice, since malice may be implied from the conduct of defendant in causing the wrong complained of, its existence being a question for the jury. Moelleur v. Moelleur, 55 M 30, 173 P 419 (1918). (See 1987 amendment.)

Punitive Damages Allowed — Railroad Employee's Willful Failure to Stop: In an action against a railway company to recover damages for failure to stop its train at a station where it was scheduled to stop when flagged, punitive, in addition to compensatory, damages may be awarded if it is shown that the engineer saw the signal but willfully refused to stop for the purpose of receiving plaintiff as a passenger. Burles v. Oreg. Short Line R.R., 49 M 129, 140 P 513 (1914). See Jones v. Shannon, 55 M 225, 175 P 882 (1918). (See 1987 amendment.)

Telegraph Operator — Fraud — Punitive Damages Allowed: Where the element of fraud entered into the wrongdoing of a telegraph operator in withholding messages to and from a customer of his company, thus enabling him to profit by it, the provisions of this section, awarding the right to punitive damages, governed and 69-11-303 did not. Lahood v. Cont. Tel. Co., 52 M 313, 157 P 639 (1916).

Taking or Detaining Property: Where evidence was insufficient to justify an inference of malice, fraud, or oppression in either taking or detaining property in controversy, in an action in conversion, imposition of punitive damages, otherwise recoverable under this section, was unwarranted. De Celles v. Casey, 48 M 568, 139 P 586 (1914).

Reversible Error for Lower Court to Substitute Its Judgment for Jury's in Determining Credibility of Witnesses and Evidence: The jury found for the plaintiff, Deonier, in a breach of fiduciary duty case against the insurer for which Deonier was a selling agent and awarded Deonier $1 million in punitive damages in addition to compensatory damages. The District Court, after making extensive findings of fact, reduced the award to $375,000. The Supreme Court reinstated the jury award, stating that it was implicit in the size of the award that the jury found the insurer's witnesses and evidence less credible than the plaintiff's and that it was an abuse of discretion for the trial court to substitute its judgment for the jury's. Deonier & Associates v. Paul Revere Life Ins. Co., 2004 MT 297, 323 M 387, 101 P3d 742 (2004).

Breach of Fiduciary Duty in Conversion of Corporate Property Without Requisite Notice and Shareholder Approval — Punitive Damages Unavailable Absent Showing of Actual Malice or Fraud: Phil was two-thirds majority shareholder in Trifad Entertainment, Inc. (Trifad), and Brad was one-third minority shareholder and Trifad director. Following Phil's extradition to Florida on racketeering charges, Brad secured a loan for $15,000, deposited the money in the Trifad account, and then sold virtually all of Trifad's assets to himself for $15,000. In addition, Brad wrote checks on Trifad's account for taxes owed and for estimated tax payments and withdrew one-third of the remaining balance and left two-thirds in the account, all without attempting to contact Phil. Phil later sued Brad for breach of contract, breach of fiduciary duty, breach of the implied covenant of good faith and fair dealing, and conversion and requested punitive damages, contending that Brad's actions were performed with actual malice and constituted actual fraud. At trial, Brad contended that the actions were reasonable considering Phil was in jail facing criminal charges, and Brad cross-claimed for indemnification from Trifad for litigation expenses and liabilities incurred in his capacity as Trifad director. The District Court found for Brad on all counts, but denied corporate indemnification. Both Phil and Brad appealed. The Supreme Court reversed, finding that Brad failed to comply with 35-1-823 by selling corporate property without the requisite notice and shareholder approval. Although contacting Phil would have been difficult, it was not impossible. However, even if Phil had been unavailable for consultation, 35-1-823 does not contain any exceptions to the notice and approval requirements governing the sale of corporate assets. Further, the sale constituted conversion because Brad exercised unauthorized dominion over Trifad property by transferring ownership to himself. The case was remanded for a determination of damages, including possible damages other than those provided in 27-1-320 if peculiar circumstances warranted compensation for future lost income and profits. The District Court erred in concluding that Brad did not breach his fiduciary duties to Trifad; however, absent proof of actual malice or actual fraud, punitive damages were not warranted. Because a breach of fiduciary duty occurred, Brad could not claim to be wholly successful in the action, so Brad's claim for corporate indemnification also failed under 35-1-453. Trifad Entertainment, Inc. v. Anderson, 2001 MT 227, 306 M 499, 36 P3d 363 (2001).

No Error in Failure of Trial Court to Detail From Bench Its Analysis of Statutory Factors Regarding Award of Punitive Damages: Onstad was assaulted on the job and sued the employer, Payless Shoesource (Payless), for failure to provide a safe workplace. The jury held Payless liable and awarded Onstad $500,000 in compensatory damages, plus an additional $1 million in punitive damages. On appeal, Payless contended that the trial court erred in approving punitive damages, asserting that Onstad did not prove actual malice, thereby failing to establish a necessary foundation for punitive damages, and that the court failed to adequately review the support for the award by enumerating from the bench its consideration of the statutory factors for approving punitive damages. The Supreme Court affirmed. The jury was instructed on malice and specifically found that Payless's conduct amounted to malice, a conclusion that was supported by the evidence. Further, it was immaterial that the trial court did not detail from the bench its analysis of each of the statutory factors as to the award of punitive damages. It was sufficient that the court made individual findings on each of the statutory factors in its subsequent written findings. Onstad v. Payless Shoesource, 2000 MT 230, 301 M 259, 9 P3d 38, 57 St. Rep. 943 (2000).

Damages Proper for Emotional Distress Based on Sale of Real Estate — Punitive Damages Appropriate: The Maloneys were promised an option to purchase property adjacent to their own, hoping to build their retirement home near Glacier Park. The real estate agent who listed the property was aware of the Maloneys' option but sold to another instead. That person then developed the property, building a 3,000-square-foot home on the very site that the Maloneys had desired and within sight of the Maloneys' residence, and then listed the newly developed property for almost six times what the Maloneys could have paid had the option been properly

offered. A special master concluded, and the District Court agreed, that the Maloneys had suffered and were entitled to compensation for the shock, worry, anger, disappointment, and frustration that they had suffered and would continue to suffer in light of the inherent duration of the Maloneys' adjacent ownership. The Supreme Court affirmed, noting that under French v. Ralph E. Moore, Inc., 203 M 327, 661 P2d 844, 40 St. Rep. 481 (1983), emotional distress damages may result from negligent or intentional damage to property arising from interference with the use and enjoyment of land and that under Johnson v. Murray, 201 M 495, 656 P2d 170, 39 St. Rep. 2257 (1982), compensatory damages could include compensation for humiliation, embarrassment, distress, and ridicule associated with interference with plaintiffs' use of their private property. The private property interest at issue here sufficiently involved the use and enjoyment of land to fall within these holdings. Further, the award of punitive damages was also affirmed in this instance despite defendant's claims of the special master's improper estimation of net worth, a syntax error, and the special master's improper recognition of punitive damages assessed against defendant in a prior case. Maloney v. Home & Inv. Center, Inc., 2000 MT 34, 298 M 213, 994 P2d 1124, 57 St. Rep. 144 (2000). See also Recovery for Negligent Infliction of Emotional Distress Attendant to Economic Loss: A Reassessment, Sandor & Berry, 37 Ariz. L. Rev. 1247 (1995).

Adequacy of Compensatory and Punitive Damages Upheld — Motion for Directed Verdict Properly Denied: In a civil action for damages against Huggins and the Carpet Barn, stemming from criminal acts damaging plaintiffs David and Susan Black's automobiles, the Blacks' wholly owned corporation was awarded $35,000 in compensatory damages and $51 in punitive damages. The Blacks contended that the award was insufficient because it failed to award damages for emotional distress and property damages and awarded only $51 in punitive damages. The District Court denied Blacks' motion for a directed verdict. The Supreme Court held that the District Court properly denied the motion because there was conflicting evidence as to the cause of Blacks' emotional distress and because the record showed that Susan Black had been reimbursed through criminal restitution and that amount was not deducted from the award to the Blacks' corporation. Concerning the amount of punitive damages awarded, the Supreme Court cited Safeco Ins. Co. v. Ellinghouse, 223 M 239, 725 P2d 217 (1986), and Dees v. Am. Nat'l Fire Ins. Co., 260 M 431, 861 P2d 141 (1993), and held that the District Court properly instructed the jury, reviewed the award in accordance with this section, and left the award intact. The Supreme Court therefore held that the District Court did not abuse its discretion in denying the motion. Rocky Mtn. Enterprises, Inc. v. Pierce Flooring, 286 M 282, 951 P2d 1326, 54 St. Rep. 1410 (1997).

Burden on Defendant to Show That Financial Condition Does Not Warrant Punitive Damages: This section requires that following a verdict of punitive damages against a defendant, a separate proceeding must be held to determine the amount and that a defendant's financial condition must be considered. The defendant is required to show that the defendant's financial condition does not support an award. The plaintiff need not show that the defendant's financial condition supports an award. Therefore, the District Court's failure to completely set aside defendant's punitive damages was not error when defendant offered no evidence of his financial condition. Cartwright v. Equitable Life Assurance Soc'y, 276 M 1, 914 P2d 976, 53 St. Rep. 268 (1996).

Insurance Fraud Punitive Damages of $6,127,845 Against Company and $30,000 Against Agent Justified: Based on its following findings, the District Court properly allowed punitive damages against a fraudulent insurance agent and his company and improperly reduced those amounts from $30,000 to $18,000 for the agent and from $6,127,845 to $4 million for the company: (1) the agent deliberately deceived the plaintiff insureds and his other clients to gain added commissions, thereby reducing the value of the policies or resulting in their cancellation; (2) the agent's training supervisor engaged in highly questionable practices and was essentially unsupervised himself; (3) the company had notice of the defendant agent's fraud, but complaints to the company by other agents about the defendant agent were ignored; (4) the company's policy was to urge customers to trust and rely on agents and to portray the company as a caring, paternal company but was also to protect its own interests, not the insureds', with regard to complaints; (5) both the agent and the company profited from the fraud; (6) the actual damages, $358,591, were substantial, it was doubtful that the agent could pay much of them, and it was also doubtful that they were large enough to impress the company of the extent of its wrongdoing; (7) the company's net worth was $1,832,462,923, and the punitive damages against it might make it examine its actions, but not make it insolvent; (8) criminal prosecution of the company was not viable; and (9) the jury was conservative, well informed by the evidence, and

did not act from passion or prejudice. Cartwright v. Equitable Life Assurance Soc'y, 276 M 1, 914 P2d 976, 53 St. Rep. 268 (1996).

New Trial Based on Excessive Punitive Damages — Abuse of Discretion Warranting Reversal: The District Court vacated a jury award of $1 million in punitive damages against an employer and $75,000 against an employee, concluding that the awards were excessive. The Supreme Court reversed, noting that the award against the employer was not excessive when compared with the employer's overall financial condition and that the employee's financial condition was improperly valued. The employee failed to produce evidence that his net worth could not support the punitive damage award, so vacation of the jury award was a manifest abuse of discretion warranting reversal. Maurer v. Clausen Distrib. Co., 275 M 229, 912 P2d 195, 53 St. Rep. 78 (1996), distinguished in Anderson v. Werner Enterprises, Inc., 1998 MT 333, 292 M 284, 972 P2d 806, 55 St. Rep. 1350 (1998).

Reversal of Jury Findings Regarding Liability Not Allowed Upon Court Review of Punitive Damage Award: A jury, by special verdict, found that defendants had no reasonable basis in law or fact for contesting plaintiffs' claim for crop damages and awarded plaintiffs punitive damages. Upon review of the damage award, the District Court concluded that defendants had a reasonable basis upon which to deny the claim and modified the damage award. On appeal, the Supreme Court held that because plaintiffs invoked their right to a jury trial, allowing the court to reverse issues of underlying liability previously submitted to and decided by the jury would interfere with the jury as trier of fact deciding the issues. Court review pursuant to subsection (7)(c) of this section must be conducted without contradicting findings of fact made by the jury, and failure to do so constitutes reversible error. Debruycker v. Guar. Nat'l Ins. Co., 266 M 294, 880 P2d 819, 51 St. Rep. 835 (1994).

Tort of Bad Faith — Not Available for Most Contract Actions — Breach: In a contract action, the Supreme Court ruled that a breach of the implied covenant of good faith and fair dealing constituted a breach of the contract and that only contract damages would be available to the prevailing party. The court stated that tort-type damages would not be available for a breach of the covenant. The court also held that the tort of bad faith would apply only in exceptional circumstances to discourage oppression in contracts that necessarily give one party a superior position. Every contract, regardless of the type, contains an implied covenant of good faith and fair dealing. A breach of the covenant is a breach of the contract. Story v. Bozeman, 242 M 436, 791 P2d 767, 47 St. Rep. 850 (1990), followed in Keller v. Dooling, 248 M 535, 813 P2d 437, 48 St. Rep. 554 (1991), Haines Pipeline Constr., Inc. v. Mont. Power Co., 251 M 422, 830 P2d 1230, 48 St. Rep. 1102 (1991), and Kneeland v. Luzenac America, Inc., 1998 MT 136, 289 M 201, 961 P2d 725, 55 St. Rep. 541 (1998).

Improper Exercise of Setoff — Punitive Damages Granted: A bank exercised a setoff, leaving a company with no operating cash or line of credit. As a result of the bank's action, the company could not meet payroll, lost all its employees, was sued many times, had its corporate goodwill destroyed, and had to enter into joint venture agreements with general contractors in order to stay in business. Absent any complaint of improper jury instruction, an award of $50,000 in punitive damages for breach of the implied covenant of good faith and fair dealing and $50,000 for negligent misrepresentation was affirmed. Bottrell v. Am. Bank, 237 M 1, 773 P2d 694, 46 St. Rep. 561 (1989).

Jury Finding of Fraud and Breach of Good Faith and Fair Dealing in Contract Action — Punitive Damages Warranted: Defendant contended a tort recovery was incorrectly allowed in a breach of contract action because the case dealt with an ordinary commercial setting in which two parties negotiated with relatively equal bargaining power and without any special relationship that would generate an exceptional duty. The Supreme Court noted that the jury found not only a breach of contract and good faith but also actions constituting fraud. The court held that when both fraud and a breach of the implied covenant of good faith and fair dealing are found, the plaintiff is free to pursue punitive damages. Webcor Electronics, Inc. v. Home Electronics, Inc., 231 M 377, 754 P2d 491, 45 St. Rep. 695 (1988).

Misrepresentation of Business Profits — Compensatory and Punitive Damage Awards Affirmed: Despite contentions that damage awards were too low in a case in which business profits were misrepresented to the detriment of buyers, the Supreme Court affirmed as adequate an award of $62,238 in compensatory damages to cover annual losses of $31,338 and reasonable wage losses of $30,900 and an award of $10,000 punitive damages to deter future similar behavior. Selvidge v. McBeen, 230 M 237, 750 P2d 429, 45 St. Rep. 168 (1988).

Award of Grossly Excessive and Disproportionate Damages — Based on Passion or Prejudice: A jury award of $5 million in punitive damages, which was found to be 20,000% above the award for economic damage caused insured and 5,000% more than the maximum of the insurance

policy, was held to be so grossly excessive and disproportionate to the injury as to shock one's conscience. Noting that appellate courts in most jurisdictions, including Montana, ordinarily defer to the discretion of the factfinder when reviewing punitive damage awards, the court found that as a matter of law this award must have been determined by passion or prejudice. On remittitur, the judgment was modified to an award of $1 million total. Safeco Ins. Co. v. Ellinghouse, 223 M 239, 725 P2d 217, 43 St. Rep. 1689 (1986). In a strong dissent, Mr. Justice Morrison noted no reversible error on any liability question and pointed out that up to this time "there is little, if any, precedent supporting the Montana Supreme Court substituting its judgment for that of the jury. Unfortunately that strong support for the jury system has now been dynamited. The majority announces loud and clear that from this day forward, four justices, robed in judicial omniscience, will replace our jury." Mr. Justice Sheehy, also dissenting, said that the "deleterious effect of the opinion in this case is its announcement that the right of a jury to set damages is hereafter subject to the consent of the majority of this Court".

Award of Punitive Damages by Trier of Fact: Appellant argued that under this section only a jury may award punitive damages. The Supreme Court, noting its decision in Miller v. Fox, 174 M 504, 571 P2d 804 (1977), construed the statute to mean that a District Court sitting as a trier of fact may award punitive damages. Shors v. Branch, 221 M 390, 720 P2d 239, 43 St. Rep. 919 (1986).

Requirement of Actual Damage Before Punitive or Exemplary Damages Recoverable:

Without a finding of actual damages, whether or not determined in amount, exemplary damages are not proper. Doll v. Major Muffler Centers, Inc., 208 M 401, 687 P2d 48, 41 St. Rep. 429 (1984).

Plaintiff's son purchased life insurance, including an accidental death rider, from defendant. The son was found dead in a Bozeman motel room. The death was determined to be an overdose of chloroform through inhalation. The policy rider excluded payment on death due to suicide or drug overdose. On June 11, 1980, defendant sent plaintiff a check for the basic policy amount with a restrictive endorsement on the back. Plaintiff contested the denial of accidental death benefits. On August 20, plaintiff returned the tendered check, and on September 5, 1980, filed suit against defendant seeking actual and punitive damages. On September 9, 1980, defendant mailed the same check without the restrictive endorsement. A jury found that the plaintiff was not entitled to the accidental death benefits but awarded $30,000 in punitive damages. Defendant appealed. In order to award punitive damages there would have had to be a violation of the insurance laws for which a penalty is prescribed and actual damages. The court found that a restrictive endorsement as a general business practice in contested settlements was an unfair claim settlement practice. The actual damages were lost interest earnings and out-of-pocket expenses for legal counsel. Actual damages need only be nominal in order to award punitive damages. Harris v. Am. Gen. Life Ins. Co., 202 M 393, 658 P2d 1089, 40 St. Rep. 164 (1983).

This section does not require actual damages to flow from the commission of the tort before punitive damages can be assessed. If a basis for actual damages exists in the record, the fact that none are awarded does not prevent the assessment of punitive damages. Where the trial court found that insurers breached their contract with insured and also that they acted in bad faith and it awarded actual damages for the breach of contract, the court could have as easily held that the damages flowed from the bad faith actions of insurers. Punitive damages were properly awarded insured based on the insurers' bad faith. Lipinski v. Title Ins. Co., 202 M 1, 655 P2d 970, 39 St. Rep. 2283 (1982).

Where the owner of a car, arriving on the scene of an accident involving his car driven by another with his permission, intentionally tampered with physical evidence at the scene and was thereafter found liable for punitive damages by a state court, but neither he nor the driver were liable for actual damages, under the policy in question the insurance company was not liable for either the punitive damages or attorney's fees. Lee v. St. Farm Mut. Auto. Ins. Co., 39 St. Rep. 1761 (D.C. Mont. 1982) (apparently not reported in Federal Supplement).

When one count of a predominantly contract action was based on an intentional tort of false representation of a refund of the purchase price if plaintiff would return the defective merchandise and judgment denied plaintiff's claim of actual damages, an award of punitive damages was beyond the power and authority of the trial court. Purington v. Sound W., 173 M 106, 566 P2d 795 (1977).

Where actual damages appear from the evidence, an award of punitive or exemplary damages will stand, though the verdict of the jury shows no finding of actual damages. Brown v. Grenz, 127 M 49, 257 P2d 246 (1953).

When the jury was instructed by the court that it could allow exemplary damages if "you find by a preponderance of the evidence that plaintiff suffered actual damages", and the jury

returned a verdict of actual damages "none" and exemplary damages "$250", the presumption is that the jury found actual damages. The fact that they did not assess a money award for the actual damages is not controlling, for there are various reasons why it did not assess a money award; an obvious one is the existence of a counterclaim by the defendant. Welsh v. Roehm, 125 M 517, 241 P2d 816 (1952).

In action for malicious prosecution where jury found malice, verdict was valid where it gave exemplary damages but entered "none" in the space on the verdict for actual damages. Fauver v. Wilkoske, 123 M 228, 211 P2d 420, 17 ALR 2d 518 (1949).

Where actual damage is shown although the extent of the damage cannot be shown in money value, exemplary damages may be awarded. Fauver v. Wilkoske, 123 M 228, 211 P2d 420, 17 ALR 2d 518 (1949), overruling Gilham v. Devereaux, 67 M 75, 214 P 606, 33 ALR 381 (1923); Bowman v. Lewis, 110 M 435, 102 P2d 1 (1940); Truzzolino Food Prod. Co. v. F. W. Woolworth Co., 108 M 408, 91 P2d 415 (1939).

Before exemplary damages may be awarded, actual damages must first be found to have been suffered. Gilham v. Devereaux, 67 M 75, 214 P 606, 33 ALR 381 (1923), overruled on another point in Fauver v. Wilkoske, 123 M 228, 211 P2d 420 (1949).

In a husband's action for damages for alienation of affections, where the jury expressly found that plaintiff had not suffered any actual damages, an award of $2,000 exemplary damages was unwarranted. Gilham v. Devereaux, 67 M 75, 214 P 606, 33 ALR 381 (1923), distinguished in Long v. Davis, 68 M 85, 217 P 667 (1923), overruled on another point in Fauver v. Wilkoske, 123 M 228, 211 P2d 420 (1949).

Damages Granted for Suing Wrong Person — Punitive Damages Not Reduced by Contributory Negligence: The defendant sued the plaintiff in connection with an automobile accident. The plaintiff informed the defendant that he was the wrong person to sue in that action. The plaintiff refused to defend the action and the defendant obtained a default judgment. As a result of the default plaintiff lost his driver's license. Plaintiff then brought this action. The court found that there was sufficient evidence for the jury to determine that defendant acted recklessly and should pay punitive damages. Punitive damages cannot be reduced by the percentage of plaintiff's contributory negligence. Shahrokhfar v. St. Farm Mut. Auto. Ins. Co., 194 M 76, 634 P2d 653, 38 St. Rep. 1669 (1981). (See 1987 amendment.)

Determination of Damages — Requisite Support: When a hospital interferes with its employee's statutory right under 50-5-503 to refuse to participate in a sterilization operation, its violation of 50-5-504 may entitle the employee to damages to be determined by a compensation theory, including reasonably certain future damages and possibly exemplary damages. Plaintiff, however, introduced no evidence supporting claims for exemplary damages. Finding no evidence to support the claim and noting that there was no particular difficulty in producing such evidence, the Supreme Court held that neither the likelihood of such improper behavior or injury nor the difficulty of proving damages is so great as to justify awarding damages without proof that such improper behavior took place. Swanson v. St. John's Lutheran Hosp., 189 M 259, 615 P2d 883, 37 St. Rep. 1420 (1980).

When Punitive Damages Allowable: Plaintiff contended that the District Court erred in determining that defendants were not liable for punitive damages. The jury returned a verdict of no liability for actual damages on the part of the State and Burlington Northern. Such a verdict precludes an award of punitive damages. Penn v. Burlington N., Inc., 185 M 223, 605 P2d 600 (1980).

Apportionment Between Joint Tortfeasors: The jury may properly apportion exemplary damages among joint tortfeasors in a conversion action, but before a finding of such damages may be made, actual damages must have been assessed, and where exemplary damages only were assessed against one of the defendants, reversal of the judgment carries with it the award of costs against such defendants. Bowman v. Lewis, 110 M 435, 102 P2d 1 (1940), overruled on another point in Fauver v. Wilkoske, 123 M 228, 211 P2d 420 (1949).

Assault and Battery — Malice — Test for Damages: In an assault case where malice is alleged, it is not the quantum of force used but whether the assailant was in a malicious state of mind which is the test in awarding exemplary damages; the use of a dangerous weapon (a hammer) is some evidence of a wanton disregard of human life and generally gives rise to such damages; the question of malice is generally one for the jury. Vaughn v. Mesch, 107 M 498, 87 P2d 177, 123 ALR 1106 (1939).

JURY QUESTION AND INSTRUCTION

No Error in Instructing Jury as to Where Punitive Damage Payment Goes: Plaintiff alleged that the District Court abused its discretion by refusing to give an instruction stating that the

jury was not to consider where punitive damage payments would go, contending that the instruction was necessary because jury consideration of any effect of a punitive damage award, including the beneficiary of the award, improperly distracts the jury from the purpose of a punitive damage award, which is to punish the wrongdoer and set an example, and results in an improper reduction in the amount awarded. Instead, the court gave a pattern instruction setting forth the statutory criteria for determining the amount of a punitive damages award and made no mention of the recipient of the award. The Supreme Court affirmed. The law does not preclude juries from considering where a punitive damage award will go when determining the amount of the award. Finstad v. W.R. Grace & Co., 2000 MT 228, 301 M 240, 8 P3d 778, 57 St. Rep. 934 (2000).

Award of Punitive Damages Not Automatic on Finding of Fraud — New Trial Not Required — Standard of Review: In a case in which the jury found that the defendants had engaged in fraudulent conduct and did not award punitive damages, the trial court did not err in denying a new trial when the evidence that would have supported an award of punitive damages was contradicted and the jury's decision to not award punitive damages was supported by substantial evidence. All elements of a claim for punitive damages must be proved by clear and convincing evidence. An appellate court will review a jury's verdict to award or not to award punitive damages under the substantial evidence rule. It is in the province of a jury to find that there is sufficient evidence of proof of fraud, yet not the quantum of evidence necessary to support an award of punitive damages. Sandman v. Farmers Ins. Exch., 1998 MT 286, 291 M 456, 969 P2d 277, 55 St. Rep. 1165 (1998).

Instruction on Vicarious Liability Not in Error When Damages Assessed for Actual Conduct: The District Court instructed the jury on Clausen's vicarious liability. The jury returned a verdict assessing punitive damages against Clausen based on its own conduct rather than because of Clausen's potential vicarious liability. Clausen's argument that the instruction was not appropriate was moot because Clausen was held liable for its own actions rather than those of another; therefore, the instruction was not prejudicial. Maurer v. Clausen Distrib. Co., 275 M 229, 912 P2d 195, 53 St. Rep. 78 (1996).

Refusal to Give Instructions Proper When Unsupported by Evidence: Appellants contended the District Court erred in refusing to give proffered instructions regarding punitive damages incurred through a power company's alleged violations of the Natural Gas Pipeline Safety Act of 1968. Although limited evidence was presented regarding each claimed violation, for none of the alleged infractions was evidence sufficient to support a determination that the Act was violated. As set out in Mydlarz v. Palmer/Duncan Constr. Co., 209 M 325, 682 P2d 695 (1984), instructions not supported by the evidence need not be given. Day v. Mont. Power Co., 242 M 195, 789 P2d 1224, 47 St. Rep. 626 (1990).

Instructions Not Requiring Jury Finding of Wrongful Act: Jury instructions explained compensation for actual and punitive damages if the jury found liability for wrongful attachment. Defendants argued that after receiving the instructions, all that remained for the jury was to determine whether property was intentionally attached. However, the jury was not required to find that defendants acted wrongfully or with malice and therefore was not required to award punitive damages. Stensvad v. Towe, 232 M 378, 759 P2d 138, 45 St. Rep. 1129 (1988).

Franchisor's Right to Determine Franchise Location — Duty to Reasonably Consider Relocation: Appellant franchisor had the sole contractual right to determine location of the franchise; however, the law imposed a duty to reasonably consider facts regarding relocation. The Supreme Court found evidence that vital information was withheld from respondents and from the vice president in charge of authorizing relocation which, if believed, would provide a basis for finding appellant acted unreasonably, thereby breaching its duty to exercise good faith. The evidence was sufficient to warrant submission to the jury on the question of good faith. Dunfee v. Baskin-Robbins, Inc., 221 M 447, 720 P2d 1148, 43 St. Rep. 964 (1986).

Inadequate Jury Instruction — Implied Covenant of Good Faith: The District Court instructed the jury on the implied covenant of good faith and fair dealing, stating that good faith means honesty in fact in the conduct or transaction concerned and then equating the implied covenant to an obligation imposed by law on defendants to do nothing to deprive plaintiffs of the benefits of their commercial transaction. On appeal, defendants argued that the implied covenant had no application in a case involving an arms-length contract. The Supreme Court, relying on its decision in Nicholson v. United Pac. Ins. Co., 219 M 32, 710 P2d 1342, 42 St. Rep. 1822 (1985), held that a breach of the implied covenant which results in damages can give rise to an action in tort, but that in order to recover additional punitive damages, plaintiffs must prove that defendants' actions in breaching the implied covenant met the requirements of 27-1-221. The tort of breach of the implied covenant of good faith and fair dealing requires more than a lack

of honesty in fact. The instruction given to the jury on this issue inadequately defined the tort. McGregor v. Cushman/Mommer, 220 M 98, 714 P2d 536, 43 St. Rep. 206 (1986), followed in Noonan v. First Bank Butte, 227 M 329, 740 P2d 631, 44 St. Rep. 1124 (1987), and in Bottrell v. Am. Bank, 237 M 1, 773 P2d 694, 46 St. Rep. 561 (1989). See also Dunfee v. Baskin-Robbins, Inc., 221 M 447, 720 P2d 1148, 43 St. Rep. 964 (1986).

Auto Accident — Intoxicated Driver on Icy Road: The jury was properly instructed on punitive damages in action arising from defendant's collision with plaintiff's auto, which was proceeding in the same direction as and in front of defendant's truck on an icy road. Defendant, according to three persons who observed him after the collision, was grossly intoxicated, and a test of his blood alcohol content found it to be .20%. Allers v. Willis, 197 M 499, 643 P2d 592, 39 St. Rep. 745 (1982).

Punitive Damages — Scope of Review: Plaintiffs sued defendant for damages claimed to have occurred to their farmlands when a seismograph hole drilled and shot by defendant brought a continuous water flow to the surface, damaging farmland. Defendant left the area and later tried unsuccessfully to plug the hole. A questionable permission to do the drilling was given by the plaintiffs, and explicit directions were given not to drill where the water commenced to flow. The District Court denied motions to remove the issue of punitive damages from the jury. The Supreme Court held that the issue was properly submitted to the jury and that the jury's determination would stand, since the Supreme Court had no basis in law upon which to set it aside. Dahl v. Petroleum Geophysical Co., 194 M 294, 632 P2d 1136, 38 St. Rep. 1474 (1981).

Failure of Jury to Fix Monetary Value on Actual Damages Not to Preclude Exemplary Damages: The failure of a jury to fix a monetary value as plaintiff's damages does not of necessity indicate an absence of actual damages so as to preclude an award of exemplary damages. Although the precise extent of damages attributable to the destruction of physical evidence by defendant may be elusive, an identifiable basis for actual damages exists which arises from the deprivation to plaintiff of tests and results necessary to prove his case. Lauman v. Lee, 192 M 84, 626 P2d 830, 38 St. Rep. 499 (1981).

Fraud in Purchase: The jury was clearly within its province in awarding punitive damages where there was substantial evidence of fraud on the part of real estate agent's use of multiple corporate identities in purchase of motel. Flemmer v. Ming, 190 M 403, 621 P2d 1038, 37 St. Rep. 1916 (1980).

Malicious Acts — Reckless Disregard: When the acts complained of are shown to be malicious, wanton, or oppressive and of such character as to indicate a reckless disregard for the rights of the plaintiff, the jury, in its discretion, may award a reasonable amount as punitive damages, in addition to compensatory damages. Butcher v. Petranek, 181 M 358, 593 P2d 743 (1979). (See 1987 amendment.)

Punitive Damage Instruction Denied: The lower court correctly refused plaintiffs' instruction regarding punitive damages, since there was no evidence of actual or implied malice on the part of defendants. Ferguson v. Town Pump, 177 M 122, 580 P2d 915 (1978). See also Gee v. Egbert, 209 M 1, 679 P2d 1194, 41 St. Rep. 515 (1984). (See 1987 amendment.)

Punitive Damages Instruction — Implied Malice: The trial court did not err in giving an instruction on implied malice that advised the jury that it is not necessary to show actual malice to recover punitive damages or in giving an instruction on punitive damages when it was clear from the record and a pretrial order that plaintiffs were bringing this case in tort, separate and distinct from any action arising out of contract. Harrington v. Holiday Rambler Corp., 176 M 37, 575 P2d 578 (1978). (See 1987 amendment.)

Matters for Jury to Consider in Assessing:

The rule that where exemplary damages are sought, the jury may take into consideration the pecuniary ability of defendant to pay, as shown by the evidence, applies in an action against joint tortfeasors; in such a case the jury may make awards of such damages in different amounts according to the various degrees of culpability of each defendant, keeping in mind the financial condition of each. Edquest v. Tripp & Dragstedt Co., 93 M 446, 19 P2d 637 (1933). See also Stensvad v. Towe, 232 M 378, 759 P2d 138, 45 St. Rep. 1129 (1988).

In assessing exemplary damages, the jury should take into consideration all the circumstances surrounding the act complained of and may consider the wealth and pecuniary ability of defendant, the matter of fixing the amount resting largely in its discretion. Johnson v. Horn, 86 M 314, 283 P 427 (1929).

Law Review Articles

BMW of North America, Inc. v. Gore: A Trial Judge's Guide to Jury Instructions and Judicial Review of Punitive Damage Awards, Harkin, 60 Mont. L. Rev. 367 (1999).

Intentional Infliction of Mental Distress in Montana, Tobias, 57 Mont. L. Rev. 99 (1996).

Insurance Coverage of Punitive Damages in Montana, Stanaway, 46 Mont. L. Rev. 77 (1985).

Employment At-Will, Wrongful Discharge, and the Covenant of Good Faith and Fair Dealing in Montana, Past, Present, and Future, Hopkins & Robinson, 46 Mont L. Rev. 1 (1985).

The Continuing Development of the Tort of Bad Faith in Montana, Graham & Luck, 45 Mont. L. Rev. 43 (1984).

Contract Damages in Montana Part II: Reliance and Restitution, Burnham, 45 Mont. L. Rev. 1 (1984).

Contract Damages in Montana Part I: Expectancy Damages, Burnham, 44 Mont. L. Rev. 1 (1983).

Punitive Damages on Ordinary Contracts, Lee, 42 Mont. L. Rev. 93 (1981).

An Insurer's Liability for the Tort of Bad Faith, Harman, 42 Mont. L. Rev. 67 (1981).

Standards for Limiting the Tort of Bad Faith Breach of Contract, Louderback, 16 U.S.F.L. Rev. 187 (1982).

The Tort of Bad Faith Breach of Contract: When, If At All, Should It Be Extended Beyond Insurance Transactions?, Diamond, 64 Marq. L. Rev. 425 (1981).

Collateral References

Damages *key* 87 through 94.

25 C.J.S. Damages §§195 through 217.

22 Am. Jur. 2d Damages §539, et seq.

Exemplary or punitive damages for pharmacist's wrongful conduct in preparing or dispensing medical prescription—cases not under Consumer Product Safety Act (15 U.S.C.A. §2072). 109 ALR 5th 397.

Availability and scope of punitive damages under state employment discrimination law. 81 ALR 5th 367.

Allowance of punitive damages in medical malpractice action. 35 ALR 5th 145.

Intoxication of automobile driver as basis for awarding punitive damages. 33 ALR 5th 303.

Excessiveness or inadequacy of punitive damages in cases not involving personal injury or death. 14 ALR 5th 242, §48 superseded by 86 ALR 5th 397.

Standard of proof as to conduct underlying punitive damage awards—modern status. 58 ALR 4th 878.

Credit life insurer's punitive damage liability for refusing payment. 55 ALR 4th 246.

Liability of successor corporation for punitive damages for injury caused by predecessor's product. 55 ALR 4th 166.

Punitive damages as within coverage of uninsured or underinsured motorist insurance. 54 ALR 4th 1186.

Discovery of defendant's sales, earnings, or profits on issue of punitive damages in tort action. 54 ALR 4th 998.

Excessiveness or inadequacy of compensatory damages for malicious prosecution. 50 ALR 4th 843.

Punitive damages for interference with contract or business relationship. 44 ALR 4th 1078.

Sufficiency of showing of actual damages to support award of punitive damages—modern cases. 40 ALR 4th 11.

Evidence of defendant's rehabilitation or reformation as relevant on issue of punitive damages. 39 ALR 4th 1122.

Claim for punitive damages in tort action as surviving death of tortfeasor or person wronged. 30 ALR 4th 707.

Effect of plaintiff's comparative negligence in reducing punitive damages recoverable. 27 ALR 4th 318.

Insurer's tort liability for consequential or punitive damages for wrongful failure or refusal to defend insured. 20 ALR 4th 23.

Recovery of punitive damages in action by purchasers of real property charging fraud or misrepresentation. 19 ALR 4th 801.

Liability insurance coverage as extending to liability for punitive or exemplary damages. 16 ALR 4th 11.

Derivative liability of partner for punitive damages for wrongful act of copartner. 14 ALR 4th 1335.

Allowance of punitive damages in action against attorney for malpractice. 14 ALR 4th 95.

Propriety of awarding punitive damages to separate plaintiffs bringing successive actions arising out of common incident or circumstances against common defendant or defendants ("one bite" or "first comer" doctrine). 11 ALR 4th 1261.

Application of comparative negligence in action based on gross negligence, recklessness, or the like. 10 ALR 4th 946.

Allowance of punitive damages in action for slander of title or disparagement of property. 7 ALR 4th 1219.

Liability of surety on private bond for punitive damages. 2 ALR 4th 1254.

Recovery of exemplary or punitive damages from municipal corporation. 1 ALR 4th 448.

Criminal liability as barring or mitigating recovery of punitive damages. 98 ALR 3d 870.

Defendant's state of mind necessary or sufficient to warrant award of punitive damages in action for false arrest or imprisonment. 93 ALR 3d 1109.

Recoverability of punitive damages in action by insured against liability insurer for failure to settle claim against insured. 85 ALR 3d 1211.

Arbitrator's power to award punitive damages. 83 ALR 3d 1037.

Admissibility on defendant's behalf, as matter in mitigation of punitive damages, of evidence as to his lack of financial resources. 79 ALR 3d 1138.

Measure and elements of buyer's recovery upon revocation of acceptance of goods under U.C.C. §2-608(1). 65 ALR 3d 388.

What constitutes malice sufficient to justify an award of punitive damages in action for wrongful attachment or garnishment. 61 ALR 3d 984.

Allowance of punitive damages for invasion of common-law rights in literary property. 40 ALR 3d 248.

Attorneys' fees or other expenses of litigation as element in measuring exemplary or punitive damages. 30 ALR 3d 1443.

Spouse's or parent's right to recover punitive damages in connection with recovery of damages for medical expenses or loss of services or consortium arising from personal injury to other spouse or to child. 25 ALR 3d 1416.

Exemplary damages in action against telephone company for mistake in or omission from its directory. 92 ALR 2d 925.

Principal's liability for punitive damages for false arrest or imprisonment caused by agent or servant. 92 ALR 2d 37.

Right of principal to recover punitive damages for agent's or broker's breach of duty. 67 ALR 2d 952.

Right to punitive or exemplary damages in action for personal injury caused by operation of automobile. 62 ALR 2d 813.

Sleeping-car company's liability for punitive damages for employee's assault upon passenger. 60 ALR 2d 1115.

Punitive damages for conversion of personalty. 54 ALR 2d 1361.

Punitive damages for pollution of stream. 49 ALR 2d 311.

Exemplary damages as recoverable for trade-mark infringement or unfair competition. 47 ALR 2d 1117.

Punitive damages as recoverable for attorney's negligence with respect to maintenance or prosecution of litigation or appeal. 45 ALR 2d 69.

Extensiveness or inadequacy of damages for alienation of affections or criminal conversation. 36 ALR 2d 551.

Exemplary damages on account of personal injury to infant as belonging to him or to parents. 32 ALR 2d 1079.

Exemplary damages in action for tenant's failure to surrender possession of rented premises. 32 ALR 2d 611.

Punitive or exemplary damages in action by spouse for alienation of affections or criminal conversation. 31 ALR 2d 713.

Punitive damages for wrongful ejection or rejection of guest from hotel or restaurant. 14 ALR 2d 715.

27-1-222. Exemplary damages for inhumane injuries to animals.

Compiler's Comments

1995 Amendment: Chapter 206 inserted (2) including ostriches, rheas, and emus as animals.

Applicability: Section 14, Ch. 206, L. 1995, provided: "[This act] applies to tax years beginning after December 31, 1995."

Case Notes

No Implied Contract Agister's Lien Absent Custody or Control of Cattle: Bellanger obtained loans from the Daniels-Sheridan Federal Credit Union to finance a ranching operation, securing the loans with several promissory notes securing an interest in the cattle on the ranch. Bellanger

subsequently defaulted on the loans, and the credit union initiated an action to enforce the promissory notes pursuant to the Uniform Commercial Code. The case broadened to encompass a dispute over proceeds from the sale of the cattle to include Bellanger's father Alfred, who asserted an agister's lien for having kept the cattle on his property. The cattle were subsequently seized and sold for $79,012.27, and the District Court split the proceeds, with $45,467.94 paid to the credit union and a judgment for the remainder owed on the promissory notes and $33,544.33 paid to the owner of the auction company where Bellanger customarily sold cattle, but Alfred and Bellanger were foreclosed of all interest in the proceeds. On appeal, Alfred asserted that his agister's lien should have entitled him to some of the proceeds. Alfred contended that an agister's lien was commenced via an implied contract when the credit union obtained a preliminary injunction against removal or sale of the cattle, which required Alfred to care for the cattle on his property, pursuant to 45-8-211, 70-6-206, and this section. The Supreme Court affirmed the District Court's finding that because Alfred never had custody or control of the cattle, allowing Bellanger to run the cattle on the property rent-free in exchange for looking after Alfred's cattle, the statutory duties upon which Alfred relied in support of an implied contract agister's lien were inapplicable. The court declined to recognize any manner for the creation of an agister's lien except as provided in 71-3-1201. Daniels-Sheridan Fed. Credit Union v. Bellanger, 2001 MT 235, 307 M 22, 36 P3d 397 (2001).

Logging Truck Collision With Cattle: In an action for damages resulting from collision of plaintiffs' logging truck with defendant's cattle, in which defendant cross complained for loss of cattle and exemplary damages, an award of $2,500 exemplary damages for loss of 20 head of cattle was not improper. Franck v. Hudson, 140 M 480, 373 P2d 951 (1962).

Jury's Province: Under this section it is within the province of the jury to fix the amount of exemplary damages, and the Supreme Court will not interfere with such a determination unless it appears to have been influenced by passion, prejudice, or some improper motive. Franck v. Hudson, 140 M 480, 373 P2d 951 (1962).

Collateral References

Animals *key* 44, 85; Damages *key* 91(1).

3A C.J.S. Animals §234; 25 C.J.S. Damages §291.

4 Am. Jur. 2d Animals §§162, 163.

Recovery of damages for emotional distress due to treatment of pets and animals. 91 ALR 5th 545.

Damages for killing or injuring dog. 61 ALR 5th 635, superseded in part by 91 ALR 5th 545.

Measure, elements, and amount of damages for killing or injuring cat. 8 ALR 4th 1287.

27-1-223. Damages for injuries or death inflicted in a duel.

Collateral References

Assault and Battery *key* 38, 40; Death *key* 14(1), 78.

25A C.J.S. Death §§23, 95.

Part 3
Measure of Damages

Part Case Notes

Violation of Federal Railroad Safety Regulations Negligence Per Se — Evidence of Contributory Negligence Disallowed: Railroad employee Woods accompanied track supervisor Holloway to inspect a section of track. Holloway exceeded the authorized limits of the track warrant and proceeded another 4 miles down the track where the inspection vehicle was struck by a train and Woods was killed. Following an investigation, the railroad concluded that Holloway's violation of the working limits caused Woods's death. Woods's widow moved for partial summary judgment that the railroad was negligent per se, but the motion was denied. The widow then requested a ruling that Woods was not contributorily negligent, but the motion was denied as untimely. The jury found that Woods was 50% negligent, and the award to the widow was reduced by half. On appeal, the Supreme Court reversed. The Federal Employers' Liability Act (FELA) governing the case is a remedial statute, the specific intent of which is to prevent railroad accidents and casualties. Federal railroad administration regulations are reviewed and construed as a comprehensive scheme of protection for railroad workers, and an interpretation of federal railroad administration regulations that leads to an unreasonable or absurd result will be rejected in favor of an interpretation that leads to a reasonable result. To conclude that federal railroad administration regulations define working limits but do not prohibit exceeding them would lead to an absurd result. Thus, the trial court erred in concluding that violation of the working limits of the track warrant was not negligence per se. FELA also

provides that an employee will not be held liable for contributory negligence when a railroad's violation of any statute enacted for the safety of employees contributed to an employee's injury or death, and the restriction against the use of contributory negligence as a defense applies to regulation violations as well, so it was also error for the trial court to allow the railroad to argue Woods's contributory negligence. The case was remanded for judgment reinstating the entire jury award. Woods v. Burlington N. & Santa Fe Ry., 2004 MT 332, 324 M 151, 104 P3d 1037 (2004), following Bevacqua v. Union Pac. RR Co., 1998 MT 120, 289 M 36, 960 P2d 273 (1998).

Damages Proper for Delayed Sale of Property Blocked by Void Zoning Ordinance: Plaintiffs bought property for investment purposes, but the sale was blocked by a county zoning ordinance that was subsequently found to be void for vagueness. Despite the fact that plaintiffs had no actual contract to sell the property, the District Court held that plaintiffs were entitled to lost interest that they would have received had a sale occurred as planned and that plaintiffs did not fail to mitigate their damages. After examining the record, the Supreme Court held that the damage award was not an abuse of discretion. Yurczyk v. Yellowstone County, 2004 MT 3, 319 M 169, 83 P3d 266 (2004). See also Sletteland v. Roberts, 2000 MT 382, 304 M 21, 16 P3d 1062 (2000).

State Agricultural Lease — Negligent Misrepresentation That State Land Available for Lease — Lost Profits Not Recoverable: The Department of Natural Resources and Conservation (DNRC) informed Bokma Farms, Inc. (Bokma), by telephone and certified letter that certain agricultural property was available for lease after Maclean failed to make a lease payment to the DNRC. Bokma made expenditures in reliance upon the DNRC's statement that the property was available for lease. The DNRC later determined that Maclean did make the lease payment and therefore renewed the lease with Maclean. Bokma sued the DNRC, alleging breach of contract and negligent misrepresentation, and asked for damages for lost profits. The Supreme Court held that the District Court properly dismissed the breach of contract claim because no lease had been signed. The Supreme Court also held, citing the Restatement (Second) of Torts 552B (1976), that although damages for lost profits may be awarded as consequential damages for negligent misrepresentation, lost profits could not be awarded in this case because the loss of profits was not caused by the misrepresentation but by the fact that Bokma did not have an enforceable lease with the DNRC. Bokma Farms, Inc. v. St., 2000 MT 298, 302 M 321, 14 P3d 1199, 57 St. Rep. 1253 (2000).

Insurance Reimbursement Under Contract Obligation: A lease agreement required the lessee to keep the building insured against loss or damage by fire. Under its sublease, a sublessee undertook this responsibility to provide fire insurance. Following destruction of the property by fire, the sublessee's insurance provided sufficient money to the lessor to rebuild the property and to the sublessee to purchase replacement equipment. The lessor sought additional money from the original lessee to recover the cost of removing and replacing the building and the rental income lost while the building was being rebuilt. The trial court properly held that the payment to the lessor under insurance purchased by the sublessee should be credited against the tort liability of the lessee. Five U's, Inc. v. Burger King Corp., 1998 MT 216, 290 M 452, 962 P2d 1218, 55 St. Rep. 906 (1998).

Lost Rental Income Not Recoverable When Contract Provides Payment Abatement: A lease agreement required the lessee to keep the building insured against loss or damage by fire. Under its sublease, a sublessee undertook this responsibility to provide fire insurance. Following destruction of the property by fire, the sublessee's insurance provided sufficient money to the lessor to rebuild the property and to the sublessee to purchase replacement equipment. The lessor sought additional money for damages for loss of rentals while the property was being rebuilt, based on the sublessee's liability in causing the fire. However, the lease contained a rent abatement clause for periods during which the property was rendered unusable, making no distinction as to the cause of a fire. The clear language of the contract required rent to abate regardless of whether the fire was caused by events unrelated to the lessee's negligence, so the claim for damages for lost rental income was properly denied. Five U's, Inc. v. Burger King Corp., 1998 MT 216, 290 M 452, 962 P2d 1218, 55 St. Rep. 906 (1998).

FELA — Stipulation That Jury Awards Not Be Added Together — Greater Award Subsuming Smaller Awards: Under the Federal Employers' Liability Act (FELA), 45 U.S.C. 51 through 60, an injured railroad worker is entitled to recover damages if the negligence of the railroad played any part, no matter how slight, in causing the injury or death for which damages are sought. In the present case, the jury found independent railroad negligence and causation in each of three work-related incidents that played a part in the condition of Bevacqua's knee. Under FELA, Bevacqua was entitled to judgment of $200,000 for a 1973 injury, $320,000 for a 1980 injury, and $40,000 for a 1990 injury. However, the parties stipulated that the jury awards for each incident

would not be added together, precluding any double recovery. The Supreme Court held that Bevacqua was entitled to $320,000, the greatest of the jury awards, and that under the terms of the stipulation, the smaller awards were subsumed in the greater award. Bevacqua v. Union Pac. RR Co., 1998 MT 120, 289 M 36, 960 P2d 273, 55 St. Rep. 469 (1998), following Rogers v. Mo. Pac. RR Co., 352 US 500, 1 L Ed 2d 493, 77 S Ct 443 (1957).

No Damages for Loss of Established Way of Life: Although evidence was conflicting, the jury properly denied an award of damages for loss of established way of life to plaintiffs whose restaurant was destroyed in a natural gas explosion upon a showing that: (1) the restaurant never did more than break even since it was purchased; (2) plaintiffs paid their living expenses from proceeds received from the sale of another cafe; (3) the restaurant lost $53,667 in the period immediately preceding the explosion; (4) plaintiffs never received a salary the entire time the restaurant was operating; and (5) plaintiff was required to leave the restaurant business because of a preexisting heart condition and high blood pressure. Day v. Mont. Power Co., 242 M 195, 789 P2d 1224, 47 St. Rep. 626 (1990).

Unjust Enrichment — Misconduct by Defendant Required — Denial of Restitution to Defaulting Purchaser: Upon default by purchasers, seller resold the property. Purchasers sought restitution, contending it was unfair to allow seller to be unjustly enriched by selling the property twice. However, restitution is normally denied to a defaulting purchaser. (See *Contract Damages in Montana Part II: Reliance and Restitution*, Burnham, 45 Mont. L. Rev. 1 (1984).) Further, in order for the equitable doctrine of unjust enrichment to apply, plaintiff must show some element of misconduct or fault on the part of defendant. Schweigert v. Fowler, 240 M 424, 784 P2d 405, 47 St. Rep. 1 (1990).

Damaged Party to Mitigate Damages — Reasonable Expectations: A damaged party is only expected to do what is reasonable under the circumstances to mitigate his damages and need not embark on a course of action that may cause further detriment to him. Romain v. Earl Schwartz Co., 238 M 500, 779 P2d 54, 46 St. Rep. 1450 (1989).

Breach of Contract — Cause of Damages Not Proven: The District Court properly found that an oral agreement to cut and bale the first crop of hay by July 10 was breached since the work was not completed until July 20. However, the delay was not proven to be the cause of the failure to get a second crop. Despite the breach of contract, failure to award damages was proper. Burns v. Hinman, 229 M 62, 744 P2d 879, 44 St. Rep. 1782 (1987).

Verdict of Zero Damages — No Abuse of Discretion: In a wrongful termination suit against newspaper, reporter Dawson appealed a District Court award of zero damages after the jury found in his favor on the issues of liability and proximate cause. The Supreme Court affirmed, ruling that although the newspaper had breached its duty of good faith and fair dealing and was the proximate cause of Dawson's damages, the reporter had three other sources of income and had failed to mitigate his damages by accepting comparable journalism work. Thus, the jury was justified in awarding zero damages. Dawson v. The Billings Gazette, 223 M 415, 726 P2d 826, 43 St. Rep. 1838 (1986), distinguished in Martinell v. Mont. Power Co., 268 M 292, 886 P2d 421, 51 St. Rep. 1329 (1994).

Overgrazing Damages Remanded — No Offset — Open Range Law: The District Court ruled that Helehan was liable for $3,000 in overgrazing damages caused to Ueland's property by horses allowed on Helehan's land and that Ueland was not entitled to reimbursement for a $3,000 fence. The court offset these amounts. The Supreme Court remanded, finding that the costs did not offset since damages flowed from Helehan to Ueland but not from Ueland to Helehan. However, the error was harmless since under Montana's open range law Helehan could not be legally obligated to restrain the horses and could not be held liable for damages occurring prior to the time the fence was built. Helehan v. Ueland, 223 M 228, 725 P2d 1192, 43 St. Rep. 1679 (1986).

Plaintiff's Refusal of Settlement — Not Relevant to Mitigation of Damages or to Defendant's Intent: The District Court properly excluded evidence of defendant's offer to compromise and settle plaintiff's claim. The court was not persuaded by defendant's argument that refusing a settlement offer is a failure to mitigate damages and that the offer showed defendant did not seek to act towards plaintiff in an oppressive or retaliatory fashion. Tribby v. NW. Bank of Great Falls, 217 M 196, 704 P2d 409, 42 St. Rep. 1133 (1985).

Old Well-Casing Valuation — Evidence Unavailable or Vague — Reasonable Valuation Attempt Affirmed: The District Court found that defendants were entitled to receive from a plaintiff the present value of casing in place in a well less the cost of removing it. The court stated that evidence of the value of the casing was "sketchy", that the casing was 17 years old, and that the cost of removal was speculative. In view of the difficulty in ascertaining the value of the casing, the lower court adopted a reasonable method and amounts based on the evidence of

experts before the court. The award was affirmed. Edington v. Creek Oil Co., 213 M 112, 690 P2d 970, 41 St. Rep. 1990 (1984).

Reentry by Lessee Following Termination of Lease — Willful Trespass: Oil and gas lease contained a provision that if production and operations were stopped and lessee did not resume them within 90 days, the lease was terminated. Production and operations were stopped and not resumed until years later, at a time when the lease had terminated and lessor had granted a lease to someone else. Lessee was a willful trespasser in entering and recommencing drilling as lessee knew the lease had expired by its own terms. Lessee thus was not entitled to proceeds from the oil produced after the reentry or to cost of producing the oil. Edington v. Creek Oil Co., 213 M 112, 690 P2d 970, 41 St. Rep. 1990 (1984).

Reduction to Present Value of Amount Due Over Time: Court ordered contract for sale of ranch rescinded at request of seller. The buyers had already resold parts of the ranch to third parties at sums to be paid over a period of time and totaling $249,345. The lower court ordered that the full $249,345 due first buyers over time be tendered by first buyers to first seller as a setoff against the money first buyers had paid to first seller, which court ordered first seller to return to first buyers. The ordered setoff was erroneous as to amount, and the case was remanded for a determination of the present value of the amounts owing to appellants, which figure would be the proper setoff. Deist v. Wachholz, 208 M 207, 678 P2d 188, 41 St. Rep. 286 (1984).

Unjust Enrichment Measure of Damages — Quantum Meruit or Value of Enhancement to Land: Where the plaintiffs failed to make a final payment to the defendant under a lease of property upon which the plaintiffs expended considerable time and effort to grow wheat and the defendant wrongfully terminated the lease, the District Court erred in awarding damages to the plaintiffs consisting of a composite of enhanced land value, custom work, fixed costs, and/or crop value. The measure of damages for unjust enrichment is either the quantum meruit value of the plaintiffs' labor or the value of the enhancement to the defendant's property, whichever is greater. In this case the total unjust enrichment as measured by the enhancement to the defendant's property was more than the quantum meruit measure of unjust enrichment, but both measures of damages cannot be used. The damages awarded to the plaintiffs were therefore reduced. Robertus v. Candee, 205 M 403, 670 P2d 540, 40 St. Rep. 1391 (1983), followed in Storms v. Bergsieker, 254 M 130, 835 P2d 738, 49 St. Rep. 655 (1992).

Unjust Enrichment — Recovery for Repudiated Contract Not Barred by Statute of Frauds: Where the plaintiffs failed to make a final payment to the defendant under a lease of property upon which the plaintiffs had spent considerable time and effort to grow wheat and the defendant thereafter wrongfully terminated the lease and retained the proceeds from the sale of plaintiffs' crop, the District Court erred in holding the plaintiffs' claim of unjust enrichment barred by the Statute of Frauds. Where one party repudiates a contract or breaches it by nonperformance, the injured party may seek restitution of the unjust enrichment whether the Statute of Frauds applies or not. Here the defendant breached the lease, and the theory of unjust enrichment applies. Robertus v. Candee, 205 M 403, 670 P2d 540, 40 St. Rep. 1391 (1983).

Valuation of Plaintiffs' Work in Unjust Enrichment Claim — Substantial Evidence Found: Where the plaintiffs brought an action for damages against the defendant on the theory of unjust enrichment of the defendant by the plaintiffs' work in breaking and planting land leased to them by the defendant, the Supreme Court found that there was substantial evidence to support the District Court's valuation of the plaintiffs' groundbreaking work. The trial court properly considered the plaintiffs' expert testimony and exhibits, which were based on assumptions in evidence, and properly considered the profit margin included in the plaintiffs' calculations. Under the rationale of Cameron v. Cameron, 179 M 219, 587 P2d 939 (1978), the court refused to disturb the District Court findings because they were based on substantial, though conflicting, evidence. Robertus v. Candee, 205 M 403, 670 P2d 540, 40 St. Rep. 1391 (1983).

Duty to Mitigate Damages — Procedure at Trial: A nondefaulting party in a contractual arrangement must act reasonably under the circumstances so as not to unnecessarily enlarge damages caused by a default. Whether the duty to mitigate damages was violated is for the trier of fact when the evidence conflicts, and the Supreme Court's function is to review the record to determine if there is substantial credible evidence to support the trial court's finding. Since the trial court's order and supporting memo did not include findings on the duty to mitigate or the reasonableness of the nondefaulting party's actions in consuming or destroying wine he did not sell after wine broker terminated wine distributorship contract, the damages award to nondefaulting party for unsold wine it consumed or destroyed was vacated and the issue remanded for further consideration. Bronken's Good Time Co. v. J. W. Brown & Associates, 203

M 427, 661 P2d 861, 40 St. Rep. 549 (1983), followed in Fordyce v. Musick, 245 M 315, 800 P2d 1045, 47 St. Rep. 2137 (1990).

Mitigation of Damages — Financial Inability to Mitigate: The duty to mitigate damages does not require an injured party to do that which is unreasonable or impracticable; consequently, when expenditures are necessary for minimization of damages, the duty does not apply to a party who is financially unable to make such expenditures. McPherson v. Kerr, 195 M 454, 636 P2d 852, 38 St. Rep. 2021 (1981), expressly overruling that portion of Stahl v. Farmer's Union Oil Co. of Richland, 145 M 106, 399 P2d 763 (1965), which declares that recovery cannot be had for damages accruing as a result of injured party's financial inability to mitigate damages.

Effect of Inflation on Damages: Where the effect of inflation on damages arising from defects in a modular home purchased from defendant consisted of testimony that as inflation made the value of the house go up it also increased the discrepancy in value caused by the defects, and there was no testimony on the percentage rate of inflation, the jury must have considered the effects of inflation, since it reached a $9,000 verdict in the face of evidence of a $3,000 cost of repairs and a $5,000 diminution in value as of 1979, approximately 2 years before trial. There was insufficient evidence on which inflation could be considered, and error occurred. Little v. Grizzly Mfg., 195 M 419, 636 P2d 839, 38 St. Rep. 1994 (1981).

Compensation for Loss of Capacity to Pursue an Established Career: A plaintiff who has been permanently injured as a result of the negligence of the defendant may recover such sum as will compensate him reasonably for the destruction of his capacity to pursue an established course of life as an element of damages distinct from plaintiff's loss of earning capacity. Johnson v. U.S., 510 F. Supp. 1039, 38 St. Rep. 599 (D.C. Mont. 1981).

Measure for Pain and Suffering Within Discretion of Fact Finder: In personal injury actions there is no measuring stick by which to determine the amount of damages to be awarded for pain and suffering other than the intelligence of a fair and impartial trier of fact governed by a sense of justice; each case must of necessity depend upon its own peculiar facts. Johnson v. U.S., 510 F. Supp. 1039, 38 St. Rep. 599 (D.C. Mont. 1981).

Recovery for Expenses of Future Medical Treatment: In a trial on the issue of damages where plaintiff suffered severe physical damage causing him to be a quadriplegic, the court found that the plaintiff is entitled to recover the reasonable value of necessary expenses for any medical, surgical, hospital, and other services, care, and supplies that the finder of fact determines to be reasonably certain to be required in the future in the treatment of the plaintiff as the proximate result of the injury in question. In this case, the jury awarded compensation for 12 hours a day as reasonable compensation even though the plaintiff required 24-hour care. Johnson v. U.S., 510 F. Supp. 1039, 38 St. Rep. 599 (D.C. Mont. 1981).

Present Cash Value of Future Damages: On the issue of damages in a personal injury action, the finder of fact must reduce future damages to the present cash value of such an amount and award the present cash value of such future damages. Johnson v. U.S., 510 F. Supp. 1039, 38 St. Rep. 599 (D.C. Mont. 1981).

When Profits on Collateral Contract Recoverable: The purchaser of an old log cabin claimed on appeal that he lost resale profits because of the actions of the seller. The Supreme Court found the sale agreement was informal and oral. No resale of the cabin was mentioned by the purchaser at that time. The purchaser did not at that time have an agreement to resell the cabin and did not inform the seller that he wanted to resell or that he actually was going to resell. The court cited the general rule that gains or profits of collateral enterprises or subcontracts are as a rule too speculative and contingent to afford an element of recovery in the case of a breach of the primary contract. At trial, the only testimony concerning the intention of the purchaser when he bought the cabin was his intention to move it. Damages must be within the contemplation of the parties when they enter the contract and be such damages as might be expected to result naturally from a breach. Without testimony that the seller should have contemplated a resale of the cabin here, the purchaser could not recover for the loss of profits from a collateral sale contract. Jeffery v. Neville, 190 M 300, 620 P2d 1218, 37 St. Rep. 1983 (1980).

Market Value as Measure of Damage: A person whose personal property is totally destroyed by the act of another is entitled to no more than damages for the market value of the property plus loss of use during the period reasonably required to replace it. Cuddy v. U.S., 489 F. Supp. 390 (D.C. Mont. 1980).

27-1-302. Damages to be reasonable.

Case Notes

Jury Award Based on Contested Expenses — Sufficient Evidence to Support Verdict: Plaintiffs asserted that a new trial was warranted because the jury in a personal injury case

returned a verdict of $9,873, which amounted to significantly less than plaintiffs' evidence of past and future medical expenses, loss of past and future wages, and pain and suffering. However, the District Court denied a new trial, and the Supreme Court affirmed, noting that if a jury award is insufficient to cover uncontested expenses, then it is not supported by substantial evidence, but that was not the case here. Evidence presented by both parties revealed a significant dispute in the nature, cause, and severity of the injury, the need for future treatment, the existence and amount of past and future wage loss, and pain and suffering. Based on the record of disputed expenses, there was substantial evidence to support the jury award, and the Supreme Court declined to retry the case or disturb the judgment, especially when the District Court had already upheld the sufficiency of the evidence on motion for a new trial. Jenks v. Bertelsen, 2004 MT 50, 320 M 139, 86 P3d 24 (2004).

Damages Proper for Delayed Sale of Property Blocked by Void Zoning Ordinance: Plaintiffs bought property for investment purposes, but the sale was blocked by a county zoning ordinance that was subsequently found to be void for vagueness. Despite the fact that plaintiffs had no actual contract to sell the property, the District Court held that plaintiffs were entitled to lost interest that they would have received had a sale occurred as planned and that plaintiffs did not fail to mitigate their damages. After examining the record, the Supreme Court held that the damage award was not an abuse of discretion. Yurczyk v. Yellowstone County, 2004 MT 3, 319 M 169, 83 P3d 266 (2004). See also Sletteland v. Roberts, 2000 MT 382, 304 M 21, 16 P3d 1062 (2000).

Jury Finding That Accident Did Not Result in Injury Supported by Substantial Evidence: Ele alleged that he was injured in a low-impact motor vehicle accident for which Ehnes admitted liability. The jury, however, found that Ele was not injured as a result of the accident, and Ele appealed, requesting that the zero damage award be set aside, in part based on a medical bill from the emergency room where Ele went after the accident and on the fact that Ehnes failed to refute the attending physician's testimony that Ele was injured and sustained damages. The Supreme Court declined to disturb the jury decision. The emergency room bill was not direct evidence that the visit was caused by the accident, but merely showed that Ele went to the emergency room. Also, notwithstanding that the physician found evidence of injury, the doctor's testimony showed that he was not aware of Ele's preexisting medical condition. Further, testimony at trial from several of Ele's coworkers showed that Ele had engaged in numerous activities following the accident that Ele later testified he was unable to do because of pain. It is the trier of fact that weighs the credibility of witnesses, and there was sufficient credible evidence for the jury to conclude that Ele had prior back problems and could do more than he claimed, that the doctor's opinion relied on an inaccurate medical history supplied by Ele, and that the accident was so minor that Ele suffered no injury necessitating an emergency room visit. Ele v. Ehnes, 2003 MT 131, 316 M 69, 68 P3d 835 (2003), following Magart v. Schank, 2000 MT 279, 302 M 151, 13 P3d 390 (2000), and distinguishing Thompson v. Bozeman, 284 M 440, 945 P2d 48 (1997), and Renville v. Taylor, 2000 MT 217, 301 M 99, 7 P3d 400 (2000).

Failure by Insurer to Present Facts to Controvert Testimony That Ongoing Medical Expenses Causally Related to Accident — Declaratory Judgment Proper: In Renville v. Taylor, 2000 MT 217, 301 M 99, 7 P3d 400 (2000), the Supreme Court held that defendant insurer was liable for all expenses related to a collision involving Renville and remanded for a new trial on the issue of damages. Renville then asked the District Court for a declaratory judgment ordering defendant to pay for ongoing medical expenses incurred by Renville subsequent to trial. The District Court denied the request on grounds that factual issues existed regarding Renville's ongoing medical expenses that required resolution by a jury. Renville appealed, asserting that the court failed to follow the law of the case, and the Supreme Court agreed and reversed. Although an insurer is entitled to dispute its obligation to pay medical expenses, there must be a factual basis for doing so. Here, defendant insurer refused to pay Renville's ongoing medical expenses because the expenses were allegedly not causally related to the collision; however, the insurer failed to present any evidence to controvert Renville's expert testimony on causation, choosing instead to rely on testimony from the first trial that had been disregarded by the jury and that was not relevant to the issue of ongoing medical expenses. Thus, the District Court erred in failing to grant Renville's motion for declaratory judgment, and defendant insurer was required to pay Renville's ongoing medical expenses pursuant to Ridley v. Guarantee Nat'l Ins. Co., 286 M 325, 951 P2d 987 (1997), and the law of the case. Renville v. Farmers Ins. Exch., 2003 MT 103, 315 M 295, 69 P3d 217 (2003).

Damages for City's Wrongful Delay in Approving Preliminary Subdivision Plat: Plaintiff subdivider's certified valuation analyst presented evidence that because of the city's delay of its decision on an application for preliminary plat approval, the subdivider lost investment value of

funds, and the subdivider testified that its property was devalued because of a decline in market value and that the subdivider incurred costs from the delay and suffered lost future investment value. The city claimed that the damages award should be modified. The Supreme Court concluded that the conditional plat approval ordered by the court should not eliminate or reduce the damages award and that it was not error for the District Court to decline to adjust the award. Kiely Constr. v. Red Lodge, 2002 MT 241, 312 M 52, 57 P3d 836 (2002).

Jury Award of Compensatory Damages Proportionate to Posttraumatic Stress Injuries — Affirmed: Onstad was assaulted on the job and sued the employer, Payless Shoesource (Payless), for failure to provide a safe workplace. The jury held Payless liable and awarded Onstad $500,000 in compensatory damages. On appeal, Payless contended that the award was excessive and unsupported by the evidence. However, Onstad was entitled to reasonable compensation for any pain and suffering that she experienced and would reasonably probably experience in the future, and the law does not set a definite standard by which to calculate compensation for mental pain and suffering. Only when the amount awarded is so grossly out of proportion as to shock the conscience will an appellate court intervene. In this case, Onstad was terrified during the attack and subsequently became withdrawn; her sense of safety, security, and self was violated; she felt extremely powerless; and her whole sense of self-esteem and self-confidence was affected. The amount of compensatory damages awarded was not so grossly disproportionate to Onstad's posttraumatic stress injury as to shock the conscience, and the Supreme Court declined to alter the award. Onstad v. Payless Shoesource, 2000 MT 230, 301 M 259, 9 P3d 38, 57 St. Rep. 943 (2000).

No Error in Failure of Trial Court to Detail From Bench Its Analysis of Statutory Factors Regarding Award of Punitive Damages: Onstad was assaulted on the job and sued the employer, Payless Shoesource (Payless), for failure to provide a safe workplace. The jury held Payless liable and awarded Onstad $500,000 in compensatory damages, plus an additional $1 million in punitive damages. On appeal, Payless contended that the trial court erred in approving punitive damages, asserting that Onstad did not prove actual malice, thereby failing to establish a necessary foundation for punitive damages, and that the court failed to adequately review the support for the award by enumerating from the bench its consideration of the statutory factors for approving punitive damages. The Supreme Court affirmed. The jury was instructed on malice and specifically found that Payless's conduct amounted to malice, a conclusion that was supported by the evidence. Further, it was immaterial that the trial court did not detail from the bench its analysis of each of the statutory factors as to the award of punitive damages. It was sufficient that the court made individual findings on each of the statutory factors in its subsequent written findings. Onstad v. Payless Shoesource, 2000 MT 230, 301 M 259, 9 P3d 38, 57 St. Rep. 943 (2000).

Insufficient Evidence to Support Jury Verdict Limiting Damages to Past Medical Expenses but Not Pain and Suffering: Renville was injured as a passenger in an automobile accident in 1995, and liability was not contested. Evidence was uncontroverted that Renville had subsequently experienced pain and suffering as a result of the accident. The jury was instructed to award damages for past and future medical expenses, loss of earnings and earning capacity, pain and suffering, and loss of the ability to pursue an occupation and an established course of life. However, the jury limited its verdict to only past medical expenses, so Renville sought a new trial on grounds of insufficient evidence to support the award and irregularities in the proceedings. On review, the Supreme Court noted that a jury may not disregard uncontradicted, credible, nonopinion evidence. The court applied Thompson v. Bozeman, 284 M 440, 945 P2d 48 (1997), in holding that if a jury fails to award damages when the only evidence of record supports an award, that verdict is not supported by substantial evidence and may be set aside. Renville was entitled to some award for damages for proved pain and suffering, and the Supreme Court remanded for new trial limited to the issue of damages. Renville v. Taylor, 2000 MT 217, 301 M 99, 7 P3d 400, 57 St. Rep. 864 (2000). On remand, the District Court concluded that factual issues still existed as to the amount of Renville's past medical expanses and that the issues must be determined by a jury on retrial. The court found that the effect of the decision in Renville I, id., was to remand the entire issue of damages for a new trial. The Supreme Court disagreed. The decision in Renville I clearly stated that the award was limited to Renville's past medical expenses, which had been proved and awarded. Therefore, the law of the case precluded the District Court from revisiting the issue of Renville's past medical expenses on remand. It was an abuse of discretion for the District Court to deny Renville's motion for summary judgment and request for declaratory judgment on the issue of past medical expenses. Renville v. Farmers Ins. Exch., 2003 MT 103, 315 M 295, 69 P3d 217 (2003). See also St. v. Gilder, 2001 MT 121, 305 M 362, 28 P3d 488 (2001).

Unreasonable Compensatory Award for Loss of Established Course of Life — New Trial Proper: Maurer produced evidence to support an award of $90,000 for loss of established course of life. Instead, the jury awarded him $500,000, which was not supported in the record. The District Court did not err in ordering a new trial on compensatory damages. A reduction in a compensatory award is justified when the award substantially exceeds what the evidence can sustain. Maurer v. Clausen Distrib. Co., 275 M 229, 912 P2d 195, 53 St. Rep. 78 (1996), distinguished in Anderson v. Werner Enterprises, Inc., 1998 MT 333, 292 M 284, 972 P2d 806, 55 St. Rep. 1350 (1998).

Plaintiff Entitled to Damages for Pain and Suffering: When a jury found defendant liable for assault and battery and awarded damages for plaintiff's medical expenses, it was the jury's duty to award damages for pain and suffering for plaintiff's serious injuries. There was not substantial evidence to support the jury's failure to award damages for pain and suffering and hearing loss. Lee v. Kane, 270 M 505, 893 P2d 854, 52 St. Rep. 268 (1995).

Crops Damaged by Spraying and Held for Sale at Higher Price Some Time After Harvest: In an action for negligent damage to crops caused by improper spraying, which caused a smaller crop, damages for the lost part of the crops were properly calculated on the basis of the amount that a bushel of the remaining crop was sold for minus the expense of growing and marketing it, rather than the market price on the date of harvest minus the growing and marketing costs. Although the plaintiffs waited for some time after harvest to sell, it is a common practice (and their common practice) engaged in to enable farmers to sell at a higher price than when there is a market glut at the time of harvest. Plaintiffs did not wait to sell in order to enhance their damages. Semenza v. Bowman, 268 M 118, 885 P2d 451, 51 St. Rep. 1209 (1994).

Adding Interest Payments to Principal Not Failure to Mitigate: The plaintiff was unable to sell industrial revenue bonds due to the defendant's negligence and had to obtain a commercial construction loan. The plaintiff did not pay the interest on the loan for the first 2 years, and that amount was added to the principal, resulting in more interest paid by the plaintiff over the life of the loan. The defendant argued that the additional interest could not be recovered because that amount resulted from the plaintiff's failure to mitigate its damages. The Supreme Court held that the loan obtained by the plaintiff was the only one available and that the terms of the loan that allowed the "financing" of the interest expense was proper and reasonable and therefore the additional interest paid was a recoverable element of damages. Billings Clinic v. Peat Marwick Main & Co., 244 M 324, 797 P2d 899, 47 St. Rep. 1464 (1990).

No Offset for Tax Benefits Received by Plaintiff: The defendant claimed that the damage award received by the plaintiff should have been reduced by the amount of tax benefits that had passed through to the individual members of the plaintiff partnership. The Supreme Court held that it was speculative as to what tax benefit would be received by each individual member of the partnership and that offsets, like damages, had to be reasonably certain in their nature and origin to be recoverable. Billings Clinic v. Peat Marwick Main & Co., 244 M 324, 797 P2d 899, 47 St. Rep. 1464 (1990).

Amount of Damages — Standard of Review: The amount of damages is committed first to the discretion of the jury and next to the discretion of the trial judge who, in passing on a motion for a new trial, may set aside the verdict if it is not just. The standard of review for the Supreme Court is not the adequacy of the damages, but whether the trial court abused its discretion in refusing to grant a new trial. Davis v. Sheriff, 234 M 126, 762 P2d 221, 45 St. Rep. 1783 (1988). See also Daines v. Knight, 269 M 320, 888 P2d 904, 52 St. Rep. 8 (1995).

Compensatory Award Reasonably Computed and Supported by Credible Evidence: A bank attacked a compensatory award on the grounds that the amount included for excessive interest paid by plaintiffs was wrong on its face and that the amounts awarded for crop loss and other expenses were speculative. The Supreme Court found that although the compensatory award was in the nature of general damages and not broken down as to items used by the jury to compute the award, it was clear from the record that the award was based on amounts claimed by plaintiffs as items of damage. Further, although crop loss amounts were gross rather than net amounts, evidence of the losses appeared to be reasonably computed. Weinberg v. Farmers St. Bank of Worden, 231 M 10, 752 P2d 719, 45 St. Rep. 391 (1988).

Amount of Investments Represents Reasonable Measure of Damages: Bank appealed judgment awarding compensatory damages, based on the amount of shareholders' investments, to a commercial trout company upon a finding that failure of the trout farm was proximately caused by a breach of contract and misrepresentation by the bank and its agent. The Supreme Court held that the trial court acted reasonably and properly in determining that the damages suffered by the trout company were the amount of shareholders' investments at the time the

bank entered the picture. Crystal Springs Trout Co. v. First State Bank of Froid, 225 M 122, 732 P2d 819, 44 St. Rep. 90 (1987).

Award of Grossly Excessive and Disproportionate Damages — Based on Passion or Prejudice: A jury award of $5 million in punitive damages, which was found to be 20,000% above the award for economic damage caused insured and 5,000% more than the maximum of the insurance policy, was held to be so grossly excessive and disproportionate to the injury as to shock one's conscience. Noting that appellate courts in most jurisdictions, including Montana, ordinarily defer to the discretion of the factfinder when reviewing punitive damage awards, the court found that as a matter of law this award must have been determined by passion or prejudice. On remittitur, the judgment was modified to an award of $1 million total. Safeco Ins. Co. v. Ellinghouse, 223 M 239, 725 P2d 217, 43 St. Rep. 1689 (1986). In a strong dissent, Mr. Justice Morrison noted no reversible error on any liability question and pointed out that up to this time "there is little, if any, precedent supporting the Montana Supreme Court substituting its judgment for that of the jury. Unfortunately that strong support for the jury system has now been dynamited. The majority announces loud and clear that from this day forward, four justices, robed in judicial omniscience, will replace our jury." Mr. Justice Sheehy, also dissenting, said that the "deleterious effect of the opinion in this case is its announcement that the right of a jury to set damages is hereafter subject to the consent of the majority of this Court".

Determination of Damages — "Good Sense": A District Court faced with widely varying estimates of value for services performed on an oral contract "split the difference" as a setoff to a recovery. The Supreme Court, recalling its decision in Spackman v. Ralph M. Parsons Co., 147 M 500, 414 P2d 918 (1966), found that formulas may serve as useful guides in determining damages, but that the final answer rests in good sense rather than mechanical application of formulas. The "compromise" developed by the District Court was found to be well in line with contract principles. Hostetter v. Donlan, 221 M 380, 719 P2d 1243, 43 St. Rep. 909 (1986).

Substantial Evidence Supporting Award — Error to Grant New Trial: District Court committed error when it granted a new trial based on inadequacy of damages when jury awarded plaintiff $2,000 of which no more than $700 was for pain and suffering caused by injuries received in automobile accident. In reversing the grant of new trial and ordering entry of judgment on the jury's verdict, the Supreme Court stated that the jury is not compelled to believe plaintiff's testimony and that to allow the District Court to simply substitute its judgment for that of the jury when there is substantial evidence to support the jury award would "create a bench supremacy and sap the vitality of jury verdicts". Maykuth v. Eaton, 212 M 370, 687 P2d 726, 41 St. Rep. 1800 (1984), distinguished in Thompson v. Bozeman, 284 M 440, 945 P2d 48, 54 St. Rep. 957 (1997).

Loss of Tax Savings as Damages: Plaintiff offered to buy defendants' ranch. One of plaintiff's disclosed purposes for wanting the ranch was for investment tax credits and depreciation for income tax purposes. After much negotiation, plaintiff paid earnest money and the parties entered into a buy-sell agreement under which the chattels were to be transferred in 1981 and the real property in 1982. Defendants later presented plaintiff with new terms, claiming transfer in different years would cause loss of grazing permits. A Forest Service official offered three alternatives in a letter. Defendants chose the one alternative inconsistent with the buy-sell agreement. At trial for breach of contract, the District Court awarded plaintiff damages for tax losses. On appeal, the Supreme Court held that plaintiff's gain of the investment tax credit upon performance of the contract was within the contemplation of the parties and reasonably foreseeable. Defendants' failure to perform their obligations under the contract negated the possibility of plaintiff's claiming the tax credits and was the legal cause of the lost opportunity. The damages were reasonably foreseeable and ascertainable and were properly awardable. Ehly v. Cady, 212 M 82, 687 P2d 687, 41 St. Rep. 1611 (1984).

Plaintiffs Injured by Defendants' Intentionally Tortious Conduct Entitled to Damages for Pain and Suffering: In a dispute over who was entitled to lease a parcel of agricultural land, defendants intentionally interfered with plaintiffs' livestock and intentionally injured plaintiffs themselves. Plaintiffs sued defendants, and the jury found that the defendants had committed wrongful acts toward the plaintiffs which were the cause of the injuries sustained by the plaintiffs. The jury awarded plaintiffs their medical expenses and $10,000 each in punitive damages. On appeal, the Supreme Court ruled that because liability had been established, the jury should have awarded damages for pain and suffering for the serious injuries suffered. The case was remanded for trial on the damages issue. Gehnert v. Cullinan, 211 M 435, 685 P2d 352, 41 St. Rep. 372 (1984), opinion withdrawn for en banc rehearing and same opinion reissued at 211 M 435, 685 P2d 352, 41 St. Rep. 1474 (1984), distinguished in Walls v. Rue, 233 M 236, 759

P2d 169, 45 St. Rep. 1451 (1988), and followed in Thompson v. Bozeman, 284 M 440, 945 P2d 48, 54 St. Rep. 957 (1997).

Damages for Humiliation, Embarrassment, and Distress: The law does not require that any witness must express an opinion as to the amount of damages that would compensate for humiliation, distress, or embarrassment; the amount of the award rests of necessity in the sound discretion of the trier of fact. Johnson v. Murray, 201 M 495, 656 P2d 170, 39 St. Rep. 2257 (1982).

Determination of Damages — Reason and Evidence: A judgment for damages must be supported by substantial evidence, and the damages must be the product of the exercise of calm and reasonable judgment. Johnson v. Murray, 201 M 495, 656 P2d 170, 39 St. Rep. 2257 (1982).

Necessity of Precision: If there is strong evidence of the fact of damage, a defendant should not escape liability because the amount of damage cannot be proven with precision. Johnson v. Murray, 201 M 495, 656 P2d 170, 39 St. Rep. 2257 (1982).

Liquidated Damages to Be Reasonable: In an action in which compensatory damages are awardable, liquidated damages awarded by the court must, under the rationale of Morgen & Oswood Constr. Co. v. Big Sky of Mont., 171 M 268, 557 P2d 1017 (1976), be shown to be reasonably related to actual damages sustained by a party. Lilienthal v. District Court, 200 M 236, 650 P2d 779, 39 St. Rep. 1711 (1982).

Excessiveness of Damages — Award for Back Injury and Loss of Earnings: Award of approximately $75,000 for impairment of earning capacity, $52,000 compensatory damages, and $15,000 punitive damages to plaintiff whose auto was hit from the rear on an icy road by defendant who was intoxicated did not constitute excessive damages. Plaintiff alleged that his back and neck were permanently injured and that as a result he would experience pain for the rest of his life whenever he participated in strenuous activities. He had been a manual laborer all his adult life, was out of work for 6 months after the accident, and fell and reinjured his back 9 months after the collision and had not returned to work as of the date of the opinion on appeal, April 15, 1982. Allers v. Willis, 197 M 499, 643 P2d 592, 39 St. Rep. 745 (1982).

Adverse Possession — Sufficiency of Damages: The appellants in an adverse possession case alleged there was insufficient evidence of the amount of damages to sustain the verdict against them. The Supreme Court considered delay rental receipts and lost profits. A judgment for damages must be supported by substantial evidence that it is not the product of mere guess or speculation. Substantial damages exist whenever the owner of property is deprived of the use of that property. Recovery of damages would not be denied provided the evidence was sufficient to afford a reasonable basis for determining the specific amount awarded. The court held that there was no uncertainty about the existence of substantial damages here. Cremer v. Cremer Rodeo Land & Livestock Co., 192 M 208, 627 P2d 1199, 38 St. Rep. 574 (1981).

Holder of Land Under Erroneous Judgment — Offset of Lease Payments: The trial court held that Fix was the owner of a state lease based on an oral agreement to assign the lease. The Supreme Court reversed the decision in Aye v. Fix, 176 M 474, 580 P2d 97 (1978). The rightful assignee of the lease contended it was error to permit Fix to offset from reasonable rental value the lease payments that Fix made to the state. The party to whom property has been awarded under an erroneous judgment may, upon reversal, deduct expenses that he necessarily incurred in the protection of that property and the payment of taxes and liens. The lease payments by Fix were an expense incurred to protect the property and therefore properly deducted from the stipulated rental. Aye v. Fix, 192 M 141, 626 P2d 1259, 38 St. Rep. 578A (1981).

Interest on Construction Loan as Reasonable Damages: In an action for damages caused by the defendants' breach of contract in refusing to complete the construction of a road for the plaintiff, the trial court did not err in granting the plaintiff interest damages for the difference between the cost of a home construction loan, conditioned upon completion of the road, at the time performance was due and at the time the plaintiff brought suit. These interest damages are not speculative and remote. The damages are prospective, but a reasonable certainty that future damages will occur will sustain an award for future damages. This test satisfies the statutory requirement that damages be reasonable. Julian v. Buckley, 191 M 487, 625 P2d 526, 38 St. Rep. 128 (1981).

Measure for Pain and Suffering Within Discretion of Fact Finder: In personal injury actions there is no measuring stick by which to determine the amount of damages to be awarded for pain and suffering other than the intelligence of a fair and impartial trier of fact governed by a sense of justice; each case must of necessity depend upon its own peculiar facts. Johnson v. U.S., 510 F. Supp. 1039, 38 St. Rep. 599 (D.C. Mont. 1981).

Recovery for Expenses of Future Medical Treatment: In a trial on the issue of damages where plaintiff suffered severe physical damage causing him to be a quadriplegic, the court found that

the plaintiff is entitled to recover the reasonable value of necessary expenses for any medical, surgical, hospital, and other services, care, and supplies that the finder of fact determines to be reasonably certain to be required in the future in the treatment of the plaintiff as the proximate result of the injury in question. The trier of fact found the compensation for 12 hours a day was a reasonable award even though plaintiff required 24-hour care. Johnson v. U.S., 510 F. Supp. 1039, 38 St. Rep. 599 (D.C. Mont. 1981).

Damages for Breach — When Speculative: In a case relating to the sale of an old log cabin, the trial court held that the buyer's costs of hiring a man to haul logs from the dismantled cabin were too speculative to recover. The proof of the damages was speculative at best. The log hauler did not testify about any debt, and the appellant did not produce a bill, although over a year had passed since the work was done for the appellant. Jeffery v. Neville, 190 M 300, 620 P2d 1218, 37 St. Rep. 1983 (1980).

Mitigation of Damages: Where mitigation of damages is concerned, the Supreme Court has supported the reasonable person test or the ordinarily prudent person test in property damage cases. The District Court properly submitted the mitigation issues to the jury on that basis here, a medical malpractice case, and the mandatory instruction requested by the doctor would have been improper where the evidence was conflicting or uncertain as to the duty of the injured party to submit to an operation. Frisnegger v. Gibson, 183 M 57, 598 P2d 574 (1979).

Review of Damage Award: The amount to be awarded as damages is properly left to the jury, and the court on appeal will not substitute its judgment for that of the jury particularly where, as here, the trial court has approved the verdict by denying a new trial. It is only where the amount awarded is so grossly out of proportion to the injury as to shock the conscience that the appellate court will intervene. Frisnegger v. Gibson, 183 M 57, 598 P2d 574 (1979), following Salvail v. Great N. Ry., 156 M 12, 473 P2d 549 (1970).

Damages in Action Against City: It was proper for the court to award a reasonable amount of damages for the continuing interference with the flow of plaintiff's irrigation water and the continuing flooding and discharge of polluted waters upon his land. Walton v. Bozeman, 179 M 351, 588 P2d 518 (1978).

Collateral References

Damages *key* 1, et seq.

25 C.J.S. Damages §§1, 2.

22 Am. Jur. 2d Damages §§27, 28.

Excessiveness or adequacy of damages awarded for injuries to trunk or torso, or internal injuries. 48 ALR 5th 129.

Measure and elements of damages for pollution of well or spring. 76 ALR 4th 629.

Excessiveness or adequacy of damages awarded for personal injuries resulting in death of persons engaged in professional, white-collar, and nonmanual occupations. 50 ALR 4th 787.

Future disease or condition, or anxiety relating thereto, as element of recovery. 50 ALR 4th 13.

Excessiveness or inadequacy of compensatory damages for defamation. 49 ALR 4th 1158.

Excessiveness or adequacy of damages awarded for personal injuries resulting in death of retired persons. 48 ALR 4th 229.

Excessiveness or inadequacy of compensatory damages for false imprisonment or arrest. 48 ALR 4th 165.

Excessiveness or adequacy of damages awarded for personal injuries resulting in death of persons engaged in trades and manual occupations. 47 ALR 4th 134.

Excessiveness or adequacy of damages awarded for personal injuries resulting in death of homemaker. 47 ALR 4th 100.

Excessiveness or adequacy of damages awarded for personal injuries resulting in death of persons engaged in farming, ranching, or agricultural labor. 46 ALR 4th 220.

Recovery of damages for grief or mental anguish resulting from death of child—modern cases. 45 ALR 4th 234.

Propriety of taking income tax into consideration in fixing damages in personal injury or death action. 16 ALR 4th 589.

Per diem or similar mathematical basis for fixing damages for pain and suffering. 3 ALR 4th 940.

Loss of profits in a business in which plaintiff is interested as a factor in determining damages for impairment of earning capacity in action for personal injuries. 12 ALR 2d 288.

Changes in cost of living or in purchasing power of money as affecting damages for personal injuries or death. 12 ALR 2d 61.

27-1-303. Limitation of damages for breach of obligation.

Case Notes

No Evidence of False Representation of Material Fact — Claim of Negligent Misrepresentation Properly Dismissed: Plaintiff claimed that vinyl siding was sold, furnished, and installed on her home under misleading circumstances because the installer failed to clearly identify the relationship with the siding manufacturer. However, plaintiff failed to specify any false statements made by either the installer or the manufacturer that led her to believe that this was true. Absent evidence demonstrating the primary element of the cause of action, plaintiff's negligent representation claim failed as a matter of law. Osterman v. Sears, Roebuck & Co., 2003 MT 327, 318 M 342, 80 P3d 435 (2003), following Yellowstone II Dev. Group, Inc. v. First Am. Title Ins. Co., 2001 MT 41, 304 M 223, 20 P3d 755 (2001).

No Statutory Shield From Liability for Joint and Severable Tortfeasors: Plaintiff received a default judgment against defendant in another case, and then amended this action to add defendants with the allegations involving the same actions that led to the default in the other case. The District Court granted summary judgment for defendants, concluding that plaintiff was barred from recovery by this section because plaintiff had already received a judgment against defendants and because granting judgment against additional defendants would allow plaintiff to recover more than the satisfaction of its losses. Plaintiff appealed and the Supreme Court reversed. Although the plain language of this section limits total recovery to the satisfaction of a plaintiff's losses for breach of an obligation unless otherwise provided by statute, the wording does not shield from liability any parties that may be jointly or severally liable or prevent a party from pursuing and receiving separate judgments against jointly and severally liable tortfeasors, even if more than one judgment entitles the plaintiff to the full amount of damages. The District Court's interpretation would effectively shield other tortfeasors who are jointly and severally liable simply because the plaintiff received a judgment or right of recovery against one of the tortfeasors, providing an effective route through which those tortfeasors could avoid liability, which is not the purpose or intent of this section. Trux, L.P. v. Mine & Mill Hydraulics, Inc., 2003 MT 20, 314 M 93, 63 P3d 1142 (2003).

Contract Remedy Providing Transfer of Twenty-Acre Parcel of Land as Security for Contractual Obligations Not Considered Unenforceable Liquidated Damages Provision — Award of Actual Damages Not Including Expectancy Damages and Lost Profits: As part of a sale of real property, Canton pledged a 20-acre parcel to Riverview Homes II, Ltd. (Riverview), as security in the event that Canton breached his contractual obligation to complete a proposed subdivision and construct an artificial lake. Canton breached the contract, and Riverview sought to quiet title to the 20-acre parcel. The District Court agreed that Canton breached the contract, but held that the contract remedy was an unenforceable liquidated damages provision because the amount of damages to be paid for breach of Canton's obligations was determined in anticipation of Canton's possible breach. The court then examined the contract for another possible method to determine the appropriate amount of damages, and ultimately awarded Riverview $92,046 as the amount that Riverview would have received for the sale of the property as bare lots without homes. Riverview appealed, contending that the contractual language was not a liquidated damages provision because the parties did not agree on the amount of compensation or damages to be paid by Canton in case of a breach of contract, and arguing that the District Court erred in setting the damage amount by failing to account for the profit that Riverview would have received from the sale of the lots with homes. The Supreme Court agreed that the contract language was not an unenforceable liquidated damages provision, but found that the discussion regarding liquidated damages was not essential to the resolution of the parties claims, and moved on to the actual award of damages. The Supreme Court declined to allow Riverview an award of speculative profits in the absence of lost profits attributable to Riverview's inability to sell developed lots. The District Court's determination of damages was affirmed. If the contract had been performed, Riverview would have had six bare lots approved as a subdivision and an artificial lake. Because of Canton's breach, Riverview had neither. The District Court's award accounted for the expectations of the parties at the signing of the contract, and Riverview was not allowed to recover a greater amount of damages than would have been gained by full performance of the contract. Riverview Homes II, Ltd. v. Canton, 2001 MT 309, 307 M 517, 38 P3d 848 (2001).

Defaulting Buyer Under Unambiguous Written Contract Cannot Rely Upon Expectations Not Covered by Contract to Avoid Contract — Disposition of Downpayment Amounts Paid and Due — County Not Liable for Negligent Misrepresentation as to Recordability of Deeds and Seller's Title Insurer Not Liable for Loss in Marketability: Documents for the sale and purchase of two sections of land unambiguously showed, and it was undisputed, that the resale of 20-acre parcels

by the buyer, the immediate acceptance by the county of 20-acre resale deeds of a type that would make subdivision review unnecessary, and the ability to resell without having to undergo subdivision review were not parts of the bargain. The parties knew that these things were contemplated, but the documents did not refer to them or make them a part of the contract. Before the contract was made, the county indicated that it would accept the 20-acre resale deeds. The deal fell through when the county changed its position after the contract was signed. The buyer failed to pay the whole downpayment, and the seller terminated the contract and kept the paid portion of the downpayment. Precontract discussions on the matter must be disregarded as parol evidence because the documents were unambiguous and did not refer to the matter. The buyer was not entitled to rescind the contract and have the paid portion of the downpayment returned based on mutual mistake or failure of consideration. There was no mutual mistake because the parties knew that it was not a certainty that the county would accept the deeds. There was no failure of consideration because the resale, county acceptance of the deeds, and avoidance of subdivision review were not part of the written contract. In addition, the need for a subdivision review would not make the land unmarketable; at most, its market value decreased and it would take longer to sell it. Furthermore, a party in default is not entitled to rescission. The seller was entitled to terminate the contract. The seller was also entitled to keep an amount of the paid portion of the downpayment equal to the amount by which the contract price for the land exceeded the market value of the land at the time of the breach. The seller was not entitled to keep the remainder of the paid portion of the downpayment or to a judgment for the unpaid portion of the downpayment because the contract did not provide for that remedy. The county was not liable in tort to the seller for negligent misrepresentation, and the buyer's title insurance company was not liable to the seller for the loss in the marketability of the land caused by the need for subdivision review. Yellowstone II Dev. Group, Inc. v. First Am. Title Ins. Co., 2001 MT 41, 304 M 223, 20 P3d 755 (2001).

Damages for Emotional Distress Improperly Awarded in Breach of Contract Action: Distinguishing emotional distress claims in a breach of contract action from emotional distress damage claims in tort actions, the Supreme Court applied 27-1-317 as the measure of damages to be used in tort actions and 27-1-311 for damages collectible under a breach of contract action, noting that 27-1-311 contains the additional limitation that the detriment must, in the ordinary course of things, be likely to result from the breach of contract and that damages must be clearly ascertainable in nature and origin. Lacking such a showing, the award of emotional damages in a breach of contract action constituted reversible error. Larson v. Undem, 246 M 336, 805 P2d 1318, 47 St. Rep. 2088 (1990).

Lessee's Breach of Agreement to Lease Office Renovated for Him: After defendant refused to move into office space plaintiff renovated under a lease agreement, a jury gave plaintiff damages for the value of the lease and for the renovation expenses. There was no improper double recovery in also granting the renovation expenses as damages when the two principal witnesses on the matter were plaintiff and his expert, who testified that there was little chance of leasing the renovated premises to someone else and that the premises would have to be completely rerenovated for any new tenant. Nicholson v. United Pac. Ins. Co., 219 M 32, 710 P2d 1342, 42 St. Rep. 1822 (1985).

Award Properly Calculated: The defendant was awarded $23,000 for actual damages for contract on 23 colts. The court determined that there were 50 colts for the 3-year breeding period and that each party was entitled to 25 colts. Defendant received two of the colts, and the fair market value of the colts was $1,000 each. The award of $23,000 was therefore proper. Miller v. Watkins, 200 M 455, 653 P2d 126, 39 St. Rep. 1867 (1982).

Partial Performance — Restitution — Damages: A joint venture was formed, the contract contemplating the feeding of cattle by one party until 80% graded "choice", followed by sale and splitting of the proceeds with the supplier of the cattle, who was the second party. When cattle prices dropped, the feeder lost his financing and defaulted on the contract. The agreement was entire and nonseverable. Having failed in the complete performance of the contract, the feeder could not recover under it. Restitution to the feeder of his expenses before default would have to be based on implied contract theory. In order for a claim of restitution to lie, there must be no willful or intentional departure from the contract, and the defects in performance must not pervade the whole, or be so essential that the object which the parties intended to accomplish is not accomplished. The feeder could not recover his prior expenses because a party who has completely breached an entire, nonseverable contract without justification or excuse may not recover for any performance rendered prior to the breach. On the contrary, a counterclaim against the feeder for damages was upheld. Roundup Cattle Feeders v. Horpestad, 184 M 480, 603 P2d 1044 (1979), distinguishing Murphy v. Redland, 178 M 296, 583 P2d 1049 (1978).

Punitive Damages Instruction — Implied Malice: The trial court did not err in giving an instruction on implied malice that advised the jury that it is not necessary to show actual malice to recover punitive damages or in giving an instruction on punitive damages when it was clear from the record and a pretrial order that plaintiffs were bringing this case in tort, separate and distinct from any action arising out of contract. Harrington v. Holiday Rambler Corp., 176 M 37, 575 P2d 578 (1978).

Law Review Articles

Contract Damages in Montana Part II: Reliance and Restitution, Burnham, 45 Mont. L. Rev. 1 (1984).

Contract Damages in Montana Part I: Expectancy Damages, Burnham, 44 Mont. L. Rev. 1 (1983).

Collateral References

Damages *key* 117, et seq.

25 C.J.S. Damages §§108 through 114.

22 Am. Jur. 2d Damages §44, et seq.

27-1-304. Value of written instrument.

Collateral References

Damages *key* 163(4).

25 C.J.S. Damages §§290 through 292.

27-1-305. Property of peculiar value.

Case Notes

Damages to Purchaser: This section and 27-1-314 must be construed together in determining damages in a case where the property of which the buyer is deprived has a peculiar value to him. Orford v. Topp, 136 M 227, 346 P2d 566 (1959).

Deprivation of Property: Similar statutes have been held applicable to cases involving damage to property in which an individual has had an interest or possession or has made special use thereof over a period of time and in which the property has acquired a value which was peculiar to that individual alone and where a measure of damages based on market value would be manifestly inadequate. Orford v. Topp, 136 M 227, 346 P2d 566 (1959).

Insufficient Evidence of Peculiar Value: Where there was no evidence to show any peculiar value to the plaintiffs in the property of which they were deprived, a verdict in excess of the difference between the price which the purchasers agreed to pay and the price for which the property was sold by the vendor was not supported. Orford v. Topp, 136 M 227, 346 P2d 566 (1959).

Law Review Articles

Contract Damages in Montana Part II: Reliance and Restitution, Burnham, 45 Mont. L. Rev. 1 (1984).

Contract Damages in Montana Part I: Expectancy Damages, Burnham, 44 Mont. L. Rev. 1 (1983).

Collateral References

Damages *key* 103, et seq.

25 C.J.S. Damages §290.

27-1-306. When replacement value to be allowed.

Compiler's Comments

2005 Amendment: Chapter 130 at end of second sentence, deleted "or another nationally published used vehicle or appraisal guide approved by the department of revenue"; and made minor changes in style. Amendment effective October 1, 2005.

2000 Amendment by Referendum — Not Codified: Chapter 515, L. 1999, at end of second sentence substituted "national appraisal guides referred to in 61-3-208" for "used car guides listed in 61-3-503(1)(c)". Amendment effective November 7, 2000. The code commissioner has not codified this amendment because the Ch. 51 and Ch. 472, L. 1999, amendments substituted references to the specific guides for a reference to the location of the guides, rendering the Ch. 515 amendment meaningless.

Saving Clause: Section 50, Ch. 515, L. 1999, was a saving clause.

Severability: Section 51, Ch. 515, L. 1999, was a severability clause.

Effective Date — Applicability: Section 52(1), Ch. 515, L. 1999, provided: "If approved by the electorate, this act is effective on approval by the electorate, except as provided in subsection (2), and applies to motor vehicle registration periods beginning after December 31, 2000."

1999 Amendments — Composite Section: Chapters 51 and 472 in second sentence substituted "most recent volume of the Mountain States Edition of the National Automobile Dealers Association (N.A.D.A.) Official Used Car Guide, the National Edition of N.A.D.A. Appraisal Guides Official Older Used Car Guide, or another nationally published used vehicle or appraisal guide approved by the department of revenue" for "used car guides listed in 61-3-503(1)(c)". Chapter 51 amendment effective March 15, 1999. Chapter 472 amendment effective April 27, 1999.

Severability: Section 71, Ch. 472, L. 1999, was a severability clause.

Saving Clause: Section 72, Ch. 472, L. 1999, was a saving clause.

1997 Amendment: Chapter 71 at end of first sentence inserted "unless, after the damages arise, the parties agree to use the "book" value"; inserted second sentence concerning reference to used car guides; inserted fourth sentence concerning replacement value; and made minor changes in style.

27-1-307. Definitions.

Compiler's Comments

1997 Amendment: Chapter 42 in introductory clause substituted "27-1-308 and this section" for "27-1-307 and 27-1-308"; and made minor changes in style. Amendment effective March 12, 1997.

Applicability: Section 3, Ch. 628, L. 1987, provided: "This act applies only to causes of action arising after the effective date of this act." Pursuant to 1-2-201, the act was effective October 1, 1987.

Case Notes

Emotional Distress Over Loss of Adult Child Not So Severe as to Be Compensable: Plaintiff argued that she suffered extreme emotional distress as the result of her son's death, allegedly caused by defendant's negligence. Applying the test for emotional distress in Sacco v. High Country Independent Press, Inc., 271 M 209, 896 P2d 411 (1995), the District Court held that plaintiff's emotional distress was insufficiently severe to support her claim, so defendant's motion for summary judgment was granted. On appeal, the Supreme Court concluded that plaintiff's testimony that "life goes on" and that it was a loss that she "must learn to deal with" showed a philosophical strength that would likely be absent in a case of severe emotional distress. Plaintiff's emotional distress was not so severe as to rise to the level of a compensable claim, so the District Court was affirmed. Renville v. Fredrickson, 2004 MT 324, 324 M 86, 101 P3d 773 (2004).

Separate and Distinct Claims Against Multiple Defendants — Settlement Proceeds of One Defendant Not Offset Against Settlement Against Another Defendant: Plaintiffs entered a settlement and release agreement with one defendant, apportioning the settlement proceeds to plaintiffs' claim for emotional distress, and releasing that defendant. Damages were awarded on plaintiffs' claim against another defendant, Schonrock, for violating the Montana Unfair Trade Practices and Consumer Protection Act of 1973. Schonrock claimed to be entitled to an offset of the emotional distress settlement against the verdict based on violation of the Act. The District Court denied the offset, and the Supreme Court affirmed. Under Schuff v. A.T. Klemens & Son, 2000 MT 357, 303 M 274, 16 P3d 1002 (2000), a dollar-for-dollar pro tanto offset reduction applies only if two or more concurrent or joint tortfeasors cause a single invisible harm. Here, the award of damages by the jury and the settlement proceeds were the result of separate and distinct injuries, so an offset of the settlement against the damages was not appropriate. Plath v. Schonrock, 2003 MT 21, 314 M 101, 64 P3d 984 (2003). See also Jim's Excavating Serv., Inc. v. HKM Associates, 265 M 494, 878 P2d 248 (1994).

Social Security Survivorship Benefits for Decedent's Lost Earnings Not Within Definition of "Collateral Source": Social Security survivorship benefits paid to the decedent's wife to compensate her for the decedent's lost earnings were not within this section's definition of a collateral source and could not be deducted from a judgment intended to cover the decedent's lost earnings. The definition of "collateral source" specifically refers to Social Security medical expense and disability payments and does not refer to Social Security survivorship payments for lost earnings. The lost earnings survivorship payments are not included in the definition's phrase "any other public program" because that phrase is limited by the more specific reference to "medical expenses and disability payments". The lost earnings survivorship payments are not included in the definition's phrase "any other source" because that phrase means any source

other than those identified and addressed in the definition and the definition addresses Social Security benefits. Schuff v. A.T. Klemens & Son, 2000 MT 357, 303 M 274, 16 P3d 1002, 57 St. Rep. 1499 (2000).

No Basis for Court to Award Offset Against Judgment Entered Against Defendant: Columbus Hospital argued that the amount of death benefits received by the Busta estate from the Veterans Benefits Administration should have been deducted from the judgment entered against the hospital for Busta's death. The Supreme Court held that the jury award did not specify what portion, if any, of the award was for the loss of financial support and therefore even if the Veterans Administration death benefits were a "collateral source" subject to being offset, there was no basis for the lower court to determine what amount of the award was subject to being offset. The Supreme Court also stated that it would not make a determination of whether or not the death benefits were to be construed as a collateral source under this section. Busta v. Columbus Hosp. Corp., 276 M 342, 916 P2d 122, 53 St. Rep. 428 (1996).

Collateral References

Damages *key* 59.

25 C.J.S. Damages §§172 through 174.

22 Am. Jur. 2d Damages §392, et seq.

27-1-308. Collateral source reductions in actions arising from bodily injury or death — subrogation rights.

Compiler's Comments

Applicability: Section 3, Ch. 628, L. 1987, provided: "This act applies only to causes of action arising after the effective date of this act." Pursuant to 1-2-201, the act was effective October 1, 1987.

Case Notes

No Collateral Source Reduction of Judgment for Workers' Compensation Payments: Because a workers' compensation insurer is entitled under 39-71-414 to subrogation for all compensation and benefits paid or to be paid, payments may not be deducted from a judgment as a collateral source under this section, which allows a collateral source deduction from a judgment, but not if the collateral source payor has a subrogation right. Therefore, the trial court properly refused to deduct ongoing workers' compensation death benefits and erroneously deducted workers' compensation medical and funeral expense payments. Schuff v. A.T. Klemens & Son, 2000 MT 357, 303 M 274, 16 P3d 1002, 57 St. Rep. 1499 (2000), followed, with regard to a claim brought against a third-party tortfeasor pursuant to 39-71-412, in Haman v. Maco Ins. Co., 2004 MT 44, 320 M 108, 86 P3d 34 (2004).

No Constitutional Right to Attorney Fees or to Reduction of Collateral Source or Settlement Offset by Plaintiff's Attorney Fees: The right to full legal redress contained in Art. II, sec. 16, Mont. Const., is limited to the recovery of those damages provided by the general tort law, and pursuant to the American Rule on attorney fees, attorney fees are not damages recoverable pursuant to the general tort law because it pertains to survival and wrongful death actions. Montana Supreme Court cases that include the costs of recovery in the concept of full compensation and that relate to equitable principles unique to the law of legal subrogation are inapplicable to the constitutional issue of whether full legal redress under the constitution requires payment of attorney fees. Montana's common law has followed the American Rule that attorney fees are not an element of damages unless expressly provided by statute or contract. Attorney fees are the subject of a contract between a party and the party's attorney. They are what the party chooses to do with part of the recovered damages, based on a prior agreement. Therefore, the right to full legal redress does not create a right to attorney fees, and the defendant's right to have collateral source and settlement payments offset against the judgment was not subject to a right of the plaintiff to have the offset amount reduced by the plaintiff's attorney fees. Schuff v. A.T. Klemens & Son, 2000 MT 357, 303 M 274, 16 P3d 1002, 57 St. Rep. 1499 (2000).

Offsetting Judgment by Amount of Settlement or Collateral Source Payment Not Denial of Full Compensation for Loss: An offset against a judgment of an amount received through settlement or from a collateral source does not deny full compensation for a loss. It simply ensures a single recovery for a single injury. Schuff v. A.T. Klemens & Son, 2000 MT 357, 303 M 274, 16 P3d 1002, 57 St. Rep. 1499 (2000).

Standard of Review: The reduction of a jury award on the basis of a collateral source statute, an award of judgment interest on the basis of a statute, or an offset of a judgment based on a plaintiff's prior settlement with another tortfeasor is a question of law and is reviewed to decide

whether the lower court correctly applied the law. Schuff v. A.T. Klemens & Son, 2000 MT 357, 303 M 274, 16 P3d 1002, 57 St. Rep. 1499 (2000).

Full Compensation Required Prior to Collateral Source Reduction: Prior to any collateral source reduction under this section, two requirements must be met: (1) the total award against all defendants must be in excess of $50,000; and (2) the plaintiff must be fully compensated. The statute also provides that it is a plaintiff's recovery that must be reduced by any amount paid or payable from a collateral source without a subrogation right, not a plaintiff's award, to ensure that a plaintiff's eventual recovery has a ceiling no higher than the full amount of the award, minus the appropriate collateral offsets. If an injured party receives an award of monetary damages against a judgment-proof defendant, it cannot be said that the party will be fully compensated because full compensation indicates that full payment must be made. Here, defendants sought a collateral source reduction after paying plaintiffs about $750,000 of a judgment in excess of $3 million. Based on the clear language of this section requiring full compensation, the District Court did not err in denying defendants' request for a collateral source reduction. Shilhanek v. D-2 Trucking, Inc., 2000 MT 16, 298 M 101, 994 P2d 1105, 57 St. Rep. 89 (2000).

Collateral Source Reduction of Insured's Verdict Against Insurer in Amount of Medical Benefits Insurer Had Paid Insured: Insured's action against her insurer for injuries sustained in a motor vehicle accident was "an action arising from bodily injury or death" within the meaning of those words as used in this section. The Supreme Court did not accept insured's claim that her action was in contract and that this section did not apply because this section applies to tort actions, not contract actions. The lower court properly used medical benefits payments to insured by the insurer as a collateral source reduction from the jury verdict. Liedle v. St. Farm Mut. Auto. Ins. Co., 283 M 129, 938 P2d 1379, 54 St. Rep. 528 (1997).

No Basis for Court to Award Offset Against Judgment Entered Against Defendant: Columbus Hospital argued that the amount of death benefits received by the Busta estate from the Veterans Benefits Administration should have been deducted from the judgment entered against the hospital for Busta's death. The Supreme Court held that the jury award did not specify what portion, if any, of the award was for the loss of financial support and therefore even if the Veterans Administration death benefits were a "collateral source" subject to being offset, there was no basis for the lower court to determine what amount of the award was subject to being offset. The Supreme Court also stated that it would not make a determination of whether or not the death benefits were to be construed as a collateral source under 27-1-307. Busta v. Columbus Hosp. Corp., 276 M 342, 916 P2d 122, 53 St. Rep. 428 (1996).

Statute of Limitations Applicable to Subrogee in Insurance Claim: St. Paul Fire & Marine Insurance Company (St. Paul), as subrogee, sought to recover from Glassing a payment made to its insured Lynn for underinsured motorist coverage, interest, and costs. Montana has no statutory authority extending the statute of limitations for subrogation claims in such cases. Because an insurer's claim is derived from that of the insured, St. Paul's claim was subject to the same defenses, including the statute of limitations, as though the action were sued upon by the insured and St. Paul had no claim for its damages independent of Lynn's claim. An insurer's right to subrogation attaches upon paying an insured's loss; thus, the 3-year statute of limitations in 27-2-204 applied to St. Paul's claim in the same manner that the original action brought by Lynn and, when raised after the 3-year limit, was time-barred. St. Paul Fire & Marine Ins. Co. v. Glassing, 269 M 76, 887 P2d 218, 51 St. Rep. 1437 (1994), followed in Nimmick v. St. Farm Mut. Auto. Ins. Co., 270 M 315, 891 P2d 1154, 52 St. Rep. 208 (1995). See also Skauge v. Mtn. St. Tel. & Tel., 172 M 521, 565 P2d 628 (1977), and Beedie v. Shelly, 187 M 556, 610 P2d 713 (1980).

Constitutionality of Statute Left Undecided: The plaintiffs argued that this section is unconstitutional because it distinguishes between awards exceeding $50,000 and those not exceeding $50,000. The Supreme Court stated that since it was remanding the case for a new trial on other grounds, it was not convinced that the plaintiffs had standing to challenge the statute's constitutionality. Knutson v. Barbour, 266 M 170, 879 P2d 696, 51 St. Rep. 749 (1994).

Collateral References

Damages *key* 59.

25 C.J.S. Damages §§172 through 174.

22 Am. Jur. 2d Damages §392, et seq.

Third-party tortfeasor's right to have damages recovered by employee reduced by amount of employee's workers' compensation benefits. 43 ALR 4th 849.

Validity and construction of no-fault insurance plans providing for reduction of benefits otherwise payable by amounts receivable from independent collateral sources. 10 ALR 4th 996.

Collateral source rule: receipt of public relief or gratuity as affecting recovery in personal injury action. 77 ALR 3d 366.

Admissibility of evidence that injured plaintiff received benefits from a collateral source, on issue of malingering or motivation to extend period of disability. 47 ALR 3d 234.

Right of tortfeasor or liability insurer to credit for amounts already disbursed to injured party under medical payments or funeral expense clause in liability policy. 11 ALR 3d 1115, §§1[c], 2, 4.

Necessity and sufficiency of claimant's efforts to recover from other sources as prerequisite of participation in indemnity fund for losses caused by uninsured or unknown motorists. 7 ALR 3d 851.

Unsatisfied claim and judgment statutes: validity and construction of provisions for deduction from awards of sums collectible by claimant from other sources. 7 ALR 3d 836.

Collateral source rule: right of tortfeasor to mitigate opponent's damages for loss of earning capacity by showing that his compensation, notwithstanding disability, has been paid by his employer. 7 ALR 3d 516.

Collateral source rule: injured person's receipt of statutory disability unemployment benefits as affecting recovery against tortfeasor. 4 ALR 3d 535.

Damages for wrongful death of husband or father as affected by receipt of social security benefits. 84 ALR 2d 167.

Pension, retirement income, social security payments, and the like, of deceased, as affecting recovery in wrongful death action. 81 ALR 2d 368.

Collateral source rule: receipt of public or private pension as affecting recovery against a tortfeasor. 75 ALR 2d 456.

Receipt of compensation from consumption of accumulated employment leave, vacation time, sick leave allowance, or the like, as affecting recovery against tortfeasor. 52 ALR 2d 577.

Right of employer, liable for wrongful discharge or retirement, to reduce or mitigate damages by amount of social security or retirement benefits received by employee. 48 ALR 2d 588.

Effect of board or lodging furnished to injured person in connection with hospital or nursing care on damages recoverable in personal injury action. 18 ALR 2d 412.

Application of collateral source rule in actions under Federal Tort Claims Act (28 USCS §2674). 104 ALR Fed. 492.

27-1-310. Damages for emotional or mental distress prohibited in contract actions — exception.

Case Notes

No Recovery of Damages for Mental Distress for Negligent Handling of Dead Body: The family of the deceased, when viewing the body, observed a stain on the clothing that was determined to be caused by leaking embalming fluid. The Supreme Court held that there could be no recovery for mental distress based upon breach of contract because the family members had not been personally injured as required by this section. Contreraz v. Michelotti-Sawyers & Nordquist Mortuary, Inc., 271 M 300, 896 P2d 1118, 52 St. Rep. 454 (1995). See also Meech v. Hillhaven W., Inc., 238 M 21, 776 P2d 488 (1989).

Emotional Distress Damages — Error to Submit to Jury: Jury instruction on emotional distress damages was improper when the evidence was insufficient to raise a question of fact about the existence of severe emotional distress. Defendant's cross-claim alleged only that he felt bad, lost sleep, and became withdrawn as a result of the defendant's failure to release plaintiff's personal guaranty in violation of the alleged agreement. The Supreme Court endorsed the severe emotional distress standard found in the Restatement (Second) of Torts, holding that the adoption of the standard was only a new interpretation of the existing "significant impact" requirement and not a departure from prior law. First Bank-Billings v. Clark, 236 M 195, 771 P2d 84, 46 St. Rep. 291 (1989), followed in Lence v. Hagadone Inv., 258 M 433, 853 P2d 1230, 50 St. Rep. 601 (1993), and affirmed in Maloney v. Home & Inv. Center, Inc., 2000 MT 34, 298 M 213, 994 P2d 1124, 57 St. Rep. 144 (2000), to the extent that it addressed the "serious" or "severe" element articulated in Sacco v. High Country Independent Press, Inc., 271 M 209, 896 P2d 411, 52 St. Rep. 407 (1995), which is synonymous with the "significant impact" element found in Johnson v. Supersave Mkt., Inc., 211 M 465, 686 P2d 209, 41 St. Rep. 1495 (1984).

Award for Mental Anguish Caused by Wrongful Attachment of Property: A jury award of $5,000 for mental anguish was warranted where, due to wrongful attachment of property, plaintiff was unable to sleep; suffered embarrassment because of the inability to pay bills; discontinued attendance at club and board meetings; and generally avoided public contact due to embarrassment. Stensvad v. Towe, 232 M 378, 759 P2d 138, 45 St. Rep. 1129 (1988).

Law Review Articles

Boldly Into the Fog: Limiting Rights of Recovery for Infliction of Emotional Distress. Cox & Shott, 53 Mont. L. Rev. 197 (1992).

Collateral References

Damages *key* 48 through 56, 102.
25 C.J.S. Damages §§92 through 104, 164.
22 Am. Jur. 2d Damages §§49, 211, et seq.

27-1-311. Breach of contract.

Case Notes

General 623
Proximately Caused or in the Ordinary Course of Things 634
Ascertainable and Not Speculative. 635
Measure of Damages 638

GENERAL

Questions of Fact Regarding Ambiguous Contract and Damages — Summary Judgment Inappropriate: Upon remand of a breach of contract action in Bradley v. Crow Tribe of Indians, 2003 MT 82, 315 M 75, 67 P3d 306 (2003), the District Court granted Bradley's motion for summary judgment a second time without considering the merits of defendant's defense to the breach of contract. However, because questions of fact still existed regarding ambiguous language in the contract and potential damages, summary judgment was inappropriate, so the case was again reversed and remanded for further consideration. Bradley v. Crow Tribe of Indians, 2005 MT 309, 329 M 448, 124 P3d 1143 (2005).

Appeal Moot for Inability of Supreme Court to Grant Relief: Plaintiffs owned a ranch, but being in default and facing foreclosure, they made a deal with defendant Bell whereby Bell would borrow money to pay off plaintiffs' debt and plaintiffs would receive an ownership interest in Bell's company formed to manage the ranch. However, the mortgage was never transferred into the company, and plaintiffs sued Bell for fraud and breach of contract. A jury granted plaintiffs $500,000 in damages for Bell's breach of contract, and Bell appealed. Bell ultimately declared bankruptcy and sold the ranch to pay off the loan and to pay off the money judgment owed to plaintiffs, whereby plaintiffs' mortgage on the ranch was released. Plaintiffs moved that Bell's appeal be dismissed for mootness, and the Supreme Court agreed. The $500,000 judgment could not simply be reversed with plaintiffs retaining ownership because the ranch had been sold, and Bell would be considerably richer than he was at the beginning of the deal, having invested little of his own money, and plaintiffs would have nothing. Therefore, applying Turner v. Mtn. Eng'r & Constr., Inc., 276 M 55, 915 P2d 799 (1996), the Supreme Court held that Bell's claim was moot based on the court's inability to grant effective relief. Graveyard Creek Ranch, Inc. v. Bell, 2005 MT 172, 327 M 491, 116 P3d 779 (2005).

Agreement to Agree to Future Lease Terms Unenforceable: Defendant agreed to lease plaintiff farmland on a cash per acre basis for 5 years with an option to extend the lease on terms to be determined later. Toward the end of the 5-year lease, defendant offered to sell the land to plaintiff, but plaintiff declined, so defendant sold the land to a third party, and plaintiff filed a complaint alleging breach of the lease agreement. Both parties moved for summary judgment, and the District Court concluded that because the lease extension language constituted an agreement to agree and was vague and unenforceable, defendant was entitled to summary judgment. On appeal, the Supreme Court affirmed. Because the parties failed to include complete and material terms for determining the duration and payments for another lease term in the negotiation clause, the clause was rendered unenforceable, and specific performance was unavailable to enforce an agreement to agree to material terms in the future. Additionally, damages were not clearly ascertainable and calculation of damages was also untenable under the lease extension, so plaintiff could not recover damages. GRB Farm v. Christman Ranch, Inc., 2005 MT 59, 326 M 236, 108 P3d 507 (2005), following Steen v. Rustad, 132 M 96, 313 P2d 1014 (1957), Riis v. Day, 188 M 253, 613 P2d 696, (1980), and Quirin v. Weinberg, 252 M 386, 830 P2d 537 (1992).

Duty of Contractor to Adhere to Building Code — Liability for Radon Damage Properly Submitted to Jury: A contractor built an indoor tennis facility, and the facility developed water leakage and radon damage. The District Court submitted the question of radon mitigation damages to the jury, which the contractor contended was error because neither the construction contract nor building codes required radon mitigation. However, the building code did require installation of a subsurface vapor barrier and proper sized gravel, which the contractor did not

install, and breach of the duty to install the barrier and proper gravel resulted in damages, including radon damages. Thus, submission of radon damages to the jury was proper. Glacier Tennis Club at The Summit, LLC v. Treweek Constr. Co, Inc., 2004 MT 70, 320 M 351, 87 P3d 431 (2004).

No Negligence by Architect if Professional Information Not Communicated in Absence of Contract: A tennis club filed a negligence and breach of contract action against a contractor who constructed a tennis facility for the club. The contractor in turn filed a third-party negligence action against the architect who had provided preliminary design parameters and building specifications for the facility. The District Court summarily dismissed the third-party claim, and the contractor appealed, but the Supreme Court affirmed. Applying Jim's Excavating Serv., Inc. v. HKM Associates, 265 M 494, 878 P2d 248 (1994), and Restatement (Second) of Torts 552 (1976), the court held that the architect owed no duty of care to the contractor because the contractor had no contract for the architect's services and failed to prove that the architect communicated professional information with the intention that the information be relied upon by the contractor. Absent a duty of care, there was no breach, so the third-party action failed as a matter of law, and summary judgment was proper. Glacier Tennis Club at The Summit, LLC v. Treweek Constr. Co, Inc., 2004 MT 70, 320 M 351, 87 P3d 431 (2004).

Conscionability Analysis of Contractual Liquidated Damages Clause — Liquidated Damages Clause Presumed Enforceable: To provide direction to contracting parties and resolve the disparities in case law regarding liquidated damages, the Supreme Court adopted a rule to analyze liquidated damages clauses from the perspective of whether or not the clause is unconscionable as indicated by the nature of the bargaining process between the parties. Unconscionability involves a two-pronged determination regarding whether: (1) the clause fits the doctrine of contract of adhesion such that the weaker party had no meaningful choice regarding acceptance of the contract provisions; and (2) the contractual terms are unreasonably favorable to the drafter, which is usually the party with superior bargaining power. Whether the clause is unreasonably favorable to the drafter in turn involves an inquiry into whether the clause is within the reasonable expectations of or unduly oppressive to the weaker party. Liquidated damages clauses are presumed enforceable, and the party seeking to avoid the clause has the burden of proving unconscionability. Unless there are underlying disputed issues of fact, the question of unconscionability is purely a matter of law for the court to decide. Arrowhead School District No. 75 v. Klyap, 2003 MT 294, 318 M 103, 79 P3d 250 (2003), overruling Daugherty Cattle Co. v. Gen. Constr. Co., 254 M 479, 839 P2d 562 (1992), to the extent that it prevented one party from introducing relevant evidence by granting summary judgment based on contract language alone, overruling Story v. Bozeman, 259 M 207, 856 P2d 202 (1993), to the extent that it placed the burden on the nonbreaching party to prove the enforceability of a liquidated damages clause, and followed in Am. Music Co. v. Higbee, 2004 MT 349, 324 M 348, 103 P3d 518 (2004).

Liquidated Damages Clause in Personal Services Contract — Conscionability of Liquidated Damages Clause in Teacher's Form Contract: In determining the enforceability of a 20% liquidated damages clause in defendant's teaching contract, the Supreme Court examined the conscionability of the clause. The court first held that the clause constituted a contract of adhesion because defendant, as the weaker bargaining party, had no meaningful choice regarding acceptance of the contract provisions. The court also noted that the contract was a form contract that provided no negotiation between the parties. However, the court held that unconscionability does not render all form contracts unacceptable and that form contracts are only unconscionable if the terms are not within the reasonable expectation of the party who had no opportunity to negotiate. Although the liquidated damages clause in defendant's contract was harsher than most, as a teacher, defendant knew that teachers are typically employed for an entire year and how difficult it is to replace equivalent services at small rural schools, so it was within defendant's reasonable expectations to agree to a contract with a 20% liquidated damages provision for departing so close to the start of the school year, even though defendant had no meaningful choice regarding the provision. The enforceability of the liquidated damages clause was affirmed. Arrowhead School District No. 75 v. Klyap, 2003 MT 294, 318 M 103, 79 P3d 250 (2003).

Use of Corporation by Individual as Subterfuge — Piercing Corporate Veil to Hold Individual Liable for Breach of Lease: Defendant formed a corporation to render dental services and leased a building for a dental practice with two other dentists, including plaintiff. After the practice became successful, defendant demanded possession of the entire property by letter. When plaintiff did not respond, defendant vacated the building on behalf of the corporation and discontinued paying rent, but the decision was never documented in the corporation's records.

Plaintiff sued for breach of the lease contract. Following trial, the District Court concluded that defendant was the alter ego of the corporation and the real party in interest under the lease and that it would be inequitable to allow defendant to use the corporation as a subterfuge to defeat public convenience or justify wrong. Thus, the corporate veil was pierced, and defendant was held personally responsible for damages arising from the breached lease. On appeal, the Supreme Court applied the test in Berlin v. Boedecker, 268 M 444, 887 P2d 1180 (1994), to determine whether circumstances were appropriate for piercing the corporate veil. The court noted that the veil may not be pierced simply because an individual is the alter ego of a corporation and the true party in interest. There must be substantial evidence that the corporate entity was used as a subterfuge to defeat public convenience, justify wrong, or commit fraud, but bad faith alone may be a sufficient cause for piercing the veil. Here, the corporation was unable to satisfy the judgment because it was undercapitalized from its inception, suggesting defendant acted in bad faith. Further, it was inequitable for defendant to personally profit from renting property to the corporation and protect himself from liability with the undercapitalized corporation. The judgment was affirmed. Peschel Family Trust v. Colonna, 2003 MT 216, 317 M 127, 75 P3d 793 (2003).

Negligence During House Moving — Breach of House Moving Agreement — Remand for Determination of Causation and Damages: Kelly entered an agreement with Hall to move four of Kelly's housing units. Hall agreed to obtain cargo insurance on each unit but did not do so. During the move, two units were damaged, and Kelly filed a claim against Hall's insurer for remuneration. The claim was denied, and the insurer sought a declaratory judgment against both Hall and Kelly. Kelly filed negligence and breach of contract claims against Hall, and Hall counterclaimed for breach of contract against Kelly. The District Court concluded that Kelly failed to establish negligence, that both parties breached the contract, and that neither party could recover against the other. On appeal, the Supreme Court affirmed the finding that Hall breached the contract by failing to obtain cargo insurance and that, based on the presumption against conditions precedent and inconclusive evidence, Kelly also breached the contract and thus could not recover breach of contract damages. However, there was no evidence to rebut Kelly's negligence claim, nor did the District Court address the damages that Hall conceded occurred during the move. Because it was error to find that Kelly failed to establish negligence, the case was remanded for trial on causation and damages. Scottsdale Ins. Co. v. Hall, 2003 MT 188, 316 M 460, 73 P3d 819 (2003).

Disclosure of Building Leakage and Source of Water Not Material Fact: Plaintiffs purchased a building in Philipsburg for use as a residence. Water began seeping into the basement a couple of years later, and plaintiffs sued the sellers for breach of the warranty of habitability and the city because the source of the water may have been from a broken water line nearby. The District Court summarily dismissed the claim against the sellers because the sellers' knowledge of prior leakage was not a material fact and because the question of the source of the water was not material to the transaction between the parties. Plaintiffs appealed, but the Supreme Court affirmed. Plaintiffs all but conceded that the prior leakage was not important when they did not disclose the leakage to the bank when they refinanced the property. Further, plaintiffs' initial claim against the sellers was for nondisclosure of the leakage without regard to the source, so summary judgment was not precluded because the source was not essential to the case against the sellers. Bond v. Philipsburg, 2003 MT 74, 315 M 7, 67 P3d 255 (2003).

Plaintiffs Residing in House for Several Years Not Entitled to Instruction on Warranty of Habitability: The Satterfields appealed the District Court's refusal to submit a jury instruction regarding the implied warranty of habitability. The Supreme Court held that the instruction was properly excluded because the plaintiffs did not introduce enough evidence to support their argument especially in light of the fact that they inhabited the home for a period of several years after construction was finished. Satterfield v. Medlin, 2002 MT 260, 312 M 234, 59 P3d 33 (2002).

Material Misrepresentation on Application for Credit Life and Disability Insurance — Denial of Coverage Warranted: Schlemmer applied to the North Central Life Insurance Company (North Central) for credit life and disability insurance but misrepresented his health history. If he had answered correctly on the application, he would have been ineligible for the insurance. Nevertheless, he averred by his signature that he understood the form and that his application statements were true, so the policy was issued. Schlemmer later filed a claim for disability payments. North Central investigated, found that Schlemmer had been treated within the previous 2 years for hypertension, chronic obstructive lung disease, and disease or disorder of the kidneys, contrary to his statements in the application, and denied the claim and refunded Schlemmer's premiums. Schlemmer sued for damages, claiming that the application and underwriting procedures used by North Central violated 33-18-201, commonly known as the

unfair claims settlement practices law, breached the covenant of good faith and fair dealing, and constituted fraud. Schlemmer also maintained that the District Court erred in failing to rule on whether North Central's agent had knowledge of Schlemmer's condition, which might have created a question of material fact. The Supreme Court affirmed the District Court's rulings that: (1) Schlemmer's claim of ignorance of the contents of the written application could not prevail because the application language was clear and unambiguous and Schlemmer did not deny signing it; (2) Schlemmer materially misrepresented his health on the application; (3) the material misrepresentation was legally sufficient to allow North Central to deny coverage under the policy; and (4) Schlemmer's argument that North Central's agent knew or should have known about Schlemmer's health was mere speculation insufficient to create an issue of fact to defeat North Central's properly supported motion for summary judgment. Further, the Supreme Court declined to consider Schlemmer's argument that the misrepresentation could not serve as a basis to rescind the policy because he did not apply for benefits until more than 2 years after applying for the insurance, pursuant to 33-22-205, because Schlemmer never raised the issue at the District Court level. Schlemmer v. N. Cent. Life Ins. Co., 2001 MT 256, 307 M 203, 37 P3d 63 (2001).

Lack of District Court Jurisdiction Over Breach of Contract Dispute Regarding Work Performed Within Indian Reservation: The District Court held that it lacked subject matter jurisdiction over a breach of contract dispute between two Montana corporations and a non-Indian minority shareholder of one of the corporations for work performed within the boundaries of the Flathead Indian Reservation, concluding that the tribal court had sole jurisdiction to hear all commercial disputes arising on the reservation involving a tribal defendant and that any allegation of fraud or impropriety involving tribal policy for giving preference to Indian-owned businesses necessarily implicated tribal self-government. Plaintiff appealed, contending that a corporation, even if Indian-owned, is neither an "Indian" nor a "tribal member" for purposes of determining subject matter jurisdiction and that the matter was nothing more than one Montana corporation bringing a claim for money damages against another Montana corporation and did not call into question any tribal act. The District Court correctly applied the three-part test in State ex rel. Iron Bear v. District Court, 162 M 335, 512 P2d 1292 (1973), in determining whether a state court may assume subject matter jurisdiction when tribal adjudicatory sovereignty over a civil dispute arising on a reservation is involved. The test involves consideration of whether: (1) federal treaties and statutes preempt state jurisdiction; (2) exercise of state jurisdiction would interfere with reservation self-government; and (3) the tribal court is currently exercising jurisdiction or has exercised it in a manner that preempts state jurisdiction. Pursuant to U.S. Supreme Court case law, if either of the first two prongs of the test is established, the state lacks jurisdiction. In analyzing the second prong of the test, the court applied Milbank Mut. Ins. Co. v. Eagleman, 218 M 58, 705 P2d 1117 (1985), which states that a tribe's interest in self-government for civil matters arising within a reservation can be implicated if a state or federal court resolves a dispute that impinges on a tribe's right to adjudicate controversies arising within the province of tribal courts or if the dispute itself calls into question the validity or propriety of an act fairly attributable to the tribe as a governmental body. In the context of this case, the questions then became: (1) whether the subcontractor was an Indian-owned business for preference purposes under its subcontract with the general contractor; and (2) whether the subcontractor committed fraud upon the tribe or otherwise violated the tribe's preference policy to the detriment of plaintiff. Concluding that the answers to both questions clearly implicated tribal court jurisdiction and policymaking authority, the court concluded that it could not assert jurisdiction without violating the policy favoring tribal self-government or interfering with the tribe's sovereignty. The Supreme Court agreed. To assume jurisdiction and decide whether a corporation had committed fraud upon the tribe or a contractor in privity with the tribe or to decide whether or not a corporation should be considered Indian-owned in spite of a prior determination by the tribe would require the District Court to impinge upon the tribe's right to adjudicate controversies arising within the province of the tribe's own courts. Further, even if the District Court were to assume that all of plaintiff's allegations were true, a hearing on the jurisdictional question was unnecessary because the court could not assume subject matter jurisdiction as a matter of law, so the court did not err by issuing its order rather than conducting a hearing on the question. Gen. Constructors, Inc. v. Chewculator, Inc., 2001 MT 54, 304 M 319, 21 P3d 604 (2001).

Plain Language of Policies Providing Insurance on Rental Car Construed — Primary Versus Excess Coverage: Hudson used a credit card to rent a 1995 Ford Mustang convertible from P.C. Rental, Inc. (P.C.). Three days later, Hudson lost control of the car, resulting in damages rendering the vehicle a total loss. At the time of the accident, P.C. had a commercial lines policy

through Empire Fire and Marine Insurance Company (Empire) that included liability and physical damage coverage. Hudson did not own a vehicle and was not covered under a personal policy, but auto rental insurance was provided by the company whose credit card Hudson used for the rental. Empire paid P.C. the agreed actual cash value of the vehicle, minus a $1,000 policy deductible, then sold the damaged vehicle for salvage and received an additional $1,108. The credit card company, Visa U.S.A. (Visa), also paid P.C. about $7,800 to cover P.C.'s deductible and lost rental fees. P.C. then brought a breach of contract action against Hudson for failing to return the vehicle in the same condition in which it was rented, as required by the rental agreement. Hudson alleged that Chase Manhattan Bank (Chase), as issuer of the credit card, was responsible for damages sustained to the rental car under the terms of the rental insurance. Hudson subsequently filed for bankruptcy and assigned all rights in the third-party action against Chase to P.C. P.C. then amended the complaint to include the credit card company as defendant, alleging that the rental insurance provided coverage on a 24-hour basis for damage to a car rented with the credit card up to the full value of the car. Visa denied P.C.'s allegations regarding the rental insurance, alleged that Visa had met its obligations under the policy by covering P.C.'s deductible and lost rental fees, and moved for summary judgment, which was granted. The District Court concluded that Hudson was an insured under the liability policy provided to P.C. by Empire and thus Empire was not entitled to subrogate against its own insured. The court determined that because both policies provided damage coverage for the same vehicle, it was necessary to look to the "other insurance" clauses of the policies. The Empire policy stated that its coverage was primary, while the Visa policy stated that its coverage was excess coverage, so Empire was not entitled to recover any of the amount that it paid to P.C. from Visa. On appeal, the Supreme Court affirmed. Given the nature of the coverage available, no determination of whether Hudson was an insured under Empire's physical damage coverage was necessary or possible under the policies. The District Court did not err when it concluded that, based on the clear language of the policies, P.C.'s physical damage coverage was primary and Visa's rental insurance was excess. P.C. Rental, Inc. v. Chase Manhattan Bank, 2000 MT 106, 299 M 315, 998 P2d 1168, 57 St. Rep. 430 (2000).

Liability for Issuance of Conflicting Title Insurance Policies — Due Diligence Standard Applicable to Title Examination Resulting in Loss: Based on information in Realty Title Company's (Realty's) own records and abstract plant, a reasonably diligent inquiry would have disclosed that a survey had been completed and filed of record for purposes of defining the tract of land covered by the Turks' policy. When Realty later insured Weibert for the same tract, it violated the rule in Lipinski v. Title Ins. Co., 202 M 1, 655 P2d 970, 39 St. Rep. 2283 (1982). Realty's own record and abstract plant put it on sufficient notice of a possible defect in Weibert's title, and Realty was therefore obligated to inquire further prior to issuing a title insurance policy insuring the same tract. Failing twice to do so, Realty breached the obligation under the agency contract to exercise due diligence in the title examination and was liable for the subsequent loss. Old Republic Nat'l Title Ins. Co. v. Realty Title Co., 1999 MT 69, 294 M 6, 978 P2d 956, 56 St. Rep. 286 (1999).

Party May Choose to Breach Contract and Pay Damages: American Music Co. (AMC) sued Higbee and requested a preliminary injunction for Higbee's not honoring the parties' contract by replacing AMC's gambling machines with other machines. The Supreme Court stated that an injunction was not available because a party has a right to breach a contract if the party is willing to pay the damages caused by the breach and, in the present case, the amount of damages could be determined. Am. Music Co. v. Higbee, 1998 MT 150, 289 M 278, 961 P2d 109, 55 St. Rep. 586 (1998).

Agricultural Lease — No Error in Failure to Give Instruction on Implied Contract Covenant to Farm in Workmanlike Manner — Express Lease Terms Stricter Than Requested Instruction on Implied Term: The Schumachers leased property that they owned to Stephens through an agricultural lease. The lease required Stephens to farm with "diligence and care" and to do "all work necessary . . . and to the best interest of lessor, all in such time and manner as shall be to the best advantage and economy". The Schumachers sued Stephens, alleging that Stephens breached the implied contract covenant of good faith and fair dealing. The District Court refused to give the Schumachers' requested instruction on an implied covenant in the lease that would have required Stephens to farm the property in a "competent, skilled, workmanlike and husbandlike fashion". The Supreme Court noted that: (1) the District Court was correct in not giving an instruction on negligence because the Schumachers' complaint and evidence contained no such theory; (2) the District Court did instruct on the implied covenant of good faith and fair dealing; (3) the standard of care required of Stephens was expressly stated in the lease itself; and (4) the Schumachers had not shown that they were prejudiced by the failure to give the requested

instruction. For these reasons, the Supreme Court held that it was not error for the District Court to refuse to give an instruction on an implied covenant to farm in a workmanlike manner. Schumacher v. Stephens, 1998 MT 58, 288 M 115, 956 P2d 76, 55 St. Rep. 247 (1998).

Agricultural Lease — No Error in Failure to Give Plaintiffs' Instruction on Effect of Material Participation Provisions — Instruction on Mutual Cooperation Held Sufficient: The Schumachers leased property that they owned to Stephens through an agricultural lease. Later, when the Schumachers sued Stephens over Stephens' failure to comply with the terms of the lease, Stephens claimed in defense that the Schumachers had breached the material participation agreements in the lease and that therefore he was excused from compliance. The Schumachers requested an instruction stating that if the jury found that Stephens failed to cooperate with the plaintiffs, then Stephens was not entitled to claim that he was excused from liability because of his contention that the Schumachers breached the material participation agreements in the lease. The District Court refused to give the instruction and instead gave an instruction stating that "the failure of a party to fully perform a contract is excused if his performance is prevented or delayed by the conduct of the other party". The Supreme Court noted that the Schumachers had not shown that they were prejudiced in any way by the failure of the District Court to give the requested instruction. Citing Fillinger v. NW. Agency, Inc., of Great Falls, 283 M 71, 938 P2d 1347 (1997), the Supreme Court held that: (1) a party assigning error to a refused instruction must show that the party was prejudiced by the refusal; and (2) the refused instruction must be reviewed in the context of the instructions that were given and the evidence produced at trial. Under these standards, the Supreme Court held that the instruction given by the District Court was sufficient. Schumacher v. Stephens, 1998 MT 58, 288 M 115, 956 P2d 76, 55 St. Rep. 247 (1998).

Mortgagee's Right to Assert, on Mortgagee's Behalf, Mortgagor's Contract and Tort Claims for Damage to Property: The mortgagee alleged that the engineering firm hired by the mortgagor knowingly laid improper pipe in the land, resulting in the state's disapproval of the pipe. The mortgagee could not sue the engineering firm for breach of contract and for breach of professional duty owed to the mortgagor under the theory that the mortgagee was a direct creditor of the mortgagor and was entitled to execute on any asset of the mortgagor and that the contract and breach of professional duty claims were assets. The mortgagee would have to be a judgment creditor of the mortgagor with a claim against the mortgagor that had been reduced to judgment before the mortgagee could sue the engineering firm for breach of the firm's contract with and professional duty to the mortgagor. Turner v. Kerin & Associates, 283 M 117, 938 P2d 1368, 54 St. Rep. 522 (1997).

Expert Testimony Not Needed on Insurance Agent's Standard of Care in Procuring Requested Insurance: In an insureds' negligence and contract action against an insurance agency for failure to procure requested coverage, an insurance agent testified as to the duties and responsibilities of an insurance agent when asked to procure specific insurance. Expert testimony on the insurance agent's standard of care and breach of the standard was not required. Fillinger v. NW. Agency, Inc., of Great Falls, 283 M 71, 938 P2d 1347, 54 St. Rep. 500 (1997).

Insurance Agent's Failure to Procure Requested Coverage — Duty of Insured to Read Policy and Confirm Requested Coverage: The jury reasonably found that it was not unreasonable for husband and wife to have not read the insurance policy covering their outfitting business and that it was reasonable for them to act in reliance upon the representations of their insurance agent. The insureds did not have an absolute duty to read the policy. Failure to read a policy might amount to contributory negligence, but that is a question for the jury. The husband testified that he asked the agent for a policy that would cover everything, especially if someone were hurt on a horse, and that he was told that it would. He asked the same question for a number of years each time that the policy was renewed and was always given an affirmative answer. The agent testified that the husband frequently asked about and was concerned about "horse rider" coverage. When an accident occurred involving a horse, the agent told the husband that the bills would be paid. However, the insurance company failed to pay the bills, and the insured sued the agent for negligence and breach of contract. Fillinger v. NW. Agency, Inc., of Great Falls, 283 M 71, 938 P2d 1347, 54 St. Rep. 500 (1997).

Breach of Contract Action for Failure to Properly Embalm Deceased — Agency — Standing to Sue: Maria handled all funeral arrangements for her deceased mother. The family of the deceased, when viewing the body, observed a stain on the clothing that was determined to be caused by leaking embalming fluid. The lower court dismissed the family's claim for breach of contract and also ruled that Maria was not acting as agent for the other family members and that only she would have been able to sue for breach of contract. The Supreme Court held that a cause of action for breach of contract would exist if Maria could show that the breach had so "damaged"

the funeral as to constitute a breach of contract entitling Maria to damages. The Supreme Court did affirm the lower court's ruling that Maria was not acting as an agent for the rest of the family in contracting with the mortuary. Therefore, only she could sue on the contract. Contreraz v. Michelotti-Sawyers & Nordquist Mortuary, Inc., 271 M 300, 896 P2d 1118, 52 St. Rep. 454 (1995).

Damages — Duty to Award Damages — Sufficient Evidence to Support Award: Plaintiff, who leased restaurant premises from defendant, sued for breach of contract and assault and battery. Defendant counterclaimed. The jury found for plaintiff and awarded contract damages. Defendant appealed on the grounds that there was insufficient evidence to support the award. Plaintiff introduced evidence of expenses, labor, actual income receipt records, rent and utility records, costs of goods and variable expense figures, complete tax returns, and several summaries of this information. Defendant failed to introduce any testimony or evidence to contradict the documents introduced by plaintiff. The Supreme Court held that there was substantial credible evidence to support the award. Having determined liability, it was the jury's duty to calculate an award of damages, including lost profits, based on the evidence presented. Lee v. Kane, 270 M 505, 893 P2d 854, 52 St. Rep. 268 (1995), followed in Grenfell v. Anderson, 1999 MT 272, 296 M 474, 989 P2d 818, 56 St. Rep. 1101 (1999).

Lost Profits — Expert Testimony Not Required — Error to Limit: Plaintiff sued for breach of contract involving the lease of a restaurant. Plaintiff appealed the District Court's limiting of damages for lost profits to the period prior to the restaurant's closing. Defendant appealed on grounds that the District Court erred in denying a motion for judgment as a matter of law on the issues of contract damages and lost profits. Defendant based his argument on the judge's statement in chambers that there was no rational basis for the jury to award lost profits because plaintiff failed to introduce expert testimony on that issue. The Supreme Court held that the lower court did not err in denying defendant's motion. Expert testimony is not required to prove lost profits. Lost profits need be proved only with the best evidence under the circumstances that will support a reasonably close estimate of the loss. The District Court abused its discretion by limiting lost profits to the period prior to the restaurant's closing. Lee v. Kane, 270 M 505, 893 P2d 854, 52 St. Rep. 268 (1995).

Failure to Comply With Provisions of Federal Act Incorporated by Reference Into Contract — Affirmative Defense: The Farm Credit Bank instituted suit to foreclose on a loan agreement with the Graveleys and filed for summary judgment. The Graveleys argued that the bank was estopped from foreclosing because it had not complied with the restructuring provisions of the Agricultural Credit Act of 1987, which had been incorporated by reference into the parties' agreement. The Supreme Court held that the Graveleys were entitled to assert as an affirmative defense the failure of the bank to follow the provisions of the Act and that allowing the defense was not synonymous with allowing a foreclosure court to substitute its judgment for that of the bank's loan officers. The Supreme Court also held that the lower court had correctly denied the motion for summary judgment on the basis that factual issues existed with respect to the merits of the Graveleys' affirmative defense. State ex rel. Farm Credit Bank of Spokane v. District Court, 267 M 1, 881 P2d 594, 51 St. Rep. 709 (1994), following Farm Credit Bank of Spokane v. Parsons, 758 F. Supp. 1368 (D.C. Mont. 1990), and followed in AgAmerica, FCB v. Robson, 272 M 413, 901 P2d 100, 52 St. Rep. 800 (1995).

Extent of Obligation of Good Faith and Fair Dealing Measured by Justifiable Expectations of Parties: Talley argued that because the covenant of good faith and fair dealing is implied into every contract, the community college that employed him as a part-time instructor breached the covenant by not hiring him back after his term contract expired. However, the nature and extent of the obligation of good faith and fair dealing is measured by the justifiable expectations of the parties. Because Talley's contract had a "no-tenure" clause that precluded any justifiable expectation of continued employment, allegations of breach of the covenant of good faith and fair dealing were not reasonable. Talley v. Flathead Valley Community College, 259 M 479, 857 P2d 701, 50 St. Rep. 889 (1993).

Elements of "Special Relationship" Necessary to Support Tort Claim of Bad Faith: The essential elements of a special relationship necessary to support a tort claim of bad faith, as set out in Wallis v. Kroehler Mfg. Co., 207 Cal. Rep. 123 (1984), are: (1) the contract must be such that the parties are in inherently unequal bargaining positions; (2) the motivation for entering the contract must be a nonprofit motivation; i.e., to secure peace of mind, security, or future protection; (3) ordinary contract damages are not adequate because they do not require the party in the superior position to account for its actions and they do not make the inferior party whole; (4) one party is especially vulnerable because of the type of harm it may suffer and of necessity places trust in the other party to perform; and (5) the other party is aware of this vulnerability. If

substantial evidence is not presented in support of each and all of the elements, the court shall direct that there is no special relationship. Simmons Oil Corp. v. Holly Corp., 258 M 79, 852 P2d 523, 50 St. Rep. 433 (1993). These elements were applied in Stephens v. Safeco Ins. Co. of America, 258 M 142, 852 P2d 565, 50 St. Rep. 467 (1993). See also Story v. Bozeman, 242 M 436, 791 P2d 767 (1990).

Monetary Damages — Specific Performance Inapplicable: In a breach of contract action seeking damages, the District Court instead ordered the return of a truck. Neither 27-1-401 nor 27-1-411 was applicable under the facts in this case. It was error to order specific performance when monetary damages was the only appropriate remedy. Merkes v. Mapston, 257 M 408, 849 P2d 210, 50 St. Rep. 332 (1993).

Admission of Erroneous Surveys — No Damages Awarded: A professional surveyor contracted to survey several parcels of land admitted in two letters that the results of his work were generally agreed to be erroneous. The developers who hired him relied on these admissions to purchase additional property affected by the alleged error, then sought to recoup as damages the amount spent as the result of the survey miscalculations. The District Court properly refused to award damages based on justifiable reliance on the surveyor's admissions of error because the decision to purchase additional land was a business decision that was not justified as long as the correct corner location remained in dispute, nor was the decision based on recordation information that was confirmed by the Bureau of Land Management. Yellowstone Basin Properties, Inc. v. Burgess, 255 M 341, 843 P2d 341, 49 St. Rep. 1051 (1992).

No Basis for Future Free Rent as Element of Compensatory Damages: The trial court ruled that plaintiff did not have to pay rent for the remainder of the term of a commercial lease because defendants had breached the contract in the past by refusing to accept rent checks. The Supreme Court held that there was no change in the position of the parties regarding future rent and that therefore free rent was not an element of compensatory damages. Daniels v. Dean, 253 M 465, 833 P2d 1078, 49 St. Rep. 535 (1992).

Equal Knowledge and Opportunity by Defaulting Party — No Duty of Nondefaulting Party to Mitigate Damages: As a rule, a nondefaulting party in a contractual arrangement must act reasonably under the circumstances so as not to unnecessarily enlarge damages caused by a default. However, as set out in 22 Am. Jur. 2d Damages 508, a nondefaulting party is not under a duty to mitigate damages if the other party, who had the duty to perform under the contract, had equal opportunity to perform and equal knowledge of the consequences of nonperformance. Nimmick v. Hart, 248 M 1, 808 P2d 481, 48 St. Rep. 293 (1991), distinguishing IFG Leasing Co. v. Schultz, 217 M 434, 705 P2d 576 (1985), and Diede v. Davis, 203 M 205, 661 P2d 838 (1983).

Breach of Implied Warranty of Habitability Not Based on Fault: The plaintiffs brought an action for specific performance when the defendants quit making house payments and demanded rescission of a contract for deed. The defendants argued for rescission, alleging that the plaintiffs had breached the implied warranty of habitability. The plaintiffs, a husband and wife, contended that the warranty did not apply to them because they were not "builder-vendors" as contemplated by Montana case law. The Supreme Court held that the warranty did apply because the plaintiffs had built and sold two other houses prior to the one sold the defendants and though the plaintiffs were only amateur builders, the theory behind the warranty is not to discern fault but to place liability on the one most able to prevent the harm. Pracht v. Rollins, 239 M 62, 779 P2d 57, 46 St. Rep. 1513 (1989).

Lessor Treating Nonpayment of Rent as Partial Breach: Under the lease terms, lessor could have treated the nonpayment of rent as a total breach and accelerated the payments but waited more than a year and a half to do so. Therefore, lessor was in breach of contract itself during that period for failure to maintain signs that were the subject of the lease. Empire Dev. Co. v. Johnson, 236 M 433, 770 P2d 525, 46 St. Rep. 487 (1989).

Breach of Contract Required for Bad Faith Liability to Attach: When an underlying contract subsumes the entirety of the relationship between parties, Montana law requires an initial finding that one party breached the contract in order to have liability for bad faith and conduct attach. Mont. Bank of Circle v. Ralph Meyers & Son, Inc., 236 M 236, 769 P2d 1208, 46 St. Rep. 324 (1989), followed in Citizens First Nat'l Bank of Wolf Point v. Moe Motor Co., 248 M 495, 813 P2d 400, 48 St. Rep. 528 (1991). See also Mann Farms, Inc. v. Traders St. Bank of Poplar, 245 M 234, 801 P2d 73, 47 St. Rep. 2094 (1990), replacing previous opinion, subsequently withdrawn, at 47 St. Rep. 1557 (1990).

Tort Case — Jury Instruction Regarding Contract: It was not error in a trial based on tort liability to instruct the jury that damages could not be awarded for breach of contract. Ahmann v. Am. Fed. S&L Ass'n, 235 M 184, 766 P2d 853, 45 St. Rep. 2305 (1988).

Suspension of Performance Upon Material Breach of Contract: As part of a contract for sale of real property, seller agreed to obtain release of mortgage within 1 year, and failure to do so constituted a material breach entitling buyer to suspend performance. Sjoberg v. Kravik, 233 M 33, 759 P2d 966, 45 St. Rep. 1270 (1988).

Seller's Failure to Control Weeds Not Breach of Contract: Property buyers claimed breach of contract because of seller's failure to control noxious weeds on adjacent property. The Supreme Court noted the existing statutory remedy for allowing propagation of noxious weeds in holding that the failure to control weeds was not sufficient to forgive payment on a contract by buyers for the purchase of land. Burgess v. Shiplet, 230 M 387, 750 P2d 460, 45 St. Rep. 293 (1988).

Defects Not Precluding Use of Dwelling as Residence — Limitation of Implied Warranty of Habitability: The Supreme Court reversed a holding that the implied warranty of habitability applied in a case where a water seepage problem was an inconvenience but did not render the home uninhabitable. The court more clearly defined the implied warranty of habitability in holding that it was limited to defects that are so substantial as to reasonably preclude use of the dwelling as a residence. Samuelson v. A.A. Quality Constr., Inc., 230 M 220, 749 P2d 73, 45 St. Rep. 157 (1988).

Provision for Attorney Fees in Sales Contract Enforceable: Where a sales contract provided for an award of attorney fees to the party for any action to enforce the contract and to the prevailing party on an appeal, the sellers were properly awarded attorney fees by the District Court for enforcing the contract after breach by the buyers. The Supreme Court remanded for a determination of fees and costs after the sellers prevailed on appeal. Stevens v. Abbott, 228 M 101, 740 P2d 1136, 44 St. Rep. 1374 (1987).

Recovery Limited in Fraudulent Sale of Securities — Punitive Damages Claim Dismissed: In a case alleging breach of contract for sale of a security by means of fraud, recovery was limited under 30-10-307 to consideration paid for the security plus interest, costs, and attorney fees. A claim for punitive damages was properly dismissed. State ex rel. Vranish v. District Court, 228 M 59, 741 P2d 412, 44 St. Rep. 1341 (1987).

Instruction Necessary — Interference With Contract: An instruction on interference with contract must address the element of unjustifiability or impropriety of the alleged tortious actions and provide that the act is "without right or justifiable cause on the part of the actor". NW. Nat'l Bank of Great Falls v. Weaver-Maxwell, Inc., 224 M 33, 729 P2d 1258, 43 St. Rep. 1995 (1986), distinguished in Weinberg v. Farmers St. Bank of Worden, 231 M 10, 752 P2d 719, 45 St. Rep. 391 (1988).

Termination of Contract as Breach: The fact that a party terminated a contract amounted to a finding that he breached the contract and that he was therefore responsible for damages related to the breach. Hostetter v. Donlan, 221 M 380, 719 P2d 1243, 43 St. Rep. 909 (1986).

Lack of Appeal of Federal Agency Decision Not to Affect Contract Rights: Popp had an oral agreement to plant and harvest land owned by Frank and Gountanis. Popp attempted to enroll the land in the federal payment in kind program (PIK) but was informed by the Agricultural Stabilization and Conservation Service (ASCS) that he must have a written lease to be eligible. He never appealed the ASCS decision. Frank later contended that the failure to appeal precluded Popp from collaterally attacking that determination in District Court. The Supreme Court held that Popp's filing of a lawsuit was not a collateral attack on the ASCS decision but rather that the amended complaint showed it was a breach of contract action. The court supported the finding that the PIK program could not be used to destroy Popp's contract rights. Popp v. Gountanis, 221 M 267, 718 P2d 340, 43 St. Rep. 801 (1986).

Implied Warranty of Habitability — Privity of Contract Not Required: Sale of a lot to plaintiffs was contingent upon plaintiffs' agreement to allow seller to contract with Mora Bros., Inc., for the construction of their home. When the land beneath their new home began to slide downhill, plaintiffs sued for damages. District Court granted plaintiffs' motion for summary judgment against seller and Mora Bros., Inc., as builder-vendors on the theory of breach of implied warranty of habitability, but denied plaintiffs' motion against Mora Bros., Inc., on the issue of negligence. Supreme Court affirmed District Court's finding that Mora Bros., Inc., is liable to plaintiffs under theory of implied warranty of habitability. The warranty does not depend on a contract for its existence, therefore privity of contract is not required. Once plaintiffs showed that house moved, defendant had to provide an explanation to create a genuine issue of fact. Defendant failed to provide an explanation, so summary judgment was proper. Degnan v. Executive Homes, Inc., 215 M 162, 696 P2d 431, 42 St. Rep. 262 (1985).

Agreement Containing Remedy for Breach — Remedy Not Expressly Made Exclusive — Injunction to Enforce Agreement Improper: A tender of stock containing an agreement not to compete contained a clear provision setting forth an appropriate remedy upon breach, which was

a reduction of one-third in the stock price. Injunction was not a proper remedy to enforce the agreement because the agreement provided an adequate remedy in law. Although the agreement didn't expressly limit available remedies to those in the agreement, the court held that such limitation was not necessary because allowing injunctive relief would have nullified the remedy agreement agreed to by the parties, contrary to the intentions of the parties. Foster v. Realty Title Co., Inc., 209 M 183, 680 P2d 323, 41 St. Rep. 630 (1984).

Breach of Contract Action Sounding in Equity — Mutuality of Consent: Although an action for breach of contract to lend money is usually an action at law, the case sounded in equity where borrower argued that the contract was illusory and thus void because it lacked mutuality and that the lender's interpretation of the contract rendered the contract unconscionable and required the contract to be voided or reformed, and the lender raised the equitable defenses of estoppel, waiver, and laches. Shimsky v. Valley Credit Union, 208 M 186, 676 P2d 1308, 41 St. Rep. 258 (1984).

No Provision in Property Settlement for Attorney Fees — Fees Improperly Awarded: Where the parties to a dissolution proceeding agreed to a property settlement that did not provide for payment of attorney fees and the District Court later issued an order providing for the attorney fees to be paid by the husband if he did not comply with the agreement, the Supreme Court held that the District Court erred in issuing the order for the payment of fees by the husband. The property settlement agreement was approved by the District Court but never incorporated by reference into the decree and therefore has the status of a private contract, and the remedies for enforcement of a judgment are unavailable. Absent a statute or contractual provision, attorney fees are generally not recoverable, and since neither is involved here, there was no right to those fees. Lorge v. Lorge, 207 M 423, 675 P2d 115, 41 St. Rep. 50 (1984).

Tenant Unilaterally Terminating Lease — Damages: Plaintiff entered into a lease agreement for a motel in Forsyth that was not yet completed. The attorney for plaintiff prepared the lease. The county health and building code inspector found deficiencies requiring correction before the motel could be licensed. The parties negotiated a reduction of payments to a percentage of actual income. Many of the deficiencies were corrected, and the facility was issued a city business license. Plaintiff moved out of the motel and made no further payments. Plaintiff brought suit claiming breach by the defendant. The District Court awarded judgment and net damages to defendant. Plaintiff contended that by taking possession of the motel and operating it, defendant impliedly consented to the surrender, thereby extinguishing further obligations under the lease. The Supreme Court held that when a tenant unilaterally terminates the lease of commercial residential premises and vacates, without justification under 70-26-203, and the landlord expressly refuses consent and subsequently operates the facility to mitigate damages, the tenant is liable for net damages. Bunke, Inc. v. Johnson, 205 M 125, 666 P2d 1234, 40 St. Rep. 1163 (1983).

Punitive Damage — Tort Not Shown: Lessor sued for failure of lessee to vacate, and lessee counterclaimed that lessor converted the premises to his own use and interrupted her peaceful possession. Lessee could not get punitive damages under the conversion theory because conversion is a tort applicable to personal chattels and a leasehold interest is not a personal chattel. Nor could punitive damages be granted for interruption of peaceful possession, as it was not proven. In the absence of a showing of tortious conduct, it was error to grant lessee punitive damages in a simple contract action. Lemley v. Allen, 203 M 37, 659 P2d 262, 40 St. Rep. 279 (1983).

Construction Contract — Evidence Admissible to Establish Damages for Breach: A general contractor on a highway project subcontracted the bridge and concrete work to the plaintiff, who in turn subcontracted the concrete work to a specialist. In an action against the general contractor for breach of contract, the specialist's expert opinion evidence was admissible to establish the reasonable cost of the concrete work under the subcontract without regard to whether he was prequalified to perform the concrete work according to state Department of Highways (now Department of Transportation) standards. The trial court's dismissal of the case because there was no valid evidence to establish damages was improper. E. F. Matelich Constr. Co. v. Goodfellow Bros., Inc., 198 M 150, 645 P2d 391, 39 St. Rep. 831 (1982).

Malicious Inducement of Breach of Contract — Individual Liability of Corporate Agents, Employees, Officers, or Directors: In a case of first impression in Montana, the issue was whether agents, employees, officers, or directors of a corporation may be held liable individually for the tort of malicious inducement of a breach of an employment contract. The resolution of the appeal depended upon a weighing of public policy considerations. The court held that the corporate veil should not be utilized as a protection device by those who employ corporate power or authority to serve their own ends. Tort liability for the inducement of breach of contract should be imposed

when a corporate agent, employee, officer, or director induces a breach of contract for private benefit or because of personal feeling and purposes relative to a third party. The privilege of limited liability should be applicable in those situations where actions are motivated and taken in the furtherance of corporate purposes, policies, and interests. When plaintiff/appellant failed to show that the actions of individual defendants were not taken in furtherance of corporate purposes and interests, the summary judgment granted to the defendants was affirmed. Phillips v. Mont. Educ. Ass'n, 187 M 419, 610 P2d 154 (1980), followed in Bottrell v. Am. Bank, 237 M 1, 773 P2d 694, 46 St. Rep. 561 (1989), Lachenmaier v. First Bank Sys., Inc., 246 M 26, 803 P2d 614, 47 St. Rep. 2244 (1990), Mannix v. Butte Water Co., 249 M 372, 816 P2d 441, 48 St. Rep. 782 (1991), and King v. Zimmerman, 266 M 54, 878 P2d 895, 51 St. Rep. 659 (1994).

Breach of Contract — Value of Goodwill Determined: In an action for breach of a contract to sell and purchase a barbershop business, the sole issue on appeal was the proper determination of the value of goodwill attributable to the shop's location. The court found that the District Court improperly restricted the reasonable value of goodwill associated with the shop's location to a 1-month period, in light of the facts that the purchaser had obtained a long-term lease and that there was no indication that the lessor would have been unwilling to have leased to the seller on a long-term rather than a month-to-month basis. While there is no rigid rule for determining the value of goodwill, the best indicator is the purchase price agreed upon in a voluntary arm's-length transaction. The three elements comprising the purchase price in this contract were the goodwill associated with the shop's location, the seller's furniture and fixtures, and the shop's telephone connection. The seller removed the fixtures and furniture and disconnected the telephone upon learning of the purchaser's new lease arrangements. These things were valued at $3,000. The seller's recovery was therefore based on the purchase price less the $3,000. An estimate of business lost due to changing locations was then used to determine the percentage of the base price representing the shop's goodwill attached to the shop's location. Baldwin v. Stuber, 187 M 430, 610 P2d 160 (1980).

Partial Performance — Restitution — Damages: A joint venture was formed, the contract contemplating the feeding of cattle by one party until 80% graded "choice", followed by sale and splitting of the proceeds with the supplier of the cattle, who was the second party. When cattle prices dropped, the feeder lost his financing and defaulted on the contract. The agreement was entire and nonseverable. Having failed in the complete performance of the contract, the feeder could not recover under it. Restitution to the feeder of his expenses before default would have to be based on implied contract theory. In order for a claim of restitution to lie, there must be no willful or intentional departure from the contract, and the defects in performance must not pervade the whole, or be so essential that the object which the parties intended to accomplish is not accomplished. The feeder could not recover his prior expenses because a party who has completely breached an entire, nonseverable contract without justification or excuse may not recover for any performance rendered prior to the breach. On the contrary, a counterclaim against the feeder for damages was upheld. Roundup Cattle Feeders v. Horpestad, 184 M 480, 603 P2d 1044 (1979), distinguishing Murphy v. Redland, 178 M 296, 583 P2d 1049 (1978).

Tort Actions Arising out of Breach of Contract: A party has a cause of action in tort arising out of a breach of contract only if the defaulting party, by breaching the contract, also breaches a duty owed to the complaining party independently of the contract. Boise Cascade Corp. v. First Sec. Bank of Anaconda, 183 M 378, 600 P2d 173 (1979), following First Sec. Bank of Bozeman v. Goddard, 181 M 407, 593 P2d 1040 (1979).

Sale of Real Estate — Water Rights: Where seller represents that motel is in compliance with AAA standards and that water rights are established, buyer will not be deprived of the benefit of his bargain and damages for buyer are appropriate, notwithstanding "as is" clause regarding premises or speculative nature of damages for replacement water supply. Moore v. Swanson, 171 M 160, 556 P2d 1249 (1976).

Instructions on Damages — Consequential Damages: Where contract for erection of silo was abandoned by defendant after negligent efforts at erection ended with collapse of silo in windstorm, plaintiff was entitled to jury instructions on damages relating both to breach of contract and to negligence. The plaintiff was also entitled to an instruction on consequential damages because the silo was an irreplaceable item. Bos v. Dolajak, 167 M 1, 534 P2d 1258 (1975).

Damages for Waste — Real Estate Contract: This section was applicable to determine damages for breach of contract and tortious injury to personal and real property where action was based on provision of contract prohibiting waste; damages for waste were recoverable despite fact that 27-1-315 makes no specific provision therefor, since this section clearly

expresses that an aggrieved party is entitled to receive compensation for the loss he sustains. Wiseman v. Holt, 163 M 387, 517 P2d 711 (1973).

Statutes Not Exclusive: Statutes on the measure of damages are not exclusive; damages in addition to those provided in the statutes are recoverable under this section. Wiseman v. Holt, 163 M 387, 517 P2d 711 (1973).

Breach by Both Parties: Where buyer of exclusive business rights in a territory broke contract by failing to make payments as they fell due and seller broke the contract by doing business in the same territory, seller could not defend his breach by claiming a rescission of the contract when he later brought an action for the amount due on it, and buyer was entitled to set off amount of profit seller took from the territory. Leiman-Scott, Inc. v. Holmes, 142 M 58, 381 P2d 489 (1963).

Well Drilling: Where defendant failed to complete contract calling for his drilling of a water well, verdict of $1,000 for plaintiff was proper. Hein v. Fox, 126 M 514, 254 P2d 1076 (1953).

Action on Injunction Bond:

The measure of damages prescribed by this section is applied in an action on an injunction bond. Sheridan County Elec. Co-op, Inc. v. Ferguson, 124 M 543, 227 P2d 597 (1951).

Where a party is precluded from moving to dissolve an injunction and is driven to the remedy of trying to defeat the injunction, in which effort he is successful, the necessary court costs and fees of witnesses are a direct result of the wrongful issuance of the injunction and constitute a recoverable item of damages in an action on the bond given pursuant to 27-19-306. McDermott v. Am. Bonding Co., 56 M 1, 179 P 828 (1919).

The measure of damages in an action on an injunction bond is the amount which will compensate for all the detriment proximately caused by the injunction during the time it was in operation or which in the ordinary course of things was likely to result therefrom. McDermott v. Am. Bonding Co., 56 M 1, 179 P 828 (1919).

Attorneys' Fees, as Such, Not Recoverable — When Recoverable as Compensatory Damages: Attorneys' fees, as such, are not allowable as part of the damages in an action for breach of contract in the absence of contractual stipulation therefor or statutory allowance thereof, but where a lessee of farmlands in his attempt to obtain possession prior to commencement of action incidentally paid a small amount to an attorney, the amount so paid was properly recoverable as an element of compensatory damages. Smith v. Fergus County, 98 M 377, 39 P2d 193 (1934).

Wrongful Interference: Where full performance of a contract is prevented by the wrongful interference of one party, the other may treat such wrongful act as a breach of the contract and sue at once for damages arising from his having been prevented from reaping all the benefits and advantages which would reasonably follow a complete performance on his part, and the measure of his recovery would be the difference between the contract price and the expense to him of doing the work. McFarland v. Welch, 48 M 196, 136 P 394 (1913).

Attorney Fees — Failure to Pay: A client's failure to pay an attorney his fee when it becomes due is a breach of an obligation arising from contract, and the measure of damages for such breach is the principal amount due at the completion of the services plus the detriment proximately caused by the client's failure to pay, that is, legal interest for loss of the use of the money from that time up to the date of trial. Myers v. Bender, 46 M 497, 129 P 330 (1913).

PROXIMATELY CAUSED OR IN THE ORDINARY COURSE OF THINGS

Consent to Sublet Unreasonably Withheld — Measure of Landlord's Damages: Where the plaintiff landlord unreasonably withheld its consent for the defendant tenant to sublet the plaintiff's offices to the state parole board and the defendant quit the premises, whereupon the plaintiff convinced Waddell, another of its tenants, to move into the offices vacated by the defendant, the District Court did not err in holding that the plaintiff was entitled only to the rent owed by the defendant minus that amount which could have been earned by subletting to the state parole board. The refusal by the plaintiff to consent to the sublease was not such an interference with the leasehold estate as to justify cancellation of the lease by the defendant, and because the lease agreement is silent as to damages owed by the defendant in such an instance, the defendant is entitled to those damages directly caused by the plaintiff's unreasonable refusal and the plaintiff is entitled to those damages directly resulting from the defendant's abandonment of the lease. The District Court therefore properly applied the amount of rent receivable by the sublease as an offset against the rental payable by the defendant over the remaining term of the lease and refused to hold the defendant liable for the rental of the offices vacated by Waddell, as those damages are remote. Brigham Young Univ. v. Seman, 206 M 440, 672 P2d 15, 40 St. Rep. 1767 (1983).

Evidence Not Established: Evidence did not establish that the breakdown of a tractor that a farmer used to perform contract to seed landowner's land was proximately caused by landowner's failure to pay farmer the balance due for his work. Therefore, the maintenance and towing award to farmer was overturned. Weyler v. Kaufman, 196 M 132, 638 P2d 393, 38 St. Rep. 2197 (1981).

Fraud in Sale of Commercial Property — Compensatory Damages as Benefit of Bargain: Where the plaintiff sued for damages caused by the defendants' fraud in the execution of a contract for deed for the sale of a shale and concrete block plant, alleging that the defendants falsely represented the plant to be in compliance with air pollution control laws, the court did not err in granting the plaintiffs as damages that amount of money necessary to bring the plant into compliance with those laws. In the sale of commercial property, a commercial standard of damages should be applied. Plaintiffs are entitled to the benefit of their bargain, a plant which complies with the law. Therefore, plaintiffs are entitled to damages in the amount that will bring the plant into compliance. Poulsen v. Treasure St. Indus., Inc., 192 M 69, 626 P2d 822, 38 St. Rep. 218 (1981).

Damages for Loss of Profits: A person may recover for loss of profits which is the natural and direct result of the act of the defendant when such amount is certain and the amount awarded by the court is well within the evidence. Nevin v. Silver Bow County, 172 M 501, 565 P2d 314 (1977).

Damages for Loss of Anticipated Gross Income: Where plaintiff sold his accounting business due to a faulty computer, he could not determine damages by showing difference between projected gross income for the year and his actual gross income because such amount lacks certainty of origin. Lovely v. Burroughs Corp., 165 M 209, 527 P2d 557 (1974), reaffirmed in Lovely v. Burroughs Corp., 169 M 454, 548 P2d 610 (1976).

Jury Instruction: In action by plaintiffs, who purchased residence from contractor before it was completed, to recover for defective material and workmanship, instruction, although broad, was not prejudicial, where it read: "You are instructed that if you find from a preponderance of the evidence in this action that plaintiffs are entitled to damages, then in arriving at the measure of damages, it is the amount which will compensate the plaintiff for all detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom, or which has resulted therefrom." Mitchell v. Carlson, 132 M 1, 313 P2d 717 (1957).

Attorney Fees: Where parties have been enjoined and the remedy by motion to dissolve is not available to them and they pursue the only course recognized by the law to rid themselves of the restrictions imposed by the injunction, namely, to defeat it, and they are successful in so doing, the reasonable compensation paid for the services of counsel employed for the special purpose of defeating the injunction is the natural and proximate result of the wrongful issuance of the injunction and is recoverable under this section in an action on the bond given under 27-19-306. McDermott v. Am. Bonding Co., 56 M 1, 179 P 828 (1919).

Damages Not Proximately Caused: Circumstances under which damage to a mining company's credit, destruction of its business, and loss of its property through sales under a judgment secured by employees for wages due at the time an attachment was levied on its real property were held not to have been the proximate consequences of the attachment for which the surety on the attachment undertaking could be held liable. Plymouth Gold Min. Co. v. USF&G Co., 35 M 23, 88 P 565 (1907).

ASCERTAINABLE AND NOT SPECULATIVE

Contract Remedy Providing Transfer of Twenty-Acre Parcel of Land as Security for Contractual Obligations Not Considered Unenforceable Liquidated Damages Provision — Award of Actual Damages Not Including Expectancy Damages and Lost Profits: As part of a sale of real property, Canton pledged a 20-acre parcel to Riverview Homes II, Ltd. (Riverview), as security in the event that Canton breached his contractual obligation to complete a proposed subdivision and construct an artificial lake. Canton breached the contract, and Riverview sought to quiet title to the 20-acre parcel. The District Court agreed that Canton breached the contract, but held that the contract remedy was an unenforceable liquidated damages provision because the amount of damages to be paid for breach of Canton's obligations was determined in anticipation of Canton's possible breach. The court then examined the contract for another possible method to determine the appropriate amount of damages, and ultimately awarded Riverview $92,046 as the amount that Riverview would have received for the sale of the property as bare lots without homes. Riverview appealed, contending that the contractual language was not a liquidated damages provision because the parties did not agree on the amount of compensation or damages to be paid by Canton in case of a breach of contract, and arguing that the District Court erred in setting the damage amount by failing to account for the profit that

Riverview would have received from the sale of the lots with homes. The Supreme Court agreed that the contract language was not an unenforceable liquidated damages provision, but found that the discussion regarding liquidated damages was not essential to the resolution of the parties claims, and moved on to the actual award of damages. The Supreme Court declined to allow Riverview an award of speculative profits in the absence of lost profits attributable to Riverview's inability to sell developed lots. The District Court's determination of damages was affirmed. If the contract had been performed, Riverview would have had six bare lots approved as a subdivision and an artificial lake. Because of Canton's breach, Riverview had neither. The District Court's award accounted for the expectations of the parties at the signing of the contract, and Riverview was not allowed to recover a greater amount of damages than would have been gained by full performance of the contract. Riverview Homes II, Ltd. v. Canton, 2001 MT 309, 307 M 517, 38 P3d 848 (2001).

Party May Choose to Breach Contract and Pay Damages: American Music Co. (AMC) sued Higbee and requested a preliminary injunction for Higbee's not honoring the parties' contract by replacing AMC's gambling machines with other machines. The Supreme Court stated that an injunction was not available because a party has a right to breach a contract if the party is willing to pay the damages caused by the breach and, in the present case, the amount of damages could be determined. Am. Music Co. v. Higbee, 1998 MT 150, 289 M 278, 961 P2d 109, 55 St. Rep. 586 (1998).

Damages Based on Opinion That Bonds Would Not Be Called: The defendant objected to the amount of damages that were based in part on expert testimony that certain industrial revenue bonds would not be called in 1992 and instead that the damages should be calculated using the year 2002. The Supreme Court held that the evidence made it reasonably certain for the jury to assume that the bonds would not be called in 1992 and that the damages incurred by the plaintiff would continue until the payoff of the loan in 2002. Billings Clinic v. Peat Marwick Main & Co., 244 M 324, 797 P2d 899, 47 St. Rep. 1464 (1990).

Sales Markup of Merchandise Not Recoverable: The plaintiff appealed a verdict that did not allow for recovery of the margin of profit in a suit against his insurance carrier for a loss sustained when certain of his goods spoiled. The Supreme Court affirmed the verdict on the basis that no contract for the sale of the goods existed at the time they were lost and that therefore an award for damages would be speculative. Maddux v. Bunch, 241 M 61, 784 P2d 936, 47 St. Rep. 82 (1990).

Loss of Future Profits — Breach of Contract: Although determination of loss of future profits is often speculative, when injury caused by a breach of contract is certain, damages for lost profits may be awarded even though the amount of damages is uncertain. Hostetter v. Donlan, 221 M 380, 719 P2d 1243, 43 St. Rep. 909 (1986), followed in Van Riper v. Ford New Holland, Inc., 261 M 206, 862 P2d 47, 50 St. Rep. 1289 (1993).

Loss of Tax Savings as Ascertainable Damages: Plaintiff offered to buy defendants' ranch. One of plaintiff's disclosed purposes for wanting the ranch was for investment tax credits and depreciation for income tax purposes. After much negotiation, plaintiff paid earnest money and the parties entered into a buy-sell agreement under which the chattels were to be transferred in 1981 and the real property in 1982. Defendants later presented plaintiff with new terms, claiming transfer in different years would cause loss of grazing permits. A Forest Service official offered three alternatives in a letter. Defendants chose the one alternative inconsistent with the buy-sell agreement. At trial for breach of contract, the District Court awarded plaintiff damages for tax losses. On appeal, the Supreme Court held that plaintiff's gain of the investment tax credit upon performance of the contract was within the contemplation of the parties and reasonably foreseeable. Defendants' failure to perform their obligations under the contract negated the possibility of plaintiff's claiming the tax credits and was the legal cause of the lost opportunity. The damages were reasonably foreseeable and ascertainable and were properly awardable. Ehly v. Cady, 212 M 82, 687 P2d 687, 41 St. Rep. 1611 (1984).

Damages Caused by Improper Installation of Heating and Cooling System — Reasonable Computation of Excess Natural Gas Use: The repeated failure to properly install a heating, ventilating, and air-conditioning system constituted breach of contract. Testimony established that the system's improper installation caused astronomical natural gas bills. Although it may be difficult to ascertain the amount of damages based upon natural gas use, it was not speculative for the District Court, based upon testimony, to compute that 80% more natural gas was consumed and to award 80% of the total natural gas bills as damages. Sack v. A.V. Design, Inc., 211 M 147, 683 P2d 1311, 41 St. Rep. 1272 (1984), followed in Cut Bank School District No. 15 v. Rummel, 2002 MT 248, 312 M 143, 58 P3d 159 (2002), in ruling that the district failed to

prove the damages element for contracted work on steps and sidewalks to a reasonable degree of certainty in its breach of contract claim.

Lost Sales as Speculative: When plaintiff estimated lost profits based upon shopping mall promotional campaign, with no history of sales from this type of effort and no deduction for overhead, the court rejected the contended loss of profits as speculative. Bolz v. Myers, 200 M 286, 651 P2d 606, 39 St. Rep. 1747 (1982).

Lost Profits as Speculative: The District Court found that the bank had breached an agreement to finance Stensvad's corporation and, after that breach, had converted or appropriated his property, resulting in damages to Stensvad. On appeal the Supreme Court reversed the District Court's award of lost profits because the damages in this case for lost profits were speculative. Stensvad v. Miners & Merchants Bank of Roundup, 196 M 193, 640 P2d 1303, 39 St. Rep. 27 (1982), followed in Olson v. Parchen, 249 M 342, 816 P2d 423, 48 St. Rep. 718 (1991), and Fox Grain & Cattle Co. v. Maxwell, 267 M 528, 885 P2d 432, 51 St. Rep. 1136 (1994). See also Topco, Inc. v. St., 275 M 352, 912 P2d 805, 53 St. Rep. 175 (1996).

Damages for Breach — When Speculative: In a case relating to the sale of an old log cabin, the trial court held that the buyer's costs of hiring a man to haul logs from the dismantled cabin were too speculative to recover. The proof of the damages was speculative at best. The log hauler did not testify about any debt, and the appellant did not produce a bill, although over a year had passed since the work was done for the appellant. Jeffery v. Neville, 190 M 300, 620 P2d 1218, 37 St. Rep. 1983 (1980).

Speculative Damages: The breach of an obligation to establish escrow contained in a mining agreement with an option to purchase did not give rise to recoverable damages even though a potential investor withdrew because of the lack of escrow. The damages are too speculative. Rogers v. Relyea, 184 M 1, 601 P2d 37 (1979).

Evidence Sufficient — No Timely Objection: The evidence offered was sufficient to support the jury's award of damages when the computations offered may have been subject to the objection that they were speculative but counsel failed to object at the trial level. Sikorski v. Olin & Rolin Mfg., Inc., 174 M 107, 568 P2d 571 (1977), followed in Story v. Bozeman, 259 M 207, 856 P2d 202, 50 St. Rep. 761 (1993), and overruled in Bache v. Gilden, 252 M 178, 827 P2d 817, 49 St. Rep. 203 (1992), to the extent that Sikorski held that failure to request a continuance at trial constituted a waiver of the right to claim error on appeal. Bache was followed in Glacier Nat'l Bank v. Challinor, 253 M 412, 833 P2d 1046, 49 St. Rep. 503 (1992).

Loss of Business Income Too Speculative: Damages reflected by loss of motel income due to installation of defective gas heaters, based on income tax returns during the time defective heaters were installed compared with subsequent years with adequate electric heaters, is too speculative and too remote to qualify as clearly ascertainable damages. Credit Counsellors, Inc. v. Jones, 169 M 311, 548 P2d 158 (1976).

Contractor's Future Profits: Where a contractor had lost his bonding capacity and thereby future profits because of a breach of contract by the state and his accountants testified in detail as to his past earnings, net income, and depreciation taken for 22 years, the jury's award of $78,000 was not too speculative as computed for the next 3 years, as the profits were reasonably foreseeable. Laas v. St. Highway Comm'n, 157 M 121, 483 P2d 699 (1971).

Profits — When Recoverable and When Not: Under this section, profits that are a mere matter of speculation cannot be made the basis of recovery in a suit for breach of contract. When the profits can be shown to be reasonably certain, they may be recovered. Jurcec v. Raznik, 104 M 45, 64 P2d 1076 (1937).

Lack of Definite Statements:

Under this section, no damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin. Rocky Mtn. Fire Ins. Co. v. Belcher, 96 M 409, 31 P2d 316 (1934).

Where, in an action for the breach of a contract, the admitted facts do not show injury and there is a lack of definite statement by witnesses justifying an inference that the defendant has suffered damage, a claim for damages in a substantial amount is properly considered without foundation in the evidence. Busbee v. Gagnon Co., 50 M 203, 146 P 275 (1915).

Applicable to Obligations Arising From Contract: The measure of damages in an action for damages for failure of seller to promptly deliver equipment for a plow, resulting in loss by buyer in preventing performance of a plowing contract, is that specified in this section as an obligation arising from contract and not that provided in 27-1-317 as damages arising ex delicto. Hall v. Advance-Rumely Thresher Co., 65 M 566, 212 P 290 (1923).

Reasonable Amount: The measure of damages recoverable in an action for breach of contract under which defendant was required to sow a tract of land in grain, etc., was such reasonable

amount, clearly ascertainable in both nature and origin, as to compensate plaintiff for the damages resultant and such additional amount as in the ordinary course of things would likely result from the breach. Harrington v. Moore Land Co., 59 M 421, 196 P 975 (1921).

Future Events: In an action for breach of contract, a requested instruction that the jury, in fixing damages for nonperformance in the future, should make allowance for the uncertainties which affect all conclusions depending on future events and that only such evidence as was reasonably certain to extend to future events should be considered in fixing damages for nonperformance of the contract was vague and indefinite and not authorized by this section. Brazell v. Cohn, 32 M 556, 81 P 339 (1905).

MEASURE OF DAMAGES

Fees of Expert Considered Damages Rather Than Witness Fees: Plaintiff employed an engineer to assess problems with a tennis facility constructed by defendant, and the engineer testified as an expert at trial regarding water damage and radon problems discovered as part of the assessment. Defendant moved to exclude evidence of the amount plaintiff paid the engineer for the consulting work, but the District Court allowed evidence of the amount plaintiff paid the expert. On appeal, defendant contended that the engineer should receive only expert witness fees as provided in 26-2-505. The Supreme Court disagreed. The record showed that the engineer was employed prior to litigation and reflected that the engineer's time was spent investigating the cause of the construction defects, rather than preparing to testify at trial. As such, the engineer's fees were properly assessed as damages instead of expert witness fees. Glacier Tennis Club at The Summit, LLC v. Treweek Constr. Co, Inc., 2004 MT 70, 320 M 351, 87 P3d 431 (2004).

Failure to Provide Documentation of Damages Precluding Damage Award: A settlement agreement provided that the wife would be sole owner of a house and be responsible for indebtedness on the property. The husband contended that he should have been credited for additional interest that he was charged on loans unrelated to the marriage because the wife defaulted on the mortgage after the final decree was entered and hurt the husband's credit rating. However, even though the wife breached the settlement agreement, the husband did not submit documentation to prove damages related to the loss of credit, and absent proof, the damage request was properly denied. In re Marriage of Mease, 2004 MT 59, 320 M 229, 92 P3d 1148 (2004).

Failure of Trial Court to Consider Damages From Defective Construction Not Erroneous: In a construction lien case, the District Court adopted the contractor's proposed findings and conclusions almost verbatim. Plaintiffs alleged error because the court failed to consider damages from defective workmanship, but the Supreme Court affirmed. Although the verbatim adoption of findings and conclusions is discouraged, in this case, the trial court considered substantial but conflicting evidence from both parties regarding the quality of the work and resolved the conflict in favor of the contractor. Given the substantial evidence upon which the decision was made, the Supreme Court declined to disturb the findings. Rossi v. Pawiroredjo, 2004 MT 39, 320 M 63, 85 P3d 776 (2004).

Assignment of Retail Installment Contract — Breach of Warranty — Abrogation of Waiver of Recourse: Arcadia Financial, Ltd. (Arcadia), is a Minnesota corporation that purchases retail installment contracts from automobile dealers, including Prestige Toyota (Prestige) in Billings, after the dealers have entered into installment contracts with automobile buyers. Knight purchased a Toyota from Prestige, and Knight's contract contained a provision assigning the contract to Arcadia under one of four options. The same day that Knight purchased the automobile, Prestige assigned the contract to Arcadia "without recourse", which meant that only the contract warranties applied, one of which was that Prestige had a valid certificate of title and would send it to the appropriate officials within 10 days of sale to ensure Arcadia's interest in the vehicle. The contract also provided that Prestige unconditionally guaranteed full performance of the contract in the event that it breached any of the warranties. Prestige failed to send a valid certificate of title as required. Knight later defaulted and filed for bankruptcy protection. Arcadia demanded that Prestige repurchase the Knight contract. Prestige admitted breaching the warranty but claimed that it was not required to repurchase the contract and refused to do so, asserting that Arcadia's damages were limited to the amount that the bankruptcy trustee received from sale of the automobile. The District Court awarded Arcadia the principal amount due on the Knight contract, plus interest, attorney fees, and costs, concluding that under the clear language of the contract assignment provisions, Prestige had guaranteed payment of all sums due when it failed to deliver the valid title within the time required. The Supreme Court agreed, noting that the contract was converted into a full recourse contract when Prestige failed

to deliver the valid title, so Prestige was required to repurchase the contract for the amount of principal remaining due. The detriment proximately caused by Prestige's failure to repurchase the contract was the principal amount owing on the contract. Further, the District Court properly awarded attorney fees to Arcadia as the prevailing party pursuant to 28-3-704. Arcadia Financial, Ltd. v. Prestige Toyota, 1999 MT 273, 296 M 494, 989 P2d 831, 56 St. Rep. 1111 (1999).

Breach of Contract Action for Failure to Properly Embalm Deceased — Agency — Standing to Sue: Maria handled all funeral arrangements for her deceased mother. The family of the deceased, when viewing the body, observed a stain on the clothing that was determined to be caused by leaking embalming fluid. The lower court dismissed the family's claim for breach of contract and also ruled that Maria was not acting as agent for the other family members and that only she would have been able to sue for breach of contract. The Supreme Court held that a cause of action for breach of contract would exist if Maria could show that the breach had so "damaged" the funeral as to constitute a breach of contract entitling Maria to damages. The Supreme Court did affirm the lower court's ruling that Maria was not acting as an agent for the rest of the family in contracting with the mortuary. Therefore, only she could sue on the contract. Contreraz v. Michelotti-Sawyers & Nordquist Mortuary, Inc., 271 M 300, 896 P2d 1118, 52 St. Rep. 454 (1995).

Damages — Duty to Award Damages — Sufficient Evidence to Support Award: Plaintiff, who leased restaurant premises from defendant, sued for breach of contract and assault and battery. Defendant counterclaimed. The jury found for plaintiff and awarded contract damages. Defendant appealed on the grounds that there was insufficient evidence to support the award. Plaintiff introduced evidence of expenses, labor, actual income receipt records, rent and utility records, costs of goods and variable expense figures, complete tax returns, and several summaries of this information. Defendant failed to introduce any testimony or evidence to contradict the documents introduced by plaintiff. The Supreme Court held that there was substantial credible evidence to support the award. Having determined liability, it was the jury's duty to calculate an award of damages, including lost profits, based on the evidence presented. Lee v. Kane, 270 M 505, 893 P2d 854, 52 St. Rep. 268 (1995), followed in Grenfell v. Anderson, 1999 MT 272, 296 M 474, 989 P2d 818, 56 St. Rep. 1101 (1999).

Lost Profits — Expert Testimony Not Required — Error to Limit: Plaintiff sued for breach of contract involving the lease of a restaurant. Plaintiff appealed the District Court's limiting of damages for lost profits to the period prior to the restaurant's closing. Defendant appealed on grounds that the District Court erred in denying a motion for judgment as a matter of law on the issues of contract damages and lost profits. Defendant based his argument on the judge's statement in chambers that there was no rational basis for the jury to award lost profits because plaintiff failed to introduce expert testimony on that issue. The Supreme Court held that the lower court did not err in denying defendant's motion. Expert testimony is not required to prove lost profits. Lost profits need be proved only with the best evidence under the circumstances that will support a reasonably close estimate of the loss. The District Court abused its discretion by limiting lost profits to the period prior to the restaurant's closing. Lee v. Kane, 270 M 505, 893 P2d 854, 52 St. Rep. 268 (1995).

Offset of Tort Judgment With Amount Owed on Contract Underlying Tort as Within Equity Power of Court: Defendant fraudulently induced plaintiffs to purchase property by misrepresenting the quality of the road that she intended to build as access to the property. The District Court required her to file an accounting reflecting the principal balance due her from each of the plaintiffs for property purchased under the contracts for deed, and the court then offset and credited the amounts due plaintiffs from the judgment against the balance of the principal owed by plaintiffs under the contracts for deed. Although the contracts themselves were not at issue, the respective obligations of the parties arose from the same transaction and damages were related to the value of the premises and the purchase price, which was the basis of the principal under the contract. It was within the equity power of the court to allow a setoff of debts under these circumstances because that power exists independent of statute when grounds for equitable interposition are shown, such as fraud or insolvency. Dew v. Dower, 258 M 114, 852 P2d 549, 50 St. Rep. 454 (1993). On remand, the District Court found that although one cotenant had quitclaimed all interest in the property to the plaintiff cotenant, the right to personal damages did not pass with the transfer of the property. Clarifying *Dew*, supra, the Supreme Court noted that the discussion regarding the equity power of the District Court was confined solely to its ability to set off the principal balances on the contracts for deed against the damages plaintiff sustained. As such, the District Court was not invested with the broad equitable power to award plaintiff 100% of the personal damages attributable to fraud when he was not entitled to such an award by law. Because the underlying action was for personal damages, not property

damages, the court properly determined that plaintiff was entitled to only 50% of the personal damages arising from defendant's fraud. However, the court miscalculated the amount of accrued interest owing, so the case was remanded for a recalculation of damages. Dew v. Dower, 269 M 286, 888 P2d 421, 51 St. Rep. 1388 (1994). See also S. Surety Co. of N.Y. v. Maney, 121 P2d 295 (Okla. 1941).

Moratory Interest on Borrowed Funds Not Recoverable: Relying upon the accuracy of plans supplied by the state, Martel Construction (Martel) contracted with the state to construct a new highway bridge to replace one originally built in 1936. In preparing its plans, the state had relied on plans used to construct the 1936 bridge, incorrectly believing that those plans represented the elevation and dimensions needed for the new bridge. As a result of this error, Martel was required to perform extra work not contemplated under the contract. The District Court awarded Martel damages for the actual construction costs for the extra work performed and damages for "moratory interest" or the interest paid on funds borrowed to finance the extra work. The Supreme Court reversed the portion of the ruling allowing recovery of "moratory interest", holding that the state is not liable for prejudgment or postjudgment interest unless the interest is part of actual damages resulting from the state's breach of contract. Martel Constr., Inc. v. St., 249 M 501, 817 P2d 812, 48 St. Rep. 812 (1991).

Damages for Emotional Distress Improperly Awarded in Breach of Contract Action: Distinguishing emotional distress claims in a breach of contract action from emotional distress damage claims in tort actions, the Supreme Court applied 27-1-317 as the measure of damages to be used in tort actions and this section for damages collectible under a breach of contract action, noting that this section contains the additional limitation that the detriment must, in the ordinary course of things, be likely to result from the breach of contract and that damages must be clearly ascertainable in nature and origin. Lacking such a showing, the award of emotional damages in a breach of contract action constituted reversible error. Larson v. Undem, 246 M 336, 805 P2d 1318, 47 St. Rep. 2088 (1990).

Tort of Bad Faith — Not Available for Most Contract Actions — Breach: In a contract action, the Supreme Court ruled that a breach of the implied covenant of good faith and fair dealing constituted a breach of the contract and that only contract damages would be available to the prevailing party. The court stated that tort-type damages would not be available for a breach of the covenant. The court also held that the tort of bad faith would apply only in exceptional circumstances to discourage oppression in contracts that necessarily give one party a superior position. Every contract, regardless of the type, contains an implied covenant of good faith and fair dealing. A breach of the covenant is a breach of the contract. Story v. Bozeman, 242 M 436, 791 P2d 767, 47 St. Rep. 850 (1990), followed in Mann Farms, Inc. v. Traders St. Bank of Poplar, 245 M 234, 801 P2d 73, 47 St. Rep. 2094 (1990) (replacing previous opinion, subsequently withdrawn, at 47 St. Rep. 1557 (1990)), Keller v. Dooling, 248 M 535, 813 P2d 437, 48 St. Rep. 554 (1991), McNeil v. Currie, 253 M 9, 830 P2d 1241, 49 St. Rep. 312 (1992), and Kneeland v. Luzenac America, Inc., 1998 MT 136, 289 M 201, 961 P2d 725, 55 St. Rep. 541 (1998).

Damages for Failure to Obtain Mortgage Release: Seller of real property failed to obtain release of a mortgage, resulting in buyer's inability to get financing for a horse ranch on the property. Damage to buyer through seller's breach of contract was properly determined to be $18,000 for increased costs of building a house, barn, and other outbuildings; $10,000 for increased costs of purchasing a tractor, plow, and irrigation equipment; $1,600 for increased costs of obtaining power to a pump and digging wells; and $13,500 for increased costs of obtaining a horse trailer and appropriate truck. Sjoberg v. Kravik, 233 M 33, 759 P2d 966, 45 St. Rep. 1270 (1988).

Net Value of Lost Crops Recoverable: On the question of damages recoverable for loss of crops due to a breach of contract that resulted in failure to participate in farm subsidy programs, only the net value of lost crops could be recovered. Albers v. Bar ZF Ranch, Inc., 229 M 396, 747 P2d 1347, 44 St. Rep. 2081 (1987).

Breach of Contract — Cause of Damages Not Proven: The District Court properly found that an oral agreement to cut and bale the first crop of hay by July 10 was breached since the work was not completed until July 20. However, the delay was not proven to be the cause of the failure to get a second crop. Despite the breach of contract, failure to award damages was proper. Burns v. Hinman, 229 M 62, 744 P2d 879, 44 St. Rep. 1782 (1987).

Breach in Sale of Restaurant — Measure of Damages and Interest: Where restaurant buyers breached a sales contract, the trial court properly granted sellers the amount expended on outstanding accounts payable incurred by the buyers, such as power service, garbage service, and advertising debts, as well as interest at 10% from the date of judgment. Stevens v. Abbott, 228 M 101, 740 P2d 1136, 44 St. Rep. 1374 (1987).

Special Interrogatories on Tort and Breach of Contract Claims — Award Under Each Theory Unclear — Remand: A District Court judgment on a special verdict based on jury findings of damages, both for breach of contract and for tort, was remanded because the special interrogatories did not state which acts were to be considered under each theory; therefore, the verdict on tort claims was unclear as to which damages were cumulative to contract damages and which were alternative. NW. Nat'l Bank of Great Falls v. Weaver-Maxwell, Inc., 224 M 33, 729 P2d 1258, 43 St. Rep. 1995 (1986), distinguished in Weinberg v. Farmers St. Bank of Worden, 231 M 10, 752 P2d 719, 45 St. Rep. 391 (1988).

Determination of Damages in Violation of Covenant Against Competition: The Supreme Court reversed a District Court judgment upon finding that a party to an agreement to sell a radio station breached a covenant against competition and remanded for a determination of damages accruing to the purchaser due to improper interference with transferred goodwill. W. Media, Inc. v. Merrick, 224 M 28, 727 P2d 547, 43 St. Rep. 1991 (1986). The Supreme Court relied on the rule set out in Crncevich v. Georgetown Recreation Corp., 168 M 113, 541 P2d 56 (1975), and Weinberg v. Farmers St. Bank of Worden, 231 M 10, 752 P2d 719, 45 St. Rep. 391 (1988), in affirming the award of attorney fees as damages. W. Media, Inc. v. Merrick, 232 M 480, 757 P2d 1308, 45 St. Rep. 1212 (1988).

Damages Awarded on Theories of Breach of Contract and Rescission: Appellant argued that the District Court award of damages on both theories of breach of contract and rescission was improper, contending that the remedies were mutually exclusive. The Supreme Court noted that restitution under a theory of rescission can, under some circumstances, be a remedy for breach of contract; however, it was clear from the complaint and judgment in this case that the recovery was in damages for breach of contract and as such was properly computed. Hostetter v. Donlan, 221 M 380, 719 P2d 1243, 43 St. Rep. 909 (1986).

Accrued Interest on Loan as Part of Damages: The District Court awarded a two-thirds share of payment in kind (PIK) benefits to a tenant, plus accrued interest on his outstanding bank loan dating from the failure of the landlords to pay his share of PIK benefits. On appeal, one landlord asserted this was error because the tenant maintained only one account that covered living expenses as well as other farming operations; therefore, the loan balance was not solely attributable to the farming of the landlord's property. The Supreme Court disagreed, noting that had the tenant received his share of PIK benefits at the proper time, he would have been able to pay the loan entirely and avoid further interest charges. The accrued interest on the loan balance from that date was held to be clearly part of his damages. Popp v. Gountanis, 221 M 267, 718 P2d 340, 43 St. Rep. 801 (1986).

Lessee's Breach of Agreement to Lease Office Renovated for Him: After defendant refused to move into office space plaintiff renovated under a lease agreement, a jury gave plaintiff damages for the value of the lease and for the renovation expenses. There was no improper double recovery in also granting the renovation expenses as damages when the two principal witnesses on the matter were plaintiff and his expert, who testified that there was little chance of leasing the renovated premises to someone else and that the premises would have to be completely rerenovated for any new tenant. Nicholson v. United Pac. Ins. Co., 219 M 32, 710 P2d 1342, 42 St. Rep. 1822 (1985).

Bailment — Damages for Loss of Deposited Items When No Value of Contents Stated: An armored car service lost five bags received from a customer, but no statement of value of the contents of the bags was set forth in the contract receipt for the bags. The Supreme Court held that 70-6-204 is a limitation on the general rule of contract damages applicable only when a bailment involves a stated value for deposited items; thus, when no value is stated, the measure of damages is determined pursuant to this section. Interstate Brands Corp. v. Cannon, 218 M 380, 708 P2d 573, 42 St. Rep. 1670 (1985).

Breach of Oral Contract — Interest Rate: Plaintiff agreed to remodel a prefab home for defendant. He also built a foundation, added a bedroom and deck, and built a double garage. Plaintiff completed the basement and sent a bill to defendant. The bill was paid. The remainder of the work was completed, but defendant refused to pay, contending the oral agreement between the parties contained a "cap" of $30,000. Plaintiff contended the agreement was on a cost-plus basis, the unpaid portion of which was $63,310. The District Court found for plaintiff and awarded the amount due with interest at 6% from the completion date. Defendant contended the award of damages was unreasonable. The amount awarded was the amount owed on the contract, not damages for breach. The award merely compensated plaintiff for what he was owed. Pursuant to 27-1-211, plaintiff was entitled to interest from the date he was entitled to payment. That was the date the District Court determined the work was completed. Since the parties had not agreed on an interest rate, the District Court used the legal rate stated in 31-1-106. This was

within the court's reasonable discretion. Frank L. Pirtz Constr., Inc. v. Hardin Town Pump, Inc., 214 M 131, 692 P2d 460, 41 St. Rep. 2366 (1984).

Sale of Land:

In an action for breach of contract for sale of land, it was proper for the trial court to award as damages both the difference in value of the land conveyed from the value promised and the difference in crop values actually obtained from crop values that would have been obtained had the conveyance been as promised. Recovery of losses for crops may be awarded only from the time the contract was entered into until the time plaintiffs were in possession of full knowledge of the facts pertaining to the breach. Castillo v. Franks, 213 M 232, 690 P2d 425, 41 St. Rep. 2071 (1984).

In computing damages for sale of land constituting constructive fraud in that representations of acreage exceeded actual acreage, buyer was not entitled to damages for loss of profits based on number of cows that total ranch would support but was entitled to damages for missing acreage computed from contract value on per acre basis without distinction between deeded and leased land or fenced or open land. Hardin v. Hill, 149 M 68, 423 P2d 309 (1967).

Although defendant was not entitled to retain downpayment on land when no binding contract of sale was ever made, he should be allowed to retain so much thereof as would be necessary to compensate him for damage caused by defendant's occupancy of the land. Fink v. Doggett, 123 M 324, 214 P2d 743 (1950).

Damages recoverable for a breach of contract of sale of farmlands are such as may fairly be supposed to have been within the contemplation of the parties when they entered into it and such as might naturally have been expected to result from its breach. Healy v. Ginoff, 69 M 116, 220 P 539 (1923).

Proper Quantum for Architect's Services: Under a contract with a landowner who wished to build housing units on the land, an architect prepared plans and specifications that were approved by landowner. Under the contract, the architect was to receive 5% of the construction cost. Following abandonment of the project, he was entitled to a fee based on quantum meruit. The proper recovery was the number of hours of service, 600, times the architect's hourly rate, $30, or $18,000. It was improper for the court to hold that the architect was entitled to only $10,000 based on the value of his services. Kenneth D. Collins Agency v. Hagerott, 211 M 303, 684 P2d 487, 41 St. Rep. 1375 (1984).

Damages Caused by Improper Installation of Heating and Cooling System — Reasonable Computation of Excess Natural Gas Use: The repeated failure to properly install a heating, ventilating, and air-conditioning system constituted breach of contract. Testimony established that the system's improper installation caused astronomical natural gas bills. Although it may be difficult to ascertain the amount of damages based upon natural gas use, it was not speculative for the District Court, based upon testimony, to compute that 80% more natural gas was consumed and to award 80% of the total natural gas bills as damages. Sack v. A.V. Design, Inc., 211 M 147, 683 P2d 1311, 41 St. Rep. 1272 (1984).

Repurchase at Reduced Price — Not Mitigation of Damages: The parties entered into an agreement for the lease of a truck. The lease agreement contained a noncancellation provision and provided alternative remedies to the lessor in the event of a default. Lessee returned the truck with current payments to lessor prior to the termination date of the lease. Lessor had to make repairs to the truck. Lessor held a public sale pursuant to the lease and repurchased the truck. He then leased it to another party. The lessor had full title to the truck before and after the sale. There was no payment from buyer to seller to offset damages resulting from lessee's default. Since there was mitigating effect in plaintiff purchasing his own truck, it was error for the District Court to consider the sale in awarding damages. The value of the re-lease rather than the sale price of the truck was the proper method of determining mitigation of damages. Diede v. Davis, 203 M 205, 661 P2d 838, 40 St. Rep. 394 (1983).

Consent to Sublet Unreasonably Withheld — Measure of Landlord's Damages: Where the plaintiff landlord unreasonably withheld its consent for the defendant tenant to sublet the plaintiff's offices to the state parole board and the defendant quit the premises, whereupon the plaintiff convinced Waddell, another of its tenants, to move into the offices vacated by the defendant, the District Court did not err in holding that the plaintiff was entitled only to the rent owed by the defendant minus that amount which could have been earned by subletting to the state parole board. The refusal by the plaintiff to consent to the sublease was not such an interference with the leasehold estate as to justify cancellation of the lease by the defendant, and because the lease agreement is silent as to damages owed by the defendant in such an instance, the defendant is entitled to those damages directly caused by the plaintiff's unreasonable refusal and the plaintiff is entitled to those damages directly resulting from the defendant's

abandonment of the lease. The District Court therefore properly applied the amount of rent receivable by the sublease as an offset against the rental payable by the defendant over the remaining term of the lease and refused to hold the defendant liable for the rental of the offices vacated by Waddell, as those damages are remote. Brigham Young Univ. v. Seman, 206 M 440, 672 P2d 15, 40 St. Rep. 1767 (1983).

Failure of Insurance Agent to Procure Insurance: Lee leased a new car and contacted Andrews, an insurance agent, to obtain insurance. Andrews didn't procure the insurance. Lee was involved in an accident, and a judgment of $152,000 was taken against him. Lee sued Andrews, and judgment was entered in favor of Lee on the question of liability. A new trial was ordered on the issue of damages. Damages include the cost of attorney fees in defending the automobile accident suit, damages awarded in that action to the amount of the insurance policy if one had been issued, and damages from having to borrow money at 20% interest to defend the action and pay the judgment. Lee v. Andrews, 204 M 527, 667 P2d 919, 40 St. Rep. 1049 (1983).

Distributorship Contract — Computation of Lost Profits: Distributor suing for breach of wine distribution contract by wine broker presented conflicting evidence regarding computation of his lost profits. An exhibit purportedly computed lost profits on a gross, per-month basis and was used by the court in fixing damages. However, distributor also testified there were expenses associated with the sale of the broker's wines that were not reflected in the exhibit. Generally, when overhead or operating expenses are saved as a result of the breach, the proper measure of recovery is net, not gross, profit, and when such expenses are constant and no saving occurs, the rule is otherwise. It was improper to grant recovery without considering that there were expenses associated with the sale of the wines, and the award was vacated and the issue remanded for reconsideration. Bronken's Good Time Co. v. J. W. Brown & Associates, 203 M 427, 661 P2d 861, 40 St. Rep. 549 (1983).

Damages for Title Insurers' Failure to Cover Easements: The $46,000 that landowner paid to purchase easement rights was the measure of damages where title insurance companies were liable to landowner up to the face amount ($25,000) of the title insurance policy for failure to discover and disclose or insure against the existence of the easements, and landowner was properly awarded his damages up to the face amount of the policy, minus $2,500 the companies had paid in a settlement of part of the easement rights. Lipinski v. Title Ins. Co., 202 M 1, 655 P2d 970, 39 St. Rep. 2283 (1982). The Lipinski rule, requiring due diligence in title examination, was applied in Old Republic Nat'l Title Ins. Co. v. Realty Title Co., 1999 MT 69, 294 M 6, 978 P2d 956, 56 St. Rep. 286 (1999).

Breach of Contract — Interference With Business: Defendant breached a contract to sell business property to plaintiff and not to compete and subsequently interfered with the conduct of plaintiff's business. Defendant is liable not only for breach of the contract between himself and plaintiff but also for the tort of intentional interference with a contractual or business relationship between plaintiff and his potential customers. Bolz v. Myers, 200 M 286, 651 P2d 606, 39 St. Rep. 1747 (1982).

Breach of a Contract to Employ — Measure of Damages: Rhines entered into an employment contract with Como, but after Como moved his family from Minnesota to Missoula, Rhines refused to give him a job. In a suit brought for breach of the contract, the Supreme Court held that the District Court improperly applied Title 39, ch. 3, part 2, in awarding damages. That part requires an employee to perform work for an employer. Since Como never performed any work for Rhines, the correct measure of damages should be the amount provided for by 27-1-311. Como v. Rhines, 198 M 279, 645 P2d 948, 39 St. Rep. 932 (1982), followed in Merkes v. Mapston, 257 M 408, 849 P2d 210, 50 St. Rep. 332 (1993). See also Grenfell v. Anderson, 1999 MT 272, 296 M 474, 989 P2d 818, 56 St. Rep. 1101 (1999).

Measure of Damages — Implied Warranty of Habitability: The court determined a breach of an implied warranty of habitability on a new home to be a breach of contract and applied this section as establishing the proper damages. The measure of damages includes the fixed contract price of having the remedial work completed and all incidental costs of moving, storage, and temporary rental, even though the total damages allowed substantially exceed the sales price of the home. Damages for emotional distress were not allowed since the liability resulted from breach of an implied warranty of habitability and not from negligence or strict liability. Chandler v. Madsen, 197 M 234, 642 P2d 1028, 39 St. Rep. 508 (1982).

Contract to Seed Land — Failure to Pay Balance Due: Trial court properly awarded contract farmer $4,760 as the balance due on a contract where he had seeded 4,690 acres at an agreed rate of $4.00 an acre for a total contract price of $18,760. Landowner had paid $14,000 and then stopped payment, and landowner was found liable for balance due as farmer had fully performed. Weyler v. Kaufman, 196 M 132, 638 P2d 393, 38 St. Rep. 2197 (1981).

Measure of Damages for Breach of Construction Contract — Labor Contributed by Plaintiffs: In a construction contract when the contractor abandoned the project or otherwise failed to complete it, the normal measure of damages was the reasonable cost of completion by another plus any damages suffered by the delay. In this case the replacement contractor completed the contract at essentially the same price quoted by the appellants, except that the plaintiff and his son-in-law contributed their own labor in order to get the job done faster. The trial court found the plaintiff had suffered damages in the amount of $1,200. The Supreme Court found that to be adequate compensation for the detriment caused by the breach. Carriger v. Ballenger, 192 M 479, 628 P2d 1106, 38 St. Rep. 864 (1981).

Amending Damages in Verdict Form: The court erred in amending the verdict form, over objection, and submitting to the jury, after instructions were settled, on issue of damages when such damages were not pleaded, were not based on evidence, and were not covered by jury instructions. Agrilease, Inc. v. Gray, 173 M 151, 566 P2d 1114 (1977).

Loss of Hay Crop: The trial court erred in submitting to the jury, over objections, the issue of damages for the loss of a hay crop when the only evidence of the market value of the hay crop was based on gross market value without deducting the cost of production and marketing such crop. Agrilease, Inc. v. Gray, 173 M 151, 566 P2d 1114 (1977).

Damages — Contract for Real Property Sale — Waste: Damage award was correct because after deducting the alleged damages the seller is better off than he would have been had the contract been performed, notwithstanding the fact that recovery for harm done to the land is not allowed. As to waste, plaintiff has a right to the return of real property only if the contract is breached. The damage done may be used to reduce the market value of the land but not to allow damages when none would be due under the statutory measure. Whitney v. Bails, 172 M 121, 560 P2d 1344 (1977).

Breach of Construction Contract: When the contractor fails to keep his agreement, the measure of the employer's damages is the sum which will put him in as good a position as if the contract had been performed. Kirby v. Kenyon-Noble Lumber Co., 171 M 329, 558 P2d 452 (1976).

Construction Contracts — Computation of Damages: Increased costs of performing a contract, standby costs for idled equipment, and lost profits were a proper measure of damages where construction work on a highway was delayed due to the state's failure to obtain rights-of-way as required by the contract. Zook Bros. Constr. Co. v. St., 171 M 64, 556 P2d 911 (1976).

Silo Replacement: Where defendant constructed silo for dairy farmer in negligent manner such that wind blew it over just before completion, proper measure of damages was replacement cost of silo plus damages for loss of use less an amount for the foundation, which remained usable. Bos v. Dolajak, 167 M 1, 534 P2d 1258 (1975).

Measure of Damages — Defective Construction: The measure of damages for defective construction is the sum which will put the owner in as good a position as if the contract had been performed, and if the defect is remedial, recovery generally will be based on the market price of completing or correcting the performance, which will generally be the cost of getting work done or completed by another. Haggerty v. Selsco, 166 M 492, 534 P2d 874 (1975).

Unacceptable Installations: Proper measure of damages for faulty installation of showers in campground was the cost of reinforcing them and bring them up to contract specifications. Haggerty v. Selsco, 166 M 492, 534 P2d 874 (1975).

Wrongfully Discharged Teacher: In an action for breach of contract, School Board's failure to follow sections 75-1622 and 75-2411, R.C.M. 1947 (since repealed), in dismissal of teacher made the dismissal void for want of jurisdiction, entitling teacher to damages for loss of benefits which would reasonably have resulted from complete performance of the contract on her part, including loss of rent-free living quarters, a condition of employment, and expenses in seeking other employment. Wyatt v. School District, 148 M 83, 417 P2d 221 (1966).

Hail Insurance: In an action by the insured against his insurer to recover loss to the insured trailer caused by a hailstorm, where the insurer failed to prove the measure of damages according to its theory of the case, the District Court was not in error in entering judgment for the insured on the basis of estimate of cost of repairing hail damage. Eby v. Foremost Ins. Co., 141 M 62, 374 P2d 857 (1962).

Limitations: The damages recoverable for the breach of an obligation arising from contract must be limited to such as may fairly be supposed to have been within the contemplation of the parties when they entered into the contract and such as might naturally be expected to result from its violation. In no case is the plaintiff entitled to recover anything more than he would have

received had the contract been performed by the defendant on his part, assuming that it had been performed. Myers v. Bender, 46 M 497, 129 P 330 (1913).

Law Review Articles

Fair Price and Fair Play Under the Montana Business Corporation Act, Oitzinger, 58 Mont. L. Rev. 407 (1997).

Tort Liability for Bad Faith in Montana: The End of the Story, Roth, 57 Mont. L. Rev. 567 (1996).

Commercial Bad Faith: Tort Recovery for Breach of Implied Covenant in Ordinary Commercial Contracts, B. The Reform of the Law of Contract Damages, Tremper, 48 Mont. L. Rev. 374 (1987).

The Continuing Development of the Tort of Bad Faith in Montana, Graham & Luck, 45 Mont. L. Rev. 43 (1984).

Contract Damages in Montana Part II: Reliance and Restitution, Burnham, 45 Mont. L. Rev. 1 (1984).

The Warranty of Habitability: A Bill of Rights for Homebuyers, Toole & Habein, 44 Mont. L. Rev. 159 (1983).

Contract Damages in Montana Part I: Expectancy Damages, Burnham, 44 Mont. L. Rev. 1 (1983).

Punitive damages on Ordinary Contracts, Lee, 42 Mont. L. Rev. 93 (1981).

An Insurer's Liability for Tort of Bad Faith, Harman, 42 Mont. L. Rev. 67 (1981).

Beyond Foreseeability: Consequential Damages in the Law of Contract, Epstein, 18 J. Legal Stud. 105 (1989).

Standards for Limiting the Tort of Bad Faith Breach of Contract, Louderback, 16 U.S.F.L. Rev. 187 (1982).

The Tort of Bad Faith Breach of Contract: When, If At All, Should It Be Extended Beyond Insurance Transactions?, Diamond, 64 Marq. L. Rev. 425 (1981).

Collateral References

Damages *key* 6, 117 through 126.

25 C.J.S. Damages §44, et seq.

22 Am. Jur. 2d Damages §§30, 43, 45, 47 through 50, 54, 57, 59 through 80.

Modern status of rules regarding tort liability of building or construction contractor for injury or damage to third person occurring after completion and acceptance of work; "forseeability" or "modern" rule. 75 ALR 5th 413.

Measure and elements of damages for lessee's breach of covenant as to repairs. 45 ALR 5th 251.

Liability of contractor who abandons building project before completion for liquidated damages for delay. 15 ALR 5th 376.

Liability of person furnishing, installing, or servicing burglary or fire alarm system for burglary or fire loss. 37 ALR 4th 47.

Recovery, under strict liability in tort, for injury or damage caused by defects in building or land. 25 ALR 4th 351.

Liability of vendor of existing structure for property damage sustained by purchaser after transfer. 18 ALR 4th 1168.

Liability of builder or real estate developer who sells new dwelling for failure to provide potable water. 16 ALR 4th 1246.

Extent of liability of seller of livestock infected with communicable disease. 14 ALR 4th 1096.

Contractual provision for per diem payments for delay in performance as one for liquidated damages or penalty. 12 ALR 4th 891.

Liability of builder of residence for latent defects therein as running to subsequent purchasers from original vendee. 10 ALR 4th 385.

Recovery based on tortfeasor's profits in action for procuring breach of contract. 5 ALR 4th 1276.

Modern status of defaulting vendee's right to recover contractual payments withheld by vendor as forfeited. 4 ALR 4th 993.

Measure of damages for landlord's breach of implied warranty of habitability. 1 ALR 4th 1182.

Liability for interference with invalid or unenforceable contract. 96 ALR 3d 1294.

Insurer's liability for consequential or punitive damages for wrongful delay or refusal to make payments due under contract. 47 ALR 3d 314.

Right and measure of recovery for breach of obligation to drill exploratory oil or gas wells. 4 ALR 3d 284.

Attorneys' fees incurred in litigation with third person as damages in action for breach of contract. 4 ALR 3d 270.

Measure of damages for breach of standard new motor vehicle warranty. 99 ALR 2d 1440.

Measure of damages recoverable by lessee for breach of lessor's covenant against use of his other property in competition with lessee-covenantee. 97 ALR 2d 111.

Extent of recovery for attempt to terminate employment or agency contract upon shorter notice than that stipulated in contract. 96 ALR 2d 277.

Measure and elements of sublessee's damages recoverable from sublessor for latter's failure to exercise option to renew his lease. 94 ALR 2d 1345.

Measure and elements of damages recoverable against union for breach of no-strike provision in collective bargaining agreement. 92 ALR 2d 1232.

Measure of damages, to advertiser, for radio or television station's breach or wrongful termination of contract. 90 ALR 2d 1199.

Mental anguish as element of damages in action for breach of contract to furnish goods. 88 ALR 2d 1367.

Measure of damages in action by grower under contract between grower of vegetable or fruit crops, and purchasing processor, packer, or canner. 87 ALR 2d 773.

Compensation recoverable under "changed conditions" clause in a public works or construction contract. 85 ALR 2d 235.

Damages for breach of implied obligation of purchaser to conduct search for, or to develop or work premises for, minerals other than oil and gas. 76 ALR 2d 748.

Aggravated or mitigated damages for breach of contract to marry. 73 ALR 2d 576.

Recovery by conditional seller or buyer, or person standing in his shoes, against third person for damage or destruction of property. 67 ALR 2d 582.

Measure and items of damages for lessee's breach of agreement to erect building. 63 ALR 2d 1110.

Employer's damages for breach of employment contract by employer's terminating employment. 61 ALR 2d 1008.

Measure and elements of damages recoverable for breach of contract to support person. 50 ALR 2d 613.

Measure of damages for landlord's breach of duty under express covenant to repair, rebuild, or restore, where property is damaged or destroyed by fire. 38 ALR 2d 717.

Measure of tenant's damages upon landlord's breach of covenant to repair. 28 ALR 2d 480.

Measure of damages recoverable from architect or other person furnishing plans for defects or insufficiency of work attributable thereto. 25 ALR 2d 1085.

Measure of damages for buyer's breach of contract to purchase article from dealer or manufacturer's agent. 24 ALR 2d 1008.

Necessity that buyer, relying on market price as measure of damages for seller's breach of sales contract, show that goods in question were available for market at price shown. 20 ALR 2d 819.

Right to recover, in action for breach of contract, expenditures incurred in preparation for performance. 17 ALR 2d 1300.

27-1-312. Breach of obligation to pay money.

Case Notes

Interest Due on Commission Fees: On appeal of a judgment awarding commission fees as detailed in a signed note but specifically denying award of interest on the debt, the Supreme Court found that the criteria to be eligible for prejudgment interest were met, that under 27-1-312 the remedy for breach of an obligation to pay money is "the terms of the obligation with interest thereon", and that the appropriate interest to be charged was ascertainable under 31-1-106. Byrne v. Terry, 228 M 387, 741 P2d 1341, 44 St. Rep. 1620 (1987).

Law Review Articles

Contract Damages in Montana Part I: Expectancy Damages, Burnham, 44 Mont. L. Rev. 1 (1983).

Collateral References

Damages *key* 74 through 86.

25 C.J.S. Damages §§175 through 194.

22 Am. Jur. 2d Damages §§81, 82.

Liability of contractor who abandons building project before completion for liquidated damages for delay. 15 ALR 5th 376.

Modern status of defaulting vendee's right to recover contractual payments withheld by vendor as forfeited. 4 ALR 4th 993.

Provision in land contract for forfeiture of payments as one for liquidated damages or penalty. 6 ALR 2d 1401, §10 superseded by 4 ALR 4th 993.

27-1-313. Breach of warranty of agent's authority.

Collateral References

Principal and Agent *key* 149(2), 150(3).

2A C.J.S. Agency §§186, 386 through 388; 3 C.J.S. Agency §529.

27-1-314. Breach of agreement to convey real property.

Case Notes

Payment of Fees Other Than for Title Search Improperly Ordered: Hickingbothams sued Duncan for fraud and constructive fraud in connection with the purchase of real estate upon which an unwarranted construction lien had been filed, and the District Court awarded $781 in attorney fees. The Supreme Court held that the fees were improperly awarded because they were not awarded for purposes of a title search or as an expense incurred in preparing to enter upon the land. The money was also not awarded pursuant to the agreement to sell and purchase because that agreement provided that the sole remedy was the return of money paid and no money had changed hands. The Supreme Court held that the District Court had misinterpreted this section as providing for fees in this case. Hickingbotham v. Duncan, 271 M 525, 898 P2d 1215, 52 St. Rep. 574 (1995).

Recovery of Survey Costs: In a contract for sale of real property when there was a technical breach of the covenant against encumbrances, the District Court did not err when it awarded damages when the court's findings were supported by substantial evidence in the record. Maloney v. Heer, 257 M 500, 850 P2d 957, 50 St. Rep. 382 (1993).

Equity Requires Payment of Prejudgment Interest: Plaintiffs, who rescinded contracts conveying real property, were entitled to prejudgment interest under the equitable theory. They had been deprived of their money for more than 8 years to date of judgment, while defendants received or were able to receive profits from the use of the land for nearly all those years. The act of one plaintiff in allowing another person to cut hay on the land did not constitute exercise of possession of the property sufficient to deny award of prejudgment interest. Brunner v. LaCasse, 234 M 368, 763 P2d 662, 45 St. Rep. 1978 (1988).

Value of Lease Adopted as Amount of Damages: Defendant had an obligation to transfer a lease to landlords, but failed to do so. The lease was included in the assignment of the farm, and its value equaled its portion of the total purchase price. It was within the discretion of the District Court to adopt the value of the lease as the amount of damages. Moore v. Hardy, 230 M 158, 748 P2d 477, 45 St. Rep. 108 (1988).

Breach of Joint Venture Fiduciary Trust — Award of Investment Plus Interest Affirmed: Kelly and Rust agreed to purchase land, subdivide it, and sell it at a profit. Rust advanced Kelly $4,000 as one-half the purchase price. Kelly paid the $4,000 balance and recorded the deed, but did not include Rust on the recorded deed. Rust moved from the area and later attempted, through his agent, to purchase Kelly's interest in the land. The agent was told the land was already sold, so Rust brought an action to recover his investment plus interest. The trial court properly held that: (1) the parties had entered into a joint venture; (2) Kelly was required in equity to hold the property in a constructive trust; (3) Kelly breached the joint venture fiduciary duty and attempted to deprive Rust of his interest in the property; and (4) Rust was entitled to return of his $4,000 investment plus interest. Rust v. Kelly, 228 M 220, 741 P2d 786, 44 St. Rep. 1471 (1987).

Alteration of Oral Contract — Rescission — Damages: Plaintiffs had an oral agreement with defendants to pay one-half of defendants' purchase price under defendants' written contract for deed for purchase of certain real property with the understanding that plaintiffs' names would be added to the title as co-purchasers. Without plaintiffs' consent, defendants made written assignment of their interests under the written contract to a third party, retaining a life estate to themselves. Plaintiffs refused to make further payments and sued for damages and to quiet title in themselves. The District Court denied plaintiffs' claims and in effect found plaintiffs to be the breaching party. The Supreme Court found plaintiffs were entitled to rescission and reversed the District Court decision. Defendants' assignment while retaining a life estate constituted a material alteration of the oral agreement to which plaintiffs had not consented. Defendants'

breach entitled plaintiffs to recover money they had paid on the contract with interest. Forsythe v. Elkins, 216 M 108, 700 P2d 596, 42 St. Rep. 680 (1985).

Loss of Tax Savings as Ascertainable Damages: Plaintiff offered to buy defendants' ranch. One of plaintiff's disclosed purposes for wanting the ranch was for investment tax credits and depreciation for income tax purposes. After much negotiation, plaintiff paid earnest money and the parties entered into a buy-sell agreement under which the chattels were to be transferred in 1981 and the real property in 1982. Defendants later presented plaintiff with new terms, claiming transfer in different years would cause loss of grazing permits. A Forest Service official offered three alternatives in a letter. Defendants chose the one alternative inconsistent with the buy-sell agreement. At trial for breach of contract, the District Court awarded plaintiff damages for tax losses. On appeal, the Supreme Court held that plaintiff's gain of the investment tax credit upon performance of the contract was within the contemplation of the parties and reasonably foreseeable. Defendants' failure to perform their obligations under the contract negated the possibility of plaintiff's claiming the tax credits and was the legal cause of the lost opportunity. The damages were reasonably foreseeable and ascertainable and were properly awardable. Ehly v. Cady, 212 M 82, 687 P2d 687, 41 St. Rep. 1611 (1984).

Breach of Agreement to Convey Land — Bad Faith — Damages — Refusal to Compel Specific Performance: A parcel of land owned by one Edmund Andrett had been leased for several years to parties named Hardy. After Andrett's death, Lillian Watt became the owner of the land, still subject to a Hardy lease. Prior to the expiration of the lease, Watt and the Hardys were disputing lease rental payments. Watt believed that the Hardy lease had expired and that the Hardys were in default on rental payments. For this reason, she contacted attorney Mason and asked him to find a new tenant. Unknown to Watt or her attorney, however, the leasing agency which Andrett had used for years before his death had renewed a lease and purchase option with the Hardys on March 1, 1968, which lease wasn't recorded until November 22, 1969. Meanwhile, attorney Mason had leased the farmland to the Stovalls, with an option to purchase, which lease was dated March 3, 1969, and recorded, previous to the Hardy lease, on September 22, 1969. The court balanced the equities of the ensuing chaos and decided that between the Hardys and the Stovalls the total circumstances favored the result reached by the trial court, upholding the sale of the land to the Hardys. The court also affirmed the damages against Lillian Watt for her breach of the agreement with the Stovalls. In so doing, they noted Lillian Watt, directly and indirectly through her attorney, kept information about sale of the land from the Stovalls unfairly and failed to answer some of their inquiries by mail and telephone. The court concluded that Watt's conduct constituted bad faith. The damages were the difference between the value of the land, as found by the trial court, and the actual contract price. Stovall v. Watt, 187 M 439, 610 P2d 164 (1980).

Cost of Altering Other Property: Where, under instructions based on this section and section 17-602, R.C.M. 1947 (since repealed), the jury was told that the plaintiff could recover the difference between the price agreed to be paid and the price plaintiff would be required to pay for similar property, the jury could not properly award an amount based on the projected costs of making some other property similar. Orford v. Topp, 136 M 227, 346 P2d 566 (1959).

Price of Other Property: This section and section 17-602, R.C.M. 1947 (since repealed), must be applied together in an appropriate case, and thus where bad faith is shown, the aggrieved buyer's damages are set at the difference between the price he agreed to pay and the price he is required to pay on the market for equivalent property. Orford v. Topp, 136 M 227, 346 P2d 566 (1959).

Property of Peculiar Value:

This section and 27-1-305 must be construed together in determining damages in a case where the property of which the buyer is deprived has a peculiar value to him. Orford v. Topp, 136 M 227, 346 P2d 566 (1959).

Where there was no evidence to show any peculiar value to the plaintiffs in the property of which they were deprived, a verdict in excess of the difference between the price which the purchasers agreed to pay and the price for which the property was sold by the vendor was not supported. Orford v. Topp, 136 M 227, 346 P2d 566 (1959).

Prompt Declaration of Termination Necessary or Option on Notice Considered Waived: Under an installment contract for sale of real property, making time of its essence and providing that in case of default on any installment the vendor shall have the option to declare the contract terminated, such option must be promptly exercised or failure of timely payment is presumed waived and the contract still valid, and if it provides for 30-day notice to terminate it, the giving thereof is essential to the exercise of the option for its termination. Thompson v. Lincoln Nat'l Life Ins. Co., 110 M 521, 105 P2d 683 (1940).

Lease of Building Under Construction: Under contract to lease a building under construction, the proper measure of damages is the difference between the price agreed to be paid as rent and the reasonable value of the term agreed upon at the time of the breach and any expenses properly incurred by plaintiff in preparing to take possession in reliance on the agreement. Jurcec v. Raznik, 104 M 45, 64 P2d 1076 (1937).

When Anticipated Profits Not Recoverable — New Venture: Anticipated profits from an established business are recoverable upon showing prior profits in the same location, but where plaintiff was about to embark on a new business venture when prevented by lessor's wrongful act in leasing the premises to another, they may not be made the basis of an action for breach of contract, since it cannot be proved what the profits would have been. Jurcec v. Raznik, 104 M 45, 64 P2d 1076 (1937).

Equitable and Legal Estates: This section applies to an agreement to convey an equitable as well as a legal estate. Ross v. Saylor, 39 M 559, 104 P 864 (1909).

Expenses Properly Incurred:

In an action to recover damages for the breach of an agreement to convey real property situated in another state, expenses incurred by the plaintiff in removing his family to that state, preparatory to taking possession of the lands sold to him by the defendant, as well as counsel fees and court costs paid by the plaintiff in defending an action to quiet title brought against him by the defendant's prior grantee are recoverable under this section as "expenses properly incurred in preparing to enter upon the land". Ross v. Saylor, 39 M 559, 104 P 864 (1909).

Where the jury returned a verdict "for necessary expenses in preparing to take possession of the land", while the court in its instruction employed the words of the statute, "expenses properly incurred", there was no substantial difference between the two expressions, and the verdict was sufficient, in the absence of an objection thereto at the trial. Ross v. Saylor, 39 M 559, 104 P 864 (1909).

Damage Where Bad Faith Is Not Alleged: Plaintiff having failed to allege bad faith, in an action to recover the amount paid by him to secure title to real estate, after discovering that defendant was unable to convey, the measure of damages was the amount paid to defendant on the purchase price, together with incidental expenses. Willard v. Smith, 34 M 494, 87 P 613 (1906).

Law Review Articles

Contract Damages in Montana Part II: Reliance and Restitution, Burnham, 45 Mont. L. Rev. 1 (1984).

Contract Damages in Montana Part I: Expectancy Damages, Burnham, 44 Mont. L. Rev. 1 (1983).

Collateral References

Vendor and Purchaser *key* 351.

92A C.J.S. Vendor and Purchaser §591.

77 Am. Jur. 2d Vendor and Purchaser §§649, 663.

Special or consequential damages recoverable, on account of delay in delivering possession, by purchaser of real property awarded specific performance. 11 ALR 4th 891.

Specific performance: compensation or damages awarded purchaser for delay in conveyance of land. 7 ALR 2d 1204, superseded in part by 11 ALR 4th 891.

27-1-315. Breach of agreement to buy real property.

Case Notes

Sale of Property Contingent on Financing — Financing Contingent on Grant of Contract — Oral Agreement to Purchase Additional Property Contingent on Initial Sale — Summary Judgment Proper Absent Genuine Issue of Fact: Community, Counseling, and Correctional Services, Inc. (Community), agreed to purchase Albright's property for a prerelease center. An additional oral agreement provided that Community would also purchase furnishings on the property when the sale was completed. The sale was contingent on Community's ability to obtain financing, and financing was contingent upon a grant for the prerelease center to Community from the Department of Corrections. Ultimately, the Department declined to issue the contract for prerelease services, Community was unable to obtain financing, and Albright was unable to sell the property or furnishings. Albright sued Community for breach of contract. The District Court granted summary judgment to Community, holding that under the plain language of the contract, the offer terminated when the Department did not issue the contract. Albright appealed, but the Supreme Court affirmed. No question of fact existed with respect to the conditions for the agreement because the agreement conditioned formation of any contract to buy

the real property on Community's ability to obtain financing and Community could not obtain financing without the Department contract. Further, Albright's own affidavit stated that the oral agreement to purchase the furnishings was contingent on purchase of the property, so no issue of fact existed regarding the sale of the furnishings either, and that issue was also properly disposed of by summary judgment. Albright v. Community, Counseling, & Correctional Serv., Inc., 2001 MT 272, 307 M 289, 37 P3d 675 (2001).

Defaulting Buyer Under Unambiguous Written Contract Cannot Rely Upon Expectations Not Covered by Contract to Avoid Contract — Disposition of Downpayment Amounts Paid and Due — County Not Liable for Negligent Misrepresentation as to Recordability of Deeds and Seller's Title Insurer Not Liable for Loss in Marketability: Documents for the sale and purchase of two sections of land unambiguously showed, and it was undisputed, that the resale of 20-acre parcels by the buyer, the immediate acceptance by the county of 20-acre resale deeds of a type that would make subdivision review unnecessary, and the ability to resell without having to undergo subdivision review were not parts of the bargain. The parties knew that these things were contemplated, but the documents did not refer to them or make them a part of the contract. Before the contract was made, the county indicated that it would accept the 20-acre resale deeds. The deal fell through when the county changed its position after the contract was signed. The buyer failed to pay the whole downpayment, and the seller terminated the contract and kept the paid portion of the downpayment. Precontract discussions on the matter must be disregarded as parol evidence because the documents were unambiguous and did not refer to the matter. The buyer was not entitled to rescind the contract and have the paid portion of the downpayment returned based on mutual mistake or failure of consideration. There was no mutual mistake because the parties knew that it was not a certainty that the county would accept the deeds. There was no failure of consideration because the resale, county acceptance of the deeds, and avoidance of subdivision review were not part of the written contract. In addition, the need for a subdivision review would not make the land unmarketable; at most, its market value decreased and it would take longer to sell it. Furthermore, a party in default is not entitled to rescission. The seller was entitled to terminate the contract. The seller was also entitled to keep an amount of the paid portion of the downpayment equal to the amount by which the contract price for the land exceeded the market value of the land at the time of the breach. The seller was not entitled to keep the remainder of the paid portion of the downpayment or to a judgment for the unpaid portion of the downpayment because the contract did not provide for that remedy. The county was not liable in tort to the seller for negligent misrepresentation, and the buyer's title insurance company was not liable to the seller for the loss in the marketability of the land caused by the need for subdivision review. Yellowstone II Dev. Group, Inc. v. First Am. Title Ins. Co., 2001 MT 41, 304 M 223, 20 P3d 755 (2001).

Lawsuit by Shareholder Causing Damages Considered Breach of Fiduciary Duty of Care: Sletteland brought a suit against two other corporate shareholders for charging excessive attorney fees and seeking their removal as corporate directors. The District Court held that the fees were excessive, but found no grounds for removal. The other shareholders filed a counterclaim against Sletteland, alleging that he breached his fiduciary duty in bringing the lawsuit because the timing of the suit caused refinancing of a project to fail, resulting in damage to the corporation and to other shareholders. The District Court agreed, and both parties appealed their respective issues. The Supreme Court reversed on the issue of excessive fees, but affirmed on the issue of breach of fiduciary duty. The fiduciary duty between shareholders of a close corporation is one of utmost good faith and loyalty. Sletteland admittedly knew of the refinancing and, as an attorney and investment banker, also knew the effect that a lawsuit alleging misconduct by board members would have on a refinancing effort. In fact, it appeared that the suit was brought to specifically derail the refinancing. Sletteland was the person who determined the timing of the suit, which was filed immediately before the individuals involved in the refinancing were to meet for discussions, and when asked to withdraw the suit so refinancing could conclude, he refused to do so. Sletteland did not use the care that an ordinarily prudent person would use in a similar situation, resulting in the breach of fiduciary duty. The Supreme Court also affirmed the award of damages. Although future damages could not be calculated exactly in this case, the District Court did not abuse its discretion in basing its calculations on expert testimony of a well-known regional economist. Sletteland v. Roberts, 2000 MT 382, 304 M 21, 16 P3d 1062, 57 St. Rep. 1639 (2000).

Acceptance of Payments Irrelevant When Service of Notice Insufficient: The real estate contract entered into by the Ahrens and Cottle provided that all notices between the parties be delivered personally or by registered mail. When Cottle failed to make several underlying payments to the bank, the Ahrens made the payments to the bank and subsequently, in

November 1993, filed suit to cancel the contract for deed and for possession of the property. In December, Cottle cured the default by making the late payments to the bank. The lower court held that the Ahrens had waived their right to default by allowing Cottle to make payments curing the default. The Supreme Court held that the payments were irrelevant because the Ahrens had never served notice of default on Cottle as required by the contract and therefore could not accelerate the contract and seek to regain possession of the property. Ahrens v. Cottle, 271 M 339, 896 P2d 1127, 52 St. Rep. 485 (1995).

Failure to Comply With Contract Notice Provisions: The real estate contract entered into by the Ahrens and Cottle provided that all notices between the parties be delivered personally or by registered mail. When Cottle failed to make several underlying payments to the bank, the Ahrens posted a notice of default on Cottle's back door. The Supreme Court held that although Montana case law has held that failure to adhere to technical requirements of notice is immaterial if an individual has knowledge of the notice, in the present case, the posting of the notice was a material flaw in service. Ahrens v. Cottle, 271 M 339, 896 P2d 1127, 52 St. Rep. 485 (1995), distinguishing Hares v. Nelson, 195 M 463, 637 P2d 19 (1981), and LeClair v. Reitner, 233 M 332, 760 P2d 740 (1988).

Landowner Testimony — Value of Property: In this action involving the sale of commercial real estate, the purchaser was allowed to estimate the value of the resort he purchased from the defendant seller. A landowner has the right to testify as to the value of his property. Zugg v. Ramage, 239 M 292, 779 P2d 913, 46 St. Rep. 1693 (1989), followed in Dew v. Dower, 258 M 114, 852 P2d 549, 50 St. Rep. 454 (1993).

Contract for Deed — Notifying Escrow Agent of Default: Seller under contract for deed did not have to notify the escrow agent as well as the buyers that payments were in default and the contract was terminated, because the contract only provided for notice to buyers and did not require notice to the escrow agent. More important, the contract gave buyers the right to pay the accelerated balance due within 90 days of receipt of the notice of default, the deed and other documents were held by and the payments were made to the escrow agent, and notice of default to the escrow agent would have prematurely closed the escrow account and denied the buyers the opportunity to pay off the contract within 90 days. Boles v. Ler, 222 M 28, 719 P2d 793, 43 St. Rep. 1035 (1986).

Contract for Deed — Seller's Right to Cancel After Accepting Late Payments to Escrow Agent: Buyers under contract for deed made three late payments to the escrow agent. The escrow agent's acceptance of the three checks was not acceptance by the seller under the theory that the escrow agent was the seller's agent and acceptance by the agent was acceptance by the principal, nor did seller's acceptance of the payments from the escrow agent ratify the agent's acceptance. Failure to promptly return the payments did not waive seller's right to cancel the contract. The contract gave buyers 90 days from notice of default to pay the balance due under the contract, and they could do so in more than one installment. Seller decided the three payments might be installments in an attempt to pay the balance due and decided to hold the checks until it became apparent that the buyers were either going to pay off the balance due or were attempting to induce seller to waive her right to cancel the contract. Seller returned the checks when she realized the latter was the motive. In addition, seller sent a second cancellation notice, making it clear what her intent was. Boles v. Ler, 222 M 28, 719 P2d 793, 43 St. Rep. 1035 (1986).

Sufficiency of Default Notice — Mandatory Finding: Michunovich purchased a tract of land under contract for deed from the Brangers. Michunovich entered a contract for deed to sell a portion of that tract to Owen. Owen fulfilled his part of the contract. Michunovich defaulted on the Branger contract. Brangers filed a breach of contract suit against Michunovich. Michunovich served Owen a notice of termination since he was unable to secure a deed release from Brangers. Michunovich did not refund Owen's downpayment as required by the contract. Owen refused to vacate the property. Michunovich assigned all his interest in the Branger contract to Stevenson with the Brangers' consent. Since Stevenson was able to bring the Branger contract current, the Brangers stipulated to the dismissal of their suit against Michunovich. Owen filed a purchaser's lien on the property under his contract from Michunovich. Stevenson then filed a quiet title action. The trial court found for Stevenson, finding that the notice from Michunovich to Owen terminated that contract so that Owen had no interest in the land. The Supreme Court remanded because according to the terms of the contract the refund of Owen's downpayment was a condition precedent to the contract being declared void. The trial court was instructed to determine whether Stevenson's default notice terminated the Owen contract and to resolve issues regarding rental value and improvements. Stevenson v. Owen, 212 M 287, 687 P2d 1010, 41 St. Rep. 1743 (1984).

Damages — Contract for Real Property Sale — Waste: Damage award was correct because after deducting the alleged damages the seller is better off than he would have been had the contract been performed, notwithstanding the fact that recovery for harm done to the land is not allowed. As to waste, plaintiff has a right to the return of real property only if the contract is breached. The damage done may be used to reduce the market value of the land but not to allow damages when none would be due under the statutory measure. Whitney v. Bails, 172 M 121, 560 P2d 1344 (1977).

Remedy Not Exclusive: This section did not provide mandatory and exclusive formulae to determine damages for breach of contract and tortious injury to personal and real property; damages for waste in action based on provision of contract prohibiting waste were properly recoverable under 27-1-311 despite fact that this section did not provide specifically therefor. Wiseman v. Holt, 163 M 387, 517 P2d 711 (1973).

Law Review Articles

Contract Damages in Montana Part I: Expectancy Damages, Burnham, 44 Mont. L. Rev. 1 (1983).

The Default Clause in the Installment Land Contract, Isham, 42 Mont. L. Rev. 110 (1981).

Collateral References

Vendor and Purchaser *key* 330.

92A C.J.S. Vendor and Purchaser §§528 through 537, 591 through 607.

77 Am. Jur. 2d Vendor and Purchaser §572.

27-1-316. Breach of covenants in grants of estates in real property.

Case Notes

No Award of Damages and Attorney Fees Unless Covenant of Warranty Breached: The Ecklunds sued the Stevensons, claiming that they owned part of the Stevensons' property. In defending the claim, the Stevensons also sued the Woods on the basis of a breach of the covenant of warranty in transferring the property to them. The lower court found that the Ecklunds had no claim to the property because the doctrine of apportionment had been properly applied to correct the 1910 plat. The Stevensons asserted that they were entitled to damages and attorney fees from the Woods because of having to defend against the Ecklunds' suit. The Supreme Court held that the Woods were not liable because the application of the doctrine of apportionment meant that the Ecklunds had no basis for a lawful claim to the property and that therefore no breach of the covenant of warranty had occurred. Stevenson v. Ecklund, 263 M 61, 865 P2d 296, 50 St. Rep. 1706 (1993).

"Deposit" — Spending of Earnest Money Not Material Breach: In a contract for sale of real estate, use of words such as "deposit", "depositing", and "held on deposit" prohibited the sellers from spending the earnest money paid by the buyer pending the closing of the sale; however, the sellers' failure to keep earnest money on deposit until the closing did not constitute a material breach of contract. The buyer was entitled to seek contract damages but not rescission. Cady v. Burton, 257 M 529, 851 P2d 1047, 50 St. Rep. 395 (1993).

Breach Not Affecting Marketability of Title: In a contract for sale of real property, a "technical" breach of the covenant against encumbrances that did not affect marketability of title is nonetheless a breach of contract. Maloney v. Heer, 257 M 500, 850 P2d 957, 50 St. Rep. 382 (1993).

Failure to Create Home Owners' Association Not Breach of Protective Covenants: Property buyers claimed sellers breached the contractual protective covenants by failing to establish a home owners' association. The argument was discounted upon finding that: (1) the contractual conditions requiring establishment were not met at the time buyers defaulted on payments; (2) there was no deadline for establishment; (3) the provision for enforcement of covenants did not declare the entire contract terminated in the event of a covenant violation as it did for default on payments; and (4) buyers never gave notice to sellers that they considered failure to establish a home owners' association a violation of the contract. Burgess v. Shiplet, 230 M 387, 750 P2d 460, 45 St. Rep. 293 (1988).

Encroachment as Encumbrance: An encroachment may or may not be an encumbrance. In determining that there was a fact question as to whether there was a legal right to encroachment, the Supreme Court adopted the rule set out in 3 American Law of Property 12.128 (A.J. Casner ed. 1952): "[I]f the encroachment is of an improvement located on adjoining land which extends across the line onto the land conveyed, there may be a breach of either the covenant of seizin or of the covenant against encumbrances, depending on whether title to that

part of the land purchased has been lost by adverse possession, or has become encumbered by an easement." D'Agostino v. Schapp, 230 M 59, 748 P2d 466, 45 St. Rep. 14 (1988).

Reversal of Award of Attorney Fees — Applicability of Specific Statutes: Respondents contended that under 27-1-316, 28-3-704, and 30-14-222 they were entitled to attorney fees. The court considered each statute and decided: (1) since the issue of unlawful restraint of trade was reversed, no damages were allowable under 30-14-222; (2) because there was no allowance for attorney fees where the covenantor brings an action for breach of contract against the covenantee, 27-1-316 was inapplicable; and (3) since an agreement with an attorney fee provision was entered into prior to the July 1, 1971, effective date enumerated in 28-3-704 and was found to have been merged in the deeds that contained no such provision, 28-3-704 was also not applicable. The award of attorney fees to respondents was reversed. Haggerty v. Gallatin County, 221 M 109, 717 P2d 550, 43 St. Rep. 674 (1986).

Collateral References

Covenants *key* 124 through 132.

21 C.J.S. Covenants §§57 through 60.

20 Am. Jur. 2d Covenants, Conditions, and Restrictions §§262 through 268.

Nominal damages for lessor's breach of covenant to put lessee into possession. 88 ALR 2d 1032.

Measure of vendee's recovery in action for damages for vendor's delay in conveying property. 74 ALR 2d 578.

Measure of damages for breach of covenant for quiet enjoyment in lease. 41 ALR 2d 1454.

Remedy of tenant against stranger wrongfully interfering with his possession. 12 ALR 2d 1192.

27-1-317. Breach of obligation other than contract.

Case Notes

No Prejudicial Error in Failure to Give Negligent Homicide Mental State Instruction in Wrongful Death Action When Other Instructions Adequately Reflect Negligence: Samson's son was killed by Bercier, a youth who walked away from a nonsecure, supervised licensed youth group home. Samson sued the state for foreseeable negligence. To boost the theory of foreseeability, Samson offered a jury instruction that defined Bercier's conduct as reckless and postulated therefrom that the conduct was foreseeable because of Bercier's background, seeking to undermine the state's theory that the shooting was an unforeseeable accident. The District Court refused to offer the instruction, instead instructing the jury on elements of wrongful death, and Samson appealed. The state argued that the mental state of Bercier was not a controlling issue and contended that it was not necessary to instruct the jury on the mental state of negligent homicide because the instructions as a whole properly included the key concepts of a wrongful death action. The Supreme Court agreed with the state. The fundamental issue concerned the state's negligence, not Bercier's mental state. Nevertheless, Samson was still able to present the foreseeability theory under the instructions that were given, so failure to give Samson's offered instruction did not result in prejudice to Samson's case. It is within a District Court's discretion to decide how to instruct the jury, taking into account the theories of the contending parties, and absent an abuse of discretion, the District Court was affirmed. Samson v. St., 2003 MT 133, 316 M 90, 69 P3d 1154 (2003). See also Busta v. Columbus Hosp. Corp., 276 M 342, 916 P2d 122 (1996).

State Not Liable for Unforeseeable Accident — Intervening Criminal Act of Third Person — Expert Testimony on Foreseeability Proper: Samson's son was killed by Bercier, a youth who walked away from a nonsecure, supervised licensed youth group home. Samson sued the state for negligence. The jury returned a verdict for the state, and Samson appealed. Rather than retry the case and evaluate the facts to determine whether the state was negligent, the Supreme Court reviewed the verdict to determine if there was substantial evidence to support it and determined that there was. In order to sustain a negligence action, plaintiff must establish a legal duty on the part of defendant, a breach of that duty, causation, and damages. In cases involving a dispute over the intervening criminal act of a third party, foreseeability must be analyzed twice—first with regard to the existence of a legal duty and second with regard to proximate causation. Samson contended that the District Court erred in allowing the state to present evidence in the form of expert testimony and to argue that the shooting was an unforeseeable accident. The state argued that the expert testimony was relevant and aided the jury. Given the need to determine the foreseeability of Bercier's actions, the expert testimony was properly allowed. Further, in cases alleging an intervening cause, juries must be instructed that the specific injury to plaintiff need not have been foreseen. Samson v. St., 2003 MT 133, 316 M 90, 69 P3d 1154 (2003),

affirming Lacock v. 4B's Restaurants, Inc., 277 M 17, 919 P2d 373 (1996). See also Lopez v. Great Falls Pre-Release Serv., Inc., 1999 MT 199, 295 M 416, 986 P2d 1081 (1999), and St. v. LaTray, 2000 MT 262, 302 M 11, 11 P3d 116 (2000).

Offer of Total Amount Owing Upon Redemption of Tax Lien — Summary Dismissal of Negligence Claim Proper Absent Damages: Shepherd held an assignment of the tax sale certificate on real property in Red Lodge. A few days before the redemption period was to expire, the owner of record redeemed the property by paying $4,407.28, but the County Treasurer unintentionally overlooked an additional $56.30 in interest that had accrued between the date that notice was given that a tax deed would be issued and the date of redemption. Shepherd then filed a complaint under 42 U.S.C. 1983, alleging that the county's failure to collect the statutorily required amount for redemption deprived him of a property interest without due process of law. Shepherd sought $250,000 in general damages, punitive damages, and attorney fees and costs. Shortly thereafter, the county tendered Shepherd $56.30 plus interest, but Shepherd rejected the money and added a negligence claim to the complaint, based on the County Treasurer's improper extinguishment of the lien. The District Court summarily dismissed the negligence claim because Shepherd was offered the full amount of recovery owing under 15-18-114, plus interest, prior to litigation. Shepherd appealed, claiming that the redemption process in 15-18-114 did not apply to cases in which a negligence action is brought for improperly extinguishing a lien and that this section should apply instead, which would allow compensation for all detriment caused by breach of an obligation not arising from a contract. The Supreme Court disagreed and affirmed the summary dismissal of the negligence claim. Regardless of the statute relied on, Shepherd was tendered all the damage caused by the County Treasurer's omission when he was offered $56.30 plus interest. Had the County Treasurer not miscalculated, that was the full additional amount Shepherd would have received. Once tendered, it was no longer owed, and without damages, there was no claim for negligence. Shepherd v. Carbon County Bd. of Comm'rs, 2002 MT 98, 309 M 391, 46 P3d 634 (2002).

Interpleader Purporting to Release Potentially Liable Individuals Remanded for Clarification That Only Insurer Released Upon Payment of Policy Limits: The District Court granted an insurer's request in a prayer for interpleader for an order "enjoining and restraining each and all of the defendants from instituting or prosecuting further any proceeding on account of the incident or the insurance policy". Defendants claimed that the order infringed on their right to seek further relief from other potentially liable persons individually after the maximum policy limits were distributed. The Supreme Court noted that the measure of damages for negligence, notwithstanding available insurance proceeds, is the amount that will compensate the injured for all detriment proximately caused, but in this instance, it was not clear whether the insurer specifically requested additional relief for other parties or intended such a comprehensive exclusion of remedies. Pursuant to the principles of subject matter jurisdiction, the District Court should have released only the insurer from further claims, not the other potentially liable individuals involved. The case was remanded for a clarification of the order. Infinity Ins. Co. v. Dodson, 2000 MT 287, 302 M 209, 14 P3d 487, 57 St. Rep. 1196 (2000).

Jury Award of Compensatory Damages Proportionate to Posttraumatic Stress Injuries — Affirmed: Onstad was assaulted on the job and sued the employer, Payless Shoesource (Payless), for failure to provide a safe workplace. The jury held Payless liable and awarded Onstad $500,000 in compensatory damages. On appeal, Payless contended that the award was excessive and unsupported by the evidence. However, Onstad was entitled to reasonable compensation for any pain and suffering that she experienced and would reasonably probably experience in the future, and the law does not set a definite standard by which to calculate compensation for mental pain and suffering. Only when the amount awarded is so grossly out of proportion as to shock the conscience will an appellate court intervene. In this case, Onstad was terrified during the attack and subsequently became withdrawn; her sense of safety, security, and self was violated; she felt extremely powerless; and her whole sense of self-esteem and self-confidence was affected. The amount of compensatory damages awarded was not so grossly disproportionate to Onstad's posttraumatic stress injury as to shock the conscience, and the Supreme Court declined to alter the award. Onstad v. Payless Shoesource, 2000 MT 230, 301 M 259, 9 P3d 38, 57 St. Rep. 943 (2000).

Joint and Several Liability — Corporations Owned by Same Person Acting as Agent: Lloyd Kimble was president of Hobble Diamond Cattle Company (Hobble) and Kimble Properties, Inc. (Kimble Properties), making him an agent of both companies. Hobble sold land to the buyers, and Kimble Properties sold them an irrigation system. The irrigation system was deficient, and part of the land lay in an old river channel. The buyers sued Kimble, Hobble, and Kimble Properties. The District Court assessed damages against Kimble and Hobble. On appeal, Kimble

argued that Hobble was responsible for fraud, but he personally was not. The Supreme Court held that at the time that Kimble sold the irrigation equipment, which was subsequently damaged by erosion of the land, he was acting as an agent of Kimble Properties, not Hobble, so the District Court erred in assessing damages against Hobble rather than Kimble Properties. However, a principal is liable for wrongs committed by an agent while acting within the scope of employment, and a director or officer is individually liable for false representations, so Kimble was personally liable regardless of which of his companies was also liable. H-D Irrigating, Inc. v. Kimble Properties, Inc., 2000 MT 212, 301 M 34, 8 P3d 95, 57 St. Rep. 832 (2000).

Prevailing Party on Ditch Easement Claim Entitled to Attorney Fees and Costs Despite Loss of Separate Counterclaim Related to Road Easement: Espy sued for easement interference related to an underground irrigation system. Quinlan filed a permissive counterclaim, alleging that Espy had interfered with Quinlan's road easement over Espy's property. Following trial, the District Court concluded that: (1) Espy was successful on his claim because he had a valid easement over Quinlan's property for use and maintenance of the irrigation system; (2) Quinlan was successful on her counterclaim because she had a valid road easement over Espy's property; (3) both parties were entitled to a permanent order restraining the other party from interfering with their respective easements; and (4) Espy was entitled to attorney fees and costs as the successful party under 70-17-112. Quinlan appealed the award of attorney fees, contending that because she prevailed on the counterclaim, neither party could be considered a prevailing party. However, Quinlan's counterclaim was not raised in the context of 70-17-112, but was instead related to a road easement. Because Espy successfully prevailed on all claims raised pursuant to 70-17-112, he was entitled to attorney fees and costs regardless of the fact that he was not the prevailing party on the counterclaim. Espy v. Quinlan, 2000 MT 193, 300 M 441, 4 P3d 1212, 57 St. Rep. 764 (2000), distinguishing Knudsen v. Taylor, 211 M 459, 685 P2d 354 (1984).

Damages for Intentional Interference With Business Relations or Prospective Economic Advantage: Defendant was found liable for intentional interference with prospective economic advantage through tortious interference with plaintiff's right to buy a parcel of land. A special master properly applied this section in determining economic damages but improperly speculated as to what an appropriate replacement parcel would cost as a means of ascertaining damages. Damages for intentional interference with prospective economic advantage must be proved by substantial evidence that is not the product of mere guess or speculation. Here, the price of an adjoining parcel had nothing to do with the parcel that plaintiffs contended that they rightfully should have been allowed to purchase and from which a prospective economic advantage was lost. The Supreme Court concluded that the judgment should be modified based on the substantive evidence of damages resulting from intentional interference with the parcel in question. Maloney v. Home & Inv. Center, Inc., 2000 MT 34, 298 M 213, 994 P2d 1124, 57 St. Rep. 144 (2000). See also Sebena v. Am. Auto. Ass'n, 280 M 305, 930 P2d 51 (1996).

Damages Proper for Emotional Distress Based on Sale of Real Estate — Punitive Damages Appropriate: The Maloneys were promised an option to purchase property adjacent to their own, hoping to build their retirement home near Glacier Park. The real estate agent who listed the property was aware of the Maloneys' option but sold to another instead. That person then developed the property, building a 3,000-square-foot home on the very site that the Maloneys had desired and within sight of the Maloneys' residence, and then listed the newly developed property for almost six times what the Maloneys could have paid had the option been properly offered. A special master concluded, and the District Court agreed, that the Maloneys had suffered and were entitled to compensation for the shock, worry, anger, disappointment, and frustration that they had suffered and would continue to suffer in light of the inherent duration of the Maloneys' adjacent ownership. The Supreme Court affirmed, noting that under French v. Ralph E. Moore, Inc., 203 M 327, 661 P2d 844, 40 St. Rep. 481 (1983), emotional distress damages may result from negligent or intentional damage to property arising from interference with the use and enjoyment of land and that under Johnson v. Murray, 201 M 495, 656 P2d 170, 39 St. Rep. 2257 (1982), compensatory damages could include compensation for humiliation, embarrassment, distress, and ridicule associated with interference with plaintiffs' use of their private property. The private property interest at issue here sufficiently involved the use and enjoyment of land to fall within these holdings. Further, the award of punitive damages was also affirmed in this instance despite defendant's claims of the special master's improper estimation of net worth, a syntax error, and the special master's improper recognition of punitive damages assessed against defendant in a prior case. Maloney v. Home & Inv. Center, Inc., 2000 MT 34, 298 M 213, 994 P2d 1124, 57 St. Rep. 144 (2000). See also Recovery for Negligent Infliction of Emotional Distress Attendant to Economic Loss: A Reassessment, Sandor & Berry, 37 Ariz. L. Rev. 1247 (1995).

Independent Tort of Intentional Spoliation of Evidence Recognized — Elements: After a review of decisions in those jurisdictions that have recognized the tort of spoliation of evidence, the Supreme Court adopted the tort of intentional spoliation of evidence, although that tort was not present in this case. Elements of intentional spoliation of evidence include: (1) the existence of a potential lawsuit; (2) defendant's knowledge of the potential lawsuit; (3) the intentional destruction of evidence designed to disrupt or defeat the potential lawsuit; (4) disruption of the potential lawsuit; (5) a causal relationship between the act of spoliation and the inability to prove the lawsuit; and (6) damages. As with negligent spoliation of evidence, a plaintiff bringing a claim for intentional spoliation of evidence is required to prove a causal relationship between the act of spoliation and the inability to prove the lawsuit and damages. Oliver v. Stimson Lumber Co., 1999 MT 328, 297 M 336, 993 P2d 11, 56 St. Rep. 1303 (1999). See also Coleman v. Eddy Potash, Inc., 905 P2d 185 (N. Mex. 1995).

Independent Tort of Negligent Spoliation of Evidence Recognized — Elements: After a review of decisions in those jurisdictions that have recognized the tort of spoliation of evidence, the Supreme Court adopted the tort of negligent spoliation of evidence. Elements of negligent spoliation include: (1) the existence of a potential civil action; (2) a legal or contractual duty to preserve evidence relevant to that action; (3) destruction of that evidence; (4) significant impairment of the ability to prove the potential civil action; (5) a causal connection between the destruction of the evidence and the inability to prove the lawsuit; (6) a significant possibility of success of the potential civil action if the evidence were available; and (7) damages. As with intentional spoliation of evidence, a plaintiff bringing a claim for negligent spoliation of evidence is required to prove a causal relationship between the act of spoliation and the inability to prove the lawsuit and damages. Oliver v. Stimson Lumber Co., 1999 MT 328, 297 M 336, 993 P2d 11, 56 St. Rep. 1303 (1999). See also Holmes v. Amerex Rent-A-Car, 710 A2d 846 (D.C. 1998).

Proof Required to Show Causation in Action Alleging Spoliation of Evidence: A third-party spoliator should not be forced to pay damages to a plaintiff who has only a frivolous underlying claim, so some threshold showing of causation and damages is required. Recovery for loss of a plaintiff's ability to prove the underlying case and a third party's interest in only compensating plaintiff for the third party's harmful conduct must be balanced in determining the standard of proof for causation in an independent cause of action for negligent or intentional spoliation of evidence. Balancing those interests requires plaintiff to show a nexus between the destroyed evidence and the impairment of proving the underlying suit. Therefore, in order to prove causation, plaintiff must show that: (1) the underlying claim was significantly impaired because of the spoliation of evidence; (2) a causal relationship exists between the projected failure of success in the underlying action and the unavailability of the destroyed evidence; and (3) the underlying action would enjoy a significant possibility of success if the spoliated evidence still existed. With respect to the third prong of causation, plaintiff must demonstrate a substantial and realistic possibility of succeeding, but need not demonstrate that success was more likely than not. Oliver v. Stimson Lumber Co., 1999 MT 328, 297 M 336, 993 P2d 11, 56 St. Rep. 1303 (1999). See also Holmes v. Amerex Rent-A-Car, 710 A2d 846 (D.C. 1998).

Easement Dispute — Attorney Fees Improperly Awarded — Foy and Randono Distinguished — Costs Sustained: Smalls brought a quiet title action against Goods for determination of an easement. Goods counterclaimed to quiet title to an easement for themselves. The District Court found in favor of the Smalls on the easement issue and awarded Smalls $8,536 in attorney fees and $759 in costs. The Supreme Court reversed on the issue of attorney fees, holding that there was no applicable exception to the general rule that attorney fees cannot be awarded absent a contractual agreement or other special circumstances. The Supreme Court held that the District Court improperly relied upon Foy v. Anderson, 176 M 507, 580 P2d 114 (1978), and Martin v. Randono, 191 M 266, 623 P2d 959 (1981). The Supreme Court stated that the Randono case stands for the proposition that fees may not be awarded as costs and that Foy is distinguishable in that in Foy, fees were awarded to a person who had sought to avoid legal action, unlike the Smalls who initiated litigation in this case. Although expressing no opinion on the applicability of Rules 11 and 54(d), M.R.Civ.P. (Title 25, ch. 20), to the case before it, the Supreme Court also pointed out that fees could be awarded as a sanction under Rule 11 and that costs could be awarded pursuant to Rule 54(d). However, the Supreme Court did sustain the award of costs to Smalls, noting that the purposes for which costs were awarded by the District Court were of the type of costs allowable under 25-10-201. Small v. Good, 284 M 159, 943 P2d 1258, 54 St. Rep. 825 (1997).

Montana Pattern Instruction No. 2.06 — Instruction to Be Coordinated With Section: After Lacock was injured in a shooting at a 4B's restaurant, he brought an action against 4B's, claiming that the restaurant should have foreseen that he would be injured. The District Court

gave Montana Pattern Instruction No. 2.06, but left off the last line of the instruction in deference to Kitchen Krafters, Inc. v. Eastside Bank of Mont., 242 M 155, 789 P2d 567 (1990). The Supreme Court held that leaving off the last line of the instruction was error because the decision in Kitchen Krafters must be coordinated with this section. Without the last line of the instruction, the Supreme Court noted that a jury will be mistakenly led into believing that to be held liable, a defendant must foresee the specific injury to the plaintiff. Lacock v. 4B's Restaurants, Inc., 277 M 17, 919 P2d 373, 53 St. Rep. 492 (1996).

Foreseeability to Be Considered Part of Analysis of Duty: The trial court refused to give Columbus Hospital's proposed jury instruction on proximate cause and also did not instruct the jury on foreseeability even though the hospital contended that the Supreme Court had included foreseeability as an element of proximate cause in Kitchen Krafters, Inc. v. Eastside Bank of Mont., 242 M 155, 789 P2d 567 (1990). The Supreme Court, after a lengthy discussion of duty, proximate cause, and foreseeability and after examining the statutory definitions of duty and proximate cause, held that foreseeability is to be considered as part of the analysis of duty rather than proximate cause. The Supreme Court further held that it was reversing that part of Kitchen Krafters that requires a two-tiered analysis of causation that includes consideration of foreseeability in cases other than those cases in which there has been an allegation that the chain of causation is severed by an independent, intervening cause. Busta v. Columbus Hosp. Corp., 276 M 342, 916 P2d 122, 53 St. Rep. 428 (1996), followed in Lacock v. 4B's Restaurants, Inc., 277 M 17, 919 P2d 373, 53 St. Rep. 492 (1996).

Crops Damaged by Spraying and Held for Sale at Higher Price Some Time After Harvest: In an action for negligent damage to crops caused by improper spraying, which caused a smaller crop, damages for the lost part of the crops were properly calculated on the basis of the amount that a bushel of the remaining crop was sold for minus the expense of growing and marketing it, rather than the market price on the date of harvest minus the growing and marketing costs. Although the plaintiffs waited for some time after harvest to sell, it is a common practice (and their common practice) engaged in to enable farmers to sell at a higher price than when there is a market glut at the time of harvest. Plaintiffs did not wait to sell in order to enhance their damages. Semenza v. Bowman, 268 M 118, 885 P2d 451, 51 St. Rep. 1209 (1994).

Award for Brain Damage Affirmed: A jury award of $177,000 for defendant's negligence resulting in plaintiff's permanent brain damage was not so grossly out of proportion as to shock the conscience of the court, was supported by substantial evidence in the record, and was thus affirmed. Simchuk v. Angel Island Community Ass'n, 253 M 221, 833 P2d 158, 49 St. Rep. 473 (1992).

Fiduciary Duty Between Shareholders in Close Corporation When No Other Type of Relationship Exists: The fiduciary duty between stockholders of a close corporation is one of utmost good faith and loyalty. However, the controlling group should not be stymied by a minority stockholder's grievances if the controlling group can demonstrate a legitimate business purpose and the minority stockholder cannot demonstrate a less harmful alternative. If called on to settle a dispute between the stockholders, the court must weigh the legitimate business purpose, if any, against the practicability of a less harmful alternative. Daniels v. Thomas, Dean & Hoskins, Inc., 246 M 125, 804 P2d 359, 47 St. Rep. 2293 (1990), citing Donahue v. Rodd Electrotype Co. of New England, Inc., 328 NE 2d 505 (Mass. 1975), and Wilkes v. Springside Nursing Home, Inc., 353 NE 2d 657 (Mass. 1976), and distinguishing Skierka v. Skierka Bros., Inc., 192 M 505, 629 P2d 214 (1981), Deist v. Wachholz, 208 M 207, 678 P2d 188 (1984), and Dunfee v. Baskin-Robbins, 221 M 447, 720 P2d 1148 (1986).

Damages for Emotional Distress Improperly Awarded in Breach of Contract Action: Distinguishing emotional distress claims in a breach of contract action from emotional distress damage claims in tort actions, the Supreme Court applied this section as the measure of damages to be used in tort actions and 27-1-311 for damages collectible under a breach of contract action, noting that 27-1-311 contains the additional limitation that the detriment must, in the ordinary course of things, be likely to result from the breach of contract and that damages must be clearly ascertainable in nature and origin. Lacking such a showing, the award of emotional damages in a breach of contract action constituted reversible error. Larson v. Undem, 246 M 336, 805 P2d 1318, 47 St. Rep. 2088 (1990).

Emotional Distress Damages Inapplicable to Case of Negligent Damages Resulting in No Physical Injury: The Supreme Court has adopted only Comment j to Restatement (Second) of Torts 46 (1965), defining severe emotional distress, but has not recognized the tort of intentional infliction of emotional distress as a cause of action. Therefore, the court declined to extend recovery for emotional distress to cases in which the defendant negligently damages or destroys real property but plaintiff suffers no physical injury. Day v. Mont. Power Co., 242 M 195, 789 P2d

1224, 47 St. Rep. 626 (1990), followed in McNeil v. Currie, 253 M 9, 830 P2d 1241, 49 St. Rep. 312 (1992).

Reduction of Compensatory Damages to Precise Amount in Record: A company had over $1 million annual gross income at the time its bank exercised a setoff, leaving the company with no operating cash or line of credit. The record showed company assets valued at $312,000, but as a result of the bank's action, the company lost all its employees, was sued many times, had its corporate goodwill destroyed, and had to enter into joint venture agreements with general contractors in order to stay in business. There was no clear indication in the record as to the company's profits following the setoff. The jury awarded the company $500,000 compensatory damages. However, rather than resort to speculation to establish the amount of lost profit reasonable to be ascribed as damages, the Supreme Court reduced the jury award to $312,000, the only positive figure in the record and the figure most favorable to the company. Bottrell v. Am. Bank, 237 M 1, 773 P2d 694, 46 St. Rep. 561 (1989).

Misrepresentation of Business Profits — Compensatory and Punitive Damage Awards Affirmed: Despite contentions that damage awards were too low in a case in which business profits were misrepresented to the detriment of buyers, the Supreme Court affirmed as adequate an award of $62,238 in compensatory damages to cover annual losses of $31,338 and reasonable wage losses of $30,900 and an award of $10,000 punitive damages to deter future similar behavior. Selvidge v. McBeen, 230 M 237, 750 P2d 429, 45 St. Rep. 168 (1988).

Award of Fair Market Value Not Compensation for Lost Profit: A cattle breeder compensated for loss of two exotic cows was awarded fair market value of the cows but was not allowed to present evidence of lost profits from his embryo production business. The Supreme Court adopted the reasoning in Snyder v. Bio-lab, Inc., 405 N.Y.S. 2d 596 (1978), in holding that the award of fair market value did not compensate for profits lost between the date the cattle were killed and the date they could reasonably have been replaced; therefore, the breeder was entitled to his lost profits for that period of time. McPherson v. Schlemmer, 230 M 81, 749 P2d 51, 45 St. Rep. 33 (1988).

Amount of Investments Represents Reasonable Measure of Damages: Bank appealed judgment awarding compensatory damages, based on the amount of shareholders' investments, to a commercial trout company upon a finding that failure of the trout farm was proximately caused by a breach of contract and misrepresentation by the bank and its agent. The Supreme Court held that the trial court acted reasonably and properly in determining that the damages suffered by the trout company were the amount of shareholders' investments at the time the bank entered the picture. Crystal Springs Trout Co. v. First State Bank of Froid, 225 M 122, 732 P2d 819, 44 St. Rep. 90 (1987).

Franchisor's Right to Determine Franchise Location — Duty to Reasonably Consider Relocation: Appellant franchisor had the sole contractual right to determine location of the franchise; however, the law imposed a duty to reasonably consider facts regarding relocation. The Supreme Court found evidence that vital information was withheld from respondents and from the vice president in charge of authorizing relocation which, if believed, would provide a basis for finding appellant acted unreasonably, thereby breaching its duty to exercise good faith. The evidence was sufficient to warrant submission to the jury on the question of good faith. Dunfee v. Baskin-Robbins, Inc., 221 M 447, 720 P2d 1148, 43 St. Rep. 964 (1986).

When Specific Amount of Damages Sought Must Be Argued: The specific amount of damages sought by plaintiff in a personal injury action must be placed before the jury in the opening argument in order to provide defendant a fair opportunity to argue the amount of damages. Miller v. LaBelle's of Colorado, Inc., 42 St. Rep. 1474 (D.C. Mont. 1985) (apparently not reported in Federal Supplement).

Bad Faith in Settling Insurance Claim — Damages: Plaintiff, a Kalispell ophthalmologist, pierced Frisnegger's eyeball with a needle while administering a local anesthetic to his eyelid. A cataract formed on the eye. Plaintiff notified his local insurance agent and on his direction notified defendant in writing that defendant was entirely at fault. Frisnegger filed suit against plaintiff. Defendant did not feel the claim was worth over $45,000 and refused to settle within the policy limits of $100,000. A jury verdict was returned for Frisnegger in the amount of $175,000. Plaintiff then brought suit against defendant alleging negligence and bad faith on the part of defendant for failure to settle the claim within policy limits. A jury verdict awarding plaintiff compensatory damages of $250,000 and punitive damages of $300,000 was returned. Defendant moved for a new trial or to alter or amend the judgment, alleging excessive damages. The trial court denied the motion. The Supreme Court said that although an action against an insurer for a breach of its implied covenant of good faith and fair dealing toward its insured sounds in contract, the action is to be regarded as one for tort. The measure of damages is the

amount that will compensate the injured party for all detriment proximately caused thereby, whether it could have been anticipated or not. When emotional distress is a factor in the detriment sustained, there is no reason why an award for such damages may not be given by a jury. The mental distress of a professional person fearing damage to his reputation and the stress of disruption of his home and professional life are elements for the jury to measure. The evidence was straightforward. The verdict was upheld. Gibson v. W. Fire Ins. Co., 210 M 267, 682 P2d 725, 41 St. Rep. 1048 (1984).

Damages Judgment to Be Supported by Substantial Evidence: In a suit for damages for negligent destruction of construction machinery, the District Court ruled in favor of plaintiff but refused to award damages for loss of rental income and interruption of business. The Supreme Court affirmed, ruling that plaintiff had not adequately proven these damage claims at trial and that a judgment for damages must be supported by substantial evidence which is not the product of mere guess or speculation. Lenz Constr. Co. v. Cameron, 207 M 506, 674 P2d 1101, 41 St. Rep. 106 (1984).

Measure of Loss-of-Use Damages: In a suit for damages for negligent destruction of construction machinery, the proper measure of loss-of-use damages is the reasonable rental value of a comparable machine for the period of time necessary for replacement, regardless of whether another machine is actually rented. Lenz Constr. Co. v. Cameron, 207 M 506, 674 P2d 1101, 41 St. Rep. 106 (1984).

Negligent Interference With Use of Land — Mental Anguish Recoverable: Plaintiffs owned a family home and a restaurant located on the same lot in Livingston. Strong odors of gasoline were detected in the basement of the restaurant. Fire officials investigated and ordered the closure of the restaurant. Testing showed concentrations of gasoline fumes constituting a health hazard. The home was also contaminated, but plaintiffs' financial situation was such that they were unable to move. The gasoline contamination was caused by leakage of defendant's storage tanks. Plaintiffs brought suit based on nuisance, negligence, and trespass theories. The jury awarded plaintiffs damages for diminution of the value of the property, lost income, pain, and mental, physical, and emotional distress. Defendant contended the pleadings did not permit recovery for pain or mental, physical, and emotional distress. The Supreme Court held that the underlying action was a suit for damages arising out of injury to real property. The court adopted the general rule that damages for mental anguish are recoverable in a negligence action where the claim is that the defendant has interfered with the use and enjoyment of plaintiffs' land. French v. Ralph E. Moore, Inc., 203 M 327, 661 P2d 844, 40 St. Rep. 481 (1983), followed in Maloney v. Home & Inv. Center, Inc., 2000 MT 34, 298 M 213, 994 P2d 1124, 57 St. Rep. 144 (2000).

Legitimate Disputes as to Law Not Within "Frivolous Case" Exception to General Rule on Recovery of Attorney Fees: Wilson brought an action against the defendant Department to prevent it from adjudicating his water rights as being subject to the prior existing right of Walton. The District Court erred in awarding attorney fees to be paid by Wilson to Walton on the theory that it was Wilson's unlawful appropriation which forced Walton to intervene in Wilson's legal action against the Department in order to protect his (Walton's) interest. Generally, attorney fees are not to be allowed absent statutory authorization or an agreement between the parties. The exception for frivolous legal action was inapplicable because a thorough examination of the basis for Wilson's claim to Walton's water rights shows that there was a legitimate basis for Wilson's claim, even though it was ultimately unsuccessful, and a legitimate dispute. State ex rel. Wilson v. Dept. of Natural Resources and Conservation, 199 M 189, 648 P2d 766, 39 St. Rep. 1294 (1982), distinguished in Braach v. Graybeal, 1999 MT 234, 296 M 138, 988 P2d 761, 56 St. Rep. 919 (1999).

Recovery for Damage to Loaned Vehicle: Plaintiff loaned the use of a semitrailer to defendant for the hauling of one load. Defendant used the truck for the hauling of a second load. The trailer was damaged in an accident and towed away and stored, and defendant was liable for plaintiff's loss of earnings for the 2 months between the date of the accident and the date of plaintiff's purchase of a new trailer and for the cost of the towing, storage, and repairs. Recovery of towing, storage, and repair charges was not limited by value of the trailer, and recovery for lost earnings included loss due to owner's financial inability to pay towing and storage charges in order to remove the trailer and have it repaired. McPherson v. Kerr, 195 M 454, 636 P2d 852, 38 St. Rep. 2021 (1981).

Possible Jury Reliance on Wrong Theory of Damages: In suit for damages arising from defects in modular home plaintiffs purchased from defendant, error occurred where case was submitted to the jury on the theories of negligence and breach of general statutory warranties, the jury was instructed on the measure of damages for negligence but not on the measure of damages for

breach of general statutory warranties, the U.C.C. warranties should have been applied to the case, not the general statutory warranties, thus precluding a general statutory warranties instruction, and it could not be determined whether the jury relied on negligence or breach of warranty in granting plaintiffs a verdict and thus it was not certain that the jury did not rely on the improper warranty theory in assessing damages. Little v. Grizzly Mfg., 195 M 419, 636 P2d 839, 38 St. Rep. 1994 (1981).

Wrongful Occupation of Property — Compensation for Personal Time Expended Properly Denied: Where the plaintiffs had failed to establish title to certain real property by adverse possession and the defendants had counterclaimed for damages caused by the wrongful occupation of the land, the court did not err in not awarding one defendant damages for his personal time expended in recovering the property and in preparing for trial. The defendants' reliance upon 27-1-317 and 27-1-320 is misplaced, as the former provides for the measure of damages where damages are not expressly provided for, as they are in this case, and the latter is applicable only to conversions of personal property; nor is the time invested by the defendant a "cost" recoverable under 27-1-318. Martin v. Randono, 191 M 266, 623 P2d 959, 38 St. Rep. 209 (1981), distinguished in Small v. Good, 284 M 159, 943 P2d 1258, 54 St. Rep. 825 (1997).

Negligent Misrepresentation by Real Estate Agent — Measure of Damages: Where the defendant real estate agent improperly identified certain real estate to prospective purchasers with the result that the buyers purchased real property they had not intended to buy, the court did not err in finding that the seller had suffered actual damages and awarding the seller $7,169.58 to cover credit issued on the wrong parcel of land, interest which was forgiven, the cost of obtaining alternate access, and the cost of title insurance, as the measure of damages prescribed by 27-1-317 is intended to be compensatory for the detriment that has been caused to the plaintiff. McCarty v. Lincoln Green, Inc., 190 M 306, 620 P2d 1221, 37 St. Rep. 2007 (1980).

Determination of Damages: When a hospital interferes with its employee's statutory right under 50-5-503 to refuse to participate in a sterilization operation, its violation of 50-5-504 may entitle the employee to damages to be determined by a compensation theory, including reasonably certain future damages and possibly exemplary damages. Swanson v. St. John's Lutheran Hosp., 189 M 259, 615 P2d 883, 37 St. Rep. 1420 (1980).

Violation of Insurance Law: An insurer has not only a contractual duty to make payment of a valid claim but a statutory duty to do so as soon as possible. It is the breach of that statutory requirement, a duty independent of the insurance contract, that gives rise to tort liability. The measure of damages in such a case is provided in 27-1-317. First Sec. Bank of Bozeman v. Goddard, 181 M 407, 593 P2d 1040 (1979).

Damages in Action Against City: It was proper for the court to award a reasonable amount of damages for the continuing interference with the flow of plaintiff's irrigation water and the continuing flooding and discharge of polluted waters upon his land. Walton v. Bozeman, 179 M 351, 588 P2d 518 (1978).

New Trial Proper to Consider Damage Award: While the jury could have considered other factors as going to the issue of "proximate cause", they would not explain the inadequacy and inconsistency of the verdict in the light of uncontradicted testimony. Thus, the Supreme Court found no abuse of discretion by the lower court in awarding a new trial but declined plaintiffs' invitation to simply make a mathematical recalculation of damages when several issues remained which were within the province of a jury. Ferguson v. Town Pump, 177 M 122, 580 P2d 915 (1978).

Damages for Blocked Ditch: When plaintiffs built an apartment house on property through which ran an irrigation ditch to which defendants had a water right, the Supreme Court reversed the District Court and awarded attorney fees and damages to defendant for costs incurred in renting a sprinkler to compensate for the blocked ditch. Boz-Lew Builders v. Smith, 174 M 448, 571 P2d 389 (1977).

Instructions on Damages — Consequential Damages: When contract for erection of silo was abandoned by defendant after negligent efforts at erection ended with collapse of silo in windstorm, plaintiff was entitled to jury instructions on damages relating both to breach of contract and to negligence. Plaintiff was also entitled to an instruction on consequential damages. Bos v. Dolajak, 167 M 1, 534 P2d 1258 (1975).

Market Value as Measure of Damages: Damages to real property caused by the derailment of a train were measured by the market value of the property immediately before its destruction and the difference in market value at the place before and after injury. Wippert v. Burlington N., Inc., 397 F. Supp. 73 (D.C. Mont. 1975).

Aggravation of Preexisting Injury: Measure of damages in tort action includes damages for aggravation of preexisting condition, but injured party is not entitled to recover damages which

would have resulted from his previous condition even without aggravation; however, where it was reasonable to suppose that in absence of accident, intervertebral disc would have herniated within not more than 2 years, still injured party was entitled to damages resulting from hastening of back condition, including pain and suffering during additional period of disability reasonably caused by accident. Kegel v. U.S., 289 F. Supp. 790 (D.C. Mont. 1968).

Estimation of Damage to Property: Where plaintiff suffered damage to motel property from sewage seeping into basement caused by defendant's workmen having negligently broken sewerline and left it open overnight, but where plaintiff's list of items damaged was ridiculously long and included discarded items, damages should have been calculated on the value of the items just before they were damaged and not on the basis of what they would cost to replace. Spackman v. Ralph M. Parsons Co., 147 M 500, 414 P2d 918 (1966).

Damage Limited — Cost of Truck: Although oil company, which negligently put diesel fuel in farmer's truck, was liable for the loss of the truck's use beyond the time reasonably necessary to make repairs, damages were limited to the cost of the truck, since, as a consequence of law, court found no distinction between cases in which property is totally destroyed and those in which it is damaged but repairable. Stahl v. Farmers Union Oil Co., 145 M 106, 399 P2d 763 (1965).

Question of Anticipation by Wrongdoer:

Where farmer was unable to pay off lien for repairs on truck, which was damaged by oil company's negligence in putting diesel fuel in it, time lost beyond that needed to repair the vehicle was compensable, even though unanticipated by the oil company. Stahl v. Farmers Union Oil Co., 145 M 106, 399 P2d 763 (1965).

In an action for damages, it is not necessary to show that the wrongdoer ought to have anticipated the particular injury which resulted; it is sufficient to show that he ought to have anticipated that some injury was likely to result as the reasonable and natural consequence of his negligence. Mize v. Rocky Mtn. Bell Tel. Co., 38 M 521, 100 P 971 (1909). See Stewart v. Stone & Webster Eng'r Corp., 44 M 160, 119 P 568 (1911).

Personal Injury Actions: There is no measuring stick by which to determine the amount of damages to be awarded in personal injury actions. Each case must depend upon its own particular facts. Chavez v. U.S., 192 F. Supp. 263 (D.C. Mont. 1961).

Loss of Profits: A person may recover for loss of profits where it is shown that such loss is the natural and direct result of the act of the defendant complained of and that such amount is certain and not speculative. Cruse v. Clawson, 137 M 439, 352 P2d 989 (1960).

Wrongful Occupation of Land: Although defendant was not entitled to retain downpayment on land when no binding contract of sale was ever made, he should be allowed to retain so much thereof as would be necessary to compensate him for damage caused by defendant's occupancy of the land. Fink v. Doggett, 123 M 324, 214 P2d 743 (1950).

Instructions Based on This Section:

Where the facts are few and simple, it is not error to give instructions containing abstract statements of statutory law; therefore, in such a case, instructions giving verbatim 27-1-221, as to when exemplary damages may be allowed, and this section, on the measure of damages for the breach of an obligation other than contract, may not be held erroneous. Johnson v. Horn, 86 M 314, 283 P 427 (1929).

In an action in conversion, the giving of an instruction submitting to the jury the measure of damages declared by this section is error, the rule thus established being inapplicable to such a case. Ferrat v. Adamson, 53 M 172, 163 P 112 (1917).

In an action by an inexperienced laundry employee who was injured while feeding a mangle, an instruction that if she was injured by defendants' negligence, she was entitled to recover what would compensate for all damage "proximately caused by the negligence of defendants, whether such damage could be anticipated or not", was not objectionable for failing to specify by whom the damage need not be anticipated, where there was no showing in the record that defendants asked for any more definite declaration upon the subject. In the case of such an employee, the doctrine of assumption of risk has no application. Coleman v. Perry, 28 M 1, 72 P 42 (1903). See Coulter v. Union Laundry Co., 34 M 590, 87 P 973 (1906).

Earning Capacity Impaired — Faulty Jury Instruction — No Guide to Amount: An instruction that if the evidence made it appear that plaintiff's earning capacity had been impaired by reason of his injuries, the jury should compensate him for such impairment, without stating a rule or guide for arriving at the amount to be awarded in that behalf, was faulty. Zanos v. Great N. Ry., 60 M 17, 198 P 138 (1921).

Railroad Failure to Stop for Sick Passenger — May Consider Probable Serious Consequences: If the engineer of a railway train sees a signal to stop but fails to stop for a sick passenger, the probable serious consequences to follow from missing the train may be considered as an element

of damages. Burles v. Oreg. Short Line R.R., 49 M 129, 140 P 513 (1914). See Jones v. Shannon, 55 M 225, 175 P 882 (1918).

Proximate Cause: To enable the plaintiff, in an action for personal injuries, to recover damages, he must show that the negligence charged was a proximate cause of the injury. Therriault v. England, 43 M 376, 116 P 581 (1911).

Conversion: An action to recover the value of ore, alleged to have been mined from a vein owned by the plaintiff and to have been converted by the defendant, is the same in legal effect as an action for the conversion of personal property; and, in view of this section and 27-1-320, the plaintiff, where he prevails, is entitled as a matter of law to interest on the value of the ore converted. Mont. Min. Co. v. St. Louis Min. & Mill. Co., 183 F 51 (9th Cir. 1910).

Capacity to Pursue Established Course of Life Distinct From Loss of Earning Capacity: Merely because the earning capacity of plaintiff, a farmer 68 years old who was injured by falling into an open cellarway, may have been so small as to be a negligible element in making up his estimate of the damages which he could recover, he was nonetheless entitled to compensation for the destruction of his capacity to pursue his established course of life, an element distinct from loss of earning capacity. Montague v. Hanson, 38 M 376, 99 P 1063 (1909). See Mullery v. Great N. Ry., 50 M 408, 148 P 323 (1915).

False Imprisonment: In an action to recover damages for false imprisonment, the court may properly call the attention of the jury to the provisions of this section as to the measure of recovery. Kroeger v. Passmore, 36 M 504, 93 P 805 (1908).

Cost of Repair of Nuisance by Injured Party: Where a party injured through the maintenance of a nuisance by a city has abated it at his own expense, after a refusal by the municipality to remedy the evil, the necessary outlay so incurred is a part of his detriment proximately caused by its maintenance and recoverable as an element of his damages. Murray v. Butte, 35 M 161, 88 P 789 (1907).

Nuisance Maintained by City: In case a city maintains a nuisance, the measure of damages is declared by this section to be the amount which will compensate the injured party for all the detriment proximately caused thereby. Murray v. Butte, 35 M 161, 88 P 789 (1907).

What May Be Considered in Estimating Damages Generally: In an action for personal injuries, the jury, in fixing the damages, may consider mental and physical suffering caused by the injury, wages plaintiff might have earned from the date of the injury to the date of the trial, and if the injuries were permanent, any loss by reason of the impairment of his capacity to earn money. Bourke v. Butte Elec. & Power Co., 33 M 267, 83 P 470 (1905).

Law Review Articles

Fair Price and Fair Play Under the Montana Business Corporation Act, Oitzinger, 58 Mont. L. Rev. 407 (1997).

Contract Damages in Montana Part II: Reliance and Restitution, Burnham, 45 Mont. L. Rev. 1 (1984).

Contract Damages in Montana Part I: Expectancy Damages, Burnham, 44 Mont. L. Rev. 1 (1983).

Collateral References

Damages *key* 95 through 116.

25 C.J.S. Damages §§105, 106.

22 Am. Jur. 2d Damages §§119, et seq., 320, et seq.

Wrongful death damages for loss of expectancy of inheritance from decedent. 42 ALR 5th 465.

Admissibility of evidence that injured plaintiff received benefits from a collateral source, on the issue of malingering or motivation to extend period of disability. 47 ALR 3d 234.

Collateral source rule: injured person's receipt of statutory disability unemployment benefits as affecting recovery against tortfeasor. 4 ALR 3d 535.

Civil liability of one causing personal injury for consequences of negligence, mistake or lack of skill of physician or surgeon. 100 ALR 2d 808.

Apportionment of damages involving successive impacts by different motor vehicles. 100 ALR 2d 16.

Period for which damages are recoverable or are computed under injunction bond. 95 ALR 2d 1190.

Damages for personal injury or death as including value of care and nursing gratuitously rendered. 90 ALR 2d 1323.

Mitigation of damages in action against attorney for negligence in preparing or recording security document. 87 ALR 2d 995.

Damages for wrongful death of husband or father as affected by receipt of social security benefits. 84 ALR 2d 764.

Decedent's pension, retirement income, social security payments, and the like, as affecting recovery in wrongful death action. 81 ALR 2d 949.

Receipt of public or private pension as affecting recovery against tortfeasor. 75 ALR 2d 885.

Fluctuations in cost of making repairs between time of loss and time of payment as affecting property insurer's liability. 74 ALR 2d 1272.

Damages recoverable in action against labor union or its officers or members for wrongful suspension or expulsion of member. 74 ALR 2d 803.

Measure of damages for destruction of or injury to airplane. 73 ALR 2d 719.

Recovery of nominal damages in wrongful death action. 69 ALR 2d 628.

Right to nominal damages for unauthorized geophysical or seismograph exploration or survey. 67 ALR 2d 457.

Damages recoverable by employer from third person tortiously killing or injuring employee. 57 ALR 2d 812.

Duty of one suing for damage to vehicle to minimize damages. 55 ALR 2d 936.

Cost of annuity as factor for consideration in fixing damages in personal injury action. 53 ALR 2d 1454.

Nominal damages for pollution of stream. 49 ALR 2d 309.

Right of employer, liable for wrongful discharge or retirement, to reduce or mitigate damages by amount of social security or retirement benefits received by employee. 48 ALR 2d 1293.

Expense incurred by injured party in remedying temporary nuisance or in preventing injury as element of damages recoverable. 41 ALR 2d 1064.

Damages in action for slander of title based on recording of instrument purporting to affect title. 39 ALR 2d 855.

Cost of hiring substitute or assistant during incapacity of injured party as item of damages in action for personal injuries. 37 ALR 2d 364.

Damages recoverable from warehousemen for negligence causing injury to, or destruction of, goods of a perishable nature. 32 ALR 2d 910.

Measure of damages in tort action arising out of delay in passing upon application for insurance. 32 ALR 2d 536.

Damages recoverable for obstruction or diversion of subterranean waters in use of land. 29 ALR 2d 1378.

Measure of damages for fraudulently procuring services at lowered rate or gratuitously. 24 ALR 2d 742.

Measure of damages for refusal of corporation or its agent to register or effectuate transfer of stock. 22 ALR 2d 62.

Damages recoverable for expulsion from social club or similar society. 20 ALR 2d 404.

Effect of board or lodging furnished to injured person in connection with hospital or nursing care on damages recoverable in personal injury action. 18 ALR 2d 659.

Recovery for loss of business resulting from resale of unwholesome food or beverages furnished by another. 17 ALR 2d 1379.

Marriage of child, or probability of marriage, as affecting measure of recovery by parents in death action. 7 ALR 2d 1380.

Liability of municipality or other governmental subdivision in connection with flood-protection measures. 5 ALR 2d 57.

27-1-318. Wrongful occupation of real property.

Case Notes

Award of Restitution and Emotional Distress Damages for Forcible Detainer: The District Court awarded plaintiffs restitution and damages for emotional distress for defendant's forcible detainer. Defendant contended that under this section, plaintiffs were only entitled to the fair rental value of any land that was wrongfully occupied. The Supreme Court disagreed. Once forcible detainer is proved, damages are recoverable under 70-27-205, and this section does not apply. In deciding whether emotional distress damages, damages for lost profits, and incidental damages are recoverable under 70-27-205, the court relied on San Francisco v. Suburban Home Bldg. Soc'y, 119 P 405 (Calif. 1911), and 36A C.J.S. Forcible Entry and Detainer 60 (2003), in holding that damages that are the natural and proximate consequence of a forcible detainer, including the damages in this case, were recoverable. Harding v. Savoy, 2004 MT 280, 323 M 261, 100 P3d 976 (2004).

No Contract Provision for Damages for Wrongful Occupation Absent Action for Wrongful Detainer — No Damages Owing When Wrongful Occupation Not Proved: Defendants defaulted on a real estate sale contract, and plaintiff exercised a provision of the contract that held defendants liable for unlawful detainer if the property was not immediately surrendered. The District Court found that plaintiff had failed to prove that defendants had actually occupied or leased the property, and concluded that plaintiff's election of the particular contractual alternative precluded plaintiff from damages for wrongful occupation because plaintiff's right to retain all sums paid pursuant to the contract included damages of the nature claimed. The Supreme Court affirmed. Actual occupation of plaintiff's property was not clearly established, and defendants had a right to rely on the choice of remedies pursuant to the contract terms. The contract provided an adequate remedy in case defendants unlawfully refused to leave the property, but did not provide for damages for wrongful occupation in the absence of an action for wrongful detainer. The District Court properly found that, absent proof of wrongful occupation or an action for unlawful detainer, damages were not owing. Weter v. Archambault, 2002 MT 336, 313 M 284, 61 P3d 771 (2002).

Easement Dispute — Attorney Fees Improperly Awarded — Foy and Randono Distinguished — Costs Sustained: Smalls brought a quiet title action against Goods for determination of an easement. Goods counterclaimed to quiet title to an easement for themselves. The District Court found in favor of the Smalls on the easement issue and awarded Smalls $8,536 in attorney fees and $759 in costs. The Supreme Court reversed on the issue of attorney fees, holding that there was no applicable exception to the general rule that attorney fees cannot be awarded absent a contractual agreement or other special circumstances. The Supreme Court held that the District Court improperly relied upon Foy v. Anderson, 176 M 507, 580 P2d 114 (1978), and Martin v. Randono, 191 M 266, 623 P2d 959 (1981). The Supreme Court stated that the Randono case stands for the proposition that fees may not be awarded as costs and that Foy is distinguishable in that in Foy, fees were awarded to a person who had sought to avoid legal action, unlike the Smalls who initiated litigation in this case. Although expressing no opinion on the applicability of Rules 11 and 54(d), M.R.Civ.P. (Title 25, ch. 20), to the case before it, the Supreme Court also pointed out that fees could be awarded as a sanction under Rule 11 and that costs could be awarded pursuant to Rule 54(d). However, the Supreme Court did sustain the award of costs to Smalls, noting that the purposes for which costs were awarded by the District Court were of the type of costs allowable under 25-10-201. Small v. Good, 284 M 159, 943 P2d 1258, 54 St. Rep. 825 (1997).

Damages Applicable to Time of Occupation, Not Time of Use: Lindey's contended that damages incurred by Goodover for loss of use because of Lindey's encroachments should not have accrued during the winter months when Goodover did not use the property. This section authorizes damages for the time of occupation, not time of use, and Goodover was entitled to damages as long as the encroachments existed. Goodover v. Lindey's Inc., 255 M 430, 843 P2d 765, 49 St. Rep. 1059 (1992).

Estimated Damages Based on Estimated Rental Value: Defendants illegally constructed part of a garage and septic system on plaintiffs' property. Plaintiff gave uncontroverted testimony regarding damages, estimating the value of rental that he would charge a third person at $30 a month for the septic system and $120 a month for the garage. The District Court awarded plaintiffs $7,159 in damages based on the estimated rental value. The stated amount was reasonable and uncontradicted, and the trial judge was free to adopt the testimony as true and sufficient. Smithers v. Hagerman, 244 M 182, 797 P2d 177, 47 St. Rep. 1483 (1990), followed in Goodover v. Lindey's Inc., 255 M 430, 843 P2d 765, 49 St. Rep. 1059 (1992).

Costs Provided by Contract Allowable Despite Tortious Nature of Claim: In an action by plaintiff to rescind a contract for sale of real property because of alleged fraud, misrepresentation, undue influence, and unconscionability, the award of attorney fees and costs that the contract provided to the successful defendant, relating to his defense and counterclaim of wrongful occupation by the plaintiff, was proper notwithstanding the contention that the action sounded in tort and not in contract (citing Winer v. Jonal Corp., 169 M 247, 545 P2d 1094 (1976)). The underlying action was based on a contract dispute. Westlake v. Osborne, 230 M 364, 750 P2d 444, 45 St. Rep. 277 (1988).

Unlawful Detainer Distinguished From Wrongful Occupation — Damages: Personal representative took possession of real property that had been sold under contract by the deceased owner and filed action to rescind the contract because of fraud, misrepresentation, undue influence, and unconscionability. The personal representative's claims were determined to be without merit in a prior appeal of this case. Buyers counterclaimed for recovery of lost rent, based on the personal representative's unlawful possession of the property. Both parties referred

to the action as one for forcible or unlawful detainer. The court held that the action was properly described as one for wrongful occupation under this section. The court further held that, in contrast to damages provided in 70-27-205 for forcible or unlawful detainer, no treble damages are provided in an action for wrongful occupation. Westlake v. Osborne, 230 M 364, 750 P2d 444, 45 St. Rep. 277 (1988).

Compensation for Personal Time Expended Properly Denied: Where the plaintiffs failed to establish title to certain real property by adverse possession and the defendants counterclaimed for damages caused by the wrongful occupation of the land, the court did not err in not awarding one defendant damages for his personal time expended in recovering the property and in preparing for trial. The time invested by the defendant is not a "cost" recoverable under 27-1-318. Martin v. Randono, 191 M 266, 623 P2d 959, 38 St. Rep. 209 (1981).

"Costs" Not to Include Attorney Fees — No Abuse of Equity Power to Award Fees: The term "costs . . . of recovering the possession" of the property does not include attorney fees, as the statutory term "costs" does not include attorney fees. In some instances, the court's general equity powers may include the power to award attorney fees but such an award is within the discretion of the court. Martin v. Randono, 191 M 266, 623 P2d 959, 38 St. Rep. 209 (1981).

Loss of Rents as Damages — Speculative Proof: At least three estimates of the rental value of the property were offered, differing by as much as $34,500 a year. Based on this evidence, one could only speculate about what damages, if any, were suffered. Martin v. Randono, 191 M 266, 623 P2d 959, 38 St. Rep. 209 (1981).

Rental Value:

Fact that plaintiff had closed its gasoline filling station entirely because of lack of business prior to its occupancy by defendant would not prove that the property has no rental value. Pritchard Petroleum Co. v. Farmers Co-op Oil & Supply Co., 121 M 1, 190 P2d 55 (1948).

In an action for the wrongful occupation and detention of real property, the rental value thereof, during the time of such wrongful occupation, may be proved as an element of damages, under an allegation that the "reasonable value of the rents and profits for the use and occupation of the premises" is a designated sum. Leyson v. Davenport, 38 M 62, 98 P 641 (1908).

Value of the Use:

The value of the use is the value to the owner of the property, not the value to the wrongdoer. Pritchard Petroleum Co. v. Farmers Co-op Oil & Supply Co., 121 M 1, 190 P2d 55 (1948).

The value of the use is ordinarily held to be the reasonable rental value of the premises withheld. Pritchard Petroleum Co. v. Farmers Co-op Oil & Supply Co., 121 M 1, 190 P2d 55 (1948), followed in Goodover v. Lindey's Inc., 255 M 430, 843 P2d 765, 49 St. Rep. 1059 (1992).

In action to recover the value of the use and occupancy of a tract of land that had been used as a filling station, it was proper to sustain objection to testimony as to the value of the use of land with respect to each gallon of gasoline and each pound of grease sold, since it is not the withholder's gain but the rental value that measures the compensation. Pritchard Petroleum Co. v. Farmers Co-op Oil & Supply Co., 121 M 1, 190 P2d 55 (1948).

"Wrongful": Where plaintiffs leased land to defendant for purpose of mining coal and lease did not grant defendant a right to mine by "outstroke" (which is mining by hoisting or removing ore from an adjoining mine through a shaft or opening in demised premises), to which use defendants put the land without consent, and it was not claimed that such use damaged the freehold or reversionary interest, and plaintiffs reserved no right of use in themselves, defendant's occupation was not "wrongful" within this section so as to authorize plaintiffs to recover from defendant the reasonable value of unauthorized use of plaintiffs' land. Speck v. Cottonwood Coal Co., 116 F2d 489 (9th Cir. 1940).

Unlawful Detainer: In an action in unlawful detainer by the United States against a lessee of Montana Indian lands, continuing in possession after expiration of lease and after the land was leased to a new tenant, judgment was authorized, under 70-27-205, "for three times the amount of the damages" that are under this section "the value of the use of the property for the time of" the occupation by appellant. Stoltz v. U.S., 99 F2d 283 (9th Cir. 1938).

Tenant at Sufferance:

Since this section provides that the detriment caused by the wrongful occupation of land is considered to be the value of the use of the property for the time of such occupation, an action under it, and not one in conversion to recover a crop grown on land or its value, by a purchaser at foreclosure sale from a tenant alleged to have wrongfully refused to deliver possession on demand, is the proper remedy, the crop or its value including not only the value of the use of the land but also the value of the seed planted and the time and labor of him who plants and cultivates the land. Kester v. Amon, 81 M 1, 261 P 288 (1927).

When a tenant by sufferance planted, raised, and harvested crops, he is answerable under this section for a sum equal at least to the value of the use and occupation of the land during his wrongful possession of it. Power Mercantile Co. v. Moore Mercantile Co., 55 M 401, 177 P 406 (1918).

Collateral References

Trespass *key* 47 through 63.
87 C.J.S. Trespass §§105 through 125.

27-1-319. Willful holding over of real property.

Compiler's Comments

1983 Amendment: Near beginning of section, changed "an infant" to "a minor".

Collateral References

Guardian and Ward *key* 133; Life Estates *key* 28; Trusts *key* 374.
31 C.J.S. Estates §67; 39 C.J.S. Guardian and Ward §287; 90A C.J.S. Trusts §§759, 760, 762.
49 Am. Jur. 2d Landlord and Tenant §360.

27-1-320. Conversion of personal property.

Case Notes

Prior Ruling That Prison Escapee's Property Was Not Abandoned Not Dispositive of Later Claim That Property Was Converted: A prison escapee who was captured and returned to prison sued the prison and five prison officials for destroying the personal property that he left behind at the prison when he escaped. In a prior decision in this case, the Supreme Court ruled that there was a presumption of intent to abandon the property based on the escapee's acts, that the presumption was rebuttable, and that the escapee rebutted it, and thus his complaint was wrongly dismissed for failure to state a claim. The escapee then claimed on remand that the prison wrongfully converted his property, and defendants were granted summary judgment. The prison had a written policy that personal property left behind by an escapee was considered contraband and would be confiscated and sold or destroyed. The prior Supreme Court ruling turned on the issue of abandonment and did not control the ruling on the summary judgment motions, which turned on the issue of conversion. Defendants were entitled to raise the prison policy as a defense. It was not error to grant defendants summary judgment. Hawkins v. Mont. State Prison, 2004 MT 289, 323 M 326, 102 P3d 2 (2004).

No Breach of Partnership Duty of Loyalty and Care When Partnership Property Accounted For: One partner transferred a partnership-owned tractor to a corporation owned by his sons, allowed the sons limited use of other partnership property without charging rent, and used personal credit cards for items for which the partnership paid. The other partner contended that this constituted conversion of partnership property and a breach of the duty of loyalty and duty of care to the partnership. The District Court found no conversion or breach of duty, and the Supreme Court affirmed. Under 35-10-405, a partner has a duty to account for partnership property or benefits received from the use or appropriation of the property, and here a proper accounting was made. The tractor was paid for, the use of other partnership property was minimal, and personal credit card expenses were accounted for separately from partnership charges. Baltrusch v. Baltrusch, 2003 MT 357, 319 M 23, 83 P3d 256 (2003).

Vehicles Listed as Partnership Assets Considered Property Subject to Equal Division Upon Dissolution of Partnership: Two partners agreed that the proceeds from the sale of all partnership assets would be divided equally between them upon dissolution. The District Court included two vehicles that were titled personally to one of the partners and his wife. The other partner contended that the personal use of the vehicles constituted conversion and that he was entitled to damages and interest under this section. The Supreme Court disagreed. Under 35-10-203, partnership property includes property purchased with partnership assets even if not purchased in the name of the partnership. Further, whether property is partnership property depends on the intent of the partners, as indicated by agreement or conduct. In this case, the vehicles were used for partnership business and listed as partnership assets and therefore considered partnership property, so proceeds from the vehicles' sale were properly divided between the partners. Baltrusch v. Baltrusch, 2003 MT 357, 319 M 23, 83 P3d 256 (2003).

Breach of Fiduciary Duty in Conversion of Corporate Property Without Requisite Notice and Shareholder Approval — Punitive Damages Unavailable Absent Showing of Actual Malice or Fraud: Phil was two-thirds majority shareholder in Trifad Entertainment, Inc. (Trifad), and Brad was one-third minority shareholder and Trifad director. Following Phil's extradition to Florida on racketeering charges, Brad secured a loan for $15,000, deposited the money in the Trifad account, and then sold virtually all of Trifad's assets to himself for $15,000. In addition,

Brad wrote checks on Trifad's account for taxes owed and for estimated tax payments and withdrew one-third of the remaining balance and left two-thirds in the account, all without attempting to contact Phil. Phil later sued Brad for breach of contract, breach of fiduciary duty, breach of the implied covenant of good faith and fair dealing, and conversion and requested punitive damages, contending that Brad's actions were performed with actual malice and constituted actual fraud. At trial, Brad contended that the actions were reasonable considering Phil was in jail facing criminal charges, and Brad cross-claimed for indemnification from Trifad for litigation expenses and liabilities incurred in his capacity as Trifad director. The District Court found for Brad on all counts, but denied corporate indemnification. Both Phil and Brad appealed. The Supreme Court reversed, finding that Brad failed to comply with 35-1-823 by selling corporate property without the requisite notice and shareholder approval. Although contacting Phil would have been difficult, it was not impossible. However, even if Phil had been unavailable for consultation, 35-1-823 does not contain any exceptions to the notice and approval requirements governing the sale of corporate assets. Further, the sale constituted conversion because Brad exercised unauthorized dominion over Trifad property by transferring ownership to himself. The case was remanded for a determination of damages, including possible damages other than those provided in this section if peculiar circumstances warranted compensation for future lost income and profits. The District Court erred in concluding that Brad did not breach his fiduciary duties to Trifad; however, absent proof of actual malice or actual fraud, punitive damages were not warranted. Because a breach of fiduciary duty occurred, Brad could not claim to be wholly successful in the action, so Brad's claim for corporate indemnification also failed under 35-1-453. Trifad Entertainment, Inc. v. Anderson, 2001 MT 227, 306 M 499, 36 P3d 363 (2001).

Use of Replacement Cost, Rather Than Market Value, of Converted Property Resulting in Erroneous Calculation of Restitution: Pritchett entered the garage of a former employer in an effort to return two hunting rifles that he had stolen and pawned to support his gambling habit. Pritchett dropped his flashlight and, unable to find it in the dark, lit a cigarette lighter, which ignited a leaking propane bottle and caused an explosion that destroyed the garage and its contents. Pritchett was convicted of burglary and ordered to pay restitution. In calculating the victim's pecuniary loss, the District Court used replacement cost, rather than actual market value, of the garage and its contents. Pritchett argued on appeal that this method of valuation resulted in a significant overstatement of his restitution obligation. The Supreme Court found that the appropriate civil action arising out of Pritchett's destruction of the garage would be an action for conversion of personal property, the loss of which is presumed to be the value of the property at the time of conversion under this section. Thus, when personal property is converted, the restitution must be based on the market value of the goods converted. The District Court's use of the replacement cost of the items was an incorrect measure of the restitution obligation, constituting reversible error. St. v. Pritchett, 2000 MT 261, 302 M 1, 11 P3d 539, 57 St. Rep. 1093 (2000).

No Personal Jurisdiction Over Nonresident Lawyer — Jurisdiction Not Acquired Through Interstate Communications: Plaintiffs sued an out-of-state attorney, alleging theft and conversion and fraud and deceit arising out of a dispute over settlement money. On defendant's motion, the District Court dismissed the complaint for lack of personal jurisdiction. When defendant came into possession of and allegedly asserted unauthorized control over settlement checks in Idaho, defendant did not do any act that resulted in the accrual of the tort of conversion within Montana. When all representations regarding the claims took place in Idaho and the settlement was negotiated in Idaho, defendant's act of mailing the contingency fee agreement and other letters to plaintiffs in Montana did not create jurisdiction in Montana. Jurisdiction is not acquired through interstate communications pursuant to a contract to be performed in another state. Bird v. Hiller, 270 M 467, 892 P2d 931, 52 St. Rep. 288 (1995).

Presumption of Damages When Elements of Conversion Proved: A detriment is a loss suffered in person or property, and a person who suffers a detriment from another's wrongful acts is entitled to damages. Under this section, the detriment caused by wrongful conversion of personal property is presumed to be the value of the property at the time of conversion, plus interest from that time, and fair compensation for the time and money expended to pursue recovery of the property. Therefore, in conversion claims, damages are presumed once the other elements of conversion are established. Eatinger v. Johnson, 269 M 99, 887 P2d 231, 51 St. Rep. 1484 (1994).

Conversion — Finding of Absolute Ownership Not Required: Under the law of conversion, it is not necessary that plaintiff have an absolute ownership of or title to the property in question, but rather the plaintiff must have an interest in the property entitling plaintiff to possession at

the time of the alleged conversion. King v. Zimmerman, 266 M 54, 878 P2d 895, 51 St. Rep. 659 (1994).

Repossession of Vehicle as Constituting Conversion — Damages: Entriken purchased a new pickup, granting the credit union a security interest in the vehicle, purchased credit disability insurance as part of the loan, and authorized payroll deduction for direct payment of the loan. Entriken was subsequently injured on the job. He notified the credit union that he was no longer working and completed the proper documents so that the disability insurance company could begin making the monthly payments. Three weeks later, Entriken received a delinquency notice but was informed by the credit union that the notice was merely a formality and that he need not worry because the disability payments would be arriving shortly. About 5 weeks later the credit union caused the vehicle to be repossessed, adding costs of repossession, storage, transportation, and legal fees to the outstanding loan balance. Without proper notice to Entriken or filing a deficiency judgment, the credit union sold the truck. Following sale of the truck, the credit union continued to receive credit disability payments as well as payroll deductions from Entriken, who was subsequently reemployed. Despite claims that Entriken had failed to properly insure the vehicle and had been delinquent in payments, the District Court correctly found that the credit union had converted the vehicle and awarded Entriken actual damages, damages for loss of use, attorney fees, and treble damages under 30-14-133. The Supreme Court affirmed the conversion question and the award of actual damages plus interest and attorney fees, reversed the award of loss of use damages as being unfounded on legal authority, and recalculated the treble damage award, under the rationale of Baird v. Norwest Bank, 255 M 317, 843 P2d 327, 49 St. Rep. 1026 (1992), to three times the actual damages rather than three times the actual damages plus the actual damages. Entriken v. Motor Coach Fed. Credit Union, 256 M 85, 845 P2d 93, 49 St. Rep. 1148 (1992).

Evidence of Conversion Clearly Conflicting — Jury to Determine Weight and Credibility of Evidence: It is within the province of the jury to determine the weight and credibility to be afforded evidence concerning conversion, and even when the evidence is clearly conflicting, the jury's determination will not be disturbed on appeal. Hansen v. Hansen, 254 M 152, 835 P2d 748, 49 St. Rep. 677 (1992), followed in Kneeland v. Luzenac America Inc., 1998 MT 136, 289 M 201, 961 P2d 725, 55 St. Rep. 541 (1998).

Instruction on Section:

When the jury heard extensive testimony during trial about the nature and duration of the relationship between the parties and determined that plaintiff was not entitled to damages for the conversion of her equipment, the finding was affirmed as based on substantial evidence even though the jury was not specifically instructed as to the evidence necessary to overcome the presumption of damages and made no findings as to any peculiar circumstances that may have existed. Hansen v. Hansen, 254 M 152, 835 P2d 748, 49 St. Rep. 677 (1992).

An instruction on the measure of damages based on the value of the grain at the time of the conversion, when defendant refused to deliver it on demand, was proper under this section. First Nat'l Bank of Kalispell v. Perrine, 97 M 262, 33 P2d 997 (1934); O'Neill v. Mont. Elev. Co., 65 M 259, 211 P 222 (1922).

In an action in conversion, the measure of damages established by this section is controlling unless special damages are pleaded and proved, in which event correct practice requires an instruction so supplementing the measure pointed out by this section as to allow such additional damages as may be warranted by the circumstances of the particular case. Ferrat v. Adamson, 53 M 172, 163 P 112 (1917).

Conversion Evidenced by Notification and Procedural Shortcomings: Johnston owned a mobile home, entitling her to possession, and Galayda owned the property on which the mobile home was located. Galayda claimed that by virtue of various notices to quit the premises, a default judgment against Johnston for back rent, and a writ of assistance directing the Sheriff to remove the mobile home, Galayda had legal authority to physically evict Johnston and her mobile home from the premises. However, a number of procedural errors occurred during the removal process that rendered the eviction actions unauthorized, including: (1) Galayda's failure under 70-24-422 to give Johnston notice to pay rent prior to filing a complaint for nonpayment and possession of the premises; (2) basing the default judgment on Galayda's incorrect sworn affidavit that Johnston owed back rent, which had in fact been paid; (3) Galayda's contract with a third party to remove the mobile home under the writ of assistance rather than having the Sheriff carry out the process, in violation of 25-13-301; (4) Galayda's service on Johnston of a notice of abandonment without sufficient facts showing absolute abandonment, in violation of 70-24-430; and (5) Galayda's failure to notify Johnston under 70-24-730 of the location of the property and of the steps necessary to reclaim the property. Failure to meet these notification

and procedural steps was evidence that Johnston was wrongfully deprived of her property and constituted conversion on the part of Galayda. Johnston v. Am. Reliable Ins. Co., 253 M 253, 833 P2d 176, 49 St. Rep. 495 (1992).

Conversion: Conversion is a tort bearing a 2-year statute of limitations. Claim for unauthorized personal expenditures incurred prior to that time is barred. Northwest Plating Co. v. Hoffman, 234 M 360, 763 P2d 44, 45 St. Rep. 1971 (1988).

Unauthorized Purchases Conversion of Corporate Assets — No Breach of Contract: Defendant's unauthorized corporate expenditures for personal expenses were a conversion of corporate assets. They were not compensation in excess of the amount authorized in the employment agreement and were not a breach of contract. Northwest Plating Co. v. Hoffman, 234 M 360, 763 P2d 44, 45 St. Rep. 1971 (1988).

Compensation for Time and Money Expended — Attorney Fees: When the District Court held that the plaintiff was entitled to fair compensation for the time and money he properly expended in pursuit of his property, it was an abuse of the court's discretion to award the appellant nothing for such damages. In this section, "expenses" and "money expended" mean virtually the same thing as "costs". Attorney fees are not included in costs, and the District Court properly denied attorney fees. Kenney v. Koch, 227 M 155, 737 P2d 491, 44 St. Rep. 960 (1987).

Profit Factor in Fair Market Value: In an action for conversion, it was error for the District Court to estimate the plaintiff's profit and subtract it from the amounts testified to as being the highest market value of converted gravel. It was clearly erroneous for the District Court to value the gravel at $3.25 per cubic yard when the evidence showed that comparable gravel was sold by the plaintiff during the time period in question for up to $16.50 per cubic yard. Profit is a factor in any property's fair market value. Kenney v. Koch, 227 M 155, 737 P2d 491, 44 St. Rep. 960 (1987).

Estoppel as to Ownership — Use of Estoppel by Third Party Claiming Conversion by Estopped Person: A dairy operation that respondent and appellants attempted to start was not successful. Respondent had contributed the use of certain equipment to the operation. Respondent was estopped from asserting ownership of equipment as against the bank which made loans to appellants with the equipment as collateral because respondent allowed the bank to believe one of the appellants owned it. However, this did not establish that respondent transferred ownership of the equipment or led appellants, who claimed respondent converted the equipment when he sold it, to act on a belief that he transferred ownership. Farmers St. Bank of Victor v. Imperial Cattle Co., 218 M 89, 708 P2d 223, 42 St. Rep. 1419 (1985).

Sale of Ranch by Joint Venturer — No Conversion or Fraud as Against Other Joint Venturers: Respondent and appellants attempted to start a dairy operation on respondent's ranch. Respondent sold the ranch after concluding that the operation would not work because adequate financing could not be obtained. There was conflicting evidence concerning respondent's intentions and whether appellants knew the ranch was for sale. Respondent made his agreed contribution to the operation, paid other expenses in an effort to find financing, and used his best efforts to make the operation a success. Appellants used some of the ranch's equipment as collateral for a loan. There was substantial credible evidence for the lower court's finding that respondent was not liable for constructive fraud for failure to inform appellants that he was going to sell the ranch. Furthermore, since appellants knew respondent did not intend to transfer ownership of the equipment to any of the appellants, their claim for conversion of the equipment must also fail. Farmers St. Bank of Victor v. Imperial Cattle Co., 218 M 89, 708 P2d 223, 42 St. Rep. 1419 (1985).

Definition and Elements: Conversion has been defined in Montana case law as a distinct act of dominion wrongfully exerted over property in denial of or inconsistent with the owner's right or as an unauthorized assumption of dominion over personal property hostile to the right of the owner. The essential elements of an action for conversion are plaintiff's ownership and right of possession of the personalty, its conversion by defendant, and resulting damages. Gebhardt v. D. A. Davidson & Co., 203 M 384, 661 P2d 855, 40 St. Rep. 521 (1983), followed in Lane v. Dunkle, 231 M 365, 753 P2d 321, 45 St. Rep. 686 (1988). See also Eatinger v. Johnson, 269 M 99, 887 P2d 231, 51 St. Rep. 1484 (1994).

Conversion — Leased Premises: Lessor sued for failure of lessee to vacate, and lessee counterclaimed that lessor converted the premises to his own use and interrupted her peaceful possession. Lessee could not get punitive damages under the conversion theory because conversion is a tort applicable to personal chattels and a leasehold interest is not a personal chattel. Nor could punitive damages be granted for interruption of peaceful possession, as it was not proven. In the absence of a showing of tortious conduct, it was error to grant lessee punitive

damages in a simple contract action. Lemley v. Allen, 203 M 37, 659 P2d 262, 40 St. Rep. 279 (1983).

Interest on Savings Account Funds Wrongfully Converted: Where the defendant wrongfully converted funds in a savings account, he must pay the rightful owner of the funds interest from the date of the conversion. Anderson v. Baker, 196 M 494, 641 P2d 1035, 39 St. Rep. 273 (1982).

Presumption Disputable: The presumption contained in 27-1-320 is a disputable one. It may be overcome by evidence of peculiar circumstances that result in greater or less injury than the statute contemplates. In the absence of proof of such special circumstances, the statutory rules govern. Graham v. Clarks Fork Nat'l Bank, 193 M 282, 631 P2d 718, 38 St. Rep. 1140 (1981), followed in Hansen v. Hansen, 254 M 152, 835 P2d 748, 49 St. Rep. 677 (1992).

Wrongful Occupation of Property — Compensation for Personal Time Expended Properly Denied: Where the plaintiffs had failed to establish title to certain real property by adverse possession and the defendants had counterclaimed for damages caused by the wrongful occupation of the land, the court did not err in not awarding one defendant damages for his personal time expended in recovering the property and in preparing for trial. The defendants' reliance upon this section is misplaced, as it is applicable only to conversions of personal property. Martin v. Randono, 191 M 266, 623 P2d 959, 38 St. Rep. 209 (1981).

Value of Lumber Wrongfully Cut: The proper measure and amount of damages for lumber wrongfully cut is the market value at the mill, not stumpage value. Rickl v. Brand S Lumber Co., 171 M 528, 559 P2d 1182 (1977). See also Hartle v. Nelson, 2000 MT 356, 303 M 264, 15 P3d 484, 57 St. Rep. 1494 (2000).

Interest:

Where special damages for time and money expended in pursuit of the property were allowed, the interest on such amount should be assessed after verdict under 31-1-110 and should not run from the time of conversion. Galbreath v. Armstrong, 121 M 387, 193 P2d 630 (1948).

Where plaintiff elected to accept value of property at time of conversion, interest from date of conversion was proper, and court erred in ordering satisfaction of judgment for amount that did not include such interest. Galbreath v. Armstrong, 121 M 387, 193 P2d 630 (1948).

When plaintiff elects to accept value of property at time of conversion, interest is allowed on that value from the date of conversion even though the value of the property is in dispute and the amount of the property converted has to be determined by the court or jury. Galbreath v. Armstrong, 121 M 387, 193 P2d 630 (1948).

Where plaintiff in an action for conversion elects to take the value of the property in money, he is entitled to its value as of the date of the conversion fixed in the complaint, if established by the evidence, and to legal interest thereon from that date, under this section. Sensiba v. Occident Elev. Co., 80 M 426, 260 P 709 (1927).

In an action for conversion, the plaintiff is entitled to recover the value of personal property at the time of its conversion, with interest from the date of the conversion. De Celles v. Casey, 48 M 568, 139 P 586 (1914).

In an action in claim and delivery, where all the evidence of value of the property was directed to the date of seizure and it was not claimed it had any usable value, the damages for detention should have been limited to interest on the amount recovered from the date of seizure to the time the verdict was returned. Webster v. Sherman, 33 M 448, 84 P 878 (1906).

Detriment — Value at Conversion: Under this section, the detriment caused by the conversion of another's personalty is presumed to be its value at the time thereof, with interest from that time. Guthrie v. Holloran, 90 M 373, 3 P2d 406 (1931).

Measure of Damages — Market Value: The measure of damages in an action for conversion is the value of the property at the time of its conversion, and this usually means its market value. Durocher v. Myers, 84 M 225, 274 P 1062 (1929).

When Option as to Damages May Be Exercised:

Plaintiff in an action in conversion may, by waiving interest, elect any date between that of the conversion and the date of the trial on which to lay his damages. Klus v. Lamire, 71 M 445, 230 P 364 (1924).

Where an action in conversion has been prosecuted with reasonable diligence, the plaintiff may exercise the option granted him by this section, of demanding the highest market value of the property at any time between the conversion and the verdict, by giving notice, if he has not otherwise limited himself by his pleading, at any time before the submission of the cause for verdict or decision. State ex rel. Broadwater Farms Co. v. Broadwater Elev. Co., 61 M 215, 201 P 687 (1921).

The giving of instructions authorizing the jury to award damages for the wrongful conversion of personal property under both the measures provided by this section, only one of which options

could be taken advantage of by the injured party, was harmless error, where there was no evidence warranting the assessment of damages in accordance with one of the standards and there was no claim that the amount of the verdict was excessive or that the evidence was insufficient to justify the verdict. Thornton-Thomas Mercantile Co. v. Bretherton, 32 M 80, 80 P 10 (1905).

Duty to Elect:

In an action for conversion, plaintiff may elect to claim damages for the value of the chattel at the time of the alleged conversion or its highest market value at any time between the conversion and the verdict, without interest (this section), but he may not claim both. Klind v. Valley County Bank of Hinsdale, 69 M 386, 222 P 439 (1924).

The party injured must elect which of the two measures of damages provided by this section he will claim, and he may not be permitted to rely upon both in the same case. Thornton-Thomas Mercantile Co. v. Bretherton, 32 M 80, 80 P 10 (1905).

Conversion — Pleading of Damages — Plaintiff Not Deprived of Highest Market Value: Under this section, plaintiff in action for conversion does not, by pleading as his damages the value of property when converted, deprive himself of the right to insist upon damages according to the highest market value of the property at any time between the conversion and the verdict, since he is not required to plead the rule of damages but may in any appropriate way, even by oral declaration in open court, announce his determination to demand the highest market value. Williams v. Gray, 62 M 1, 203 P 524 (1921).

Plaintiff's Right to Highest Market Value Whether Inequitable or Unjust: Where plaintiff in an action in conversion has brought himself within the rule requiring diligence in prosecuting the action, the fact that the measure of damages recoverable under it may be inequitable and unjust cannot deprive him of his right to recover the highest market value of the property at any time between the conversion and the verdict, at plaintiff's option, which he might have obtained but for the wrongful act of defendant. State ex rel. Broadwater Farms Co. v. Broadwater Elev. Co., 61 M 215, 201 P 687 (1921).

Application of Section: The measure of damages applicable in an action brought by a partner to recover the value of his interest in the partnership property sold to a stranger by his copartner in violation of subsection (3) of section 7998, R.C.M. 1935 (since repealed), is that fixed by this section as the reasonable value of the property at the date of the conversion or the highest market value at any time between the conversion and the verdict. Doll v. Hennessy Mercantile Co., 33 M 80, 81 P 625 (1905).

Collateral References

Trover and Conversion *key* 44 through 52.

89 C.J.S. Trover and Conversion §163, et seq.

18 Am. Jur. 2d Conversion §116, et seq.

Recovery of damages in replevin for value of use of property detained, by successful party having only security interest as conditional vendor, chattel mortgagee, or the like. 33 ALR 2d 774.

Damages recoverable for wrongful registration of trademark. 26 ALR 2d 1184.

Measure of damages for conversion or loss of or damage to personal property having no market value. 12 ALR 2d 933.

Credit for upkeep or other expense in computing damages for use or detention of property in replevin. 7 ALR 2d 933.

27-1-321. Conversion of personal property — damages of lienholder.

Collateral References

Trover and Conversion *key* 42.

89 C.J.S. Trover and Conversion §164.

18 Am. Jur. 2d Conversion §116, et seq.

27-1-322. Seduction.

Collateral References

Seduction *key* 18 through 22.

70 Am. Jur. 2d Seduction §56, et seq.

Measure and elements of damages recoverable from putative spouse by other for wrongfully inducing entry into or cohabitation under illegal, void, or nonexistent marriage. 72 ALR 2d 994.

27-1-323. Wrongful death.

Compiler's Comments

1987 Amendment: After "under" deleted reference to 27-1-512.

Case Notes

Case-Specific Basis for Award for Loss of Consortium to Parents For Wrongful Death of Adult Child — Bear Medicine Standard of Proof — Award to Personal Representative for Grief, Sorrow, and Mental Anguish Affirmed: An adult child was killed in a vehicle accident. A jury awarded the mother, who was the personal representative of the child, $300,000 for loss of consortium and $450,000 for grief, sorrow, and mental anguish and awarded the father $200,000 for loss of consortium and $300,000 for grief, sorrow, and mental anguish. The defendant insurer appealed the awards. The Supreme Court held that because the father was not the personal representative, damages of any kind were inappropriate in the wrongful death claim, so the awards to the father were vacated. As personal representative, the mother was entitled to damages for grief, sorrow, and mental anguish, and that award was affirmed. The court then examined the loss of consortium award to the mother. In Bear Medicine v. U.S., 192 F. Supp. 2d 1053 (D.C. Mont. 2002), a federal court allowed recovery for loss of consortium and speculated that Montana would adopt a cause of action for loss of consortium for parents of adult children. However, the Supreme Court declined to define exactly under what circumstances a loss of consortium claim by parents of an adult child would stand, holding that each case must be determined on the facts and evidence presented. Significant evidence must include an extraordinarily close and interdependent relationship, such as that shown in Bear Medicine, before a loss of consortium claim may be considered. In this case, the mother did not meet the high level of proof to meet the Bear Medicine standard, so the award for loss of consortium was vacated. Hern v. Safeco Ins. Co. of Ill., 2005 MT 301, 329 M 347, 125 P3d 597 (2005).

Loss of Consortium Claim Allowed Only by Personal Representative: Plaintiff sought damages for a loss of consortium for the death of her adult child in a car accident, allegedly caused by defendant's negligence. The District Court concluded that Montana law does not recognize a loss of consortium claim for the death of an adult child, so defendant's motion for summary judgment was granted. The Supreme Court agreed with the defendant petition on rehearing that a loss of consortium claim arising from a negligently inflicted death is an inextricable element of a wrongful death action that may be brought only be a personal representative of a decedent under 27-1-513 and that damages for wrongful death may be recovered only once. Plaintiff did not have standing to bring a wrongful death action under 27-1-513 because she was neither her son's heir nor his personal representative, so plaintiff's loss of consortium claim should have been dismissed as a matter of law. Allowing a separate loss of consortium claim by someone other than a personal representative would create a multiplicity of claims arising from the same wrongful death, in contravention of legislative intent. In situations when both causes of action apply, the personal representative must bring both actions together to prevent multiple actions arising from the same death. Thus, even though the District Court arrived at the correct conclusion for the wrong reason, summary judgment for defendant was affirmed. Renville v. Fredrickson, 2004 MT 324, 324 M 86, 101 P3d 773 (2004).

Calculation of Damages for Wrongful Death of Wife — Remarriage of Husband Irrelevant: Damages become fixed at the moment of the injury. Therefore, remarriage of a spouse in a wrongful death case is irrelevant and should not be referred to in any manner. Kuhnke v. Fisher, 210 M 114, 683 P2d 916, 41 St. Rep. 952 (1984).

Death of Child — Damages for Grief and Distress: Damages for the sorrow, mental distress, or grief of the parents of a deceased minor are recoverable in a wrongful death action brought pursuant to 27-1-512. Any previous decisions, to the extent they conflict with this holding, are expressly overruled. Dawson v. Hill & Hill Truck Lines, 206 M 325, 671 P2d 589, 40 St. Rep. 1689 (1983).

No Recovery for Decedent's Nonadopted Minor Stepchildren: When the issue was certified to it by the U.S. District Court, the Montana Supreme Court ruled that nonadopted minor stepchildren of a decedent cannot state a claim for the deprivation of decedent's consortium and support. Versland v. Caron Transp., 206 M 313, 671 P2d 583, 40 St. Rep. 1681 (1983).

Interfamily Tort Immunity: Personal representative does not have right superior to that of deceased. Doctrine of interfamily tort immunity is a defense to wife's personal representative's cause of action to recover wrongful death damages where husband's negligence caused wife's death. St. Farm Mut. Auto. Ins. Co. v. Leary, 168 M 482, 544 P2d 444 (1975).

Allocation of Amount of Recovery: In the event of a recovery for the wrongful death of the deceased, the District Court may then take requisite action to allocate the amount of recovery in

a proper pro rata share among the surviving heirs, but it is clearly not for any jury to decide what amount should be awarded to each of the several plaintiffs in such an action. State ex rel. Carroll v. District Court, 139 M 367, 364 P2d 739 (1961).

Amount of Award Found Not Excessive: In an action for damages for death by wrongful act, brought by the mother of a boy 19 years of age who was killed within the scope of his employment, a verdict for $18,000 was held not to be excessive, the mother being altogether dependent upon him for her support. Hollenback v. Stone & Webster Eng'r Corp., 46 M 559, 129 P 1058 (1913).

Consortium Loss by Widow: In an action by a widow for the death of her husband, caused by the alleged negligence of the defendant, she may recover as an element of damages the pecuniary loss, if any, because of her being deprived of the comfort, protection, society, and companionship of her husband. Mize v. Rocky Mtn. Bell Tel. Co., 38 M 521, 100 P 971 (1909).

Law Review Articles

Such Damages as Are Just: A Proposal for More Realistic Compensation in Wrongful Death Cases, Strong & Jacobsen, 43 Mont. L. Rev. 55 (1982).

Recovery for Loss of Society and Companionship in Wrongful Death and Personal Injury Actions, Schmidt, 13 S. Ill. U.L.J. 319 (1989).

Collateral References

Death *key* 78 through 101.

25A C.J.S. Death §17, et seq.

22A Am. Jur. 2d Death §186, et seq.

Wrongful death damages for loss of expectancy of inheritance from decedent. 42 ALR 5th 465.

Part 4
Specific and Preventive Relief

Part Case Notes

Failure of Counteroffer Under Statute of Frauds — Handwritten Additions by Sellers' Agent Not Subscribed by Sellers — Part Performance and Equitable Estoppel Inapplicable: After Austin rejected a counteroffer on property that he was interested in buying, the agent, Everett, went to the office of the listing agent, Young, who contacted one of the two owners of the property by telephone. That owner, Cash, said that she would consider sale of the property for an additional $5,000 but that she would first have to discuss it with her brother, the other owner. Everett then added a handwritten paragraph to the rejected counteroffer, noting the sale of all of the property for $115,000 and faxed it back to Austin. When Austin received the revised counteroffer, he believed that it had been signed by Cash and, believing that a binding contract had been made, lowered the sale price of other property that he owned in California. Cash and her brother subsequently received and accepted an offer for their property from a different buyer, whereupon the Austins filed a lis pendens against Cash's property, preventing its sale to the other buyer. The Supreme Court held that because neither the sellers nor their agents signed or initialed the handwritten addition to the counteroffer, the contract was not properly subscribed by the sellers or their agents and therefore did not satisfy the statute of frauds. The Supreme Court also held that the action of the Austins in reducing the sale price of their California properties was an act in contemplation of eventual performance of the contract and not an act of part performance itself. For this reason, part performance did not excuse the application of the statute of frauds. The Supreme Court also held that in order for a court to order specific performance of a contract, there had to be a binding contract in the first place and held that because the additional language to the sale contract had not been subscribed, no contract existed. Finally, the Supreme Court held that promissory estoppel is inapplicable when a contract is clearly within the statute of frauds. Austin v. Cash, 274 M 54, 906 P2d 669, 52 St. Rep. 1119 (1995).

Contract for Deed — Title Vested in Seller — Specific Performance Proper: The Undems sold their land in 1984 without Larson's written consent as required in the contract. Larson did not file a complaint until 1987. The Undems maintained that a grant of specific performance was inappropriate because they could not transfer title they no longer had. Larson maintained that in a contract for deed, legal title to the property remains vested in the seller, and therefore specific performance was proper. The Supreme Court, noting that specific performance is an equitable remedy and a matter of the District Court's discretion, agreed with Larson that in this case, specific performance was proper. Larson v. Undem, 246 M 336, 805 P2d 1318, 47 St. Rep. 2088 (1990).

Award of Attorney Fees for Time Spent Obtaining Judgment for Specific Performance: Appellant claimed District Court erred in awarding attorney fees on respondent's counterclaim

for specific performance of the parties' agreement concerning buy-out of respondent's interest in a business, contending that the court failed to award relief on the contract claim. The Supreme Court found substantial evidence that appellant failed to perform the required acts and that relief was awarded by way of specific performance. The District Court properly limited recovery to the number of hours spent by respondent's attorney in obtaining the judgment for specific performance. Proto v. Elliot, 222 M 393, 722 P2d 625, 43 St. Rep. 1358 (1986).

Award of Interest Proper: It was proper in an action for the specific performance of a settlement agreement for the District Court to award interest to the prevailing parties. The adverse party's 4-year delay of his performance of the settlement agreement clearly deprived them of the benefit of the interest on the rent he should have paid. Further, he had the use of a substantial piece of property for that period. Hass v. Hass Land Co., 217 M 246, 704 P2d 63, 42 St. Rep. 1170 (1985).

Remedy for Failure to Recognize Preference — Order to Redefine and Readvertise Position Upheld: Where the plaintiff had been denied employment for a library staff position and sued to enforce the preference required by 10-2-203, the District Court did not err in ordering the library to redefine and readvertise the position. The court found that the minimum requirements set out in the library's Notice of Position Open bore little correlation to the rating scale used in the selection process. Because the minimal qualifications were never clearly determined or clearly stated, they could not have been used in evaluating the plaintiff's application. It was therefore only fair that all applicants be given an opportunity to reapply. Crabtree v. Mont. St. Library, 204 M 398, 665 P2d 231, 40 St. Rep. 963 (1983).

Plaintiff's Election to Waive Claims in Exchange for Something: A buyer seeking specific performance of a contract for sale of a ranch did not have an absolute right to elect to waive his claim against the sellers for rents and profits for the period during which defendants were in possession of the ranch, in exchange for buyer's paying interest on the balance of the purchase price due. He was entitled to an election only if he was without blame and the sellers wrongfully deprived him of possession, neither of which was the case where buyer's first payment was late, though not so late as to bar specific performance, and the sellers acted in good faith. Stoddard v. Gookin, 203 M 435, 661 P2d 865, 40 St. Rep. 554 (1983).

27-1-401. When specific or preventive relief permitted.

Case Notes

No Basis for Damages Absent Evidence of Wrongful Detainer — Summary Judgment Proper: Plaintiff sought damages for defendant's detention of a tractor in which plaintiff had a security interest. Defendant moved to dismiss the claims, and the District Court granted summary judgment for defendant. Plaintiff appealed, but the Supreme Court affirmed. Claim and delivery require that the claimant prove that property is wrongfully detained and that the claimant has the right to immediate possession at the time that the action is brought. However, in this case, there was insufficient evidence that defendant wrongfully detained the tractor because defendant had no contractual relationship with plaintiff regarding the tractor and owed no contractual duty to return the tractor to plaintiff. Absent evidence of wrongful detainer, there was no basis for plaintiff to recover damages, so summary judgment was proper. 1st Bank v. Winderl, 2002 MT 339, 313 M 306, 60 P3d 998 (2002).

Monetary Damages — Specific Performance Inapplicable: In a breach of contract action seeking damages, the District Court instead ordered the return of a truck. Neither 27-1-411 nor this section was applicable under the facts in this case. It was error to order specific performance when monetary damages was the only appropriate remedy. Merkes v. Mapston, 257 M 408, 849 P2d 210, 50 St. Rep. 332 (1993).

Award of Interest Proper: It was proper in an action for the specific performance of a settlement agreement for the District Court to award interest to the prevailing parties. The adverse party's 4-year delay of his performance of the settlement agreement clearly deprived them of the benefit of the interest on the rent he should have paid. Further, he had the use of a substantial piece of property for that period. Hass v. Hass Land Co., 217 M 246, 704 P2d 63, 42 St. Rep. 1170 (1985).

Specific Performance — Court as Court of Equity: A June 1976 agreement between the parties provided that plaintiff would advance money for the downpayment in the purchase of real property in Billings and would receive certain benefits, including a 50% interest in the property, in return. Plaintiff was to control any contractual arrangements until defendant had contributed, by payment of the monthly installments, a sum equal to the downpayment. In 1977, prior to the equalization of contributions, plaintiff entered negotiations to sell the property. No agreement between plaintiff and defendant was reached regarding the sale, and plaintiff filed

suit seeking specific performance of the agreement. Plaintiff was granted summary judgment allowing him exclusive control of contractual negotiations concerning the land for 1 year. On appeal, the Supreme Court held that in a specific performance case the District Court sits as a court of equity and is empowered to determine questions involved in the case and do complete justice. It was within the power of the trial court to restore the parties to the status quo, and the period of 1 year for plaintiff to control was not unreasonable. Downs v. Smyk, 185 M 16, 651 P2d 1238, 39 St. Rep. 1786 (1982).

Money Judgment Equivalent to Specific Performance: In an action on a contract for deed, a request for a money judgment for the balance of the purchase price that may be awarded in an action at law has been considered identical to a decree of specific performance, which requires the buyer to pay the balance of the purchase price. Glacier Campground v. Wild Rivers, Inc., 182 M 389, 597 P2d 689 (1978), followed in Aveco Properties, Inc. v. Nicholson, 229 M 417, 747 P2d 1358, 44 St. Rep. 2098 (1987).

Photographers: The taking of photographs, either by licensed or unlicensed photographers, is not a nuisance, and an injunction could not be had to prevent the activities of unlicensed photographers. St. Bd. of Examiners in Photography v. Keller, 120 M 364, 185 P2d 503 (1947).

When Injunctive Relief May Be Granted: Though a court of equity has no criminal jurisdiction, where a penalty is provided by a statute for a violation of its provisions, such as the 8-hour law relating to workmen in underground mines, and where there is some interference, actual or threatened, with property or other personal rights, equity may grant injunctive relief, notwithstanding the employer may thereafter be punished criminally for the infringement of such rights. Contention that plaintiff employees are estopped from seeking relief because in pari delicto with defendant company was held not meritorious. Butte Miners' Union No. 1 v. Anaconda Copper Min. Co., 112 M 418, 118 P2d 148 (1941).

Injunctive Relief Appropriate to Criminal Prosecution: Injunction is an equitable remedy, and as a general rule a court of equity will take no part in the administration of the criminal law and may not enjoin either the commission of crimes or their prosecution and punishment. State ex rel. Stewart v. District Court, 77 M 361, 251 P 137 (1926).

Collateral References

Judgment *key* 4.

49 C.J.S. Judgments §6.

27-1-402. How specific relief given.

Case Notes

No Basis for Damages Absent Evidence of Wrongful Detainer — Summary Judgment Proper: Plaintiff sought damages for defendant's detention of a tractor in which plaintiff had a security interest. Defendant moved to dismiss the claims, and the District Court granted summary judgment for defendant. Plaintiff appealed, but the Supreme Court affirmed. Claim and delivery require that the claimant prove that property is wrongfully detained and that the claimant has the right to immediate possession at the time that the action is brought. However, in this case, there was insufficient evidence that defendant wrongfully detained the tractor because defendant had no contractual relationship with plaintiff regarding the tractor and owed no contractual duty to return the tractor to plaintiff. Absent evidence of wrongful detainer, there was no basis for plaintiff to recover damages, so summary judgment was proper. 1st Bank v. Winderl, 2002 MT 339, 313 M 306, 60 P3d 998 (2002).

Award of Interest Proper: It was proper in an action for the specific performance of a settlement agreement for the District Court to award interest to the prevailing parties. The adverse party's 4-year delay of his performance of the settlement agreement clearly deprived them of the benefit of the interest on the rent he should have paid. Further, he had the use of a substantial piece of property for that period. Hass v. Hass Land Co., 217 M 246, 704 P2d 63, 42 St. Rep. 1170 (1985).

Real Estate Sale — Payment of Full Value by Plaintiff as Part of Judgment: Defendants, on behalf of plaintiff, exercised their option to purchase for $100,000 a ranch they leased. Plaintiff paid $10,000 downpayment required by owner and was to pay defendants $15,000 on November 1, 1973, and the same amount after the following January 1, at which time plaintiff would be deeded defendants' interest and would take over the payments to owner. Plaintiff paid $2,000 on November 2, and three tenders of the rest of the first $15,000 payment were made prior to December 12, 1973, and refused by defendants. Plaintiff sued on that date for specific performance and was granted it, the court ordering plaintiff to pay defendants $28,000 with interest from the date of the judgment in return for a warranty deed. Defendants were in possession of the property during the suit and paid the remainder due the owner, insurance, and

taxes, and made improvements. There was no indication plaintiff wanted the ranch as a personal residence. The effect of the judgment was to give plaintiff for $40,000 a ranch he contracted to pay $130,000 for. The Supreme Court ruled that the relative expenditures and benefits of the parties during litigation must be considered, such as defendants' payments and improvements and their use of the property, in order to determine what plaintiff should ultimately pay defendants for the ranch. The case was remanded for consideration of this issue. Stoddard v. Gookin, 203 M 435, 661 P2d 865, 40 St. Rep. 554 (1983).

Specific Performance — Court as Court of Equity: A June 1976 agreement between the parties provided that plaintiff would advance money for the downpayment in the purchase of real property in Billings and would receive certain benefits, including a 50% interest in the property, in return. Plaintiff was to control any contractual arrangements until defendant had contributed, by payment of the monthly installments, a sum equal to the downpayment. In 1977, prior to the equalization of contributions, plaintiff entered negotiations to sell the property. No agreement between plaintiff and defendant was reached regarding the sale, and plaintiff filed suit seeking specific performance of the agreement. Plaintiff was granted summary judgment allowing him exclusive control of contractual negotiations concerning the land for 1 year. On appeal, the Supreme Court held that in a specific performance case the District Court sits as a court of equity and is empowered to determine questions involved in the case and do complete justice. It was within the power of the trial court to restore the parties to the status quo, and the period of 1 year for plaintiff to control was not unreasonable. Downs v. Smyk, 200 M 334, 651 P2d 1238, 39 St. Rep. 1786 (1982).

Collateral References

Declaratory Judgment *key* 1; Injunction *key* 5; Judgment *key* 4; Replevin *key* 1; Specific Performance *key* 1.

43A C.J.S. Injunctions §§1, 2; 77 C.J.S. Replevin §3; 81 C.J.S. Specific Performance §§2, 5.

27-1-403. How preventive relief given.

Case Notes

No Basis for Damages Absent Evidence of Wrongful Detainer — Summary Judgment Proper: Plaintiff sought damages for defendant's detention of a tractor in which plaintiff had a security interest. Defendant moved to dismiss the claims, and the District Court granted summary judgment for defendant. Plaintiff appealed, but the Supreme Court affirmed. Claim and delivery require that the claimant prove that property is wrongfully detained and that the claimant has the right to immediate possession at the time that the action is brought. However, in this case, there was insufficient evidence that defendant wrongfully detained the tractor because defendant had no contractual relationship with plaintiff regarding the tractor and owed no contractual duty to return the tractor to plaintiff. Absent evidence of wrongful detainer, there was no basis for plaintiff to recover damages, so summary judgment was proper. 1st Bank v. Winderl, 2002 MT 339, 313 M 306, 60 P3d 998 (2002).

Collateral References

Injunctions *key* 1, et seq.; Judgment *key* 4.

43A C.J.S. Injunctions §§7, 12; 49 C.J.S. Judgments §6.

42 Am. Jur. 2d Injunctions §1.

27-1-411. When specific performance of an obligation may be compelled.

Case Notes

Decree of Specific Performance — Enforcement of Purchase Option in Lease Agreement — Remand for Establishment of Performance Schedule: McDonald constructed a restaurant on leased real property in Bozeman. The lease included a provision allowing McDonald a limited option to purchase the property. The property was appraised pursuant to the lease conditions, and McDonald indicated that he was prepared to purchase the property at the appraised price. The lessors refused to complete the transaction, resulting in an action by McDonald to enforce the agreement. The District Court found that the option provision contained all material terms and was legally enforceable and that the requirements of the option had been met, so specific performance was awarded to McDonald. The lessors appealed. The remedy of specific performance is allowed under this section, and contracts for the sale of real property are specifically enforceable under 27-1-419 because it is presumed that the breach of an agreement to transfer real property cannot be adequately relieved by pecuniary compensation. The lessors contended that the option clause was ambiguous and represented only "an agreement to agree" and that a further contract between the parties was necessary if the option was to be enforced. The Supreme Court noted that the option clause set forth the time in which the option was

exercisable, the method for calculating the purchase price and interest rate, the method by which the purchase price would be paid, and the parties' rights in case of default. Thus, the option contained all the material terms to make the acts necessary to purchase the property clearly ascertainable and was not ambiguous. The lessors nevertheless complained that the option provision did not state who was responsible for paying taxes or provide fully for forfeiture remedies. However, under Keaster v. Bozik, 191 M 293, 623 P2d 1376 (1981), absolute certainty in every detail is not a prerequisite for specific performance and collateral matters, such as responsibility for taxes and insurance, need not be expressed in the contract. The District Court's finding that the purchase option was enforceable was therefore affirmed, but the Supreme Court remanded to allow the District Court to set up a schedule for performance of the obligations and the commencement of interest, as required in Keaster. McDonald v. Cosman, 2000 MT 126, 299 M 499, 6 P3d 956, 57 St. Rep. 522 (2000), distinguishing Henkel v. Hewitt Agency, Inc., 206 M 303, 671 P2d 582 (1983), and Quirin v. Weinberg, 252 M 386, 830 P2d 537 (1992).

Specific Performance Proper: When a contract for sale of property provided for specific performance and did not contain a provision requiring that the buyer keep the property in the USDA Conservation Reserve Program (CRP), a disagreement between the parties over the property's participation in CRP was not material to the main purpose of the agreement and did not abrogate the remedy of specific performance. Peuse v. Malkuch, 275 M 221, 911 P2d 1153, 53 St. Rep. 135 (1996).

Buy/Sell Agreement — Specific Performance Available: A buy/sell contract provided that sale of land was contingent upon the buyer being able to obtain financing. The only remaining event to occur to finalize the financing process was an appraisal of the land, but the sellers refused to cooperate in the appraisal process. The District Court did not err in determining that the contract was valid and specifically enforceable when the record showed that the plaintiff was able to obtain financing as required by the contract. Hofmann v. George, 267 M 292, 883 P2d 826, 51 St. Rep. 1007 (1994).

Specific Performance of Property Buyout Proper: In 1960, four couples entered a property agreement regarding the use and maintenance of a vacation cabin on Holter Lake. Each couple received an undivided one-fourth interest in the property. The agreement contained a provision allowing cotenants to buy out a couple's interest for $1,000. Over the years, all the parties died except Berger, who in 1991 tendered $1,334 to Baker's estate for her interest in the property, which by then constituted a one-third share. Because good consideration was part of the original agreement and the parties entered the agreement with free and equal bargaining powers, knowing that they could predecease the other couples and leave the surviving couple or spouse with full ownership of the property, specific performance of the original agreement was proper despite the fact that the property had increased in value significantly over time. Baker v. Berger, 265 M 21, 873 P2d 940, 51 St. Rep. 389 (1994).

Monetary Damages — Specific Performance Inapplicable: In a breach of contract action seeking damages, the District Court instead ordered the return of a truck. Neither 27-1-401 nor this section was applicable under the facts in this case. It was error to order specific performance when monetary damages was the only appropriate remedy. Merkes v. Mapston, 257 M 408, 849 P2d 210, 50 St. Rep. 332 (1993).

Buy/Sell Agreement Expressly Providing for Remedy of Specific Performance: The defendants argued that the plaintiffs were not entitled to specific performance on a buy/sell agreement for real property. The Supreme Court found that the subsequently proposed contract by the defendants did not conform to the buy/sell agreement, that the buy/sell agreement provided for specific performance, and that the plaintiffs were not unwilling to perform in accordance with the buy/sell agreement and therefore were entitled to specific performance. Smith v. Johnson, 245 M 137, 798 P2d 106, 47 St. Rep. 1661 (1990).

Negotiation of Terms After Entering Buy/Sell Agreement: The Supreme Court found that the buy/sell agreement for real property entered into by the parties contained all the essential terms needed to constitute a contract and that therefore the plaintiffs were entitled to sue for specific performance. Smith v. Johnson, 245 M 137, 798 P2d 106, 47 St. Rep. 1661 (1990).

Mutuality of Performance in Deficiency Judgment: The District Court properly ordered sale of land when specific performance was contractually compelled; but in the deficiency judgment and right of redemption, it provided only that the "interest held by the defendant" be sold. Because 27-1-414 requires mutuality of performance, the contract seller's interest must also be sold. Specific performance was found to be a requirement to transfer title of the real property. Aveco Properties, Inc. v. Nicholson, 229 M 417, 747 P2d 1358, 44 St. Rep. 2098 (1987).

Parties Agree to Specific Performance as Available Remedy: In a case involving buyer's breach of a buy-sell contract for the sale of real property, the court properly granted specific

performance to the sellers. The court held that when, as in this case, the parties to the contract expressly agree in writing that specific performance is an available remedy and the sellers perform all material conditions precedent, specific performance may be compelled. Hillstrom v. O'Neil, 226 M 452, 736 P2d 126, 44 St. Rep. 795 (1987).

Award of Attorney Fees for Time Spent Obtaining Judgment for Specific Performance: Appellant claimed District Court erred in awarding attorney fees on respondent's counterclaim for specific performance of the parties' agreement concerning buy-out of respondent's interest in a business, contending that the court failed to award relief on the contract claim. The Supreme Court found substantial evidence that appellant failed to perform the required acts and that relief was awarded by way of specific performance. The District Court properly limited recovery to the number of hours spent by respondent's attorney in obtaining the judgment for specific performance. Proto v. Elliot, 222 M 393, 722 P2d 625, 43 St. Rep. 1358 (1986).

Contract Terms Not Definite — No Specific Performance: Only where all the terms of the agreement are definite may a contract be specifically enforced. The Supreme Court, finding that the terms of a real estate buy-sell agreement were so indefinite as to be without meaning unless rewritten, reversed the District Court's order requiring a real estate agency to sell the property in question. Henkel v. Hewitt Agency, Inc., 206 M 303, 671 P2d 582, 40 St. Rep. 1674 (1983).

Option Contract — Uncertainty Created by Option and Time for Exercise of Option: Plaintiff and realtor authorized to sell lots for corporation executed a contract under which plaintiff deposited $500, would pay $5,000 upon payment to plaintiff at a future uncertain time of a bonus in that amount, and would pay the balance of the purchase price within 90 days of the $5,000 payment and be given title. The contract was later modified to provide that if the bonus was not paid by January 1, 1980, plaintiff could either purchase the lot by paying the balance of the purchase price beyond the deposit within 90 days or choose to not purchase and to receive back the deposit. That it was not known when, if ever, the bonus would be received and that it was not clear which option plaintiff would select if the bonus was not paid did not make the contract too uncertain to be specifically enforceable by plaintiff. Absolute certainty in every detail of a contract is not a prerequisite to specific performance of the contract. Naylor v. Hall, 201 M 59, 651 P2d 1010, 39 St. Rep. 1953 (1982).

Property Subject to Buy-Sell Destroyed — No Unjust Enrichment — Specific Performance Proper: In 1979 defendants sold an apartment building to the Browns. Browns assumed a first mortgage and executed a note to defendants secured by a second mortgage. Insurance payable to defendants was carried to the extent of the second mortgage. Browns became delinquent in their payments, and defendants filed an action to foreclose their second mortgage but did not pursue it. Plaintiffs contacted defendants in April 1981 concerning the purchase of their second mortgage at a lower price, and the parties entered a buy-sell agreement. The plaintiff agreed with Browns to purchase their interest and receive a deed to the property. Under that agreement, plaintiff was to assume the Browns' indebtedness, including the second mortgage. A fire destroyed the building in May 1981, and plaintiffs sent a rescission notice to Browns and tendered to defendants full payment and an Assignment of Mortgage form. Defendants refused both, and plaintiffs sued for specific performance. Defendants answered, raising various defenses, including the fact that the source of the tender was not from a rehabilitation loan as contemplated in the buy-sell agreement and that plaintiff would be unjustly enriched because of insurance payable on the building. Defendants' contention that plaintiff was not entitled to specific performance because the tender was not from the rehabilitation loan specified in the contract rings hollow when they later conceded that after the fire there was no way plaintiff could obtain the loan because no building existed. Plaintiff also contended that specific performance could not lie because the subject matter of the contract was substantially destroyed before the contract was closed. Here, it was the buyer who sought specific performance, and the contract contained a clause giving both parties the right to specific performance. Regardless of the decision of the court, one party would gain substantially from the insurance proceeds. Unjust enrichment theory applies when no contract exists and the court implies a contract in law. Here, a contract did not exist, and specific performance was proper because there was nothing unjust or oppressive in requiring defendants to follow through on their end of the deal. Maxted v. Barrett, 198 M 81, 643 P2d 1161, 39 St. Rep. 780 (1982), followed in Marco & Co., LLC v. Deaconess/Billings Clinic Health Sys., 1998 MT 26, 287 M 293, 954 P2d 1116, 55 St. Rep. 91 (1998).

Option Agreement — Sufficiency of Consent and Consideration: The defendant appealed from a judgment granting specific performance of an option agreement to the plaintiff and ordering the property involved conveyed to the plaintiff. On appeal, the Supreme Court rejected the defendant's contention that the writing involved was not an option agreement because it failed to

meet the essential requirements for the validity of a contract. In particular, he contended that there was a lack of consent and that the consideration was legally insufficient. The Supreme Court found the actual payment of $1 and actual participation in a family corporate dissolution sufficient consideration for the agreement. A memorandum here acted as an offer, and a binding agreement resulted from action on that offer by the offeree. The trial court was affirmed. Van Atta v. Schillinger, 191 M 472, 625 P2d 73, 38 St. Rep. 426 (1981).

Certainty of Option Contract — Specific Performance of Reformed Contract: Where the plaintiff and defendant entered into an option contract giving the plaintiff an option to purchase certain real estate but the parties failed to specify the interest which would be retained by the defendant in certain improvements and failed to specify the dates upon which the downpayment and annual payments would be made and the date upon which interest would accrue, the contract was nonetheless sufficiently definite to allow its enforcement by specific performance. At trial, the court took testimony of the parties and reformed the contract so as to make it sufficiently definite as to the defendant's retained interest to allow specific performance. The fact that certain dates were not specified is not fatal to the contract, as it need not be absolutely certain in every detail, and where a time of performance is not specified, a reasonable time will be implied. Keaster v. Bozik, 191 M 293, 623 P2d 1376, 38 St. Rep. 194 (1981).

Specific Performance — Failure to Tender Purchase Price — Excuse: Plaintiff and defendants entered into a buy-sell agreement for a parcel of land. The agreement was prepared by defendants' real estate agent. The agreement failed to note a 60-foot roadway and utility easement. Defendants in the meantime sold an adjoining parcel of land, including an interest in the 60-foot easement. Plaintiff sued for specific performance of the buy-sell agreement. Plaintiff was excused from tendering the purchase price because defendants by selling the adjoining parcel subject to the easement indicated their refusal and inability to perform the agreement. Plaintiff is entitled to specific performance of that part of the agreement defendants are now able to convey, notwithstanding that it is the very same title plaintiff refused to accept in the first instance. Chadwick v. Giberson, 190 M 88, 618 P2d 1213, 37 St. Rep. 1723 (1980).

Roadway — Interest in Real Property: The District Court did not err in granting the remedy of specific performance under 27-1-411 for breach of an agreement to establish a roadway in a specified route because the right to a roadway granted in a written instrument is an interest in real property under 70-17-101, and money damages under 27-1-419 are presumed to be an inadequate remedy for breach of an agreement to transfer real property. Silva v. McGuinness, 189 M 252, 615 P2d 879, 37 St. Rep. 1401 (1980).

Specific Performance Appropriate Because of Speculative Nature of Money Damages: In 1946, the Link Brothers built a tram railroad at the Lewis and Clark Caverns State Park. The ownership, operation, and maintenance of the tram was turned over to the state. The agreement required that the state operate and maintain the tram and remit a percentage of the fares to the Link Brothers. The tram was discontinued and the track removed in 1976. In an action for specific performance, the court ordered the state to restore the tram to a fit condition. Specific performance was the appropriate remedy because of the speculative nature of determining the amount of money damages. Link v. St., 180 M 469, 591 P2d 214 (1979).

Valid Contract Required: In order for equity to decree specific performance, it is necessary that there be in existence and in effect a contract valid at law and binding upon the parties against whom performance is sought, for specific performance is never applicable where there is no obligation to perform. Schwedes v. Romain, 179 M 466, 587 P2d 388 (1978), followed in Thornton v. Songstad, 263 M 390, 868 P2d 633, 51 St. Rep. 104 (1994). Schwedes and Thornton were followed in Austin v. Cash, 274 M 54, 906 P2d 669, 52 St. Rep. 1119 (1995).

Evidence: Court properly admitted extrinsic evidence in hearing on specific performance of contract to sell realty since contract description was general and surveyor's description was by metes and bounds, but both parties had originally agreed as to the location of the property and had signed the contract. Milkovich v. Orr, 529 P2d 1382 (1975) (apparently not reported in Montana Reports).

Real Estate Sale: Agreement to sell real estate, giving general description of the property, which had been signed by all parties, was enforceable by specific performance since there was no question as to the location of the property and the purchasers had obtained a survey and made the downpayment with the approval of the sellers' agents. Milkovich v. Orr, 529 P2d 1382 (1975) (apparently not reported in Montana Reports).

Inadequate Relief by Pecuniary Compensation:

Under principle that monetary damages are presumed inadequate as remedy in contract for purchase of land, purchaser was entitled to specific performance notwithstanding seller's

contention that presumption was rebutted by testimony of purchaser that he could ascertain damages if not allowed to obtain the property. Brown v. Griffin, 150 M 498, 436 P2d 695 (1968).

Where complaint alleged breach of a contract to convey land described therein, it was sufficient to raise the presumption that pecuniary compensation would not afford adequate relief, within subsection (2) of this section, though there was no allegation of special circumstances showing that plaintiff had no adequate remedy at law. Christiansen v. Aldrich, 30 M 446, 76 P 1007 (1904).

Waiver of Invalidity: The objection that a contract in suit is invalid under the Statute of Frauds is waived where the point that the contract, to be enforceable, must be in writing was not raised either in the pleadings or by objection to the introduction of evidence. Alley v. Peeso, 88 M 1, 290 P 238 (1930).

Law Review Articles

The Post-Employment Covenant Not to Compete: An Old Dog Doing a New Trick, Watt, 49 Mont. L. Rev. 353 (1988).

Collateral References

Specific Performance *key* 1, et seq., 25, et seq.

81 C.J.S. Specific Performance §§2, 5, 35.

Special or consequential damages recoverable, on account of delay in delivering possession, by purchaser of real property awarded specific performance. 11 ALR 4th 891.

Specific performance: compensation or damages awarded purchaser for delay in conveyance of land. 7 ALR 2d 1204, superseded in part by 11 ALR 4th 891.

27-1-412. Obligations which cannot be specifically enforced.

Compiler's Comments

1985 Amendment: Deleted former (3) that read: "an agreement to submit a controversy to arbitration".

Case Notes

Agreement to Agree to Future Lease Terms Unenforceable: Defendant agreed to lease plaintiff farmland on a cash per acre basis for 5 years with an option to extend the lease on terms to be determined later. Toward the end of the 5-year lease, defendant offered to sell the land to plaintiff, but plaintiff declined, so defendant sold the land to a third party, and plaintiff filed a complaint alleging breach of the lease agreement. Both parties moved for summary judgment, and the District Court concluded that because the lease extension language constituted an agreement to agree and was vague and unenforceable, defendant was entitled to summary judgment. On appeal, the Supreme Court affirmed. Because the parties failed to include complete and material terms for determining the duration and payments for another lease term in the negotiation clause, the clause was rendered unenforceable, and specific performance was unavailable to enforce an agreement to agree to material terms in the future. Additionally, damages were not clearly ascertainable and calculation of damages was also untenable under the lease extension, so plaintiff could not recover damages. GRB Farm v. Christman Ranch, Inc., 2005 MT 59, 326 M 236, 108 P3d 507 (2005), following Steen v. Rustad, 132 M 96, 313 P2d 1014 (1957), Riis v. Day, 188 M 253, 613 P2d 696, (1980), and Quirin v. Weinberg, 252 M 386, 830 P2d 537 (1992).

Prohibition on Use of Injunction to Enforce Negative Covenants in Personal Services Contracts: Plaintiff broadcasting company had exclusive rights to broadcast Montana State University-Bozeman (MSU) athletic contests, and at the request of the university, plaintiff entered an exclusive contract with the MSU football coach for broadcast rights for a 1-hour program during football season, in addition to several commercials. The university subsequently sought bids for a new broadcast contract, and plaintiff notified the university that there was a potential conflict concerning the contract with the coach. The university ultimately contracted with another broadcasting company and notified the coach that he was expected to provide interviews with the new company. Plaintiff then sought a temporary restraining order restricting the coach from performing services elsewhere during the term of the contract. The request was denied, and plaintiff appealed, but the Supreme Court affirmed. Section 27-19-103(5), coupled with the specific contract enforcement prohibition in subsection (1) of this section, prohibits the use of injunctive relief to enforce negative covenants contained in personal services contracts that prevent a party from performing services elsewhere during the life of the contract, and Montana courts may not enjoin the violation of a contract when specific performance is barred by Montana law. Reier Broadcasting Co., Inc. v. Kramer, 2003 MT 165,

316 M 301, 72 P3d 944 (2003). See also Anderson v. Neal Institutes Co., 173 P 779 (Calif. App. 1918), and Titus v. Superior Court, 368 P2d 874 (Ariz. 1962).

Engagement Ring Given in Contemplation of Marriage Considered Gift — Conditional Gift Analysis: Albinger gave Harris a $29,000 diamond engagement ring when the two promised to marry. The relationship was strained, resulting in breakups and the return of the ring to Albinger several times, but each time the couple reconciled, and the ring was returned to Harris. Following their final separation, Albinger told Harris to "take the car, the horse, the dog, and the ring", so Harris moved to Kentucky, marriage plans evaporated, and Harris refused to return the ring. Albinger filed in District Court to settle ownership of the ring. The District Court found the ring to be a gift in contemplation of marriage, implying that the existence of a condition attached to the gift, and held that Albinger was entitled to return of the ring upon failure of the condition of marriage. Harris appealed, and the Supreme Court reversed. The rights and duties of parties regarding property exchanges in contemplation of marriage are determined by existing law and common-law principles. A gift is a transfer of personal property made voluntarily and without consideration, and the essential elements of an inter vivos gift are donative intent, voluntary delivery, and acceptance by the recipient. Delivery, which manifests the intent of the giver, must turn over dominion and control of the property to the recipient, and when made without condition, such a gift becomes irrevocable upon acceptance, so the Supreme Court will not void the transfer when the giver experiences a change of heart. The only revocable gift recognized under Montana law is a gift in view of death, and a gift causa mortis may be revoked by the giver at any time and is revoked by the giver's recovery from the illness or escape from the peril under which the gift was made. However, the Supreme Court declined to analogize gifts in contemplation of marriage with a gift in contemplation of death. Further, a purported gift that is part of the inducement for an agreement to do or not do a certain thing becomes the consideration essential to contract formation. An exchange of promises creates a contract to marry, albeit an unenforceable one, so when an engagement ring is given as consideration for the promise to marry, a contract is formed and legal action to recover the ring is barred by the abolition of breach of promise actions in 27-1-602. Here, the engagement ring was an unconditional, completed gift upon acceptance, and a completed gift is not revocable. Thus, the ring remained in Harris's ownership and control. Albinger v. Harris, 2002 MT 118, 310 M 27, 48 P3d 711 (2002).

Decree of Specific Performance — Enforcement of Purchase Option in Lease Agreement — Remand for Establishment of Performance Schedule: McDonald constructed a restaurant on leased real property in Bozeman. The lease included a provision allowing McDonald a limited option to purchase the property. The property was appraised pursuant to the lease conditions, and McDonald indicated that he was prepared to purchase the property at the appraised price. The lessors refused to complete the transaction, resulting in an action by McDonald to enforce the agreement. The District Court found that the option provision contained all material terms and was legally enforceable and that the requirements of the option had been met, so specific performance was awarded to McDonald. The lessors appealed. The remedy of specific performance is allowed under 27-1-411, and contracts for the sale of real property are specifically enforceable under 27-1-419 because it is presumed that the breach of an agreement to transfer real property cannot be adequately relieved by pecuniary compensation. The lessors contended that the option clause was ambiguous and represented only "an agreement to agree" and that a further contract between the parties was necessary if the option was to be enforced. The Supreme Court noted that the option clause set forth the time in which the option was exercisable, the method for calculating the purchase price and interest rate, the method by which the purchase price would be paid, and the parties' rights in case of default. Thus, the option contained all the material terms to make the acts necessary to purchase the property clearly ascertainable and was not ambiguous. The lessors nevertheless complained that the option provision did not state who was responsible for paying taxes or provide fully for forfeiture remedies. However, under Keaster v. Bozik, 191 M 293, 623 P2d 1376 (1981), absolute certainty in every detail is not a prerequisite for specific performance and collateral matters, such as responsibility for taxes and insurance, need not be expressed in the contract. The District Court's finding that the purchase option was enforceable was therefore affirmed, but the Supreme Court remanded to allow the District Court to set up a schedule for performance of the obligations and the commencement of interest, as required in Keaster. McDonald v. Cosman, 2000 MT 126, 299 M 499, 6 P3d 956, 57 St. Rep. 522 (2000), distinguishing Henkel v. Hewitt Agency, Inc., 206 M 303, 671 P2d 582 (1983), and Quirin v. Weinberg, 252 M 386, 830 P2d 537 (1992).

Discussions Regarding Land Trade Insufficient to Create Contractual Obligation: Parties discussed a land exchange and worked together with a surveyor in placing stakes and laying out lines for the exchange. Weinberg contended that these actions constituted partial performance

sufficient to trigger specific enforcement of the agreement. However, the discussions regarding the land trade were insufficient to create a contractual obligation. Absent a showing of consideration or evidence or indicia of what the parties agreed to and the terms of their agreement, an enforceable agreement did not exist. Quirin v. Weinberg, 252 M 386, 830 P2d 537, 49 St. Rep. 331 (1992).

Improper to Issue Injunction if Contract Obligation Cannot Be Specifically Enforced: Contract between the parties dealt with present and future obligations concerning the construction of a sewage treatment facility and the handling of wastes. On appeal, the Supreme Court reversed the lower court's granting of an injunction on the grounds that the performance required under the contract was not clear enough to allow for specific performance. Therefore, it was not sufficiently certain to warrant the issuing of an injunction. Westland Enterprises, Inc. v. Boyne USA, Inc., 237 M 186, 772 P2d 309, 46 St. Rep. 724 (1989).

Certainty and Completeness of Contract:

Those matters which are merely subsidiary, collateral, or which go to the performance of the contract are not essential, and therefore need not be expressed in the informal agreement. Majers v. The Shining Mtns., 230 M 373, 750 P2d 449, 45 St. Rep. 283 (1988); Steen v. Rustad, 132 M 96, 313 P2d 1014 (1957).

A contract to be specifically enforced must be complete and certain in all essential matters included within its scope. Nothing must be left to conjecture or surmise or be so vague as to make it impossible for the court to glean the intent of the parties from the instrument or the acts sought to be enforced. Steen v. Rustad, 132 M 96, 313 P2d 1014 (1957).

Absolute certainty and completeness in every detail are not prerequisites of specific performance, only reasonable certainty and completeness being required. Majers v. The Shining Mtns., 230 M 373, 750 P2d 449, 45 St. Rep. 283 (1988); Gropp v. Lotton, 160 M 415, 503 P2d 661 (1972); Steen v. Rustad, 132 M 96, 313 P2d 1014 (1957).

Before a decree of specific performance may be awarded, the contract sought to be specifically performed must, under subsection (6) of this section, not only be certain but also complete. Reeves v. Littlefield, 101 M 482, 54 P2d 879 (1936).

A writing acknowledging receipt of a sum of money in part payment "for ranch of 200 acres (describing it by section, township and range), water rights of located 1869 and 1871. If not as I say and represent the money to be returned", intended by the parties as the basis for future negotiations and superseded by a formal deed executed a few days later, was incapable of specific performance because too indefinite and lacking in mutuality. Kofoed v. Bray, 69 M 78, 220 P 532 (1923).

An agreement to enter into an agreement upon terms to be afterward settled between the parties cannot, as a general rule, be enforced. Livingston Water-Works v. Livingston, 53 M 1, 162 P 381 (1916); Monahan v. Allen, 47 M 75, 130 P 768 (1913); Long v. Needham, 37 M 408, 96 P 731 (1908), distinguished in Reeves v. Littlefield, 101 M 482, 54 P2d 879 (1936).

Contract Terms Not Definite — No Specific Performance: Only where all the terms of the agreement are definite may a contract be specifically enforced. The Supreme Court, finding that the terms of a real estate buy-sell agreement were so indefinite as to be without meaning unless rewritten, reversed the District Court's order requiring a real estate agency to sell the property in question. Henkel v. Hewitt Agency, Inc., 206 M 303, 671 P2d 582, 40 St. Rep. 1674 (1983).

Arbitration Clause Unenforceable: An architect's service contract contained a standardized arbitration clause. At issue were questions of law and mixed questions of law and fact. Neither party consented to arbitrate the dispute. Without the consent of the parties, the clause was unenforceable under this section. Ace Plumbing & Heating, Inc. v. School District, 204 M 81, 662 P2d 1327, 40 St. Rep. 678 (1983) (decided prior to 1985 amendment of 27-1-412).

Property Subject to Buy-Sell Destroyed — No Unjust Enrichment — Specific Performance Proper: In 1979 defendants sold an apartment building to the Browns. Browns assumed a first mortgage and executed a note to defendants secured by a second mortgage. Insurance payable to defendants was carried to the extent of the second mortgage. Browns became delinquent in their payments, and defendants filed an action to foreclose their second mortgage but did not pursue it. Plaintiffs contacted defendants in April 1981 concerning the purchase of their second mortgage at a lower price, and the parties entered a buy-sell agreement. The plaintiff agreed with Browns to purchase their interest and receive a deed to the property. Under that agreement, plaintiff was to assume the Browns' indebtedness, including the second mortgage. A fire destroyed the building in May 1981, and plaintiffs sent a rescission notice to Browns and tendered to defendants full payment and an Assignment of Mortgage form. Defendants refused both, and plaintiffs sued for specific performance. Defendants answered, raising various defenses, including the fact that the source of the tender was not from a rehabilitation loan as

contemplated in the buy-sell agreement and that plaintiff would be unjustly enriched because of insurance payable on the building. Defendants' contention that plaintiff was not entitled to specific performance because the tender was not from the rehabilitation loan specified in the contract rings hollow when they later conceded that after the fire there was no way plaintiff could obtain the loan because no building existed. Plaintiff also contended that specific performance could not lie because the subject matter of the contract was substantially destroyed before the contract was closed. Here, it was the buyer who sought specific performance, and the contract contained a clause giving both parties the right to specific performance. Regardless of the decision of the court, one party would gain substantially from the insurance proceeds. Unjust enrichment theory applies when no contract exists and the court implies a contract in law. Here, a contract did not exist, and specific performance was proper because there was nothing unjust or oppressive in requiring defendants to follow through on their end of the deal. Maxted v. Barrett, 198 M 81, 643 P2d 1161, 39 St. Rep. 780 (1982).

Specific Performance — Failure to Tender Purchase Price — Excuse: Plaintiff and defendants entered into a buy-sell agreement for a parcel of land. The agreement was prepared by defendants' real estate agent. The agreement failed to note a 60-foot roadway and utility easement. Defendants in the meantime sold an adjoining parcel of land, including an interest in the 60-foot easement. Plaintiff sued for specific performance of the buy-sell agreement. Plaintiff was excused from tendering the purchase price because defendants by selling the adjoining parcel subject to the easement indicated their refusal and inability to perform the agreement. Plaintiff is entitled to specific performance of that part of the agreement defendants are now able to convey, notwithstanding that it is the very same title plaintiff refused to accept in the first instance. Chadwick v. Giberson, 190 M 88, 618 P2d 1213, 37 St. Rep. 1723 (1980).

Valid Contract Required: In order for equity to decree specific performance, it is necessary that there be in existence and in effect a contract valid at law and binding upon the parties against whom performance is sought, for specific performance is never applicable where there is no obligation to perform. Schwedes v. Romain, 179 M 466, 587 P2d 388 (1978), followed in Quirin v. Weinberg, 252 M 386, 830 P2d 537, 49 St. Rep. 331 (1992), and Austin v. Cash, 274 M 54, 906 P2d 669, 52 St. Rep. 1119 (1995).

Specificity of Property Description: When there was no dispute between the parties as to the identity of real property to be sold and when the agents of the sellers, the sellers, and the buyers approved a subsequent survey of the property, the court did not err in granting specific performance for the sale of the property. Milkovich v. Orr, 529 P2d 1382 (1975) (apparently not reported in Montana Reports).

Lease With Option to Buy: Plaintiff was entitled to specific performance of agreement by which defendants gave plaintiff an exclusive option to purchase land under the existing lease for $8,500; plaintiff's method of exercising the option was to pay defendants $1,500 before November 1, 1951; that sum would constitute the downpayment on the property; payment of the balance was provided for by the plaintiff delivering to the defendants two-thirds of the crop raised each year, such crop share to cover the payment due and owing on the contract for that year; and it was further provided that the plaintiff was to summer fallow 45 acres of land during the year 1951. Steen v. Rustad, 132 M 96, 313 P2d 1014 (1957).

Collateral References

Specific Performance *key* 25, et seq.

81 C.J.S. Specific Performance §35.

27-1-413. Specific performance not to be oppressive.

Case Notes

Oppressive to Require Specific Performance — Party Not to Receive Title After Paying Full Purchase Price: The parties, Gandy and Eschler, entered into an agreement releasing each other from the performance of a real estate purchase contract upon the payment of $20,000 by Eschler to Gandy. Eschler defaulted on the payments, and Gandy brought an action seeking specific performance requiring Eschler to pay the underlying contract price of $258,640 or in the alternative the $20,000. The Supreme Court held that Gandy could not seek specific performance because he no longer had title to the property and it would be oppressive to require Eschler to pay the full purchase price required by the contract and to not receive the property after having performed. Gandy v. Eschler, 261 M 355, 862 P2d 1116, 50 St. Rep. 1357 (1993).

Collateral References

Specific Performance *key* 16.

81 C.J.S. Specific Performance §20.

27-1-414. Right to specific performance to be mutual.

Case Notes

Ability of Both Parties to Perform Contract Obligations Required to Obtain Specific Performance: The parties, Gandy and Eschler, entered into an agreement releasing each other from the performance of a real estate purchase contract upon the payment of $20,000 by Eschler to Gandy. Eschler defaulted on the payments, and Gandy brought an action seeking specific performance requiring Eschler to pay the underlying contract price of $258,000 or in the alternative the $20,000. The Supreme Court held that Gandy could not seek specific performance because he no longer had title to the property and therefore could not transfer the property to Eschler if Eschler were required to fulfill his contract obligation and pay the full purchase price. Gandy v. Eschler, 261 M 355, 862 P2d 1116, 50 St. Rep. 1357 (1993).

Mutuality of Performance in Deficiency Judgment: The District Court properly ordered sale of land when specific performance was contractually compelled; but in the deficiency judgment and right of redemption, it provided only that the "interest held by the defendant" be sold. Because 27-1-414 requires mutuality of performance, the contract seller's interest must also be sold. Specific performance was found to be a requirement to transfer title of the real property. Aveco Properties, Inc. v. Nicholson, 229 M 417, 747 P2d 1358, 44 St. Rep. 2098 (1987).

Execution and Delivery of Quitclaim Deed — Lack of Mutuality for Agreement to Reconvey: The District Court found that a quitclaim deed was executed and delivered by the Morins to the Mapstons before a typewritten note was signed by Mapstons to convey the subject property to Morins. This central finding of fact was held to be clearly supported in the evidence. The legal effect of the finding is that the quitclaim deed constituted a gift to Mapstons, no consideration being necessary. The transfer vested all actual title which Morins then had, since no different intention was expressed or necessarily implied. The typewritten note cannot be specifically enforced by Morins because they had not received an adequate consideration for the contract and because the contract lacks mutuality. Moreover, no involuntary trust was created. Morin v. Mapston, 217 M 403, 705 P2d 118, 42 St. Rep. 1283 (1985).

Property Subject to Buy-Sell Destroyed — No Unjust Enrichment — Specific Performance Proper: In 1979 defendants sold an apartment building to the Browns. Browns assumed a first mortgage and executed a note to defendants secured by a second mortgage. Insurance payable to defendants was carried to the extent of the second mortgage. Browns became delinquent in their payments, and defendants filed an action to foreclose their second mortgage but did not pursue it. Plaintiffs contacted defendants in April 1981 concerning the purchase of their second mortgage at a lower price, and the parties entered a buy-sell agreement. The plaintiff agreed with Browns to purchase their interest and receive a deed to the property. Under that agreement, plaintiff was to assume the Browns' indebtedness, including the second mortgage. A fire destroyed the building in May 1981, and plaintiffs sent a rescission notice to Browns and tendered to defendants full payment and an Assignment of Mortgage form. Defendants refused both, and plaintiffs sued for specific performance. Defendants answered, raising various defenses, including the fact that the source of the tender was not from a rehabilitation loan as contemplated in the buy-sell agreement and that plaintiff would be unjustly enriched because of insurance payable on the building. Defendants' contention that plaintiff was not entitled to specific performance because the tender was not from the rehabilitation loan specified in the contract rings hollow when they later conceded that after the fire there was no way plaintiff could obtain the loan because no building existed. Plaintiff also contended that specific performance could not lie because the subject matter of the contract was substantially destroyed before the contract was closed. Here, it was the buyer who sought specific performance, and the contract contained a clause giving both parties the right to specific performance. Regardless of the decision of the court, one party would gain substantially from the insurance proceeds. Unjust enrichment theory applies when no contract exists and the court implies a contract in law. Here, a contract did not exist, and specific performance was proper because there was nothing unjust or oppressive in requiring defendants to follow through on their end of the deal. Maxted v. Barrett, 198 M 81, 643 P2d 1161, 39 St. Rep. 780 (1982).

Option to Purchase in Mining Agreement: The rule that contracts which do not involve mutuality cannot be specifically enforced is modified in favor of a holder of an option to purchase in a mining agreement. The option may be specifically enforced because the purpose of the agreement is to vest in one of the parties the privilege of determining whether the agreement is to be executed. This is necessary because of the great cost involved in investigating the value of the mine. Rogers v. Relyea, 184 M 1, 601 P2d 37 (1979).

Buy/Sell Signed by One of Two Purchasers: A buy/sell agreement was signed by one of two purchasers on behalf of himself and the other purchaser. In a suit for specific performance, the

failure of one of the purchasers to sign the contract does not prevent the purchasers from obtaining specific performance. Ingalls v. Brady, 180 M 443, 591 P2d 200 (1979).

Specific Performance of Lease Option — Conditions Precedent: The court properly denied plaintiff's motion for summary judgment on an action for specific performance of a lease option agreement when he failed to show that he fully and fairly performed conditions precedent. Seifert v. Seifert, 173 M 501, 568 P2d 155 (1977).

Sale of Mining Property: Vendee of a contract for the sale of mining property cannot compel specific performance by the vendor, where the contract called for the vendee to deposit a specific amount of cash in the bank and the vendee had not done so. Sidwell v. The New Mine Sapphire Synd., 130 M 189, 297 P2d 299 (1956), followed in Rocky Mtn. Bank v. Stuart, 280 M 74, 928 P2d 243, 53 St. Rep. 1305 (1996). (Dissenting opinion, 130 M 189, 297 P2d 299 (1956).)

Application of Section:

Where plaintiff has done everything under the contract except to issue and deliver the certificates of stock to defendant and this can be specifically enforced, this section does not prevent plaintiff from specific performance to compel defendant to assign an oil and gas lease which was entered into. Bull Creek Oil & Gas Dev. v. Bethel, 127 M 222, 258 P2d 960 (1953).

Where plaintiff, after agreeing with defendant that he would put up money to purchase a gas and oil lease, did not put it up, he could not compel the defendant to transfer a half interest in the lease since to be entitled to specific performance he must show that he has performed his part of the agreement. McDonald v. Stewart, 127 M 188, 259 P2d 799 (1953).

As a general rule of equity, a contract will not be specifically enforced unless there is mutuality of obligation and remedy, i.e., where one of the parties is not bound by the contract, he cannot call upon the courts to compel specific performance by the other party, which rule is substantially embodied in this section. Templeton v. Williard, 83 M 317, 272 P 522 (1928), distinguished in Bull Creek Oil & Gas Dev. v. Bethel, 127 M 222, 258 P2d 960 (1953).

Under this section, the vendor of land under a contract giving him the privilege to declare all of the deferred payments immediately due upon failure to make any one of them may maintain an action against the vendee to compel specific performance of the contract on his part by paying the balance of the purchase price. Saint v. Beal, 66 M 292, 213 P 248 (1923).

Under this section, when either of the parties to an obligation is entitled to specific performance, the other party is also entitled to it, the remedy being mutual. Saint v. Beal, 66 M 292, 213 P 248 (1923).

Waiver of Performance: Unless performance is waived or excused, a plaintiff seeking to enforce a contract must perform his obligations and plaintiff's willful violation of an essential covenant of a contract is a defense to specific enforcement of the contract. McDonald v. Stewart, 127 M 188, 259 P2d 799 (1953).

Option to Repurchase: Want of mutuality did not preclude specific enforcement of written option to repurchase liquor business, where defendant's obligation under decree was conditioned upon payment by plaintiff of amounts found by the court to be due defendant. Brubaker v. D'Orazi, 120 M 22, 179 P2d 538 (1947).

Reconveyance of Realty: Where plaintiff conveyed real property to his partner to be used in the partnership business under the condition that the partner assume certain mortgage payments and if he failed to do so, plaintiff would be entitled to again become the sole owner of the property and the partner entitled to repayment of the money he invested in the business, a decree awarding specific performance by reconveyance of the realty, conditioned that plaintiff mortgage all the partnership property to secure defendant's refund under his counterclaim, the court finding that a money judgment against plaintiff would probably be uncollectible, was sustained by the evidence. Hall v. Lommasson, 113 M 272, 124 P2d 694 (1942).

Exchange of Land: Where a party seeking specific performance of an agreement for an exchange of land tendered a deed and offered to do equity, the remedy became mutual, the fact that when the agreement was made the element of mutuality may have been absent then becoming immaterial. Hogan v. Thrasher, 72 M 318, 233 P 607 (1925).

Collateral References

Specific Performance *key* 6, 32(1).

81 C.J.S. Specific Performance §§11 through 14.

71 Am. Jur. 2d Specific Performance §21.

27-1-415. Parties who cannot be compelled to perform.

Case Notes

Mistake as to Taxes — May Negate Specific Performance as Remedy: Double AA Corporation sought specific performance to require Newland & Company, a trust company, to convey land

that it held in trust and had entered into a contract to sell to Double AA. The Supreme Court found that the evidence showed that Shirley Bragg, who had agreed to the sale on behalf of the trust, had been incorrectly advised that unless the trust sold the ranch prior to the death of her mother, the trust would be liable for a substantial amount of taxes upon her mother's death. The Supreme Court held that in light of all the equities of the case, Bragg's mistake regarding taxes was a sufficient reason to deny specific performance and to limit Double AA's remedy to money damages. Double AA Corp. v. Newland & Co., 273 M 486, 905 P2d 138, 52 St. Rep. 1073 (1995). See also Stovall v. Watt, 187 M 439, 610 P2d 164 (1980).

Execution and Delivery of Quitclaim Deed — Lack of Consideration for Agreement to Reconvey: The District Court found that a quitclaim deed was executed and delivered by the Morins to the Mapstons before a typewritten note was signed by Mapstons to convey the subject property to Morins. This central finding of fact was held to be clearly supported in the evidence. The legal effect of the finding is that the quitclaim deed constituted a gift to Mapstons, no consideration being necessary. The transfer vested all actual title which Morins then had, since no different intention was expressed or necessarily implied. The typewritten note cannot be specifically enforced by Morins because they had not received an adequate consideration for the contract and because the contract lacks mutuality. Moreover, no involuntary trust was created. Morin v. Mapston, 217 M 403, 705 P2d 118, 42 St. Rep. 1283 (1985).

Unclean Hands Doctrine — Applicability — Divorce Agreement: Where wife sought to avoid compliance with terms of decree of dissolution, arguing that husband's unclean hands prevented specific performance under 27-1-415, the court held that section is only applicable to contracts. It is not applicable to the enforcement of a settlement agreement incorporated into a decree of dissolution, which must be enforced as a judgment. The unclean hands doctrine is not a defense to enforcement of a judgment, especially when the defense is based on acts occurring before the entry of judgment, and the judgment has not been set aside. Lawrence v. Lawrence, 197 M 262, 642 P2d 1043, 39 St. Rep. 548 (1982).

Option Agreement — Sufficiency of Consent and Consideration: The defendant appealed from a judgment granting specific performance of an option agreement to the plaintiff and ordering the property involved conveyed to the plaintiff. On appeal, the Supreme Court rejected the defendant's contention that the writing involved was not an option agreement because it failed to meet the essential requirements for the validity of a contract. In particular, he contended that there was a lack of consent and that the consideration was legally insufficient. The Supreme Court found the actual payment of $1 and actual participation in a family corporate dissolution sufficient consideration for the agreement. A memorandum here acted as an offer, and a binding agreement resulted from action on that offer by the offeree. The trial court was affirmed. Van Atta v. Schillinger, 191 M 472, 625 P2d 73, 38 St. Rep. 426 (1981).

Five Dollars as Sufficient Consideration — Option Enforceable by Specific Performance: Where the plaintiff and defendant entered into an option contract giving the plaintiff the option to purchase certain lands belonging to the defendant worth approximately $200,000 and the contract recited a consideration of $5 for an irrevocable 6-month option and a revocable 6-month option, the consideration was sufficient to create a valid contract as well as adequate to allow the equitable remedy of specific enforcement. The buyer's efforts to obtain an FHA loan also constituted part of the consideration. In the absence of evidence of fraud, if the purchase price for the land is adequate, even nominal consideration is adequate to support an option. Keaster v. Bozik, 191 M 293, 623 P2d 1376, 38 St. Rep. 194 (1981).

Breach of Agreement to Convey Land — Bad Faith — Damages — Refusal to Compel Specific Performance: A parcel of land owned by one Edmund Andrett had been leased for several years to parties named Hardy. After Andrett's death, Lillian Watt became the owner of the land, still subject to a Hardy lease. Prior to the expiration of the lease, Watt and the Hardys were disputing lease rental payments. Watt believed that the Hardy lease had expired and that the Hardys were in default on rental payments. For this reason, she contacted attorney Mason and asked him to find a new tenant. Unknown to Watt or her attorney, however, the leasing agency which Andrett had used for years before his death had renewed a lease and purchase option with the Hardy son March 1, 1968, which lease wasn't recorded until November 22, 1969. Meanwhile, attorney Mason had leased the farmland to the Stovalls, with an option to purchase, which lease was dated March 3, 1969, and recorded, previous to the Hardy lease, on September 22, 1969. The court balanced the equities of the ensuing chaos and decided that between the Hardys and the Stovalls the total circumstances favored the result reached by the trial court, upholding the sale of the land to the Hardys. The court also affirmed the damages against Lillian Watt for her breach of the agreement with the Stovalls. In so doing, they noted Lillian Watt, directly and indirectly through her attorney, kept information about sale of the land from the Stovalls

unfairly and failed to answer some of their inquiries by mail and telephone. The court concluded that Watt's conduct constituted bad faith. The damages were the difference between the value of the land, as found by the trial court, and the actual contract price. Stovall v. Watt, 187 M 439, 610 P2d 164 (1980). See also Double AA Corp. v. Newland & Co., 273 M 486, 905 P2d 138, 52 St. Rep. 1073 (1995).

Valid Contract Required: In order for equity to decree specific performance, it is necessary that there be in existence and in effect a contract valid at law and binding upon the parties against whom performance is sought, for specific performance is never applicable where there is no obligation to perform. Schwedes v. Romain, 179 M 466, 587 P2d 388 (1978), followed in Austin v. Cash, 274 M 54, 906 P2d 669, 52 St. Rep. 1119 (1995).

Contract Barred at Law as in Equity: The legal deficiencies of inadequacy of consideration and lack of consent are equally applicable to bar enforcement of a written contract at law as in equity. Schlegel v. Moorhead, 177 M 456, 582 P2d 336 (1978).

Transferee of Stock — Speculative Damages — Specific Performance: The granting of specific performance is discretionary, and where the awarding of damages for breach of an agreement to transfer shares of stock would not have been appropriate due to the speculative value of the stock, a decree of specific performance was proper. Where one acquires or purchases property, knowing that the property is subject to a contract to be sold to another, he may be compelled to perform the contract in the same manner and to the same extent as his grantor. Myhre v. Myhre, 170 M 410, 554 P2d 276 (1976).

Denial of Specific Performance — Concealment of Information: Where the court did not find affirmative misrepresentation in the formation of a contract, it was not necessarily inconsistent to find that specific performance of the contract would be unjust and unreasonable due to concealment of information in answer to a party's question in the preformation discussions. Schlegel v. Moorhead, 170 M 391, 553 P2d 1009 (1976).

Inadequate Consideration — Oil and Gas Lease: Where production records of producing wells in close proximity to the area covered by an oil and gas lease showed that the lease was entered into for a rental below that of the area, the District Court properly found that there was inadequate consideration. Schlegel v. Moorhead, 170 M 391, 553 P2d 1009 (1976).

Assignment of Liquor License: In case where city held liquor license that it assigned to the lessee-operator of the municipal airport lounge facility then permitted reassignment directly from one lessee to the next as proprietorship of the lounge changed, city's willingness to renew current operator's lease and permit the assignment of the license was not sufficient consideration to permit the city to obtain specific performance of lease clause requiring reassignment of license to city upon termination of the lease. State ex rel. Victor's, Inc. v. District Court, 169 M 110, 545 P2d 1098 (1976).

Just and Reasonable: In an action for specific performance of a contract of sale made by a receiver appointed in a mortgage foreclosure, the District Court must look to the real parties in interest and refuse relief if the contract was not just and reasonable or if performance would operate more harshly upon the parties than its refusal would upon the plaintiff seeking performance. Interior Sec. Co. v. Campbell, 55 M 459, 178 P 582 (1919).

Defenses to Specific Performance: The evident meaning of this section is that any one of its subsections furnishes a defense to an action for specific performance. In other words, when specific performance is sought against a party, he may interpose any one of the defenses named above, and if he can maintain it, he defeats the action. The burden of proof as to such defense is upon him who asserts it. In re Grogan's Estate, 38 M 540, 100 P 1044 (1909); Finlen v. Heinze, 28 M 548, 73 P 123 (1903).

Inadequate Consideration — Transfer of Mining Claim: Where complainant's entry on defendant's land for the purpose of locating a mining claim was wholly ineffectual as against defendant for that purpose, a contract by which complainants agreed to transfer to defendant an undivided one-third interest in the lead or lode, in consideration of defendant's transfer to plaintiffs of an undivided two-thirds interest therein, together with the necessary amount of real estate covered by the location, etc., in settlement of the rights of the parties without litigation, was not based on a sufficient consideration to support a suit for specific performance under (1) of this section. Traphagen v. Kirk, 30 M 562, 77 P 58 (1904).

Inadequate Consideration — Burden of Proof: A party seeking specific performance of a contract is required to set forth the consideration therefor, and the burden of proof that such consideration is inadequate is on the party resisting specific performance. Finlen v. Heinze, 28 M 548, 73 P 123 (1903).

Collateral References

Specific Performance *key* 49.

81 C.J.S. Specific Performance §§46, 47.

27-1-416. Parties who cannot obtain specific performance.

Case Notes

Completion of Survey Not Condition Precedent: Buyer breached buy-sell agreement, claiming he is entitled to rescission because of sellers' refusal to permit a survey of the real property prior to closing of the sale. The court properly held that there is no language in the contract indicating completion of a survey to be a condition precedent to closing. Because the sellers had performed all material conditions precedent, they are entitled to specific performance. Hillstrom v. O'Neil, 226 M 452, 736 P2d 126, 44 St. Rep. 795 (1987).

Parties Agree to Specific Performance as Available Remedy: In a case involving buyer's breach of a buy-sell contract for the sale of real property, the court properly granted specific performance to the sellers. The court held that when, as in this case, the parties to the contract expressly agree in writing that specific performance is an available remedy and the sellers perform all material conditions precedent, specific performance may be compelled. Hillstrom v. O'Neil, 226 M 452, 736 P2d 126, 44 St. Rep. 795 (1987).

Specific Performance of Lease Option — Conditions Precedent: The court properly denied plaintiff's motion for summary judgment on an action for specific performance of a lease option agreement when he failed to show that he fully and fairly performed conditions precedent. Seifert v. Seifert, 173 M 501, 568 P2d 155 (1977).

Abandonment — Estoppel: Where there was no evidence that the purchaser intended to abandon a contract for the sale of a ranch and no evidence the sellers so intended and the sellers pressed for payment and received some payment, specific performance of the contract was proper and seller was estopped from not complying with the contract. Maxted v. Stenberg, 166 M 460, 534 P2d 864 (1975).

Cash Deposit — Failure to Make: Vendee of a contract for the sale of mining property cannot compel specific performance by the vendor, where the contract called for the vendee to deposit a specific amount of cash in the bank and he had not done so. An allegation in the complaint that the vendee had deposited a substantial sum in the bank was not sufficient since the contract called for a specific amount. Sidwell v. The New Mine Sapphire Synd., 130 M 189, 297 P2d 299 (1956), followed in Rocky Mtn. Bank v. Stuart, 280 M 74, 928 P2d 243, 53 St. Rep. 1305 (1996). (Dissenting opinion, 130 M 189, 297 P2d 299 (1956).)

Collateral References

Specific Performance *key* 17.

81 C.J.S. Specific Performance §§26, 28.

27-1-417. Specific performance by party who signed when other party did not sign contract.

Case Notes

Buy/Sell Signed by One of Two Purchasers: A buy/sell agreement was signed by one of two purchasers on behalf of himself and the other purchaser. In a suit for specific performance the failure of one of the purchasers to sign the contract does not prevent the purchasers from obtaining specific performance. Ingalls v. Brady, 180 M 443, 591 P2d 200 (1979).

Collateral References

Specific Performance *key* 17, 32(1).

81 C.J.S. Specific Performance §§15, 26, 28.

27-1-418. Liquidation of damages not a bar to specific performance.

Collateral References

Specific Performance *key* 58.

81 C.J.S. Specific Performance §60.

71 Am. Jur. 2d Specific Performance §§57 through 59.

27-1-419. Specific performance of agreement to transfer property — distinction between real and personal property.

Case Notes

Decree of Specific Performance — Enforcement of Purchase Option in Lease Agreement — Remand for Establishment of Performance Schedule: McDonald constructed a restaurant on leased real property in Bozeman. The lease included a provision allowing McDonald a limited

option to purchase the property. The property was appraised pursuant to the lease conditions, and McDonald indicated that he was prepared to purchase the property at the appraised price. The lessors refused to complete the transaction, resulting in an action by McDonald to enforce the agreement. The District Court found that the option provision contained all material terms and was legally enforceable and that the requirements of the option had been met, so specific performance was awarded to McDonald. The lessors appealed. The remedy of specific performance is allowed under 27-1-411, and contracts for the sale of real property are specifically enforceable under this section because it is presumed that the breach of an agreement to transfer real property cannot be adequately relieved by pecuniary compensation. The lessors contended that the option clause was ambiguous and represented only "an agreement to agree" and that a further contract between the parties was necessary if the option was to be enforced. The Supreme Court noted that the option clause set forth the time in which the option was exercisable, the method for calculating the purchase price and interest rate, the method by which the purchase price would be paid, and the parties' rights in case of default. Thus, the option contained all the material terms to make the acts necessary to purchase the property clearly ascertainable and was not ambiguous. The lessors nevertheless complained that the option provision did not state who was responsible for paying taxes or provide fully for forfeiture remedies. However, under Keaster v. Bozik, 191 M 293, 623 P2d 1376 (1981), absolute certainty in every detail is not a prerequisite for specific performance and collateral matters, such as responsibility for taxes and insurance, need not be expressed in the contract. The District Court's finding that the purchase option was enforceable was therefore affirmed, but the Supreme Court remanded to allow the District Court to set up a schedule for performance of the obligations and the commencement of interest, as required in Keaster. McDonald v. Cosman, 2000 MT 126, 299 M 499, 6 P3d 956, 57 St. Rep. 522 (2000), distinguishing Henkel v. Hewitt Agency, Inc., 206 M 303, 671 P2d 582 (1983), and Quirin v. Weinberg, 252 M 386, 830 P2d 537 (1992).

Party May Choose to Breach Contract and Pay Damages: American Music Co. (AMC) sued Higbee and requested a preliminary injunction for Higbee's not honoring the parties' contract by replacing AMC's gambling machines with other machines. The Supreme Court stated that an injunction was not available because a party has a right to breach a contract if the party is willing to pay the damages caused by the breach and, in the present case, the amount of damages could be determined. Am. Music Co. v. Higbee, 1998 MT 150, 289 M 278, 961 P2d 109, 55 St. Rep. 586 (1998).

Mistake as to Taxes — May Negate Specific Performance as Remedy: Double AA Corporation sought specific performance to require Newland & Company, a trust company, to convey land that it held in trust and had entered into a contract to sell to Double AA. The Supreme Court found that the evidence showed that Shirley Bragg, who had agreed to the sale on behalf of the trust, had been incorrectly advised that unless the trust sold the ranch prior to the death of her mother, the trust would be liable for a substantial amount of taxes upon her mother's death. The Supreme Court held that in light of all the equities of the case, Bragg's mistake regarding taxes was a sufficient reason to deny specific performance and to limit Double AA's remedy to money damages. Double AA Corp. v. Newland & Co., 273 M 486, 905 P2d 138, 52 St. Rep. 1073 (1995). See also Stovall v. Watt, 187 M 439, 610 P2d 164 (1980).

Specific Performance of Property Buyout Proper: In 1960, four couples entered a property agreement regarding the use and maintenance of a vacation cabin on Holter Lake. Each couple received an undivided one-fourth interest in the property. The agreement contained a provision allowing cotenants to buy out a couple's interest for $1,000. Over the years, all the parties died except Berger, who in 1991 tendered $1,334 to Baker's estate for her interest in the property, which by then constituted a one-third share. Because good consideration was part of the original agreement and the parties entered the agreement with free and equal bargaining powers, knowing that they could predecease the other couples and leave the surviving couple or spouse with full ownership of the property, specific performance of the original agreement was proper despite the fact that the property had increased in value significantly over time. Baker v. Berger, 265 M 21, 873 P2d 940, 51 St. Rep. 389 (1994).

Roadway — Interest in Real Property: The District Court did not err in granting the remedy of specific performance under 27-1-411 for breach of an agreement to establish a roadway in a specified route because the right to a roadway granted in a written instrument is an interest in real property under 70-17-101, and money damages under 27-1-419 are presumed to be an inadequate remedy for breach of an agreement to transfer real property. Silva v. McGuinness, 189 M 252, 615 P2d 879, 37 St. Rep. 1401 (1980).

Rebuttable Presumptions:

Under principle that monetary damages are presumed inadequate as remedy in contract for purchase of land, purchaser was entitled to specific performance notwithstanding seller's contention that presumption was rebutted by testimony of purchaser that he could ascertain damages if not allowed to obtain the property. Brown v. Griffin, 150 M 498, 436 P2d 695 (1968).

The presumption that breach of agreement to transfer personal property can be adequately relieved by pecuniary compensation is rebuttable and was overcome by trial court's express finding to the contrary in action for specific performance of written option to repurchase retail liquor business. Brubaker v. D'Orazi, 120 M 22, 179 P2d 538 (1947).

Application of Section:

Where defendant vendee in a suit seeking specific performance introduced no evidence in opposition to the presumption declared by this section, he was in no position to contend on appeal that the vendor had an adequate remedy at law by a suit for damages. Conner v. Helvik, 105 M 437, 73 P2d 541 (1937).

Under this section, it is presumed that the breach of an agreement to sell or exchange land cannot be adequately compensated in damages, and where the court on ample evidence found that plaintiff in his action for specific performance could not be made whole by damages, the contention that specific performance should not have been decreed has no merit. Hogan v. Thrasher, 72 M 318, 233 P 607 (1925).

Sufficiency of Complaint:

In an action for the specific performance of a contract for the sale of lands, it is not necessary for the complaint to allege that the plaintiff has no complete or adequate remedy at law in damages. Lowery v. Cole, 47 M 64, 130 P 410 (1913); Christiansen v. Aldrich, 30 M 446, 76 P 1007 (1904); Ide v. Leiser, 10 M 5, 24 P 695 (1890).

It is not necessary, in an action for the specific performance of a contract for the sale of real property, for the plaintiff, asking for a preliminary injunction, to allege that he has no adequate remedy at law; when it appears that the defendant has refused to comply with his contract, the presumption attaches that the plaintiff has suffered detriment, which is irreparable in an action for damages; he is, therefore, prima facie entitled to invoke the aid of equity to obtain equitable relief, namely, the performance of the contract. Lowery v. Cole, 47 M 64, 130 P 410 (1913); Christiansen v. Aldrich, 30 M 446, 76 P 1007 (1904); Ide v. Leiser, 10 M 5, 24 P 695 (1890).

Collateral References

Specific Performance *key* 63 through 72, 119.

81 C.J.S. Specific Performance §76; 81A C.J.S. Specific Performance §§167 through 170.

71 Am. Jur. 2d Specific Performance §112.

27-1-420. No specific performance of agreement to buy property when title not clear.

Case Notes

Contract for Deed — Title Vested in Seller — Specific Performance Proper: The Undems sold their land in 1984 without Larson's written consent as required in the contract. Larson did not file a complaint until 1987. The Undems maintained that a grant of specific performance was inappropriate because they could not transfer title they no longer had. Larson maintained that in a contract for deed, legal title to the property remains vested in the seller, and therefore specific performance was proper. The Supreme Court, noting that specific performance is an equitable remedy and a matter of the District Court's discretion, agreed with Larson that in this case, specific performance was proper. Larson v. Undem, 246 M 336, 805 P2d 1318, 47 St. Rep. 2088 (1990).

Suspension of Performance Upon Material Breach of Contract: As part of a contract for sale of real property, seller agreed to obtain release of mortgage within 1 year, and failure to do so constituted a material breach entitling buyer to suspend performance. Sjoberg v. Kravik, 233 M 33, 759 P2d 966, 45 St. Rep. 1270 (1988).

Collateral References

71 Am. Jur. 2d Specific Performance §120.

27-1-421. Compelling performance of successor in interest in title — obligations respecting real property.

Case Notes

Personal Representative Bound by Buyout Provision in Property Agreement — Specific Performance Proper: In 1960, four couples entered a property agreement regarding the use and maintenance of a vacation cabin on Holter Lake. Each couple received an undivided one-fourth interest in the property. The agreement contained a provision allowing cotenants to buy out a

couple's interest by two methods: (1) through a voluntary inter vivos sale by a couple to the cotenants for $1,000 or the value of a couple's interest after a contribution toward the purchase of the interest of any former couple; or (2) through a compulsory buyout of a surviving spouse's interest at death. Over the years, all the parties died except Berger, who in 1991 tendered $1,334 to Baker's estate for her interest in the property, which by then constituted a one-third share. Baker's personal representative refused the tender on grounds that the agreement was unenforceable, but the District Court granted Berger specific performance of the agreement. On appeal, the Supreme Court affirmed the lower court decision as a proper use of discretion, holding that: (1) even under the maxim expressio unius est exclusio alterius, transfer of a surviving spouse's interest in the property was prohibited; (2) generally contracts made by a decedent are specifically enforceable against the decedent's personal representatives, heirs, devisees, and assigns even when they were not a party to the original agreement; (3) the agreement contained an express covenant to sell that justified enforcement of the agreement against the estate; and (4) despite any increase in the fair market value of the property, good consideration was established under the original terms of the agreement, so no new consideration was required, and Berger was entitled to receive what was contained in the original bargain. Baker v. Berger, 265 M 21, 873 P2d 940, 51 St. Rep. 389 (1994).

Corporate Officers Purchasing Property Corporation Had Agreed to Sell — Specific Performance Against: Plaintiff and realtor authorized to sell lots for corporation executed a 1975 contract under which plaintiff deposited $500, would pay $5,000 upon payment to plaintiff at a future uncertain time of a bonus in that amount, and would pay the balance of the purchase price within 90 days of the $5,000 payment and be given title. The contract was later modified to provide that if the bonus was not paid by January 1, 1980, plaintiff could either purchase the lot by paying the balance of the purchase price beyond the deposit within 90 days or choose not to purchase and to receive back his deposit. The contract became an option contract on January 1, 1980, when the bonus had not been paid by that time. Plaintiff had the option to choose at that time, and when he chose to purchase, there was then a binding contract under which either party was entitled to specific performance. The executive officers of the corporation, who prior to January 1, 1980, had in their official capacity sold the lot to themselves knowing of the agreement between plaintiff and realtor, were liable to perform the contract in the same manner as the corporation was obligated to perform it, and plaintiff was entitled to specific performance against the executive officers. Naylor v. Hall, 201 M 59, 651 P2d 1010, 39 St. Rep. 1953 (1982).

Collateral References

Specific Performance *key* 19 through 24.
81 C.J.S. Specific Performance §§30 through 34.

27-1-431. Judgment for possession of or title to real property.

Case Notes

Default on Trust Indenture — Motion for Possession Proper: Ryans contended the District Court erred in granting the motion of the beneficiary of a trust indenture and underlying promissory note for possession of real property following Ryans' default. The Supreme Court affirmed, noting the trust indenture was properly filed, interest was properly transferred, and procedures governing notice, posting, and publication of sale were correctly followed. Citizens St. Bank v. Ryan, 243 M 23, 792 P2d 1116, 47 St. Rep. 1179 (1990).

Collateral References

Ejectment *key* 114; Judgment *key* 4.
28A C.J.S. Ejectment §126; 49 C.J.S. Judgments §6.

27-1-432. Judgment for delivery of personal property.

Collateral References

Replevin *key* 2.
77 C.J.S. Replevin §3.
66 Am. Jur. 2d Replevin §16.

27-1-433. Cancellation of written instrument.

Case Notes

Effect on Lease: This section fortifies a holding that when a tax claim has been removed as a cloud on title, a lease given by the tax claimant no longer constitutes a cloud on the title even though the lessee was not a party to the quiet title action. Purcell v. Gibbs, 133 M 481, 326 P2d 679 (1958).

Distinguished From Action to Quiet Title:

Title may be cleared under this section, providing for cancellation of instruments aimed at a particular instrument under a complaint pointing out the specific grounds relied upon to establish invalidity, or 70-28-101 for the purpose of quieting title under which inquiry into the whole title to the property is permissible, the court being given broad powers, including that of removing clouds and canceling instruments and where the rule against collateral attack upon judgments does not apply to tax deeds issued under 15-18-202 (now repealed), plaintiff being entitled to introduce evidence of irregularities, defects, and omissions as well as the deed itself. Sanborn v. Lewis & Clark County, 113 M 1, 120 P2d 567 (1941).

In an action to quiet title under 70-28-101, as distinguished from one brought under this section to remove a cloud on title, the complaint alleging that the defendant claims an adverse estate or interest is sufficient without further defining it, whereas under the latter section the pleader must state facts disclosing the apparent validity of the instrument attacked and its actual invalidity. Slette v. Review Publishing Co., 71 M 518, 230 P 580 (1924), explained in Ryan v. Bloom, 120 M 443, 186 P2d 879 (1947). See also Hopkins v. Walker, 244 US 486, 61 L Ed 1270, 37 S Ct 711 (1917).

What Plaintiff Must Show to Justify Cancellation:

The rule announced in Glacier County v. Schlinski, 90 M 136, 300 P 270 (1931), that in attacking a tax deed the particular defects on which the pleader relies to defeat the deed must be clearly and specifically pointed out applies to actions brought under this section. Sanborn v. Lewis & Clark County, 113 M 1, 120 P2d 567 (1941).

The rule that in a suit to remove a particular cloud from the plaintiff's title, the facts showing that title and the existence and invalidity of the instrument or record sought to be eliminated as a cloud are essential parts of the plaintiff's cause of action and must be alleged in the bill is the same in respect of suits to remove clouds under this section, as distinguished from suits to quiet title under 70-28-101. Hopkins v. Walker, 244 US 486, 61 L Ed 1270, 37 S Ct 711 (1917), distinguished in Marshall v. Desert Properties Co., 103 F2d 551 (9th Cir. 1939).

To justify the cancellation of an instrument under this section the plaintiff must show that injury may result to him if the instrument is left outstanding; the court cannot interfere if the instrument is invalid and its invalidity appears directly or constructively upon its face. Hicks v. Rupp, 49 M 40, 140 P 97 (1914).

Where real estate is sold under a deed warranting title against encumbrances, the grantor may, after he has parted with title, maintain suit to have a mortgage, placed on record after he became the owner and of the existence of which he was unaware, canceled of record. Kersten v. Coleman, 50 M 82, 144 P 1092 (1914).

Section Applicable to Oil and Gas Leases: An action to have an oil and gas lease declared terminated and canceled of record for failure of the lessee to commence drilling operations or make the stipulated payment in lieu thereof is one in equity and falls within the provisions of this section, authorizing cancellation to remove a cloud upon title. Am. Sur. Co. of New York v. Butler, 86 M 584, 284 P 1011 (1930); McNamer Realty Co. v. Sunburst Oil & Gas Co., 76 M 332, 247 P 166 (1926).

Purpose of Action Under This Section: The purpose of an action brought under this section to have an oil and gas lease declared void and terminated by the failure of the lessee to observe its conditions is to clear the record of an apparent cloud in the shape of an instrument that has ceased to have any effect but still remains of record, and in such a case the equitable rules as to relief from a forfeiture are not applicable. McNamer Realty Co. v. Sunburst Oil & Gas Co., 76 M 332, 247 P 166 (1926).

Complaint Under This Section Held to State Cause of Action:

Allegations of the complaint showing that a land contract sought to be canceled was of record, that the purchaser was in possession of the premises, and that by its terms the latter was shown to have an equitable interest in them was sufficient to show that the instrument was of such a character as to constitute it a menace to plaintiff's title if left outstanding. Hammond-Dodson Co. v. Slattery, 67 M 489, 216 P 323 (1923).

In an action to cancel instruments claimed to constitute clouds upon the title to mining property, thus preventing plaintiff from obtaining a bidder upon execution sale under a judgment in a mechanics' lien (now construction lien) foreclosure proceeding, the complaint was held insufficient to state a cause of action under this section (conceding, but not deciding, that the action could be maintained under those sections) for failure to allege the facts showing the apparent validity of the instruments claimed to constitute clouds as well as the facts showing their invalidity. Heavilin v. O'Connor, 61 M 507, 202 P 1115 (1921).

When Insufficient to Admit Cancellation:

Where plaintiff in his action to remove a cloud from the title to property had based his cause of action upon the levy of a Writ of Attachment, his contention on appeal that the Writ was improperly levied and therefore constituted no lien upon the property deprives him of the relief asked for, since if it constituted no lien it cast no cloud which needed removal. Newman v. N. Mont. Ass'n of Credit Men, 63 M 545, 208 P 914 (1922).

Complaint in an action to remove a cloud from the title to real property was fatally defective for failure to state facts sufficient to disclose the apparent validity of the instrument attacked and its actual invalidity. Poulos v. Lyman Bros. Co., 63 M 561, 208 P 598 (1922), distinguished in Slette v. Review Publishing Co., 71 M 518, 230 P 580 (1924).

Collateral References

Cancellation of Instruments *key* 1, et seq., 4, 56; Quieting Title *key* 7, 49.

12A C.J.S. Cancellation of Instruments §§7, 31, 45, 112, 114; 74 C.J.S. Quieting Title §§86 through 89.

13 Am. Jur. 2d Cancellation of Instruments §1.

27-1-434. Animal welfare hearing.

Compiler's Comments

Effective Date: This section is effective October 1, 2003.

Part 5
Right to Bring Action or Assert Defense

Part Case Notes

State Remedy and State Court Enforcement of Contract Wages Required by Federal Davis-Bacon Act: The District Court had subject matter jurisdiction of state contract law claims against a contractor and subcontractors by workers hired to build housing on Malmstrom Air Force base under a contract between the contractor and the Air Force. The workers claimed that they were not paid the prevailing wages required by the federal Davis-Bacon Act. The defendants claimed that there was no private right of action and that the workers had not exhausted their federal administrative remedies. The evidence showed that the workers extensively used the administrative remedies, taking all proper steps to attempt to administratively resolve the dispute. The workers were not seeking to enforce the Davis-Bacon Act labor standards; they sought to enforce a contract that includes wages required by the Act, a subtle but important distinction. The Act does not preempt the workers' right to a state enforcement action, using state remedies, under the facts of this case. That right is in keeping with Montana's longstanding policy and constitutional guarantee in Art. II, sec. 16, Mont. Const., of citizens' access to Montana courts when they are aggrieved. As third-party beneficiaries of the contract, the workers have the right to sue in state court to enforce the contract under state law. Favel v. Am. Renovation & Constr. Co., 2002 MT 266, 312 M 285, 59 P3d 412 (2002).

27-1-501. Survival of cause of action or defense — death or disability or transfer of interest.

Compiler's Comments

1987 Amendment: Inserted "(2) Actions brought under this section and 27-1-513 must be combined in one legal action and any element of damages may be recovered only once."

Case Notes

Compensation for Lost Household Services Not Appropriate in Survivorship Action — Award Not Erroneous When No Double Damages Awarded: Damages for compensation of lost household services are legitimate in a personal injury claim and a wrongful death action, but not in a survivorship action. However, the District Court did not abuse its discretion in the present survivorship case by awarding damages for compensation of lost household services when the damages did not constitute impermissible double recovery and were within the range of damages to which plaintiffs were entitled. Hern v. Safeco Ins. Co. of Ill., 2005 MT 301, 329 M 347, 125 P3d 597 (2005).

Damages for Loss of Established Course of Life — Limited to Personal Injury Claims: Damages for loss of established course of life are unique to Montana and are limited to personal injury claims as opposed to survivorship claims, as expressed in Oberson v. U.S., 311 F. Supp. 2d 917 (D.C. Mont. 2004). This species of damages is intended to compensate for an injured person's

loss of what the person once had and the accompanying realization that the person will live life without ever recovering the previous course of life. In the present case, the District Court incorrectly instructed the jury that it could award damages for loss of established course of life in a survivorship action. Hern v. Safeco Ins. Co. of Ill., 2005 MT 301, 329 M 347, 125 P3d 597 (2005).

Reopening of Litigation for Injured Members of Class Action — Summary Judgment Proper: After plaintiffs settled with the insurer for damages incurred in the death of plaintiffs' daughter, a class action suit concerning insurance stacking provisions allowed plaintiffs to reopen their case and seek further damages from the insurer. Plaintiffs filed another damage claim with the insurer, but the claim was denied, so plaintiffs sued the insurer seeking full recovery of their damages. Plaintiffs filed a combined motion for summary judgment and motion to strike affirmative defenses, and defendant filed a cross-motion to bar plaintiffs from relitigating the wrongful death and survivorship action. The parties agreed that there were no genuine issues of material fact, and the District Court granted plaintiffs' motion and denied defendant's motion. On appeal, the Supreme Court affirmed. As injured members of the certified class, plaintiffs were clearly entitled to relitigate their claims. The affirmative defenses that plaintiffs sought to strike did not include estoppel or res judicata, but those defenses were inapplicable in light of the scope of the class action agreement allowing reopening of litigation. Absent an issue of material fact, summary judgment for plaintiffs was appropriate. Hern v. Safeco Ins. Co. of Ill., 2005 MT 301, 329 M 347, 125 P3d 597 (2005).

Venue in Matter Involving Multiple Defendants — Plaintiff's Venue Alternatives Properly Exercised: Plaintiff's husband was killed in an accident at the city bus barn in Lewis and Clark County in Helena. Plaintiff filed a survivorship/wrongful death action in Silver Bow County against defendant city in Lewis and Clark County and against defendant gas company with its principal place of business in Silver Bow County. The city moved for a change of venue to Lewis and Clark County, but the motion was denied. On appeal, the city argued that because Gabriel v. School District No. 4, 264 M 177, 870 P2d 1351 (1994), and Wentz v. Mont. Power Co., 280 M 14, 928 P2d 237 (1996), established that the proper venue for trial of a combined survivorship/wrongful death action is either the county where the survivorship action arose or the county where the wrongful death claim arose and that neither claim in this case arose in Silver Bow County, Silver Bow County was not a proper venue. Plaintiff contended that under 25-2-117, when there are multiple defendants, a proper place for trial of any defendant is proper for all defendants. The Supreme Court agreed with plaintiff. Although Gabriel and Wentz approved counties where survivorship or wrongful death actions arose as proper venues, neither case established those counties as exclusive venues for survivorship/wrongful death actions. In cases with multiple defendants pursuant to 25-2-117, including defendants that are both political subdivisions and private entities, 25-2-126, which provides venue for actions against political subdivisions, does not prevail over 25-2-122, which provides venue for tort actions, but rather provides alternative venue options to a plaintiff. The plaintiff properly exercised a venue option here, and denial of the change of venue motion was affirmed. Meyer v. Mont. Power Co., LLC, 2005 MT 66, 326 M 283, 109 P3d 269 (2005), distinguishing Whalen v. Mont. Right to Life Ass'n, 2002 MT 328, 313 M 204, 60 P3d 972 (2002).

Conditions for Seeking Damages in Survival and Wrongful Death Actions: A survival action belongs to the decedent's estate, allowing recovery for injury to the deceased from the action causing death, and damages recoverable in the action are personal to the decedent, so the estate's right of recovery is identical to the decedent's right, had the decedent lived. Only the personal representative may sue for damages suffered by the decedent in a survival action. Neither the surviving spouse nor any other heir has a legal right to pursue the action unless appointed personal representative. In a survival action, the decedent's estate may recover damages for: (1) lost earnings from the time of injury to death; (2) the present value of the decedent's reasonable earnings during the decedent's life expectancy; (3) medical and funeral expenses; (4) pain and suffering; and (5) other special damages. No Montana law requires an offset of lost future earnings for economic consumption, and an award for future earnings should not be reduced on account of economic consumption. By contrast, a wrongful death action is personal to the decedent's heirs and independent of any cause of action available to the estate and seeks to compensate the heirs for the harm or damages that they personally suffered as a result of the decedent's death. Generally, a wrongful death plaintiff may recover for: (1) loss of consortium; (2) loss of comfort and society; and (3) the reasonable value of the monetary contributions that the decedent would have provided for the support, education, training, and care of the heirs during the life expectancy of the decedent and survivors. Thus, a reduction for economic consumption and the cost of maintenance applies in wrongful death actions. Therefore, in survival actions, the decedent's estate is entitled to recover the full value of the lost future

earnings including that portion attributable to economic consumption, while in wrongful death actions, the decedent's heirs are not entitled to the economic consumption allocation. Payne v. District Court, 2002 MT 313, 313 M 118, 60 P3d 469 (2002), following Burns v. Eminger, 84 M 397, 276 P 437 (1929), and Swanson v. Champion Int'l Corp., 197 M 509, 646 P2d 1166 (1982). Swanson and Payne were followed in Hern v. Safeco Ins. Co. of Ill., 2005 MT 301, 329 M 347, 125 P3d 597 (2005).

Supervisory Control of Issue Related to Wrongful Death and Survival Action and Evidence of Economic Consumption: Plaintiff sought supervisory control of an action related to evidence of economic consumption as it pertained to a survival action and wrongful death. The Supreme Court found that allowing the District Court to permit the jury to consider evidence of economic consumption in this case would be a mistake of law constituting a deviation from well-established jurisprudence that would alter the cost of and preparation for trial, affect settlement negotiations, and call into question the value of any potential verdict, resulting in additional time and expense for appellate resolution and subsequent litigation. Any remedy available to plaintiff on direct appeal would thus prove inadequate, resulting in a gross injustice. Therefore, the Supreme Court held that this was an appropriate case in which to exercise supervisory control. Payne v. District Court, 2002 MT 313, 313 M 118, 60 P3d 469 (2002).

Death of Defendant in Criminal Case Abates Case Entirely — Prior Cases Clarified: Holland was convicted in District Court of criminal syndicalism by accountability and other offenses and appealed his conviction. Holland died after the case had been briefed to the Supreme Court but before it was decided, so the state moved to dismiss. Holland's counsel opposed the motion to dismiss, arguing that it was in the best interests of society and the judicial system to allow the appeal to be decided on its merits. The Supreme Court noted that its earlier opinions in the cases of St. v. Lawrence, 122 M 277, 201 P2d 756 (1949), St. v. Pichette, 125 M 327, 237 P2d 1076 (1951), St. v. Hale, 128 M 116, 270 P2d 993 (1954), St. v. Koble, 129 M 605, 285 P2d 837 (1955), St. v. Clark-Kotarski, 156 M 527, 486 P2d 876 (1971), and St. v. Cripps, 177 M 410, 582 P2d 312 (1978), all held that the death of a defendant abates an appeal. The Supreme Court pointed out that 37-61-401(2) requires that a civil case go forward notwithstanding the death of a party but that in criminal cases, no case or controversy remains when a defendant dies and that if a deceased defendant's sentence were affirmed on appeal, it would be impossible to execute the sentence. The Supreme Court also noted, citing State ex rel. Fletcher v. District Court, 260 M 410, 859 P2d 992 (1993), that it does not render advisory opinions and that the Montana Rules of Appellate Procedure provide for substitution of a personal representative in the case of the death of a party in a civil action, but there is no such provision for criminal cases. The Supreme Court held that upon the death of the defendant, the prosecution of a criminal case, including fines, abates in its entirety. The Supreme Court's prior opinions were clarified to the extent that opinions in those cases were not consistent with its present opinion. St. v. Holland, 1998 MT 67, 288 M 164, 955 P2d 1360, 55 St. Rep. 282 (1998).

Wrongful Death — Survival Action — Venue: Plaintiff's husband suffered a heart attack in Rosebud County and later died in Yellowstone County. Plaintiff sued in Yellowstone County. Rosebud County and other defendants moved to change venue. The District Court refused, and the Supreme Court affirmed. That the wrongful death action is combined with a survivorship action that could have been brought in Rosebud County because the survivorship action arose there does not render Yellowstone County an improper place for trial for both. Wentz v. Mont. Power Co., 280 M 14, 928 P2d 237, 53 St. Rep. 1277 (1996).

Award of Punitive Damages Against Estate of Deceased Tortfeasor: In a case of first impression, the Supreme Court noted that because under this section a cause of action or defense does not abate because of the death of a party but survives and may be maintained by the party's representatives, punitive damages may be assessed against the estate of a deceased tortfeasor. Whether it is appropriate to assess punitive damages to set an example is a question for the trier of fact. Tillett v. Lippert, 275 M 1, 909 P2d 1158, 53 St. Rep. 1 (1996).

Proceeds of Wrongful Death or Survival Claim — Ownership by Heirs or Survivors: Under Swanson v. Champion Int'l Corp., 197 M 509, 646 P2d 1166 (1982), the ownership of proceeds from settlement of wrongful death or survival claims belongs to the heirs or the estate, respectively. In this case, a $95,000 settlement draft was paid to settle claims against the insured driver in exchange for his release from claims for wrongful death and personal injury. The draft was made payable to the estate and to the estate's attorney. However, the estate offered evidence that there was no agreement to pay any fee to the attorney from those proceeds. Applying Swanson, the evidence created a factual issue regarding ownership of the proceeds and accrued interest sufficient to preclude summary judgment and a directed verdict requested by

the attorney regarding payment of fees. Eatinger v. Johnson, 269 M 99, 887 P2d 231, 51 St. Rep. 1484 (1994).

Wrongful Death — Survival of Action — Tribal Court Jurisdiction: In a suit arising out of an on-reservation automobile accident involving no tribal members, the Tribal Court of the Confederated Salish and Kootenai Tribes of the Flathead Reservation has subject matter jurisdiction over the wrongful death and survivorship claims and personal jurisdiction over the tortfeasor, a nonmember resident of the reservation. Initiation of a probate action in the state court did not deprive the tribal court of jurisdiction over the survivorship claim. Hinshaw v. Mahler, 42 F3d 1178 (9th Cir. 1994).

Proper Venue for Wrongful Death Action: As set out in Carroll v. W.R. Grace & Co., 252 M 485, 830 P2d 1253 (1992), because death is a necessary element in a wrongful death action, a wrongful death action accrues at the time of the death rather than on the date of injury, for statute of limitations purposes. The corollary to Carroll is that for purposes of determining venue under 25-2-126, a wrongful death claim arises where the death occurs. Gabriel v. School District No. 4, 264 M 177, 870 P2d 1351, 51 St. Rep. 217 (1994). However, see Meyer v. Mont. Power Co., LLC, 2005 MT 66, 326 M 283, 109 P3d 269 (2005), in which it was held that in cases with multiple defendants, neither Gabriel nor Meyer establish those counties where survivorship or wrongful death actions arose as exclusive venues for survivorship/wrongful death actions.

Indian Health Service as Representative of Indigent Indian Child: Since Indian Health Service assumed the role of Indians' advocate and facilitator in ensuring that their health care needs are met, it may proceed under this section as representative of an indigent Indian child to seek reimbursement from the county for any previous payment of the child's medical bills. McNabb v. Bowen, 829 F2d 787 (9th Cir. 1987).

Deceased Defendant in Tort Action — Unmarried Without Children or Estate — Action Against Parents as Successors in Interest: Where the defendant in a tort action was deceased, it was not error to dismiss the deceased and his estate and substitute his parents as successors in interest to the deceased. The deceased was unmarried and childless at the time of his death and left no estate. There was no representative, and under this section his parents, as successors in interest, are the proper parties. Such substitution is permitted under Rule 17(a), M.R.Civ.P. (Title 25, ch. 20), without adversely affecting any applicable Statute of Limitations. Simonson v. White, 220 M 14, 713 P2d 983, 43 St. Rep. 133 (1986).

Jury Verdict on Wrongful Death — Survival Claims Inconsistent: In this medical malpractice case, the jury awarded $75,000 on the wrongful death claim and zero on the survival claim. This verdict was totally inconsistent and contrary to the mandates of law; therefore, a new trial was properly granted under 25-11-102. The same act of negligence by the defendant was the basis for both actions. If the negligence which caused personal injury to the living victim caused his later death, a jury would be compelled to award damages for his personal injury as well as awarding damages on the wrongful death claim. Rudeck v. Wright, 218 M 41, 709 P2d 621, 42 St. Rep. 1380 (1985), distinguished, with regard to liability for negligent design and supervision of a water pipeline project, in Jim's Excavating Serv., Inc. v. HKM Associates, 265 M 494, 878 P2d 248, 51 St. Rep. 623 (1994), also distinguished, in a case involving contested evidence of survivorship damages, in Barnes v. United Indus., Inc., 275 M 25, 909 P2d 700, 53 St. Rep. 17 (1996), and followed in Brockie v. Omo Constr., Inc., 268 M 519, 887 P2d 167, 51 St. Rep. 1322 (1994).

Personal Representative's Right to Pursue Wrongful Death Action Instead of Survivorship Action: A decedent's personal representative clearly has a prior right to pursue a wrongful death action on behalf of the heirs in order to avoid the diseconomies and confusion caused by a plethora of lawsuits. Decedent's wife could thus, as his personal representative, pursue a wrongful death action. Decedent's ex-wives claimed that the personal representative had improperly failed to file a survivorship action instead of a wrongful death action in the hopes that she could (unfairly) increase her portion of any recovery. In re Pegg's Estate, 209 M 71, 680 P2d 316, 41 St. Rep. 558 (1984).

General Discussion of Wrongful Death and Survival Actions: For general discussion of wrongful death and survival actions, see Swanson v. Champion Int'l Corp., 197 M 509, 646 P2d 1166, 39 St. Rep. 639 (1982). See also Sorum v. Rieder & Co., 205 M 98, 666 P2d 1221, 40 St. Rep. 1120 (1983), for discussion of application of Swanson rule.

Action to Declare Marriage Invalid: Earl Adams married his first cousin and 2 months later commenced an action for a declaration of invalidity of his marriage. While this action was pending, Earl died. This action did not abate by reason of his death. His personal representatives may continue the action. Adams v. Adams, 185 M 63, 604 P2d 332 (1979), overruled, with regard to elements of collateral estoppel, in Dagel v. Great Falls, 250 M 224, 819 P2d 186, 48 St. Rep. 919 (1991).

Interfamily Tort Immunity Survival: Personal representative of wife was barred by interfamily tort immunity doctrine where defense arose prior to husband's death, as husband's personal representative would be able to avail himself of defense. St. Farm Mut. Auto. Ins. Co. v. Leary, 168 M 482, 544 P2d 444 (1975).

Order for New Trial Reversed: Where a case has been fully and ably submitted and the verdict is supported by the evidence and there is nothing incredible in the verdict, a new trial should not be granted and the original jury verdict should be allowed to stand. Beebe v. Johnson, 165 M 96, 526 P2d 128 (1974).

Wrongful Death Action:

The defendant's negligence caused a boat collision which injured the decedent and knocked him into the water. The injuries were not serious enough to cause death, but the decedent drowned after being knocked into the water. In order for the decedent's cause of action for his injuries to survive, there has to be an appreciable period of time between the collision and his death. Stephens v. Brown, 160 M 453, 503 P2d 667 (1972), followed in Starkenburg v. St., 282 M 1, 934 P2d 1018, 54 St. Rep. 214 (1997).

Decedent's mother was real party in interest in wrongful death action where decedent left no surviving wife or children and his father was dead. Cowan v. Pac. Gamble Robinson Co., 232 F. Supp. 403 (D.C. Mont. 1964).

A cause of action in favor of one whose death results from the wrongful act of another, under this section (a general survival statute), survives the death of the wrongdoer as well as the death of the party whose rights were infringed. Anderson v. Wirkman, 67 M 176, 215 P 224 (1923).

This section creates no new right of action, and the representative's right is conditioned upon the right of the party to maintain an action himself; hence, in a case of instantaneous death, the representative cannot recover for conscious suffering by his deceased before death, since deceased himself would have no action. Chicago, Milwaukee & St. Paul Ry. v. Clement, 226 F 426 (9th Cir. 1915).

Loss of Earnings: Where, in survivorship action under this section, jury returned verdict based only upon personal property belonging to decedent destroyed in accident and awarded no damages for loss of earning capacity, District Court did not abuse its discretion in granting new trial on damages only, since jury could not "disregard uncontradicted, credible nonopinion evidence" establishing decedent's earning capacity. Putman v. Pollei, 153 M 406, 457 P2d 776 (1969), distinguished, in a case involving contested evidence of survivorship damages, in Barnes v. United Indus., Inc., 275 M 25, 909 P2d 700, 53 St. Rep. 17 (1996).

Personal Injuries Action: Suit for personal injuries filed by decedent prior to his death survived in favor of administratrix of his estate. Pickett v. Kyger, 151 M 87, 439 P2d 57 (1968).

Transfer of Interest: Where an action is pending at the time of a transfer of a portion of the original plaintiff's interest, the provisions of this section become applicable. White v. Connor, 138 M 1, 354 P2d 722 (1960).

Change of Venue: A motion seeking a change of venue under 25-2-201 is not a defense within the meaning of this section. McGraff v. McGillvray, 135 M 256, 342 P2d 736 (1959).

Criminal Prosecution: Though a civil action does not abate by the death of a party if the cause of action survives, in a criminal prosecution the death of the convicted person abates the appeal. St. v. Lawrence, 122 M 277, 201 P2d 756 (1949), followed and clarified in St. v. Holland, 1998 MT 67, 288 M 164, 955 P2d 1360, 55 St. Rep. 282 (1998).

Workers' Compensation Cases: The widow of an employee insured under the Workmen's Compensation Act (now Workers' Compensation Act) and killed in the performance of his duties, after being awarded workmen's compensation, had the right, as heir and administratrix, to bring a negligence action against the driver of the car which killed her husband and employ an attorney to conduct the case, the latter being given a first lien upon his client's cause of action by 37-61-420, which cannot be affected by subrogation of the claim under the Workmen's Compensation Act (now Workers' Compensation Act). Hardware Mut. Cas. Co. v. Butler, 116 M 73, 148 P2d 563 (1944).

Attachment: Attachment is a "proceeding" within the meaning of this section, authorizing substitution of parties in an action or proceeding; since plaintiff under the facts stated could, under section 93-2801, R.C.M. 1947 (since repealed and replaced by Rule 17(a), M.R.Civ.P.), have maintained his action as trustee of an express trust and this section authorizes substitution of the assignee of a cause of action as plaintiff, there appeared no reason why an amendment substituting himself as owner of the cause of action in an action commenced by him as trustee would affect the continuing force of the levy so long as it will not change the cause of action. N. Mont. Ass'n of Credit Men v. Hauge, 111 M 56, 105 P2d 1102 (1940).

Foreign Administrator of Defendant: Although an action for tort survives the death of the wrongdoer under this section and the action is transitory wherever service may be had, such action was not maintainable against an administratrix in Washington in a federal court in Washington since it was not one on "contract" under the Washington probate law, and since a Washington citizen could not bring such an action, denial did not violate equality of treatment under the United States Constitution. Muir v. Kessinger, 35 F. Supp. 116 (D.C. Mont. 1940).

Appeal After Transfer of Interest: Where a landowner commenced suit to enjoin an irrigation district from assessing the land for interest on bonds of the district but pending appeal transferred its interest to another corporation, the appealing district was not deprived of its right to have the judgment against it reviewed because of the transfer. Rosebud Land & Improvement Co. v. Carterville Irrigation District, 102 M 465, 58 P2d 765 (1936).

Assignor Continuing Pending Action: Though under section 93-2801, R.C.M. 1947 (since repealed and replaced by Rule 17(a), M.R.Civ.P.), every action must be prosecuted in the name of the real party in interest, where an action on a claim is pending at the time of its assignment, it may, under this section, be continued in the name of the assignor. Osborne v. McDonald, 91 M 83, 5 P2d 568 (1931).

Claim Against Decedent's Estate: Where an action is pending against a decedent at the time of his death, the action does not abate, under this section, if the plaintiff presents his claim to the executor or administrator of decedent's estate for allowance or rejection as required by section 91-2714, R.C.M. 1947 (since repealed). In re Stevenson's Estate, 87 M 486, 289 P 566 (1930).

Removal of Public Officer: A proceeding for the removal of a County Commissioner from office on a charge of illegal collection of fees, resulting in his ouster, did not abate with his death, and his personal representative was entitled to prosecute the appeal taken by defendant during his lifetime. St. v. Russell, 84 M 61, 274 P 148 (1929).

Seduction and Breach of Promise: An action for either breach of promise or seduction survives and may be maintained against the administrator of the estate of defendant. Kennedy v. Rogan, 52 M 242, 156 P 1078 (1916).

Directors' Liability Survives: The right of action given by a statute requiring the annual preparation and filing of a report by the directors of a domestic trading corporation, showing the financial affairs of the company and, in case of their default, making these directors liable for debts of the corporation while the default continues, survives their death and may be prosecuted against their estates. First Nat'l Bank v. Cottonwood Land Co., 51 M 544, 154 P 582 (1916), explained in Anderson v. Wirkman, 67 M 176, 215 P 224 (1923). See N. Pac. Ry. v. Crowell, 245 F 668 (D.C. N.J. 1917).

Personal Injuries to Minor Decedent: Under this section, the administrator of the estate of a minor who died before action could be brought to recover damages for personal injuries, which he survived for an appreciable length of time, could properly bring suit in that behalf, and the contention that either the parent or guardian was the proper party plaintiff, under 27-1-512, was without merit. Melzner v. N. Pac. Ry., 46 M 162, 127 P 146 (1912).

Cause of Action Presupposed: Every survival statute presupposes the existence of a cause of action in favor of the injured party. Such a statute does not create a new cause of action but only carries forward the right that the injured party had before his death. Dillon v. Great N. Ry., 38 M 485, 100 P 960 (1909). See also Starkenburg v. St., 282 M 1, 934 P2d 1018, 54 St. Rep. 214 (1997), as to the rule that death may not be instantaneous for survival of a cause of action.

Dower Right Survives: An action by a widow to recover a dower right and for the value of rents and profits does not abate upon her death but survives to her legal representative. Lynde v. Wakefield, 19 M 23, 47 P 5 (1896), explained in Melzner v. N. Pac. Ry., 46 M 162, 127 P 146 (1912).

Substitution of Assignee as Plaintiff: The assignee of an account to whom it has been transferred by the original plaintiff after a complaint and answer have been filed, and who has been substituted as plaintiff, may prove the assignment although it was not pleaded in the complaint. Campbell v. Irvine, 17 M 476, 43 P 626 (1896).

Defense Survives: A defense does not abate by the death of a defendant after the commencement of an action, although there has been no service of summons, but survives under this section and may be maintained by his representatives. Lavell v. Frost, 16 M 93, 40 P 146 (1895).

Collateral References

Abatement and Revival *key* 33, 41 through 70.

1 C.J.S. Abatement and Revival §§97, 98, 113, et seq.

1 Am. Jur. 2d Abatement, Survival, and Revival §1.

Death of obligor parent as affecting decree for support of child. 14 ALR 5th 557.

Death of obligor spouse as affecting alimony. 79 ALR 4th 10.

Claim for punitive damages in tort action as surviving death of tortfeasor or person wronged. 30 ALR 4th 707.

Effect of death of beneficiary upon right of action under death statute. 13 ALR 4th 1060.

Validity of exception for specific kind of tort action in survival statute. 77 ALR 3d 1349.

Recovery, in action for benefit of decedent's estate in jurisdiction which has both wrongful death and survival statutes, of value on earnings decedent would have made after death. 76 ALR 3d 125.

Death of putative father as precluding action for determination of paternity or for child support. 58 ALR 3d 188.

Abatement or survival of action for attorney's malpractice or negligence upon death of either party. 65 ALR 2d 1211.

Death as terminating coexecutor's, coadministrator's, or testamentary cotrustee's liability for defaults or wrongful acts of fiduciary in handling estate. 65 ALR 2d 1126.

Effect of death of appellant upon appeal from judgment of mental incompetence against him. 54 ALR 2d 1161.

Medical malpractice action as abating upon death of either party. 50 ALR 2d 1445.

Survival of obligation of guaranty. 41 ALR 2d 1243.

Statutory liability for physical injuries inflicted by animal as surviving defendant's death. 40 ALR 2d 543.

Claim for negligently damaging or destroying personal property as surviving tortfeasor's death. 40 ALR 2d 533.

Survival of action based on delay in passing upon application for insurance. 32 ALR 2d 537.

Insanity of defendant as ground for abatement of action for divorce. 19 ALR 2d 180.

Survivability or assignability of action or cause of action for damages for fraudulently procuring purchase or sale of property. 76 ALR 403.

Survival of liability on joint obligation. 67 ALR 608.

Assignability of right of action ex delicto for injury to property, as affected by statute. 5 ALR 130.

27-1-502. Survival of counterclaim — death or assignment.

Case Notes

Use of Damage Judgments to Offset Damages Against Assignor Arising From Breach of Wellhead Purchase Contracts: First Security Bank filed a complaint in which it sought to recover amounts allegedly owed by Northern Montana Gas Company (Northern) to Montana Pacific Oil & Gas Company (MOPOG) based on wellhead purchase contracts that Northern allegedly breached. Northern's answer included defenses under this section, claiming a right to offset against any recovery obtained by the bank the amount of judgments entered in its favor against First Security Bank's assignor, MOPOG, and defenses under 27-1-503, claiming that its right to offset could not be defeated when MOPOG assigned its claim to the bank and when that claim was ultimately asserted by the Federal Deposit Insurance Corporation (FDIC). The trial court concluded that the FDIC, as the bank's receiver, was entitled to damages and that none of the judgments could be set off against FDIC. On appeal, the Supreme Court held that when read in the context of this section, "cross-demands" necessarily refers to claims between the parties and that this section does not limit setoff to claims arising out of the same transaction, but refers only to counterclaims that could have been set up in the same action. Because at the time that MOPOG assigned its rights to First Security its obligation already existed and because Northern was entitled to assert that obligation as a basis for setoff, pursuant to 27-1-503, Northern's right survived the assignment. The District Court relied on the general rule that in the absence of an express assumption of liability, an assignee is not liable for an assignor's obligation. However, that holding fails to recognize the difference between a counterclaim for affirmative relief and a defense that simply seeks to reduce the plaintiff's recovery dollar-for-dollar based on a defense that could have been asserted against the assignor. Pursuant to Rules 13(b) and 13(c), M.R.Civ.P. (Title 25, ch. 20), any claim that Northern had against MOPOG could have been permissibly set up as a counterclaim if MOPOG had sued Northern for breach of the wellhead purchase contracts. Therefore, Northern's right to offset survived the assignment by MOPOG to the bank. Although a setoff requires mutuality, all mutuality requires is that the defendant have a right to assert the claim against the plaintiff or its assignor that forms the basis for setoff. Thus, the Supreme Court affirmed the award of damages to FDIC and reversed the District Court, holding that judgments could not be used to setoff the bank's damage award because pursuant to this section, Northern had a right to offset those amounts against any claim by

MOPOG and pursuant to 27-1-503, the right to offset that amount survived the assignment by MOPOG of its rights to First Security Bank. Fed. Deposit Ins. Corp. v. N. Mont. Gas Co., 274 M 371, 908 P2d 1357, 52 St. Rep. 1276 (1995).

Collateral References

Set-Off and Counterclaim *key* 24, 55, et seq.

80 C.J.S. Set-Off and Counterclaim §§22, 58.

27-1-503. What defenses to action survive assignment of right to action.

Case Notes

Use of Damage Judgments to Offset Damages Against Assignor Arising From Breach of Wellhead Purchase Contracts: First Security Bank filed a complaint in which it sought to recover amounts allegedly owed by Northern Montana Gas Company (Northern) to Montana Pacific Oil & Gas Company (MOPOG) based on wellhead purchase contracts that Northern allegedly breached. Northern's answer included defenses under 27-1-502, claiming a right to offset against any recovery obtained by the bank the amount of judgments entered in its favor against First Security Bank's assignor, MOPOG, and defenses under this section, claiming that its right to offset could not be defeated when MOPOG assigned its claim to the bank and when that claim was ultimately asserted by the Federal Deposit Insurance Corporation (FDIC). The trial court concluded that the FDIC, as the bank's receiver, was entitled to damages and that none of the judgments could be set off against FDIC. On appeal, the Supreme Court held that when read in the context of 27-1-502, "cross-demands" necessarily refers to claims between the parties and that 27-1-502 does not limit setoff to claims arising out of the same transaction, but refers only to counterclaims that could have been set up in the same action. Because at the time that MOPOG assigned its rights to First Security its obligation already existed and because Northern was entitled to assert that obligation as a basis for setoff, pursuant to this section, Northern's right survived the assignment. The District Court relied on the general rule that in the absence of an express assumption of liability, an assignee is not liable for an assignor's obligation. However, that holding fails to recognize the difference between a counterclaim for affirmative relief and a defense that simply seeks to reduce the plaintiff's recovery dollar-for-dollar based on a defense that could have been asserted against the assignor. Pursuant to Rules 13(b) and 13(c), M.R.Civ.P. (Title 25, ch. 20), any claim that Northern had against MOPOG could have been permissibly set up as a counterclaim if MOPOG had sued Northern for breach of the wellhead purchase contracts. Therefore, Northern's right to offset survived the assignment by MOPOG to the bank. Although a setoff requires mutuality, all mutuality requires is that the defendant have a right to assert the claim against the plaintiff or its assignor that forms the basis for setoff. Thus, the Supreme Court affirmed the award of damages to FDIC and reversed the District Court, holding that judgments could not be used to setoff the bank's damage award because pursuant to 27-1-502, Northern had a right to offset those amounts against any claim by MOPOG and pursuant to this section, the right to offset that amount survived the assignment by MOPOG of its rights to First Security Bank. Fed. Deposit Ins. Corp. v. N. Mont. Gas Co., 274 M 371, 908 P2d 1357, 52 St. Rep. 1276 (1995).

Substitution of Parties: Defendant in a mortgage foreclosure suit based on nonpayment of a promissory note that had been assigned by the payee to another and retransferred by the latter to the former after default had been entered was not prejudiced by an amendment of the complaint, after default, by substitution of the original payee for the assignee as party plaintiff, since any defense he may have had against the payee on the note, whether negotiable in the first instance or nonnegotiable, was equally available to him against the assignee, plaintiff in the foreclosure suit. Price v. Skylstead, 69 M 453, 222 P 1059 (1924).

Receiver as Assignee: A receiver of an insolvent commercial bank acts as assignee of the insolvent, and as such must, in the collection of its assets, recognize the right of setoff where it exists, just as the bank would have been compelled to do had it sought to enforce collection prior to insolvency. Aetna Accident & Liab. Co. v. Miller, 54 M 377, 170 P 760 (1918); Williams v. Johnson, 50 M 7, 144 P 768 (1914).

Payment to Assignor: Where the maker of a nonnegotiable contract made for the payment of money or personal property pays the assignor without notice of an assignment of such contract and in good faith takes an acquittance, such payment constitutes a complete defense to an action by the assignee. Cornish v. Woolverton, 32 M 456, 81 P 4 (1905).

Nonnegotiable Instruments:

This section is not in conflict with 28-2-206, nor does one in anywise limit the operation of or expand the other. Cornish v. Woolverton, 32 M 456, 81 P 4 (1905); Stadler v. First Nat'l Bank, 22 M 190, 56 P 111 (1899).

The change in the rule of the common law, whereby the assignee of a nonnegotiable contract could not maintain an action thereon in his own name but only in the name of the assignor, brought about by section 93-2801, R.C.M. 1947 (since repealed), was the reason for and rendered necessary the enactment of this section. Cornish v. Woolverton, 32 M 456, 81 P 4 (1905); Stadler v. First Nat'l Bank, 22 M 190, 56 P 111 (1899).

Setoff of Intermediate Claim: This section does not permit the setoff against the assignee of a demand against the assignor arising between the endorsement and notice thereof. Where a debtor of a bank has deposits, the certificates of which have not matured, the insolvency of the bank will not give the debtor the right to have such deposits set off against his debt. Stadler v. First Nat'l Bank, 22 M 190, 56 P 111 (1899), distinguished in Apple v. Edwards, 92 M 524, 16 P2d 700 (1932).

Collateral References

Assignments *key* 99 through 103; Bills and Notes *key* 314 through 322, 364 through 384.

10 C.J.S. Bills and Notes §§166, et seq., 190, 191.

Rights of assignee or subsequent holder of negotiable paper executed to foreign corporation doing business in state without compliance with local requirements. 80 ALR 2d 465.

Enforceability, by transferee, of note given in violation of constitutional or statutory provision precluding issuance of corporate stock in consideration of promissory note. 78 ALR 2d 866.

Relative rights as between assignee of conditional seller and a subsequent buyer from the conditional seller after repossession or the like. 72 ALR 2d 342.

Transferee of nonnegotiable commercial paper given by purchaser of chattel and secured by conditional sale, retention of title, or chattel mortgage, as subject to defenses against seller arising subsequent to transfer. 44 ALR 2d 24.

Rights of assignee of one who has violated statute as to doing business under an assumed or fictitious name or designation not showing the names of the persons interested. 42 ALR 2d 547.

Oil or gas "royalty" within language of assignment. 4 ALR 2d 492.

Setoff or counterclaim between prior parties to a negotiable instrument as available against one not a holder in due course. 70 ALR 245.

27-1-511. Right of minor to bring civil action or other proceeding.

Case Notes

Loss of Consortium Claim Independent as to Damages, but Derivative as to Liability: Mickelson was injured when the fire truck that he was driving was struck by a Montana Rail Link (MRL) train. His spouse and children sought damages for loss of consortium. The District Court held that the loss of consortium claims should be reduced by the percentage of negligence attributed to Mickelson. When a plaintiff's contributory negligence is determined to be not greater than the tortfeasor's negligence, then damages for loss of consortium, being independent and not contingent upon the rights or liabilities of a parent or spouse, may not be reduced by the other spouse's negligence. However, because the language in 27-1-702 provides that any damages allowed must be diminished in the proportion to the amount of negligence attributable to the person recovering, a loss of consortium claim is considered independent as to damages and derivative as to liability. In other words, a defendant must be more liable for a plaintiff's injuries than the plaintiff before there can be any recovery, whether it is on the plaintiff's personal injury claim or on a loss of consortium claim stemming from those injuries. For example, if plaintiff is determined to be 50% or less contributorily negligent for plaintiff's injuries, then a spouse or child could recover 100% of a loss of consortium claim; however, if plaintiff is determined to be 51% or more contributorily negligent for plaintiff's injuries, then a spouse or child would recover nothing on a loss of consortium claim. Therefore, the Supreme Court directed that, on retrial, any contributory negligence attributable to Mickelson could not be imputed to the spouse and children to reduce a loss of consortium award, but if Mickelson was found more liable than MRL, there could be no recovery for loss of consortium. Mickelson v. Mont. Rail Link, Inc., 2000 MT 111, 299 M 348, 999 P2d 985, 57 St. Rep. 446 (2000), following Herold v. Burlington N., Inc., 761 F2d 1241 (8th Cir. 1985).

Elements Necessary for Minor Child to Establish Claim for Loss of Parental Consortium: In Montana, the elements necessary for a minor child to establish a claim for loss of parental consortium are: (1) a third party tortiously causes the parent to suffer a serious, permanent, and disabling mental or physical injury compensable under Montana law; and (2) the parent's ultimate condition of mental or physical impairment must be so overwhelming and severe that it causes the parent-child relationship to be destroyed or nearly destroyed. If the tortfeasor is not subject to liability to the parent under tort principles, the child cannot sustain a cause of action

for loss of parental consortium. If the parent could not recover from the tortfeasor for purely mental or emotional injury absent a physical component, the child cannot bring an action for consortium loss resulting from that injury. The destruction or near destruction of the parent-child relationship is a necessary element in establishing the cause of action, not merely a factor in computing damages. Keele v. St. Vincent Hosp. & Health Care Center, 258 M 158, 852 P2d 574, 50 St. Rep. 475 (1993), following Villareal v. St. Dept. of Transportation, 774 P2d 213 (Ariz. 1989).

Right of Child to Cause of Action for Loss of Parental Consortium — Injury by Third Party: Minor children are entitled to the support, aid, protection, affection, society, discipline, guidance, and training of their parents. Therefore, a minor child who has been deprived of these rights by the tortious injury to a parent by a third party has a separate cause of action for loss of parental consortium. However, any one element of damages for the injury may be recovered only once. Pence v. Fox, 248 M 521, 813 P2d 429, 48 St. Rep. 550 (1991).

Operation and Effect: At common law an infant plaintiff sued by guardian ad litem, but under statutes of this state he may appear by his general guardian or his guardian ad litem. Melzner v. N. Pac. Ry., 46 M 162, 127 P 146 (1912); Flaherty v. Butte Elec. Ry., 40 M 454, 107 P 416 (1910).

Collateral References

Infants *key* 70, 78.

43 C.J.S. Infants §312.

42 Am. Jur. 2d Infants §§150 through 154.

27-1-512. Action by parent or guardian for injury to child or ward.

Compiler's Comments

1987 Amendment: In five places following "injury" deleted "or death" and made minor changes in phraseology.

Case Notes

Reopening of Litigation for Injured Members of Class Action — Summary Judgment Proper: After plaintiffs settled with the insurer for damages incurred in the death of plaintiffs' daughter, a class action suit concerning insurance stacking provisions allowed plaintiffs to reopen their case and seek further damages from the insurer. Plaintiffs filed another damage claim with the insurer, but the claim was denied, so plaintiffs sued the insurer seeking full recovery of their damages. Plaintiffs filed a combined motion for summary judgment and motion to strike affirmative defenses, and defendant filed a cross-motion to bar plaintiffs from relitigating the wrongful death and survivorship action. The parties agreed that there were no genuine issues of material fact, and the District Court granted plaintiffs' motion and denied defendant's motion. On appeal, the Supreme Court affirmed. As injured members of the certified class, plaintiffs were clearly entitled to relitigate their claims. The affirmative defenses that plaintiffs sought to strike did not include estoppel or res judicata, but those defenses were inapplicable in light of the scope of the class action agreement allowing reopening of litigation. Absent an issue of material fact, summary judgment for plaintiffs was appropriate. Hern v. Safeco Ins. Co. of Ill., 2005 MT 301, 329 M 347, 125 P3d 597 (2005).

Loss of Consortium Claim Allowed Only by Personal Representative: Plaintiff sought damages for a loss of consortium for the death of her adult child in a car accident, allegedly caused by defendant's negligence. The District Court concluded that Montana law does not recognize a loss of consortium claim for the death of an adult child, so defendant's motion for summary judgment was granted. The Supreme Court agreed with the defendant petition on rehearing that a loss of consortium claim arising from a negligently inflicted death is an inextricable element of a wrongful death action that may be brought only be a personal representative of a decedent under 27-1-513 and that damages for wrongful death may be recovered only once. Plaintiff did not have standing to bring a wrongful death action under 27-1-513 because she was neither her son's heir nor his personal representative, so plaintiff's loss of consortium claim should have been dismissed as a matter of law. Allowing a separate loss of consortium claim by someone other than a personal representative would create a multiplicity of claims arising from the same wrongful death, in contravention of legislative intent. In situations when both causes of action apply, the personal representative must bring both actions together to prevent multiple actions arising from the same death. Thus, even though the District Court arrived at the correct conclusion for the wrong reason, summary judgment for defendant was affirmed. Renville v. Fredrickson, 2004 MT 324, 324 M 86, 101 P3d 773 (2004).

Proceeds of Wrongful Death or Survival Claim — Ownership by Heirs or Survivors: Under Swanson v. Champion Int'l Corp., 197 M 509, 646 P2d 1166 (1982), the ownership of proceeds from settlement of wrongful death or survival claims belongs to the heirs or the estate, respectively. In this case, a $95,000 settlement draft was paid to settle claims against the insured driver in exchange for his release from claims for wrongful death and personal injury. The draft was made payable to the estate and to the estate's attorney. However, the estate offered evidence that there was no agreement to pay any fee to the attorney from those proceeds. Applying *Swanson*, the evidence created a factual issue regarding ownership of the proceeds and accrued interest sufficient to preclude summary judgment and a directed verdict requested by the attorney regarding payment of fees. Eatinger v. Johnson, 269 M 99, 887 P2d 231, 51 St. Rep. 1484 (1994).

Supreme Court Recognizes Wrongful Death Claim for Stillborn Fetus: Alexa Strzelczyk brought a wrongful death action against her physician for the death of her full-term, stillborn fetus. The defendant, Jett, removed the case to federal court because neither party still resided in Montana. The federal court certified the case to the state Supreme Court because of the state court's decision in Kuhnke v. Fisher, 210 M 114, 683 P2d 916 (1984), holding that under state law at that time, wrongful death statutes did not support a claim for the death of a stillborn fetus. The federal court noted that the statutes had been revised since the 1984 decision. The Supreme Court ruled that the revised statutes provided for an action for the wrongful death of a "person", rather than "minor child", and that a child conceived but not yet born is defined as an "existing person" under the law, so far as may be necessary for its interest in the event of its subsequent birth. The Supreme Court noted that "live" birth is not statutorily required. The Supreme Court also held that each case must be considered carefully to determine if the circumstances make it "necessary" for the fetus to be determined to be a person in order to protect some interest. Strzelczyk v. Jett, 264 M 153, 870 P2d 730, 51 St. Rep. 206 (1994).

Allocation of Award for Wrongful Death of Child to One Parent Only: While generally both parents are entitled to share any award for the wrongful death of a child, where evidence demonstrated that only the mother could reasonably be expected to suffer damages, including loss of consortium, mental anguish, and loss of future support, it was not error for the District Court to allocate all proceeds of the wrongful death action to the mother. In re Estate of Farnum, 224 M 304, 730 P2d 391, 43 St. Rep. 2205 (1986).

One-Action Rule Not Applicable to Death of Minor — Action for Wrongful Death of Child Settled by Personal Representative — Allocation of Proceeds: The one-action rule applied to wrongful death of an adult under 27-1-513, providing that only one action may be brought by the personal representative, does not apply to the wrongful death of a child in 27-1-512, under which either parent may bring an action. However, where the mother was properly appointed personal representative, it was not error for the probate court to authorize her to settle both the wrongful death action and the survival action, which could only be settled by the personal representative, and to approve allocation of the proceeds of the settlement between the two actions. In re Estate of Farnum, 224 M 304, 730 P2d 391, 43 St. Rep. 2205 (1986).

Child's Death Occurring Prior to Amendment of This Section Providing That Wrongful Death Action May Be Brought by Either Parent — Second Action by Father Permissible — Lack of Standing by Defendant to Challenge Constitutionality of Statute: Prior to its amendment in 1975, section 93-2809, R.C.M. 1947 (now recodified as 27-1-512), provided that an action for wrongful death of a child was to be brought by the child's father, unless the father was dead or had deserted the family. In those instances, the mother could bring the lawsuit. The statute was amended to provide that either parent may bring such an action. Barrett's daughter was killed in an automobile accident 2 weeks before the statute was amended. Barrett and his wife were divorced in 1969, prior to the child's death. The mother was the child's legal custodian. Ten weeks after the amendment went into effect, the mother filed a wrongful death action. The mother settled the case and as personal representative of the child's estate executed a release of all claims arising from the accident. Barrett had not been made a party to the lawsuit or notified of the proceedings, nor did he share in the proceeds of the settlement; however, he was aware of the lawsuit prior to its settlement. In 1978, Barrett filed a wrongful death action on his own behalf. The District Court, over appellant's objection, conducted a jury trial at which Barrett prevailed. The Supreme Court affirmed. The court agreed with appellant's contention that normally there can be only one wrongful death action arising from a death. But the court ruled that, in this case, the father's suit was permissible because an action for wrongful death accrues in the statutory designee at the time of death and the amendment had not been made retroactive. The court further held that appellant lacked standing to challenge the constitutionality of the

original statute because appellant was not injured by the alleged under-inclusiveness of the statute. Barrett v. Soyland, 221 M 160, 717 P2d 1090, 43 St. Rep. 712 (1986).

No Wrongful Death Action for Death of Unborn Child: In view of the rule for calculating the periods of minority set forth in 41-1-102, an unborn fetus is not a "minor child" within the meaning of 27-1-512 and an action for the wrongful death of an unborn child cannot be maintained under present state law. Kuhnke v. Fisher, 210 M 114, 683 P2d 916, 41 St. Rep. 952 (1984), distinguished in Strzelczyk v. Jett, 264 M 153, 870 P2d 730, 51 St. Rep. 206 (1994).

Death of Child — Damages for Grief and Distress: Damages for the sorrow, mental distress, or grief of the parents of a deceased minor are recoverable in a wrongful death action brought pursuant to 27-1-512. Any previous decisions, to the extent they conflict with this holding, are expressly overruled. Dawson v. Hill & Hill Truck Lines, 206 M 325, 671 P2d 589, 40 St. Rep. 1689 (1983).

General Discussion of Wrongful Death and Survival Actions: For general discussion of wrongful death and survival actions, see Swanson v. Champion Int'l Corp., 197 M 509, 646 P2d 1166, 39 St. Rep. 639 (1982). See also Sorum v. Rieder & Co., 205 M 98, 666 P2d 1221, 40 St. Rep. 1120 (1983), for discussion of application of Swanson rule.

Personal Injury — When Strict Liability Applies — Harmless Error: Plaintiffs purchased a used dirt bike from the defendant. Both plaintiffs were injured riding the motorcycle and brought an action in strict liability, and alternately, in negligence. The case was submitted to the jury on the negligence theory only. The jury found that the plaintiff's actions were the proximate cause of the accident in both cases and that the defendant was not negligent. On appeal, the plaintiffs alleged error in the failure to submit the case to make a pretrial ruling on the strict liability theory. The Supreme Court held that the plaintiffs could not have been prejudiced by the court's failure to instruct on strict liability because: (1) in this particular case the jury's findings of no negligence on the part of the defendant in adjusting the brakes would foreclose a finding by defect by reason of brake maladjustment; (2) plaintiffs did not carry their burden to establish a causal relationship between brake maladjustment and the accident in that the testimony fails to prove that the accident was caused by defective brakes rather than caused by the bike hitting the ditch at a time the driver was inattentive. Likewise, since the jury found the defendant to be not negligent, any error in instructions on affirmative defenses was harmless. Therefore, the instructions pertaining to assumption of risk did not require review. Evangeline v. Billings Cycle Center, 192 M 106, 626 P2d 841, 38 St. Rep. 550 (1981).

Interfamily Tort Immunity Doctrine: Where wife could not have maintained tort action against husband for injuries received in automobile accident allegedly due to husband's negligence, there was no cause of action to flow to her personal representative and son could not maintain action as her personal representative after her death. St. Farm Mut. Auto. Ins. Co. v. Leary, 168 M 482, 544 P2d 444 (1975).

Jurisdiction — Indian Plaintiff: Montana has jurisdiction to hear action for wrongful death brought by Indian plaintiff against non-Indian as a result of automobile accident within the boundaries of the reservation, since all persons have free access to Montana courts and equal protection of its laws. McCrea v. Busch, 164 M 442, 524 P2d 781 (1974), followed in Lambert v. Ryozik, 268 M 219, 886 P2d 378, 51 St. Rep. 1250 (1994).

Limitation of Actions: An action by an adoptive father and natural grandfather under this section is an action for an injury to a pecuniary interest of the parent, therefore one for an injury to a property right that must be commenced within 2 years from the date the claim arose under 27-2-207. LaTray v. Mannix Elec. Co., 148 M 303, 419 P2d 744 (1966), but see Bryant v. Hall, 157 M 28, 482 P2d 147 (1971).

Mother Bringing Action:

Decedent's mother was real party in interest in wrongful death action where decedent left no surviving wife or children and his father was dead. Cowan v. Pac. Gamble Robinson Co., 232 F. Supp. 403 (D.C. Mont. 1964).

The complaint, in an action brought by the mother of a child to recover damages for personal injuries sustained by the latter, must set forth that the father was dead or had deserted his family at the time the action was commenced, and in the absence of such allegation the complaint fails to state a cause of action. Martin v. Butte, 34 M 281, 86 P 264 (1906).

Amount of Verdict:

A verdict of $15,195 was not excessive in an action by father for wrongful death of his 5-year-old son. Wyant v. Dunn, 140 M 181, 368 P2d 917 (1962).

Damages awarded for injury to a minor cover both the child's cause of action pursuant to section 93-2805, R.C.M. 1947 (since repealed), and the parents' cause of action, pursuant to this section. Chavez v. U.S., 192 F. Supp. 263 (D.C. Mont. 1961).

Argument of Counsel: In an action by a father for the wrongful death of his infant son, it was not reversible error for the trial court to permit the plaintiff's counsel, over objection, in their argument to the jury, to suggest a mathematical basis for fixing damages for loss of love, affection, and companionship on a per diem basis, where the trial judge instructed the jury that any remark of counsel not sustained by the evidence should be disregarded. Wyant v. Dunn, 140 M 181, 368 P2d 917 (1962).

Interest on Verdict: Where the amount due a father for the wrongful death of his minor son was not ascertained (or ascertainable) until after the jury had returned its verdict, interest was allowable only from the date the verdict was rendered. Wyant v. Dunn, 140 M 181, 368 P2d 917 (1962).

Causes of Action Distinguished:

In the case of an injury to a minor, there arise two causes of action, one in favor of the minor under section 93-2805, R.C.M. 1947 (since repealed), and the other in favor of the parents under this section. Chavez v. U.S., 192 F. Supp. 263 (D.C. Mont. 1961).

In the case of a personal injury to a minor, one cause of action arises in his own favor and another in favor of the parents for loss of services during minority; in case of death the action in favor of the minor survives and may be prosecuted by his administrator (this section), and recovery of damages by a parent, either as guardian ad litem of the living child or as administrator of the estate of the decedent in the surviving action, is no bar to recovery by the parent in his own right for damages by reason of injury to the child (subject to an exception not involved herein). Burns v. Eminger, 84 M 397, 276 P 437 (1929), distinguished in Marinkovich v. Tierney, 93 M 72, 17 P2d 93 (1932).

Death of Child: Insofar as this section authorizes a guardian to prosecute an action for injury to his ward, it relates only to such an action as the minor has during his lifetime; while, in case of the death of the minor from such injury, his action or right of action survives and is to be maintained by his personal representative. Melzner v. N. Pac. Ry., 46 M 162, 127 P 146 (1912).

Federal Employers' Liability Act: In an action, under the Federal Employers' Liability Act, brought by the personal representative of one injured while employed by a common carrier in interstate commerce, the complaint must allege and the proof show that there are in existence persons answering the description of the beneficiaries named in the statute. Melzner v. N. Pac. Ry., 46 M 162, 127 P 146 (1912).

Earnings After Majority of Child: In an action for the death of his minor son, the plaintiff can recover for pecuniary benefits reasonably to be expected to be received from the deceased after his majority, in view of this section, 27-1-323, permitting the award of such damages as may be just, and 40-6-214, making it the duty of children to support a parent who is unable to maintain himself. Gilman v. G. W. Dart Hardware Co., 42 M 96, 111 P 550 (1910).

Guardian Ad Litem Bringing Action: The provisions of this section are not exclusive, but the minor may proceed under section 93-2805, R.C.M. 1947 (since repealed), and sue by his guardian ad litem. (See Rule 17(c), M.R.Civ.P., for present provisions.) Flaherty v. Butte Elec. Ry., 40 M 454, 107 P 416 (1910).

Law Review Articles

Loss of Consortium and Loss of Services Actions: A Legacy of Separate Spheres, Ridgeway, 50 Mont. L. Rev. 349 (1989).

Such Damages as Are Just: A Proposal for More Realistic Compensation in Wrongful Death Cases, Strong & Jacobsen, 43 Mont. L. Rev. 55 (1982).

Collateral References

Death *key* 31(1), (7); Guardian and Ward *key* 118; Parent and Child *key* 7(6); Parties *key* 27.

25A C.J.S. Death §§56, 57, 109; 39 C.J.S. Guardian and Ward §57; 67A C.J.S. Parent and Child §§329 through 344; 67A C.J.S. Parties §72.

Medical malpractice in connection with diagnosis, care, or treatment of diabetes. 43 ALR 5th 87.

Liability of proprietor of store, business, or place of amusement, for injury to one using baby stroller, shopping cart, or the like, furnished by defendant. 42 ALR 5th 159.

What items of damages on account of personal injury to infant belong to him, and what to parent. 32 ALR 2d 1060.

Prenatal injury of child, parent's right of action. 27 ALR 2d 1258; 10 ALR 2d 1068.

Recovery by tenant of damages for injury to child as result of wrongful eviction. 17 ALR 2d 942.

Loss of services or support as element of damages for personal injury resulting in death of infant. 14 ALR 2d 502.

Marriage of child as affecting right of recovery by parents in death action. 7 ALR 2d 1380.

Funeral expenses, parent's right of recovery at common law from tortfeasor causing child's death. 3 ALR 2d 938.

Contributory negligence of parent as bar to an action by parent or administrator for death of child. 2 ALR 2d 785.

"Sentimental" losses including mental anguish, loss of society, and loss of marital, filial, or parental care and guidance, as element of damages in action for wrongful death. 74 ALR 11.

27-1-513. Action for wrongful death.

Compiler's Comments

1987 Amendment: Near beginning, after "When", inserted "injuries to and", after "person" deleted "not being a minor", substituted "the personal representative of the decedent's estate" for "his heirs or personal representatives", and made minor change in phraseology.

Case Notes

Case-Specific Basis for Award for Loss of Consortium to Parents For Wrongful Death of Adult Child — Bear Medicine Standard of Proof — Award to Personal Representative for Grief, Sorrow, and Mental Anguish Affirmed: An adult child was killed in a vehicle accident. A jury awarded the mother, who was the personal representative of the child, $300,000 for loss of consortium and $450,000 for grief, sorrow, and mental anguish and awarded the father $200,000 for loss of consortium and $300,000 for grief, sorrow, and mental anguish. The defendant insurer appealed the awards. The Supreme Court held that because the father was not the personal representative, damages of any kind were inappropriate in the wrongful death claim, so the awards to the father were vacated. As personal representative, the mother was entitled to damages for grief, sorrow, and mental anguish, and that award was affirmed. The court then examined the loss of consortium award to the mother. In Bear Medicine v. U.S., 192 F. Supp. 2d 1053 (D.C. Mont. 2002), a federal court allowed recovery for loss of consortium and speculated that Montana would adopt a cause of action for loss of consortium for parents of adult children. However, the Supreme Court declined to define exactly under what circumstances a loss of consortium claim by parents of an adult child would stand, holding that each case must be determined on the facts and evidence presented. Significant evidence must include an extraordinarily close and interdependent relationship, such as that shown in Bear Medicine, before a loss of consortium claim may be considered. In this case, the mother did not meet the high level of proof to meet the Bear Medicine standard, so the award for loss of consortium was vacated. Hern v. Safeco Ins. Co. of Ill., 2005 MT 301, 329 M 347, 125 P3d 597 (2005).

Compensation for Lost Household Services Not Appropriate in Survivorship Action — Award Not Erroneous When No Double Damages Awarded: Damages for compensation of lost household services are legitimate in a personal injury claim and a wrongful death action, but not in a survivorship action. However, the District Court did not abuse its discretion in the present survivorship case by awarding damages for compensation of lost household services when the damages did not constitute impermissible double recovery and were within the range of damages to which plaintiffs were entitled. Hern v. Safeco Ins. Co. of Ill., 2005 MT 301, 329 M 347, 125 P3d 597 (2005).

Damages for Loss of Established Course of Life — Limited to Personal Injury Claims: Damages for loss of established course of life are unique to Montana and are limited to personal injury claims as opposed to survivorship claims, as expressed in Oberson v. U.S., 311 F. Supp. 2d 917 (D.C. Mont. 2004). This species of damages is intended to compensate for an injured person's loss of what the person once had and the accompanying realization that the person will live life without ever recovering the previous course of life. In the present case, the District Court incorrectly instructed the jury that it could award damages for loss of established course of life in a survivorship action. Hern v. Safeco Ins. Co. of Ill., 2005 MT 301, 329 M 347, 125 P3d 597 (2005).

Reopening of Litigation for Injured Members of Class Action — Summary Judgment Proper: After plaintiffs settled with the insurer for damages incurred in the death of plaintiffs' daughter, a class action suit concerning insurance stacking provisions allowed plaintiffs to reopen their case and seek further damages from the insurer. Plaintiffs filed another damage claim with the insurer, but the claim was denied, so plaintiffs sued the insurer seeking full recovery of their damages. Plaintiffs filed a combined motion for summary judgment and motion to strike affirmative defenses, and defendant filed a cross-motion to bar plaintiffs from relitigating the wrongful death and survivorship action. The parties agreed that there were no genuine issues of material fact, and the District Court granted plaintiffs' motion and denied defendant's motion. On appeal, the Supreme Court affirmed. As injured members of the certified class, plaintiffs were clearly entitled to relitigate their claims. The affirmative defenses that plaintiffs sought to

strike did not include estoppel or res judicata, but those defenses were inapplicable in light of the scope of the class action agreement allowing reopening of litigation. Absent an issue of material fact, summary judgment for plaintiffs was appropriate. Hern v. Safeco Ins. Co. of Ill., 2005 MT 301, 329 M 347, 125 P3d 597 (2005).

Venue in Matter Involving Multiple Defendants — Plaintiff's Venue Alternatives Properly Exercised: Plaintiff's husband was killed in an accident at the city bus barn in Lewis and Clark County in Helena. Plaintiff filed a survivorship/wrongful death action in Silver Bow County against defendant city in Lewis and Clark County and against defendant gas company with its principal place of business in Silver Bow County. The city moved for a change of venue to Lewis and Clark County, but the motion was denied. On appeal, the city argued that because Gabriel v. School District No. 4, 264 M 177, 870 P2d 1351 (1994), and Wentz v. Mont. Power Co., 280 M 14, 928 P2d 237 (1996), established that the proper venue for trial of a combined survivorship/wrongful death action is either the county where the survivorship action arose or the county where the wrongful death claim arose and that neither claim in this case arose in Silver Bow County, Silver Bow County was not a proper venue. Plaintiff contended that under 25-2-117, when there are multiple defendants, a proper place for trial of any defendant is proper for all defendants. The Supreme Court agreed with plaintiff. Although Gabriel and Wentz approved counties where survivorship or wrongful death actions arose as proper venues, neither case established those counties as exclusive venues for survivorship/wrongful death actions. In cases with multiple defendants pursuant to 25-2-117, including defendants that are both political subdivisions and private entities, 25-2-126, which provides venue for actions against political subdivisions, does not prevail over 25-2-122, which provides venue for tort actions, but rather provides alternative venue options to a plaintiff. The plaintiff properly exercised a venue option here, and denial of the change of venue motion was affirmed. Meyer v. Mont. Power Co., LLC, 2005 MT 66, 326 M 283, 109 P3d 269 (2005), distinguishing Whalen v. Mont. Right to Life Ass'n, 2002 MT 328, 313 M 204, 60 P3d 972 (2002).

Loss of Consortium Claim Allowed Only by Personal Representative: Plaintiff sought damages for a loss of consortium for the death of her adult child in a car accident, allegedly caused by defendant's negligence. The District Court concluded that Montana law does not recognize a loss of consortium claim for the death of an adult child, so defendant's motion for summary judgment was granted. The Supreme Court agreed with the defendant petition on rehearing that a loss of consortium claim arising from a negligently inflicted death is an inextricable element of a wrongful death action that may be brought only be a personal representative of a decedent under this section and that damages for wrongful death may be recovered only once. Plaintiff did not have standing to bring a wrongful death action under this section because she was neither her son's heir nor his personal representative, so plaintiff's loss of consortium claim should have been dismissed as a matter of law. Allowing a separate loss of consortium claim by someone other than a personal representative would create a multiplicity of claims arising from the same wrongful death, in contravention of legislative intent. In situations when both causes of action apply, the personal representative must bring both actions together to prevent multiple actions arising from the same death. Thus, even though the District Court arrived at the correct conclusion for the wrong reason, summary judgment for defendant was affirmed. Renville v. Fredrickson, 2004 MT 324, 324 M 86, 101 P3d 773 (2004).

Police Dispatcher Credibility Having No Bearing on Wrongful Death Action Given City's Admission of Negligence: Plaintiff requested that a medical team be sent to her home to attend to her husband who was in respiratory arrest, but the police dispatcher sent the medics to the wrong address. The husband subsequently died, and the wife brought a wrongful death and negligence action against the city. The city admitted negligence, but the jury found for the city, holding that the city's negligence was not a substantial factor in the death. Plaintiff appealed, but the Supreme Court affirmed. Given the city's admission of negligence, the dispatcher's failure to report the address confusion did not make the city's negligence or liability for the death any more or less probable. Further, the dispatcher's credibility, even if damaged by the revelation of the misdirection, had no bearing on the case, nor did plaintiff indicate how impairment of the dispatcher's credibility would matter, given the admission of negligence by the city. Christofferson v. Great Falls, 2003 MT 189, 316 M 469, 74 P3d 1021 (2003).

No Prejudicial Error in Failure to Give Negligent Homicide Mental State Instruction in Wrongful Death Action When Other Instructions Adequately Reflect Negligence: Samson's son was killed by Bercier, a youth who walked away from a nonsecure, supervised licensed youth group home. Samson sued the state for foreseeable negligence. To boost the theory of foreseeability, Samson offered a jury instruction that defined Bercier's conduct as reckless and postulated therefrom that the conduct was foreseeable because of Bercier's background, seeking

to undermine the state's theory that the shooting was an unforeseeable accident. The District Court refused to offer the instruction, instead instructing the jury on elements of wrongful death, and Samson appealed. The state argued that the mental state of Bercier was not a controlling issue and contended that it was not necessary to instruct the jury on the mental state of negligent homicide because the instructions as a whole properly included the key concepts of a wrongful death action. The Supreme Court agreed with the state. The fundamental issue concerned the state's negligence, not Bercier's mental state. Nevertheless, Samson was still able to present the foreseeability theory under the instructions that were given, so failure to give Samson's offered instruction did not result in prejudice to Samson's case. It is within a District Court's discretion to decide how to instruct the jury, taking into account the theories of the contending parties, and absent an abuse of discretion, the District Court was affirmed. Samson v. St., 2003 MT 133, 316 M 90, 69 P3d 1154 (2003). See also Busta v. Columbus Hosp. Corp., 276 M 342, 916 P2d 122 (1996).

State Not Liable for Unforeseeable Accident — Intervening Criminal Act of Third Person — Expert Testimony on Foreseeability Proper: Samson's son was killed by Bercier, a youth who walked away from a nonsecure, supervised licensed youth group home. Samson sued the state for negligence. The jury returned a verdict for the state, and Samson appealed. Rather than retry the case and evaluate the facts to determine whether the state was negligent, the Supreme Court reviewed the verdict to determine if there was substantial evidence to support it and determined that there was. In order to sustain a negligence action, plaintiff must establish a legal duty on the part of defendant, a breach of that duty, causation, and damages. In cases involving a dispute over the intervening criminal act of a third party, foreseeability must be analyzed twice—first with regard to the existence of a legal duty and second with regard to proximate causation. Samson contended that the District Court erred in allowing the state to present evidence in the form of expert testimony and to argue that the shooting was an unforeseeable accident. The state argued that the expert testimony was relevant and aided the jury. Given the need to determine the foreseeability of Bercier's actions, the expert testimony was properly allowed. Further, in cases alleging an intervening cause, juries must be instructed that the specific injury to plaintiff need not have been foreseen. Samson v. St., 2003 MT 133, 316 M 90, 69 P3d 1154 (2003), affirming Lacock v. 4B's Restaurants, Inc., 277 M 17, 919 P2d 373 (1996). See also Lopez v. Great Falls Pre-Release Serv., Inc., 1999 MT 199, 295 M 416, 986 P2d 1081 (1999), and St. v. LaTray, 2000 MT 262, 302 M 11, 11 P3d 116 (2000).

Conditions for Seeking Damages in Survival and Wrongful Death Actions: A survival action belongs to the decedent's estate, allowing recovery for injury to the deceased from the action causing death, and damages recoverable in the action are personal to the decedent, so the estate's right of recovery is identical to the decedent's right, had the decedent lived. Only the personal representative may sue for damages suffered by the decedent in a survival action. Neither the surviving spouse nor any other heir has a legal right to pursue the action unless appointed personal representative. In a survival action, the decedent's estate may recover damages for: (1) lost earnings from the time of injury to death; (2) the present value of the decedent's reasonable earnings during the decedent's life expectancy; (3) medical and funeral expenses; (4) pain and suffering; and (5) other special damages. No Montana law requires an offset of lost future earnings for economic consumption, and an award for future earnings should not be reduced on account of economic consumption. By contrast, a wrongful death action is personal to the decedent's heirs and independent of any cause of action available to the estate and seeks to compensate the heirs for the harm or damages that they personally suffered as a result of the decedent's death. Generally, a wrongful death plaintiff may recover for: (1) loss of consortium; (2) loss of comfort and society; and (3) the reasonable value of the monetary contributions that the decedent would have provided for the support, education, training, and care of the heirs during the life expectancy of the decedent and survivors. Thus, a reduction for economic consumption and the cost of maintenance applies in wrongful death actions. Therefore, in survival actions, the decedent's estate is entitled to recover the full value of the lost future earnings including that portion attributable to economic consumption, while in wrongful death actions, the decedent's heirs are not entitled to the economic consumption allocation. Payne v. District Court, 2002 MT 313, 313 M 118, 60 P3d 469 (2002), following Burns v. Eminger, 84 M 397, 276 P 437 (1929), and Swanson v. Champion Int'l Corp., 197 M 509, 646 P2d 1166 (1982). Swanson and Payne were followed in Hern v. Safeco Ins. Co. of Ill., 2005 MT 301, 329 M 347, 125 P3d 597 (2005).

Supervisory Control of Issue Related to Wrongful Death and Survival Action and Evidence of Economic Consumption: Plaintiff sought supervisory control of an action related to evidence of economic consumption as it pertained to a survival action and wrongful death. The Supreme

Court found that allowing the District Court to permit the jury to consider evidence of economic consumption in this case would be a mistake of law constituting a deviation from well-established jurisprudence that would alter the cost of and preparation for trial, affect settlement negotiations, and call into question the value of any potential verdict, resulting in additional time and expense for appellate resolution and subsequent litigation. Any remedy available to plaintiff on direct appeal would thus prove inadequate, resulting in a gross injustice. Therefore, the Supreme Court held that this was an appropriate case in which to exercise supervisory control. Payne v. District Court, 2002 MT 313, 313 M 118, 60 P3d 469 (2002).

Wrongful Death — Survival Action — Venue: Plaintiff's husband suffered a heart attack in Rosebud County and later died in Yellowstone County. Plaintiff sued in Yellowstone County. Rosebud County and other defendants moved to change venue. The District Court refused, and the Supreme Court affirmed. That the wrongful death action is combined with a survivorship action that could have been brought in Rosebud County because the survivorship action arose there does not render Yellowstone County an improper place for trial for both. Wentz v. Mont. Power Co., 280 M 14, 928 P2d 237, 53 St. Rep. 1277 (1996).

Wrongful Death — Survival of Action — Tribal Court Jurisdiction: In a suit arising out of an on-reservation automobile accident involving no tribal members, the Tribal Court of the Confederated Salish and Kootenai Tribes of the Flathead Reservation has subject matter jurisdiction over the wrongful death and survivorship claims and personal jurisdiction over the tortfeasor, a nonmember resident of the reservation. Initiation of a probate action in the state court did not deprive the tribal court of jurisdiction over the survivorship claim. Hinshaw v. Mahler, 42 F3d 1178 (9th Cir. 1994), overruled concerning general propositions on tribal jurisdiction in Strate v. A-1 Contractors, 520 US 438, 137 L Ed 2d 661, 117 S Ct 1404 (1997).

Proceeds of Wrongful Death or Survival Claim — Ownership by Heirs or Survivors: Under Swanson v. Champion Int'l Corp., 197 M 509, 646 P2d 1166 (1982), the ownership of proceeds from settlement of wrongful death or survival claims belongs to the heirs or the estate, respectively. In this case, a $95,000 settlement draft was paid to settle claims against the insured driver in exchange for his release from claims for wrongful death and personal injury. The draft was made payable to the estate and to the estate's attorney. However, the estate offered evidence that there was no agreement to pay any fee to the attorney from those proceeds. Applying *Swanson*, the evidence created a factual issue regarding ownership of the proceeds and accrued interest sufficient to preclude summary judgment and a directed verdict requested by the attorney regarding payment of fees. Eatinger v. Johnson, 269 M 99, 887 P2d 231, 51 St. Rep. 1484 (1994).

Wrongful Death — Survival of Action — Tribal Court Jurisdiction: In a suit arising out of an on-reservation automobile accident involving no tribal members, the Tribal Court of the Confederated Salish and Kootenai Tribes of the Flathead Reservation has subject matter jurisdiction over the wrongful death and survivorship claims and personal jurisdiction over the tortfeasor, a nonmember resident of the reservation. Initiation of a probate action in the state court did not deprive the tribal court of jurisdiction over the survivorship claim. Hinshaw v. Mahler, 42 F3d 1178 (9th Cir. 1994).

Proper Venue for Wrongful Death Action: As set out in Carroll v. W.R. Grace & Co., 252 M 485, 830 P2d 1253 (1992), because death is a necessary element in a wrongful death action, a wrongful death action accrues at the time of the death rather than on the date of injury, for statute of limitations purposes. The corollary to Carroll is that for purposes of determining venue under 25-2-126, a wrongful death claim arises where the death occurs. Gabriel v. School District No. 4, 264 M 177, 870 P2d 1351, 51 St. Rep. 217 (1994), followed in Wentz v. Mont. Power Co., 280 M 14, 928 P2d 237, 53 St. Rep. 1277 (1996). However, see Meyer v. Mont. Power Co., LLC, 2005 MT 66, 326 M 283, 109 P3d 269 (2005), in which it was held that in cases with multiple defendants, neither Gabriel nor Meyer establish those counties where survivorship or wrongful death actions arose as exclusive venues for survivorship/wrongful death actions.

Supreme Court Recognizes Wrongful Death Claim for Stillborn Fetus: Alexa Strzelczyk brought a wrongful death action against her physician for the death of her full-term, stillborn fetus. The defendant, Jett, removed the case to federal court because neither party still resided in Montana. The federal court certified the case to the state Supreme Court because of the state court's decision in Kuhnke v. Fisher, 210 M 114, 683 P2d 916 (1984), holding that under state law at that time, wrongful death statutes did not support a claim for the death of a stillborn fetus. The federal court noted that the statutes had been revised since the 1984 decision. The Supreme Court ruled that the revised statutes provided for an action for the wrongful death of a "person", rather than "minor child", and that a child conceived but not yet born is defined as an "existing person" under the law, so far as may be necessary for its interest in the event of its subsequent

birth. The Supreme Court noted that "live" birth is not statutorily required. The Supreme Court also held that each case must be considered carefully to determine if the circumstances make it "necessary" for the fetus to be determined to be a person in order to protect some interest. Strzelczyk v. Jett, 264 M 153, 870 P2d 730, 51 St. Rep. 206 (1994).

When Wrongful Death Action Accrues: No claim exists until all elements of a cause of action occur pursuant to 27-2-102, and death is an element of a wrongful death claim under this section. Therefore, a wrongful death action in Montana accrues at the time of decedent's death. Carroll v. W.R. Grace & Co., 252 M 485, 830 P2d 1253, 49 St. Rep. 24 (1992).

Negligence Action for Failure to Prevent Suicide — General Rule — Exceptions: Plaintiff brought a wrongful death action founded on negligence for failure of defendant to prevent the suicide of plaintiff's uncle. Regarding civil liability for suicide, the Supreme Court expressly adopted the general rule set out in 41 ALR 4th 353 that negligence actions for the suicide of another will generally not lie because the act of suicide is considered a deliberate intervening act exonerating the defendant from legal responsibility. The two narrow exceptions deal with: (1) causing another to commit suicide; and (2) allowing the imposition of a duty to prevent suicide but only in a custodial situation where suicide is foreseeable. A landlord-tenant relationship did not meet the criteria for establishing a custodial relationship. Krieg v. Massey, 239 M 469, 781 P2d 277, 46 St. Rep. 1839 (1989), cited in Marazzato v. Burlington N. RR Co., 249 M 487, 817 P2d 672, 48 St. Rep. 804 (1991).

One-Action Rule Not Applicable to Death of Minor — Action for Wrongful Death of Child Settled by Personal Representative — Allocation of Proceeds: The one-action rule applied to wrongful death of an adult under 27-1-513, providing that only one action may be brought by the personal representative, does not apply to the wrongful death of a child in 27-1-512, under which either parent may bring an action. However, where the mother was properly appointed personal representative, it was not error for the probate court to authorize her to settle both the wrongful death action and the survival action, which could only be settled by the personal representative, and to approve allocation of the proceeds of the settlement between the two actions. In re Estate of Farnum, 224 M 304, 730 P2d 391, 43 St. Rep. 2205 (1986).

Jury Verdict on Wrongful Death — Survival Claims Inconsistent: In this medical malpractice case, the jury awarded $75,000 on the wrongful death claim and zero on the survival claim. This verdict was totally inconsistent and contrary to the mandates of law; therefore, a new trial was properly granted under 25-11-102. The same act of negligence by the defendant was the basis for both actions. If the negligence which caused personal injury to the living victim caused his later death, a jury would be compelled to award damages for his personal injury as well as awarding damages on the wrongful death claim. Rudeck v. Wright, 218 M 41, 709 P2d 621, 42 St. Rep. 1380 (1985), distinguished, with regard to liability for negligent design and supervision of a water pipeline project, in Jim's Excavating Serv., Inc. v. HKM Associates, 265 M 494, 878 P2d 248, 51 St. Rep. 623 (1994), and also distinguished, in a case involving contested evidence of survivorship damages, in Barnes v. United Indus., Inc., 275 M 25, 909 P2d 700, 53 St. Rep. 17 (1996).

Mother as Proper "Heir" to Bring Wrongful Death Action: When decedent was killed in an auto accident, her only surviving relatives of any degree of kinship mentioned in the intestate succession statute were her mother and a sister, who filed a joint petition for a declaratory judgment as to who could maintain an action for decedent's wrongful death. The District Court correctly ruled that the mother was the sole heir for purposes of bringing the action. The court applied the intestate succession statutory definition of "heirs" in effect at the time the wrongful death act was amended to allow only the "heirs and personal representatives" of the decedent to recover. "Heirs" means those who take upon decedent's death under the intestacy statute. In re Norwest Capital Management & Trust Co., 215 M 399, 697 P2d 930, 42 St. Rep. 493 (1985).

Right of Minor Children to Bring Wrongful Death Action Though Spouse Survives: The issue of a decedent who is survived by his spouse may maintain an action for damages under 27-1-513, even though the Uniform Probate Code (UPC) now defines "heirs" as those who are entitled to the property of the decedent under intestate succession and, under the intestate succession statutes, a surviving spouse is entitled to all of the estate. Prior to enactment of the UPC, minor children could bring a wrongful death action. That right was not repealed by adoption of the UPC. Section 72-1-106 does not obviate a minor's right since the UPC provisions control only if other statutory provisions conflict with probate, guardianship, and estate matters. Wrongful death is not within these subjects. Johnson v. Marias River Elec. Co-op, Inc., 211 M 518, 687 P2d 668, 41 St. Rep. 1528 (1984).

Personal Representative's Right to Pursue Wrongful Death Action Instead of Survivorship Action: A decedent's personal representative clearly has a prior right to pursue a wrongful death

action on behalf of the heirs in order to avoid the diseconomies and confusion caused by a plethora of lawsuits. Decedent's wife could thus, as his personal representative, pursue a wrongful death action. Decedent's ex-wives claimed that the personal representative had improperly failed to file a survivorship action instead of a wrongful death action in the hopes that she could (unfairly) increase her portion of any recovery. In re Pegg's Estate, 209 M 71, 680 P2d 316, 41 St. Rep. 558 (1984).

Probate Court's Jurisdiction Over Wrongful Death Action in Another District: Estate was being probated in one District Court, and personal representative's wrongful death action was being considered in another district. The probate court exceeded its jurisdiction when it assumed jurisdiction over the settlement of the wrongful death action, approved it, and ordered dismissal of the action. The Supreme Court stated that whether the proceeds of the settlement or award in the wrongful death action belonged to the estate or to the heirs was pertinent to the issue of the probate court's jurisdiction over the wrongful death action and that the probate court had jurisdiction only if the proceeds belonged to the estate. The Supreme Court did not appear to definitively decide the underlying issue, though it leaned toward the traditional rule that the proceeds belong to the heirs, are personal to them, and constitute no part of the estate. The court stated that it was for the Legislature to decide whether a District Court acting as a probate court should have some jurisdiction over a wrongful death claim filed in another District Court. In re Pegg's Estate, 209 M 71, 680 P2d 316, 41 St. Rep. 558 (1984).

No Recovery for Decedent's Nonadopted Minor Stepchildren: When the issue was certified to it by the U.S. District Court, the Montana Supreme Court ruled that nonadopted minor stepchildren of a decedent cannot state a claim for the deprivation of decedent's consortium and support. Versland v. Caron Transp., 206 M 313, 671 P2d 583, 40 St. Rep. 1681 (1983).

General Discussion of Wrongful Death and Survival Actions: For general discussion of wrongful death and survival actions, see Swanson v. Champion Int'l Corp., 197 M 509, 646 P2d 1166, 39 St. Rep. 639 (1982). See also Sorum v. Rieder & Co., 205 M 98, 666 P2d 1221, 40 St. Rep. 1120 (1983), for discussion of application of Swanson rule.

Proof of Source of Blood Used for Blood Tests: There was no merit to the argument that defendants, sued for wrongful death, failed to prove that blood used for blood alcohol tests admitted in evidence came from motor vehicle accident victims where plaintiff did little more than selectively present testimony at trial and the persons who took the blood samples had no doubt that they were taken from victims. McAlpine v. Midland Elec. Co., 194 M 154, 634 P2d 1166, 38 St. Rep. 1577 (1981).

Availability of Wrongful Death Remedy Under Former Law: The defendants in this wrongful death and survival action owned a rental house leased to the plaintiff. The plaintiff's husband died of an electrical shock received through the plumbing of the house. The plaintiff appealed the granting of a summary judgment motion to the defendants. The Residential Landlord and Tenant Act was adopted after this case arose, so its adoption of the doctrine of implied warranty of habitability was inapplicable. The Supreme Court here examined case law prior to the new statute and overruled a holding in the Dier case that if the landlord fails to repair, after notice, the tenant may himself repair, within a certain limit, or move out; but he has no redress in damages for injury to person or property consequent upon the landlord's failure to repair. That holding was not applicable to cases involving tenant suits for personal injuries against a landlord. Citing Art. II, sec. 16, Mont. Const., the court said that it would be patently unconstitutional to deny a tenant all causes of action for personal injuries or wrongful death arising out of the alleged negligent management of rental premises by a landlord. A repair and deduct statute provides no alternative remedy for damages caused by personal injury or wrongful death. The duty of care in section 58-607, R.C.M. 1947, now 27-1-701, was held applicable. This is a duty to exercise ordinary care in the management of the premises to avoid exposing persons thereon to an unreasonable risk of harm, subject to the defenses of contributory negligence or assumption of risk. Corrigan v. Janney, 192 M 99, 626 P2d 838, 38 St. Rep. 545 (1981).

Interfamily Tort Immunity: Personal representative does not have right superior to that of deceased. Doctrine of interfamily tort immunity is a defense to wife's personal representative's cause of action to recover wrongful death damages where husband's negligence caused wife's death. St. Farm Mut. Auto. Ins. Co. v. Leary, 168 M 482, 544 P2d 444 (1975).

Limitation of Actions: An action under this section for wrongful death is governed by the 3-year limitation rather than by the 2-year limitation. Bryant v. Hall, 157 M 28, 482 P2d 147 (1971), overruling Smith v. Wiprud, 154 M 325, 463 P2d 317 (1969).

One Action for Wrongful Death: This section specifically provides that there can be but one action for a wrongful death and that such action must be prosecuted and maintained by the personal representative. State ex rel. Carroll v. District Court, 139 M 367, 364 P2d 739 (1961).

Substitution of Parties: District Court was directed to deny petition of decedent's divorced wife, guardian ad litem of decedent's and her children, to intervene in wrongful death action, commenced by the widow as administratrix and trustee for the decedent's minor children, and to strike from the files the complaint in intervention as an attempted substitution of party plaintiffs in a wrongful death action. State ex rel. Carroll v. District Court, 139 M 367, 364 P2d 739 (1961).

Municipal Liability: In enforcing city ordinances and laws, a city policeman is acting as an agent of the state, and the city, therefore, is not responsible in damages for his conduct. Kingfisher v. Forsyth, 132 M 39, 314 P2d 876 (1957).

Workers' Compensation Cases: The widow of an employee insured under the Workmen's Compensation Act (now Workers' Compensation Act) and killed in the performance of his duties, after being awarded workmen's compensation, had the right, as heir and administratrix, to bring a negligence action against the driver of the car which killed her husband and employ an attorney to conduct the case, the latter being given a first lien upon his client's cause of action by 37-61-420, which cannot be affected by the subrogation provisions of the Workmen's Compensation Act (now Workers' Compensation Act). Hardware Mut. Cas. Co. v. Butler, 116 M 73, 148 P2d 563 (1944).

Parties Plaintiff: The right of action for damages given by this section to the heirs or personal representative of an adult whose death is caused by wrongful act or negligence is solely for the benefit of the heirs, the representative merely acting as their trustee and the amount recovered not being a part of decedent's estate; hence the complaint of an administrator setting forth the damages sustained by decedent's father and mother was not open to demurrer on the ground of misjoinder of parties plaintiff (the administrator and the heirs) or causes of action, recovery by the administrator barring a subsequent action by the heirs. Batchoff v. Butte Pac. Copper Co., 60 M 179, 198 P 132 (1921).

Derivative Nature of Action:

This section does not create a cause of action in favor of the wife and children of one, not a minor, killed by the wrongful act or neglect of another, because of the wrong done to them; the words of the statute "wrongful act or neglect of another" imply actionable wrong or negligence toward the decedent and not toward his surviving wife and children. Melville v. Butte-Balaklava Copper Co., 47 M 1, 130 P 441 (1913).

Where a man not a minor has been killed by the wrongful act or neglect of another, the right of his widow and children to recover damages depends upon whether the decedent, had he survived his injuries, could have recovered, inasmuch as they claim under him. Melville v. Butte-Balaklava Copper Co., 47 M 1, 130 P 441 (1913).

Joinder of Employer and Employee: A master and his servant may properly be joined as defendants in an action for personal injuries directly caused by the negligence of the servant, for which negligent act the master is answerable under the doctrine of respondeat superior. Knuckey v. Butte Elec. Ry., 41 M 314, 109 P 979 (1910).

Adult Children of Decedent as Plaintiffs: As this section does not limit the right of recovery for the death of a parent to minors, it was for the jury to say, under the evidence, whether the children of the deceased, both of legal age, suffered damage through the death of their father and what sum would compensate them. Hollingsworth v. Davis-Daly Estates Copper Co., 38 M 143, 99 P 142 (1909).

Imputed Liability: While this section imposes responsibility upon all whose actual wrongdoing contributes to the death of another, whether they be employees or employers, indemnitees or indemnitors, responsibility for reputed wrongdoing is imposed upon but one class, namely, employers; and the rule of expressio unius est exclusio alterius therefore operates to exclude all liability of indemnitors, except for actual, as distinguished from imputed, wrongdoing. Northam v. Cas. Co. of Am., 177 F 981 (9th Cir. 1909).

Exemplary Damages: There is no reason why 27-1-221, relative to exemplary damages, should not apply to actions begun by virtue of the legislative permission granted by this section when the defendant is charged primarily as the wrongdoer. Olsen v. Mont. Ore Purchasing Co., 35 M 400, 89 P 731 (1907).

Law Review Articles

Recognizing Parental Consortium: Montana Follows a National Trend in Pence v. Fox, Vannatta, 54 Mont. L. Rev. 149 (1993).

Such Damages as Are Just: A Proposal for More Realistic Compensation in Wrongful Death Cases, Strong & Jacobsen, 43 Mont. L. Rev. 55 (1982).

Collateral References

Death *key* 78 through 101.

25A C.J.S. Death §§95 through 128.

22A Am. Jur. 2d Death §186, et seq.

Recovery, in action for benefit of decedent's estate in jurisdiction which has both wrongful death and survival statutes, of value on earnings decedent would have made after death. 76 ALR 3d 125.

27-1-514. Who may sue for whose seduction.

Case Notes

Marriage of Plaintiff: Where plaintiff in an action for her seduction brought under this section married one other than defendant between the time of the commencement of the action and the trial, such marriage did not abate the action. Taylor v. Rann, 106 M 588, 80 P2d 376 (1938).

Statute of Limitations: Where acts of intercourse under a promise of marriage continued from September 1932 until November 1, 1935, the cause of action accrued at the time the first act of intercourse was completed, and the action was barred by 27-2-204, 2 years thereafter, in September 1934. The court rejected the contention that continued acts constituted one transaction and Statute of Limitations started to run at the time of the last act. Taylor v. Rann, 106 M 588, 80 P2d 376 (1938).

Collateral References

Seduction *key* 11.

70 Am. Jur. 2d Seduction §§49, 50.

Part 6
Abolition of Certain Causes of Action

27-1-602. Cause of action for breach of promise abolished — right to damages for fraud and unjust enrichment preserved.

Case Notes

Engagement Ring Given in Contemplation of Marriage Not Considered Gift — Conditional Gift Analysis: Albinger gave Harris a $29,000 diamond engagement ring when the two promised to marry. The relationship was strained, resulting in breakups and the return of the ring to Albinger several times, but each time the couple reconciled, and the ring was returned to Harris. Following their final separation, Albinger told Harris to "take the car, the horse, the dog, and the ring", so Harris moved to Kentucky, marriage plans evaporated, and Harris refused to return the ring. Albinger filed in District Court to settle ownership of the ring. The District Court found the ring to be a gift in contemplation of marriage, implying that the existence of a condition attached to the gift, and held that Albinger was entitled to return of the ring upon failure of the condition of marriage. Harris appealed, and the Supreme Court reversed. The rights and duties of parties regarding property exchanges in contemplation of marriage are determined by existing law and common-law principles. A gift is a transfer of personal property made voluntarily and without consideration, and the essential elements of an inter vivos gift are donative intent, voluntary delivery, and acceptance by the recipient. Delivery, which manifests the intent of the giver, must turn over dominion and control of the property to the recipient, and when made without condition, such a gift becomes irrevocable upon acceptance, so the Supreme Court will not void the transfer when the giver experiences a change of heart. The only revocable gift recognized under Montana law is a gift in view of death, and a gift causa mortis may be revoked by the giver at any time and is revoked by the giver's recovery from the illness or escape from the peril under which the gift was made. However, the Supreme Court declined to analogize gifts in contemplation of marriage with a gift in contemplation of death. Further, a purported gift that is part of the inducement for an agreement to do or not do a certain thing becomes the consideration essential to contract formation. An exchange of promises creates a contract to marry, albeit an unenforceable one, so when an engagement ring is given as consideration for the promise to marry, a contract is formed and legal action to recover the ring is barred by the abolition of breach of promise actions in this section. Here, the engagement ring was an unconditional, completed gift upon acceptance, and a completed gift is not revocable. Thus, the ring remained in Harris's ownership and control. Albinger v. Harris, 2002 MT 118, 310 M 27, 48 P3d 711 (2002).

Failure to Keep Promise to Pay Medical Bills if Injured Person Travels to Exam — No Fraud: The District Court properly granted the church summary judgment on issues of fraud and misrepresentation in an action arising after plaintiff fell and was injured on church property. Plaintiff claimed that the church agreed in writing to pay medical bills if plaintiff would travel to Salt Lake City for a medical exam. Plaintiff did so, and the church failed to pay. The promise to pay money in the future was not a representation, the first element of a prima facie case for fraud or misrepresentation. Davis v. Church of Jesus Christ of Latter Day Saints, 258 M 286, 852 P2d 640, 50 St. Rep. 535 (1993).

Part 7
Liability

Part Case Notes

No Liability of Equine Activity Sponsor for Unavoidable Risks or Inherent Risks of Which Participant Is or Should Be Aware: Equine activity sponsors have no duty to protect participants from unavoidable risks or from the inherent risks of equine activities of which the participant is or should be aware. As long as the participant expects a risk inherent in equine activities, the equine activity sponsor is not liable for injury suffered as a result of that risk. McDermott v. Carie, LLC, 2005 MT 293, 329 M 295, 124 P3d 168 (2005).

Sufficient Evidence to Support Jury Verdict That Principal Breached Fiduciary Duty to Its Agent: An insured brought an action against Deonier, an insurance agent, and Paul Revere Life Insurance Company (Revere) to recover benefits and damages after the insured's claim was denied on grounds of a preexisting condition, despite the incontestability clause in the policy. The agent cross-claimed against the company for indemnity and breach of fiduciary duty, contending that there was a significant amount of evidence that Revere planned to assert the Forman defense in Montana (see Mass. Cas. Ins. Co. v. Forman, 516 F2d 425 (5th Cir. 1975), in which an insurer asserted a legal defense to the incontestability clause based on its definition of sickness as excluding disabilities that manifested themselves prior to the date of issue of the policy) and that Revere's failure to inform Deonier of its intention to invoke the defense was a clear breach of Revere's duty to inform its agents of a risk of pecuniary loss from potential lawsuits. Revere asserted that pursuant to Doettl v. Colonial Life & Accident Ins. Co., 505 F. Supp. 127 (D.C. Mont. 1981), in which a Montana federal District Court endorsed the Forman defense, it had no reason to believe that its policy interpretation might be in violation of Montana law and therefore did not breach its duty to inform its agents of risk of pecuniary loss. In the first Deonier case, Deonier & Associates v. Paul Revere Life Ins. Co., 2000 MT 238, 301 M 347, 9 P3d 622 (2000), the Supreme Court reversed the lower court's summary judgment in favor of Revere that held that there had not been a breach of fiduciary duty and remanded the case back to the lower court for a jury trial on the issue of liability and damages. The jury found for Deonier and awarded her $150,000 in compensatory damages and $1 million in punitive damages, which the trial court reduced to $375,000. The trial court denied Revere's motion for judgment as a matter of law that it had not breached its fiduciary duty. The Supreme Court affirmed on the basis that Deonier had presented evidence that Revere knew it would assert the Forman defense and that such an action might lead to pecuniary damages for its agents, and therefore there existed a legally sufficient evidentiary basis for a reasonable jury to find that a breach of fiduciary duty had occurred. Deonier & Associates v. Paul Revere Life Ins. Co., 2004 MT 297, 323 M 387, 101 P3d 742 (2004).

No Evidence of False Representation of Material Fact — Claim of Negligent Misrepresentation Properly Dismissed: Plaintiff claimed that vinyl siding was sold, furnished, and installed on her home under misleading circumstances because the installer failed to clearly identify the relationship with the siding manufacturer. However, plaintiff failed to specify any false statements made by either the installer or the manufacturer that led her to believe that this was true. Absent evidence demonstrating the primary element of the cause of action, plaintiff's negligent representation claim failed as a matter of law. Osterman v. Sears, Roebuck & Co., 2003 MT 327, 318 M 342, 80 P3d 435 (2003), following Yellowstone II Dev. Group, Inc. v. First Am. Title Ins. Co., 2001 MT 41, 304 M 223, 20 P3d 755 (2001).

Defaulting Buyer Under Unambiguous Written Contract Cannot Rely Upon Expectations Not Covered by Contract to Avoid Contract — Disposition of Downpayment Amounts Paid and Due — County Not Liable for Negligent Misrepresentation as to Recordability of Deeds and Seller's Title Insurer Not Liable for Loss in Marketability: Documents for the sale and purchase of two sections of land unambiguously showed, and it was undisputed, that the resale of 20-acre parcels by the buyer, the immediate acceptance by the county of 20-acre resale deeds of a type that would make subdivision review unnecessary, and the ability to resell without having to undergo

subdivision review were not parts of the bargain. The parties knew that these things were contemplated, but the documents did not refer to them or make them a part of the contract. Before the contract was made, the county indicated that it would accept the 20-acre resale deeds. The deal fell through when the county changed its position after the contract was signed. The buyer failed to pay the whole downpayment, and the seller terminated the contract and kept the paid portion of the downpayment. Precontract discussions on the matter must be disregarded as parol evidence because the documents were unambiguous and did not refer to the matter. The buyer was not entitled to rescind the contract and have the paid portion of the downpayment returned based on mutual mistake or failure of consideration. There was no mutual mistake because the parties knew that it was not a certainty that the county would accept the deeds. There was no failure of consideration because the resale, county acceptance of the deeds, and avoidance of subdivision review were not part of the written contract. In addition, the need for a subdivision review would not make the land unmarketable; at most, its market value decreased and it would take longer to sell it. Furthermore, a party in default is not entitled to rescission. The seller was entitled to terminate the contract. The seller was also entitled to keep an amount of the paid portion of the downpayment equal to the amount by which the contract price for the land exceeded the market value of the land at the time of the breach. The seller was not entitled to keep the remainder of the paid portion of the downpayment or to a judgment for the unpaid portion of the downpayment because the contract did not provide for that remedy. The county was not liable in tort to the seller for negligent misrepresentation, and the buyer's title insurance company was not liable to the seller for the loss in the marketability of the land caused by the need for subdivision review. Yellowstone II Dev. Group, Inc. v. First Am. Title Ins. Co., 2001 MT 41, 304 M 223, 20 P3d 755 (2001).

Imposition of Liability as Matter of Law as Sanction for Discovery Abuse: Following extensive discovery requests, plaintiffs moved to compel discovery and for sanctions. The District Court imposed liability as a matter of law upon defendants as a sanction for discovery abuse. The court based its decision on findings that defendants: (1) misrepresented their corporate ownership and control; (2) falsely represented in briefs and at hearing that all pertinent documents had been provided; (3) knowingly withheld and concealed significant information; (4) falsely represented their involvement with equipment design and construction standards; and (5) falsely represented that certain investigation documents had been prepared for purposes of litigation. Citing In re Adoption of R.D.T., 239 M 33, 778 P2d 416 (1989), defendants contended on appeal that the court's use of deposition testimony solicited subsequent to defendants' discovery responses invoked the wisdom of hindsight, resulting in a Kafkaesque nightmare. After examining the record and noting sufficient evidence supporting the District Court's findings of defendants' repeated and willful concealment and misrepresentation of facts during discovery, the Supreme Court held that defendants had misconstrued both R.D.T. and Franz Kafka, noting that if anyone in the case were guilty of creating a nightmare, it was defendants through their refusal to comply with rules of discovery and civil procedure and to disclose information necessary for the proper presentation of plaintiffs' case. Imposition of liability as a matter of law as a sanction for discovery abuses was affirmed. Bulen v. Navajo Refining Co., Inc., 2000 MT 222, 301 M 195, 9 P3d 607, 57 St. Rep. 912 (2000), following First Bank v. Heidema, 219 M 373, 711 P2d 1384 (1986).

Criminal Liability Based on Failure to Act When Self-Preservation at Issue — No Legal Duty to Perform Legal Duty at Personal Risk: For criminal liability to be based on a failure to act, there must be a legally imposed duty to act and the person must be physically capable of performing the act. When self-preservation is at stake, the law does not require a person to save another's life by sacrificing one's own. No crime is committed by a person who in saving one's own life in the struggle for the only means of safety causes the death of another. Accountability may still exist for the results of the peril into which one person places another, but the law does not require a person to risk serious bodily injury to perform a legal duty. (See 40 Am. Jur. Homicide §116 (1999).) State ex rel. Kuntz v. District Court, 2000 MT 22, 298 M 146, 995 P2d 951, 57 St. Rep. 111 (2000), following St. v. Mally, 139 M 599, 366 P2d 868 (1961), and distinguishing People v. Beardsley, 113 NW 1128 (1907). See also Burns v. Fisher, 132 M 26, 313 P2d 1044 (1957).

Justifiable Use of Force — No Duty to Assist Aggressor in Zone of Risk — Revival of Duty to Summon Aid: Kuntz was charged with negligent homicide for stabbing Becker and then failing to immediately call for medical assistance. Kuntz pleaded justifiable use of force. The state contended that even if the use of force was justified, a proved subsequent failure by Kuntz to summon aid could constitute a gross deviation from ordinary care. The Supreme Court held that when a person justifiably uses force to fend off an aggressor, that person has no duty to assist the aggressor in any manner that could conceivably create the risk of bodily injury to that person or

to other persons. This absence of a duty necessarily includes any conduct that would require the person to remain in or return to the zone of risk created by the original aggressor. The victim has but one duty after fending off an attack, and that is the duty owed to one's self, as a matter of self-preservation, to seek and secure safety away from the place where the attack occurs. Thus, a person who justifiably acts in self-defense is temporarily afforded the same status as an innocent bystander (see Pope v. St., 396 A2d 1054 (Md. 1979)). However, the duty to summon aid may in fact be revived but only after the victim has fully exercised the right to secure safety from personal harm. Only then may a legal duty be imposed to summon aid for the person placed in peril by an act of self-defense, and before that duty is imposed, there must be a showing that: (1) the person had knowledge of the facts indicating a duty to act; and (2) the person was physically capable of performing the act. Even so, a proved breach of the legal duty may still fall short of negligent homicide, which requires a gross deviation from an ordinary or reasonable standard of care. To find a person who justifiably acts in self-defense criminally culpable for causing the death of the aggressor, the failure to summon aid must be the cause in fact of the aggressor's death, not the justified use of force itself. State ex rel. Kuntz v. District Court, 2000 MT 22, 298 M 146, 995 P2d 951, 57 St. Rep. 111 (2000), following St. v. Bier, 181 M 27, 591 P2d 1115, 36 St. Rep. 466 (1979).

Sale of Trust Lands Within Flathead Reservation — No Jurisdiction Found for Purposes of Breach of Contract, Fraud, and Negligent Misrepresentation: Neuman, an enrolled member of the Confederated Salish and Kootenai Tribes, sought assistance from the Bureau of Indian Affairs (BIA) to clear the title to trust land within the Flathead Reservation so that Neuman could sell it. He also engaged a real estate broker. Both Neuman and prospective buyers, the Krauses, made considerable efforts to consummate the sale, but Neuman was informed by the BIA that there was a substantial cloud on the title. Neuman therefore terminated the listing agreement, and the Krauses sued for damages, alleging breach of contract, fraud, constructive fraud, fraud in the inducement, and negligent misrepresentation. The District Court, on the recommendation of a special master and after applying the test laid out in State ex rel. Iron Bear v. District Court, 162 M 335, 512 P2d 1292 (1973), found a lack of subject matter jurisdiction. The Supreme Court held that 25 U.S.C. 345 and 28 U.S.C. 1353 vest exclusive jurisdiction in the federal courts over disputes involving allotted lands within Indian reservations and that 28 U.S.C. 1360 preempted its jurisdiction. The Supreme Court also held that the Krauses' lawsuit was a dispute involving title to allotted lands even though the action was a tort claim and breach of contract claim because all of the Krauses' claims could not be separated from questions of title to Indian trust lands. Noting that it had already held in In re Marriage of Wellman, 258 M 131, 852 P2d 559 (1993), that an attempt by state courts to adjudicate rights in Indian trust land for the purpose of money damages was precluded by federal law, the Supreme Court held that it made no difference that the Krauses had deleted from their complaint a prayer for specific performance. The claims could still not be separated from the issue of title to Indian lands. Krause v. Neuman, 284 M 399, 943 P2d 1328, 54 St. Rep. 937 (1997).

FELA Action — Conflicting Evidence Found to Be Substantial Evidence — No Negligence Found in Application of Baggage Weight Standards: McGregor, a ticket agent for Amtrak, sued Amtrak for damages under the Federal Employers' Liability Act (FELA) for injuries that she sustained while lifting heavy baggage off a train car onto a baggage cart. McGregor claimed that Amtrak was negligent in adoption and enforcement of its baggage weight limits allowing passengers to pack and employees to lift baggage up to 75 pounds for carriage by Amtrak. Citing Lee v. Kane, 270 M 505, 893 P2d 854 (1995), the Supreme Court found that the evidence conflicted as to whether Amtrak was negligent but found that it was still substantial evidence from which a reasonable mind might conclude that Amtrak was not negligent. McGregor v. Nat'l RR Passenger Corp., 284 M 178, 943 P2d 1269, 54 St. Rep. 834 (1997).

Tort of Malicious Defense Not Recognized in Montana: The plaintiff alleged that the defendant had never intended to engage in litigation yet allowed her attorney to indicate to the plaintiff's bank that litigation was pending. This action resulted in certain funds of the plaintiff being held by the bank, thereby damaging the plaintiff's business relations. The plaintiff argued that the defendant's opposition to the suit against her for tortious interference with a business relation constituted the tort of malicious defense. The Supreme Court held that the tort of malicious defense has never been recognized in Montana. The court stated that it was not deciding if the tort should be recognized but that under the facts, the defendant's actions were not malicious and the tort was not applicable. Smith v. Barrett, 242 M 37, 788 P2d 324, 47 St. Rep. 514 (1990).

Liability of Tortfeasors Acting in Concert: Two defendants who were passengers in a car that was involved in a chase of and subsequent accident with another vehicle claimed that because

they were not in control of the vehicle and did not make any encouraging statements to the driver, they could not be held liable for a tort or for injuries resulting from the accident. However, undisputed facts showed that they voluntarily joined in the pursuit for the purpose of eventually assaulting the occupants of the other vehicle and that they helped to free their own vehicle when it became stuck on a fence, thereby substantially assisting in the chase and encouraging the driver's actions. These facts showed that they acted in concert as tortfeasors, as defined in part in Restatement (Second) of Torts 876 (1979), and were subject to liability; therefore, a partial summary judgment for plaintiff on the issue of liability was proper. Sloan v. Fauque, 239 M 383, 784 P2d 895, 46 St. Rep. 1767 (1989).

Accepted Work Rule Doctrine — Contractor Nonliability: The District Court properly granted summary judgment in favor of a contractor on the issue of negligence based on the accepted work rule doctrine. The doctrine, first recognized in Ulmen v. Schwieger, 92 M 331, 12 P2d 856 (1932), is based on the rule that an independent contractor is not liable to third parties for injuries that occur after the work has been completed and turned over to and accepted by the employer. Instead, the person employing the contractor is substituted as the responsible party. The Supreme Court affirmed the doctrine by refusing to extend contractor liability to foreseeable injury caused by negligent construction. Harrington v. LaBelle's of Colo., Inc., 235 M 80, 765 P2d 732, 45 St. Rep. 2176 (1988), overruled by Pierce v. ALSC Architects, P.S., 270 M 97, 890 P2d 1254, 52 St. Rep. 93 (1995).

Comparison of Conduct in Ascertaining Damages: Willful or wanton conduct may be compared with like conduct for the purpose of ascertaining damages. Refusing an offered instruction on comparing like conduct was error. Gurnsey v. Conklin Co., Inc., 230 M 43, 751 P2d 151, 45 St. Rep. 1 (1988), citing Simonson v. White, 220 M 14, 713 P2d 983, 43 St. Rep. 133 (1986).

Negligence in Selection of Contractor — Employer Liability: In an action involving a fertilizer salesman, the Supreme Court applied the general rule of section 411, Restatement (Second) of Torts, which provides that an employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor to do work that involves a risk of physical harm unless it is skillfully and carefully done. Gurnsey v. Conklin Co., Inc., 230 M 43, 751 P2d 151, 45 St. Rep. 1 (1988).

Certified Question — Interspousal Tort Immunity Abolished: In an original proceeding for declaratory judgment on two certified questions from U.S. District Court, the Supreme Court held that it abolished the defense of interspousal tort immunity in Miller v. Fallon County, 222 M 214, 721 P2d 342, 43 St. Rep. 1185 (1986), because historical reasons for that immunity were no longer valid. Therefore, that doctrine did not bar claim of wife-passenger against her husband-driver for negligence in operation of motor vehicle. (See also 40-2-109.) Noone v. Fink, 222 M 273, 721 P2d 1275, 43 St. Rep. 1258 (1986).

Insurer's Duty to Settle Third-Party Claim Within Policy Limits — Evidence to Support Bad Faith: Plaintiff, a Kalispell ophthalmologist, pierced Frisnegger's eyeball with a needle while administering a local anesthetic to his eyelid. A cataract formed on the eye. Plaintiff notified his local insurance agent and on his direction notified defendant in writing that defendant was entirely at fault. Frisnegger filed suit against plaintiff. Defendant did not feel the claim was worth over $45,000 and refused to settle within the policy limits of $100,000. A jury verdict was returned for Frisnegger in the amount of $175,000. Plaintiff then brought suit against defendant alleging negligence and bad faith on the part of defendant for failure to settle the claim within policy limits. A jury verdict awarding plaintiff compensatory damages of $250,000 and punitive damages of $300,000 was returned. On appeal, the Supreme Court stated that the duty to accept a reasonable offer within policy coverage limits arises from an implied covenant of good faith and fair dealing that neither party will do anything which will injure the right of the other to receive the benefits of the agreement. One of the usual benefits of liability insurance is the settlement of claims without litigation or at least without trial if the cause is litigated. The implied obligation of good faith and fair dealing requires the insurer to settle in an appropriate case, although not required by the express terms of the policy. Where a liability insurance company by the terms of its policy obtains from the insured an irrevocable power to determine whether to accept or reject an offer of compromise, a fiduciary duty between the insured and insurer is created. The court applied the six-factor test set out in Jessen v. O'Daniel, 210 F. Supp. 317 (D.C. Mont. 1982). The court found that the failure of defendant through its agents to follow established standards of investigation, evaluation, negotiation, and communication with its insured were sufficient factors to uphold the jury's finding of bad faith. Gibson v. W. Fire Ins. Co., 210 M 267, 682 P2d 725, 41 St. Rep. 1048 (1984). See also Dunfee v. Baskin-Robbins, Inc., 221 M 447, 720 P2d 1148, 43 St. Rep. 964 (1986).

Possible Differing Conclusions — No Directed Verdict: Plaintiff applied to defendant for health coverage for himself and his family. He met with an agent who filled out the application, which was signed by both parties. Plaintiff was not given a copy of the application or contract and was not advised that the application was part of the contract. The application was accepted. The family contracted medical bills which defendant declined to pay, claiming that the bills stemmed from "preexisting conditions" not covered by the contract. Defendant then unilaterally canceled the contract, claiming plaintiff had misrepresented his family's health in the application, and plaintiff filed suit. Defendant moved for a directed verdict on the issues of actual and constructive fraud and the tort of bad faith, which was denied. If the representations that induced the plaintiff to enter the contract were false, he would have a case in fraud. If the contract were breached, a cause of action may sound in tort, although it arises out of a breach of contract, if the defaulting party by breaching the contract also breaches the duty to act in good faith owed to the other party independently of the contract. The evidence viewed in a light most favorable to plaintiffs indicated reasonable men could differ as to the conclusions drawn from the evidence. Therefore, the directed verdict was properly denied. Weber v. Blue Cross of Mont., 196 M 454, 643 P2d 198, 39 St. Rep. 245 (1982).

Rescue Doctrine — Applicable Only While Harm Happening: The "rescue" doctrine, which provides relief when injury occurs to a person attempting to prevent harm caused by another, is applicable only when the rescue is necessary to halt damage, not after damage has occurred and further possibility of harm has been eliminated. Kiamas v. Mon-Kota, 196 M 357, 639 P2d 1155, 39 St. Rep. 161 (1982).

Duty Owed to Business Invitee: Krone wrenched her knee while being shown a parcel of rural property by McCann, a realtor. Krone cannot describe what caused her injury; she only knows that she stumbled over something, possibly an old corral pole or a mound of dirt. The parties agree that Krone was a business invitee when she was injured. The duty owed to a business invitee is to use ordinary care to keep the premises reasonably safe and to warn the invitee of any hidden or lurking dangers. The property owner is not an insurer against all accidents and injuries to invitees. In this case there were no facts presented indicating that the property owner breached a duty owed to Krone, and the District Court properly granted defendant's motion for summary judgment. Krone v. McCann, 196 M 260, 638 P2d 397, 39 St. Rep. 10 (1982), distinguished in Vincelette v. Metropolitan Life Ins. Co., 273 M 408, 903 P2d 1374, 52 St. Rep. 1035 (1995), overruled, as to the standard that a property owner is absolved of liability because a dangerous condition upon the premises is open and obvious, in Richardson v. Corvallis Pub. School District No. 1, 286 M 309, 950 P2d 748, 54 St. Rep. 1422 (1997), and followed in Gentry v. Douglas Hereford Ranch, Inc., 1998 MT 182, 290 M 126, 962 P2d 1205, 55 St. Rep. 737 (1998).

Availability of Doctrine of Equitable Estoppel: An estoppel arises only when a party by his conduct or acquiescence has caused another in good faith to change his position for the worse. A letter of instruction and joint assignment of funds, unenforceable for lack of consideration and mutuality, was not relied upon by the plaintiff to its detriment since the modular home in question had already been manufactured and delivered by the plaintiff when the letter was executed. Boise Cascade Corp. v. First Sec. Bank of Anaconda, 183 M 378, 600 P2d 173 (1979).

Part Law Review Articles

Limitations on Manufacturer Liability in Second Collision Actions, Reichert, 43 Mont. L. Rev. 109 (1982).

A Framework for Analysis of Products Liability in Montana, Tobias & Rossbach, 38 Mont. L. Rev. 221 (1977).

27-1-701. Liability for negligence as well as willful acts.

Compiler's Comments

Repeal of Provision Terminating Amendment: Section 3, Ch. 516, L. 1987, inserted "Except as otherwise provided by law" at the beginning of this section and in section 7 terminated the amendment July 1, 1991. Section 1, Ch. 171, L. 1995, repealed section 7 and repealed sec. 8, Ch. 530, L. 1991, which extended the termination date to July 1, 1995. The effect of the repeal is to retain the exception clause.

1987 Amendments: Chapters 209, 397, 437, 440, 508, and 516 at beginning inserted exception clause.

Applicability — Effective Date: Section 3, Ch. 437, L. 1987, provided: "This act is effective on passage and approval and applies to claims accruing after the effective date of this act." Pursuant to sec. 3, this act was effective April 9, 1987.

Interim Study Committee Bill: Chapter 437, L. 1987, was introduced at the request of the Joint Interim Subcommittee on Liability Issues. See committee report, Legislative Council, 1986.

Saving Clause: Section 3, Ch. 397, L. 1987, provided: "This act does not affect rights and duties that matured, penalties that were incurred, or proceedings that were begun before the effective date of this act." Pursuant to 1-2-201, this act was effective October 1, 1987.

Severability: Section 4, Ch. 508, L. 1987, was a severability section.

Case Notes

General 719
Duty of Care 742
Negligence as a Matter of Law 763
Causation 770
Res Ipsa Loquitur 781
Willful Acts 784

GENERAL

Use of Redacted Pretort Release to Establish Statutory Liability Shield Allowed: A pretort form indicating a prospective release from liability for negligence is illegal. However, it was not improper for a trial court to allow introduction of a redacted version of an illegal exculpatory agreement to show that an equine activity sponsor was statutorily protected from liability from unavoidable risks or from the inherent risks of equine activities of which the participant was or should have been aware. In the present case, plaintiff failed to cite authority or establish error by the trial court in admitting the redacted agreement, and the Supreme Court affirmed the trial court's denial of plaintiff's motion for a new trial on grounds that the redacted agreement was improperly admitted in evidence. McDermott v. Carie, LLC, 2005 MT 293, 329 M 295, 124 P3d 168 (2005).

No Right to Expectation of Privacy in Public Criminal Records or Negligence in Use of Records: In 1998, Barr applied for a part-time airport security officer position and consented to a background check. A 10-year check revealed no arrests, and Barr was hired. About 1 month later, another security officer requested a criminal background check on Barr, which revealed a 1968 arrest in Alaska for criminal nonsupport. Prior to the end of Barr's probationary period, his employment was terminated, and he sued the airport authority. Barr's claim was summarily dismissed. On appeal, the Supreme Court held that under 44-5-103, Barr's Alaska arrest was public information that anyone could access and its dissemination was not improper and that coupled with Barr's consent to the background check, Barr had no constitutional expectation of privacy in the criminal record. Barr's negligence claims also failed because he failed to offer proof of all elements of common-law negligence. Summary judgment for defendants was affirmed. Barr v. Great Falls Int'l Airport Authority, 2005 MT 36, 326 M 93, 107 P3d 471 (2005).

Emotional Distress Over Loss of Adult Child Not So Severe as to Be Compensable: Plaintiff argued that she suffered extreme emotional distress as the result of her son's death, allegedly caused by defendant's negligence. Applying the test for emotional distress in Sacco v. High Country Independent Press, Inc., 271 M 209, 896 P2d 411 (1995), the District Court held that plaintiff's emotional distress was insufficiently severe to support her claim, so defendant's motion for summary judgment was granted. On appeal, the Supreme Court concluded that plaintiff's testimony that "life goes on" and that it was a loss that she "must learn to deal with" showed a philosophical strength that would likely be absent in a case of severe emotional distress. Plaintiff's emotional distress was not so severe as to rise to the level of a compensable claim, so the District Court was affirmed. Renville v. Fredrickson, 2004 MT 324, 324 M 86, 101 P3d 773 (2004).

Loss of Consortium Claim Allowed Only by Personal Representative: Plaintiff sought damages for a loss of consortium for the death of her adult child in a car accident, allegedly caused by defendant's negligence. The District Court concluded that Montana law does not recognize a loss of consortium claim for the death of an adult child, so defendant's motion for summary judgment was granted. The Supreme Court agreed with the defendant petition on rehearing that a loss of consortium claim arising from a negligently inflicted death is an inextricable element of a wrongful death action that may be brought only be a personal representative of a decedent under 27-1-513 and that damages for wrongful death may be recovered only once. Plaintiff did not have standing to bring a wrongful death action under 27-1-513 because she was neither her son's heir nor his personal representative, so plaintiff's loss of consortium claim should have been dismissed as a matter of law. Allowing a separate loss of consortium claim by someone other than a personal representative would create a multiplicity

of claims arising from the same wrongful death, in contravention of legislative intent. In situations when both causes of action apply, the personal representative must bring both actions together to prevent multiple actions arising from the same death. Thus, even though the District Court arrived at the correct conclusion for the wrong reason, summary judgment for defendant was affirmed. Renville v. Fredrickson, 2004 MT 324, 324 M 86, 101 P3d 773 (2004).

Sufficient Evidence of City's Willful or Wanton Misconduct to Preclude Summary Judgment — Negligence Claim Against City Barred by Recreational Use Statute: Plaintiff was injured on June 20, 2001, after falling through a damaged plank on the Polson city dock, and filed suit against the city for negligently maintaining the premises and for failing to warn of the unsafe condition. The District Court granted summary judgment for the city on grounds that plaintiff failed to present evidence in support of the claim that the city was aware of the defective plank before June 20 or that the city acted willfully or wantonly. The court also concluded that plaintiff's negligence claim was precluded by 70-16-302, the recreational use statute. On appeal, the Supreme Court concluded that the facts, when considered in a light most favorable to plaintiff, were sufficient to raise a genuine issue as to whether the city's failure to timely repair the damaged plank or warn plaintiff of the danger constituted willful or wanton misconduct, precluding summary judgment and warranting a trial on the issue. However, the Supreme Court agreed that the recreational use statute barred plaintiff's negligence claim. Jobe v. Polson, 2004 MT 183, 322 M 157, 94 P3d 743 (2004).

Sledding in City Park Considered Recreational Purpose for Which City Immune From Liability: Plaintiff was injured on a sledding hill at a city park. The trial court held that the city was immune from liability pursuant to 70-16-302. Citing Dobrocke v. Columbia Falls, 2000 MT 179, 300 M 348, 8 P3d 71 (2000), plaintiff contended that because city parks are freely available to the public, it was unnecessary for the law to encourage availability by limiting a city's tort liability. The Supreme Court disagreed and distinguished Dobrocke, holding that the use of city parks is discretionary, unlike the use of city streets and boulevards that was at issue in Dobrocke, so the legislative rationale behind 70-16-302 to encourage the availability of recreational areas applied. Winter sports, such as sledding, are explicitly listed in the statute as a recreational purpose, so summary judgment for the city was affirmed. Weinert v. Great Falls, 2004 MT 168, 322 M 38, 97 P3d 1079 (2004).

Preclusion of Evidence of Federal Safety Standards Not Error Absent Contract Guaranteeing Safety by Contractor on Jobsite: Grover was a carpenter who was injured after falling from the roof of a home that he was working on. Grover sued the general contractor for negligently failing to maintain a safe workplace. The District Court granted the contractor's motion in limine to prohibit the introduction of federal safety standards as evidence of the contractor's negligence. The jury found for the contractor, and on appeal, Grover asserted that the District Court abused its discretion in not allowing the evidence. However, the Supreme Court affirmed. The homeowner, not the general contractor, exercised actual oversight responsibilities on the project, including project design, permitting, provision of tools, hiring and firing of employees, and safety concerns. The contract under which Grover was hired did not address a project safety program, safety devices, safeguards, or protective equipment, and the contractor neither assumed nor exercised the authority to create safe working conditions. Thus, the District Court did not abuse its discretion in refusing to allow admission of job safety standards as evidence of the contractor's negligence. Grover v. Cornerstone Constr. N.W., Inc., 2004 MT 148, 321 M 477, 91 P3d 1278 (2004), following Shannon v. Howard S. Wright Constr. Co., 181 M 269, 593 P2d 438 (1979), and Gibby v. Noranda Minerals Corp., 273 M 420, 905 P2d 126 (1995).

No Evidence of False Representation of Material Fact — Claim of Negligent Misrepresentation Properly Dismissed: Plaintiff claimed that vinyl siding was sold, furnished, and installed on her home under misleading circumstances because the installer failed to clearly identify the relationship with the siding manufacturer. However, plaintiff failed to specify any false statements made by either the installer or the manufacturer that led her to believe that this was true. Absent evidence demonstrating the primary element of the cause of action, plaintiff's negligent representation claim failed as a matter of law. Osterman v. Sears, Roebuck & Co., 2003 MT 327, 318 M 342, 80 P3d 435 (2003), following Yellowstone II Dev. Group, Inc. v. First Am. Title Ins. Co., 2001 MT 41, 304 M 223, 20 P3d 755 (2001).

Failure to Provide Expert Testimony Regarding Adequacy of Swimming Pool Depth for Diving — Summary Judgment Proper: Plaintiff was injured diving into a municipal swimming pool and sued the city for negligence and strict liability. Administrative rules adopted in 1985 set standards articulating board lengths for various pool depths, but the rules apply only to pools constructed or remodeled after June 28, 1985, and the pool in question was constructed in 1972, so the rules did not apply. Further, 50-53-107 does not define a particular standard of conduct to

which public pool operators must conform, but rather imposes a general duty on a city to keep a pool safe. Absent an applicable standard, plaintiff was required to present expert testimony to assist jurors in determining whether the pool depth was unreasonably dangerous for the diving board length. Plaintiff offered no expert testimony on the subject, thus failing to establish a prima facie case of liability, so the District Court properly granted summary judgment to the city. Dayberry v. E. Helena, 2003 MT 321, 318 M 301, 80 P3d 1218 (2003).

Negligence During House Moving — Breach of House Moving Agreement — Remand for Determination of Causation and Damages: Kelly entered an agreement with Hall to move four of Kelly's housing units. Hall agreed to obtain cargo insurance on each unit but did not do so. During the move, two units were damaged, and Kelly filed a claim against Hall's insurer for remuneration. The claim was denied, and the insurer sought a declaratory judgment against both Hall and Kelly. Kelly filed negligence and breach of contract claims against Hall, and Hall counterclaimed for breach of contract against Kelly. The District Court concluded that Kelly failed to establish negligence, that both parties breached the contract, and that neither party could recover against the other. On appeal, the Supreme Court affirmed the finding that Hall breached the contract by failing to obtain cargo insurance and that, based on the presumption against conditions precedent and inconclusive evidence, Kelly also breached the contract and thus could not recover breach of contract damages. However, there was no evidence to rebut Kelly's negligence claim, nor did the District Court address the damages that Hall conceded occurred during the move. Because it was error to find that Kelly failed to establish negligence, the case was remanded for trial on causation and damages. Scottsdale Ins. Co. v. Hall, 2003 MT 188, 316 M 460, 73 P3d 819 (2003).

No Prejudicial Error in Failure to Give Negligent Homicide Mental State Instruction in Wrongful Death Action When Other Instructions Adequately Reflect Negligence: Samson's son was killed by Bercier, a youth who walked away from a nonsecure, supervised licensed youth group home. Samson sued the state for foreseeable negligence. To boost the theory of foreseeability, Samson offered a jury instruction that defined Bercier's conduct as reckless and postulated therefrom that the conduct was foreseeable because of Bercier's background, seeking to undermine the state's theory that the shooting was an unforeseeable accident. The District Court refused to offer the instruction, instead instructing the jury on elements of wrongful death, and Samson appealed. The state argued that the mental state of Bercier was not a controlling issue and contended that it was not necessary to instruct the jury on the mental state of negligent homicide because the instructions as a whole properly included the key concepts of a wrongful death action. The Supreme Court agreed with the state. The fundamental issue concerned the state's negligence, not Bercier's mental state. Nevertheless, Samson was still able to present the foreseeability theory under the instructions that were given, so failure to give Samson's offered instruction did not result in prejudice to Samson's case. It is within a District Court's discretion to decide how to instruct the jury, taking into account the theories of the contending parties, and absent an abuse of discretion, the District Court was affirmed. Samson v. St., 2003 MT 133, 316 M 90, 69 P3d 1154 (2003). See also Busta v. Columbus Hosp. Corp., 276 M 342, 916 P2d 122 (1996).

Insurer Required to Pay Undisputed Medical Coverage Without Settlement Agreement When Liability Reasonably Clear — No Bad Faith Claim for Pre-Watters Conditioned Settlement Offer: Defendant insurer offered to pay plaintiffs the policy limit of $1 million in exchange for a full release of claims against the insureds. Plaintiffs refused to provide a release, the case went to trial, and plaintiffs were awarded more than $3 million. Plaintiffs then counterclaimed against the insurer, claiming that refusal to pay the undisputed medical claims without a release violated 33-18-201(6) and (13). The Supreme Court noted that the purpose of 33-18-201 is to ensure prompt payment of damages for which an insurer is clearly obligated. Thus, pursuant to Ridley v. Guar. Nat'l Ins. Co., 286 M 325, 951 P2d 987 (1997), and Watters v. Guar. Nat'l Ins. Co., 2000 MT 150, 300 M 91, 3 P3d 626 (2000), the insurer had a duty to pay plaintiffs' undisputed medical expenses up to the limits of its coverage and without the benefit of a settlement agreement. Nevertheless, because the insurer made its settlement offer in 1998, more than 2 years prior to the Watters decision, the insurer had an arguably reasonable basis under 33-18-242 for asserting that it was entitled to condition payment of policy limits on plaintiffs' provision of a release of claims, so the insurer was not liable for acting in bad faith in violation of 33-18-201. Shilhanek v. D-2 Trucking, Inc., 2003 MT 122, 315 M 519, 70 P3d 721 (2003), overruling Juedeman v. Nat'l Farmers Union Property & Cas. Co., 253 M 278, 833 P2d 191 (1992), and overruling Watters to the extent that Watters implies that an insurer's obligation under Ridley is limited to the minimum coverage required by the Motor Vehicle Safety-Responsibility Act.

Question of Material Fact Regarding Law Firm's Handling of Real Estate Contract — Summary Judgment Improperly Granted: Plaintiff sued its law firm for work performed in writing a contract for a real estate transaction. Plaintiff's expert opined that the firm violated the standard of care when it: (1) had a nonattorney with no contract drafting experience draft the initial agreement and insert an inaccurate legal description of the property obtained from plaintiff's own engineering firm; (2) used the phrase "more or less" to cure defects in the property description when the legal description was clearly deficient; (3) failed to include a provision that required the seller to sign future applications for a final plat; and (4) failed to execute proper escrow documents to prevent the seller from having veto power over any proposed development of the property. The law firm presented its own expert to refute the allegations. The District Court analyzed the allegations of negligence, applying the legal malpractice standards in Lorash v. Epstein, 236 M 21, 767 P2d 1335 (1989), and, finding no issues of material fact, granted the law firm's motion for summary judgment. Plaintiff appealed, and the Supreme Court reversed, finding that summary judgment was improper. The conflicting expert testimony itself raised a material issue of fact regarding the standard of care that required resolution by a trier of fact. Further, material questions remained concerning whether the law firm's independent failure to recognize a problem with the legal description contributed as a cause to plaintiff's damages, whether the firm followed the requisite standard of care in drafting the escrow agreement, and whether the purported terms of the escrow agreement satisfied the requisite standard of care. Babcock Place Ltd. Partnership v. Berg, Lilly, Andriolo, & Tollefsen, P.C., 2003 MT 111, 315 M 364, 69 P3d 1145 (2003).

Duty of Railroad to Construct and Maintain Safe Railroad Crossing — Summary Dismissal of Liability Case Against County for Road Construction Proper: The North Alaska road crossing was built in the early 1920s through the cooperative efforts of the county and the railroad. The crossing was entirely on railroad property, and the railroad allowed access to the county over the years to maintain the road and to erect signs on the railroad's right-of-way. Fisch was injured in 1998 when his dump truck was struck by a train at the crossing. The railroad sought to ascribe liability to the county for negligent design and construction of the crossing. The county denied all allegations of negligence, and the District Court granted summary judgment to the county on the issue of liability. The railroad appealed on grounds that ARM 18.6.311 required the county to construct and maintain the roadway through the crossing in a safe manner. The Supreme Court disagreed. The clear intent of the administrative rule was to limit application of the rule to projects arising from the state's allocation of federal funds made available to improve the safety of railroad crossings and did not address road-rail alignment or crossing design. The historical ambiguity of whether the railroad or the county chose the exact location for the crossing raised no genuine issue of material fact and was irrelevant to the question of which entity had the duty to construct and maintain the crossing. Rather, under 69-14-602, that duty was statutorily assigned to and rested clearly with the railroad. Thus, summary dismissal of the liability claim against the county was proper. Fisch v. Mont. Rail Link, Inc., 2003 MT 76, 315 M 13, 67 P3d 267 (2003).

Disclosure of Building Leakage and Source of Water Not Material Fact: Plaintiffs purchased a building in Philipsburg for use as a residence. Water began seeping into the basement a couple of years later, and plaintiffs sued the sellers for breach of the warranty of habitability and the city because the source of the water may have been from a broken water line nearby. The District Court summarily dismissed the claim against the sellers because the sellers' knowledge of prior leakage was not a material fact and because the question of the source of the water was not material to the transaction between the parties. Plaintiffs appealed, but the Supreme Court affirmed. Plaintiffs all but conceded that the prior leakage was not important when they did not disclose the leakage to the bank when they refinanced the property. Further, plaintiffs' initial claim against the sellers was for nondisclosure of the leakage without regard to the source, so summary judgment was not precluded because the source was not essential to the case against the sellers. Bond v. Philipsburg, 2003 MT 74, 315 M 7, 67 P3d 255 (2003).

No Requirement That Private Property Be Available for Public Use Before Landowner Liability Shield Applies — Landowner Immune From Suit Absent Consideration or Evidence of Misconduct: Saari went inner tube sledding with a church group on a hill at a ski resort after the resort was closed for the day. The group paid no fees to use the hill and did not rent or purchase equipment from the resort operator. During that evening, Saari lost control and crashed in a creek bed, suffering injuries which subsequently caused Saari's death. Saari's estate sued the resort operator on six negligence counts, including survival action, wrongful death, negligence, premises liability, attractive nuisance, and infliction of emotional distress. The District Court held that 70-16-302 precluded liability by the operator because there was no duty of care owed to

Saari and granted summary judgment to the operator on all counts. The estate appealed, but the Supreme Court affirmed. By its terms, 70-16-302 provides for landowner liability when a recreational user gives valuable consideration to the landowner in exchange for using the property or when the landowner acts with willful or wanton misconduct. While conceding that Saari paid no consideration for use of the ski hill, the estate nevertheless argued that the operator generally benefited from after-hours sledders, which constituted consideration. However, no legal authority was advanced for the proposition that economic benefits received at a different point in time constituted valuable consideration given by Saari on the night in question, and these speculative statements did not give rise to a genuine issue of material fact. Moreover, the operator's failure to prevent or supervise after-hours sledding did not constitute willful or wanton misconduct. An absence of evidence cannot establish the existence of a genuine issue of material fact. Finally, the estate cited Simchuk v. Angel Island Community Ass'n, 253 M 221, 833 P2d 158 (1992), for the proposition that a question of fact existed regarding whether the property was open to the public. Under Simchuk, if the land upon which an injury occurs is not available for public use, the landowner does not enjoy the limited liability afforded by 70-16-302. However, a public use requirement would essentially negate the "without permission" language of the statute and exceed the parameters of the statute, and because the statute contains no express language that property be open for public use before the liability shield applies, the Supreme Court overruled Simchuk to that extent. Summary judgment on all counts was proper. Saari v. Winter Sports, Inc., 2003 MT 31, 314 M 212, 64 P3d 1038 (2003).

Interpretation of Uniform Building Code Ordinance Matter of Law — Violation May Constitute Negligence Per Se: Chambers was injured after falling into a pit at the Helena garbage transfer station. A Uniform Building Code (UBC) ordinance required guardrails on most landings and ramps, except on the loading side of loading docks. The District Court held that the pit did not fit the loading dock exception and that the city's failure to install guardrails was negligence per se. The city argued that interpretation of the UBC ordinance was a finding of fact that the trial court improperly removed from the province of the jury because the court made credibility determinations and weighed the evidence. Chambers maintained that, like statutes, interpretation of a UBC ordinance is a question of law. The Supreme Court agreed with Chambers. Violation of a UBC ordinance is a matter of law, violation of which may constitute negligence per se, and in this case, it was undisputed that the city was subject to the ordinance and that there were no guardrails installed along the transfer station pit. Chambers was a member of the class of persons that the ordinance was designed to protect and met the elements of negligence per se. Further, pursuant to Montana pattern jury instructions, it is up to the jury to decide whether a statute has been violated. Once the trial court determined that the city was negligent per se, the jury instruction should not have been given because there were no more undisputed issues regarding violation of the statute. The only remaining determination was whether the loading dock exception applied to the pit, and that was a statutory interpretation for the court to decide. The plain language of the UBC ordinance and its exception did not include a pit design such as that used at the transfer station, so the trial court correctly interpreted the ordinance and held the city negligent per se. Chambers v. Helena, 2002 MT 142, 310 M 241, 49 P3d 587 (2002).

Negligence Per Se — New Trial Granted When Evidence Insufficient to Justify Jury Verdict: Chambers was injured after falling into a pit at the Helena garbage transfer station. The District Court found the city to be negligent per se and submitted the issues of causation and damages to the jury. The jury found that the city's negligence was not the cause of the accident. The District Court held that the verdict was based on insufficient evidence because the city was negligent per se and that Chambers fell over an edge that was required to have a fall protection device, so Chambers was granted a new trial on causation. The city appealed, but the Supreme Court affirmed. Chambers met the burden of showing that the city's negligence was a substantial factor in the accident, and there was insufficient evidence for the jury to find otherwise, so a new trial on causation was proper. Chambers v. Helena, 2002 MT 142, 310 M 241, 49 P3d 587 (2002). See also Brockie v. Omo Constr., Inc., 255 M 495, 844 P2d 61 (1992).

Whether Activity Considered Abnormally Dangerous Question of Law — Trial Court Required to Consider Restatement Factors in Determination of Abnormally Dangerous Activity: The question of whether an activity is abnormally dangerous, thereby subjecting the operator to strict liability, is a question of law for courts to decide. The question cannot rest on one factor alone; rather, the court must consider all the factors in Restatement (Second) of Torts 520 (1976). Even though one factor may ultimately weigh more heavily than the others, a trial court must at least explicitly consider all the factors listed in the Restatement, and failure to independently consider those factors constitutes an incomplete determination of whether the activity is

abnormally dangerous as a matter of law, warranting remand. Chambers v. Helena, 2002 MT 142, 310 M 241, 49 P3d 587 (2002), clarifying Matkovic v. Shell Oil Co., 218 M 156, 707 P2d 2 (1985), and Dvorak v. Matador Serv., Inc., 223 M 98, 727 P2d 1306 (1986).

Sufficient Evidence That Damages Not Result of State Negligence to Submit Case to Jury — Judgment as Matter of Law Not Appropriate: Pula sued in federal court, alleging negligence against the city of Chinook, Blaine County, three Chinook police officers, the County Sheriff, and the state, related to an incident of rape of Pula by another inmate while Pula was incarcerated in Blaine County jail. All the claims were settled except the claim against the state, which was dismissed and subsequently refiled in state District Court. At trial, Pula moved for judgment as a matter of law, contending that the state presented no admissible evidence to counter the claims of duty, breach, causation, and damages. The District Court denied the motion and sent the case to the jury. The jury found that the state was negligent, but that its negligence was not the cause of Pula's injuries. Pula appealed the denial of the motion for judgment as a matter of law, but the Supreme Court affirmed. The state presented substantial evidence that the damages suffered by Pula were not the result of the state's negligent acts or omissions, and the evidence was sufficient to submit the case to the jury, so judgment as a matter of law was not appropriate. Pula v. St., 2002 MT 9, 308 M 122, 40 P3d 364 (2002).

Liability of Parent for Child's Injury to Third Person Based on Parent's Failure to Exercise Reasonable Care of Child — Restatement of Torts as Reasonable Expression of Parent's Duty — Kienenberger Reversed: Crisafulli attended an auction conducted by Bass's auction company and was injured when Bass's son rode a bicycle through the crowd of spectators while handling auction tickets and hit Crisafulli. The District Court applied J.L. v. Kienenberger, 257 M 113, 848 P2d 472 (1993), granting summary judgment to Bass on grounds that parents have no independent duty to control the behavior of their children. Crisafulli contended that Kienenberger was distinguishable and that the District Court should instead have followed Restatement (Second) of Torts 316 (1965). That section of the Restatement does not make a parent liable for the torts of a child, but imposes liability on the parent for the parent's own failure to exercise a duty of reasonable care, then narrowly defines the circumstances under which that duty arises by requiring that the parent knows of the ability to control the child and understands the necessity for doing so, and then further conditions liability on a finding that the parent's failure created an unreasonable risk of harm to a third person. The Supreme Court concluded that imposition of liability under these limited and exceptional circumstances, in the absence of any legislative policy to the contrary, was a reasonable expression of a parent's duty in Montana and adopted the Restatement, overruling Kienenberger to the extent that it was inconsistent. The District Court's order granting summary judgment to Bass on the issue was reversed. Crisafulli v. Bass, 2001 MT 316, 308 M 40, 38 P3d 842 (2001). See also Mitchell v. Wiltfong, 604 P2d 79 (Kans. Ct. App. 1979).

Denial of General Liability Coverage Based on Liquor Liability Exclusion — Failure to Raise Alternative Negligence Theory — Summary Judgment Proper: Cusenbary was injured when a bar patron drove a car through the wall of Mortensen's tavern. Mortensen was covered by USF&G Co. under a general liability policy, but the insurance included a liquor liability exclusion. When Mortensen tendered the claim to USF&G Co. for defense, the company denied coverage and refused to defend based on the exclusion, so Cusenbary's claim was tried to a jury and Mortensen was found guilty of negligence (see Cusenbary v. Mortensen, 1999 MT 221, 296 M 25, 987 P2d 351 (1999)). Mortensen then assigned all rights to coverage under the general liability policy to Cusenbary. Cusenbary then sued USF&G Co., contending that the company had a duty to indemnify Mortensen for negligent behavior in management of the bar, separate from the negligent conduct of serving alcohol to an intoxicated patron, because the separate conduct was not excluded by the liquor liability exclusion. The District Court granted summary judgment for USF&G Co., holding that the separate conduct related directly to the improper service or sale of alcohol and that Mortensen failed to set forth evidence supporting an alternative negligence theory, so as a matter of law, Mortensen's judgment was excluded by the express language of the policy. The Supreme Court affirmed, citing Sheffield Ins. Co. v. Lighthouse Properties, Inc., 234 M 395, 763 P2d 669 (1988). All claims and arguments at trial were related to Mortensen's negligence in serving alcohol, and no assertion was ever made that the proposed evidence was relevant to any other theory of negligence or to any other theory. All of the claims arose from serving alcohol and were thus excluded from coverage. Cusenbary v. USF&G Co., 2001 MT 261, 307 M 238, 37 P3d 67 (2001).

Absence of Genuine Issue of Material Fact Regarding Negligent Installation of Septic System — Summary Judgment Proper: Prior to the Sherrards' purchase of property for building a home and horse arena, they had the county sanitarian issue a resite evaluation that addressed ground

water levels and designated appropriate septic systems to service each building. The sanitarian approved a permit for a shallow cap system for the horse arena. The system was subject to state regulations requiring minimum 12-inch trenches and prohibiting installation where the water table reached within 5 feet of the natural ground surface. The Sherrards contracted with Prewett to install the system. Prewett dug a hole for the septic tank, dug 36-inch deep trenches for lateral pipes in the drain field, placed washed gravel and pipes in the trenches, and prepared the system for inspection. The next day, the new county sanitarian inspected the system, found standing ground water in the septic tank and observed water in the lateral trenches, fixed the ground water level at 27 inches below the natural surface, and because the ground water level was too high to meet county and state requirements, revoked the Sherrards' permit. The Sherrards then sued Prewett for negligent installation of the system. The District Court determined that because the ground water depth was less than 5 feet and the shallow cap system could not meet regulations, the object of the contract between the parties was illegal and the Sherrards could not proceed with their contract-based claim. Therefore, the court concluded that no genuine issue of material fact existed and granted summary judgment for Prewett, and the Supreme Court affirmed. The Sherrards' bare denial of the 27-inch ground water level and their speculation about the ground water level at the time that the original permit was issued, were insufficient to raise a genuine issue of material fact because they constituted mere denial, speculation, or conclusory statements. The material fact was not whether the ground water level was precisely 27 inches below the surface, but whether it was 5 feet or more below the surface as required by state regulations. To prevail, the Sherrards needed to come forward with substantial and material evidence with regard to the ground water level at the horse arena, but they failed to do so, so summary judgment was proper. Sherrard v. Prewett, 2001 MT 228, 306 M 511, 36 P3d 378 (2001).

No Assumption of Risk in Purchase of Damaged Real Property — Summary Judgment Reversed: Koelzer owned an inn by a mining and power generation site near Colstrip. Koelzer discovered that mining activity had damaged the inn and filed a complaint in 1994 against the mining and power generation companies, but did not pursue the damage claim. In 1996, Dale and Shawonda Lewis approached Koelzer about purchasing the inn, and the issue of the damages and Koelzer's claim came up. The Lewises inspected the inn and discovered additional damages, which led Koelzer to reassert the damage claim, but the claim was again unresolved. Nevertheless, the Lewises offered to buy the inn, and title was eventually conveyed to Dale's parents, who were able to secure financing. Koelzer notified the companies by fax that the inn had been sold and requested that the companies work with Dale on the structural damage discussed in the past. About 1 year later, Dale received an estimate of $91,000 to repair the damages and filed a nuisance complaint and a complaint seeking compensation from the companies for damages, after the Lewises acquired title to the inn in 1998. The District Court dismissed the Lewises' claim for damages arising after title was acquired on grounds that the Lewises had assumed the risk of those damages when they purchased the property. On appeal, the District Court was reversed on the issue of postpurchase damages. Under Mead v. M.S.B., Inc., 264 M 465, 872 P2d 782 (1994), assumption of risk is no longer available as a separate affirmative defense in negligence cases. Instead, that defense now merges into the general liability scheme of comparative negligence in which the conduct of the parties is compared based on evidence of negligence and contributory negligence, as established by reasonable and prudent person standards. Here the questions of whether the Lewises negligently purchased an inn that they knew might be subject to future damages or whether those future damages were sufficiently foreseeable to be taken into account in the purchase price of the inn were questions of fact for a jury and should not have been dismissed by summary judgment. Lewis v. Puget Sound Power & Light Co., 2001 MT 145, 306 M 37, 29 P3d 1028 (2001).

Failure to Show That but for Negligent Legal Advice, Deportation Could Have Been Successfully Defended — Professional Negligence Claim Properly Dismissed: Fang, a Chinese citizen and lawful permanent United States resident employed by Montana State University-Bozeman, was involved in a domestic dispute with his wife that resulted in charges of assault. Fang consulted Bock, who worked at the university legal services offices, regarding the possibility of deportation. Bock in turn consulted Rice, an attorney who had made a presentation on immigration law at a seminar that Bock had attended, and asked if a misdemeanor domestic abuse charge was grounds for deportation. Rice informed Bock that the federal Immigration and Naturalization Service (INS) would not initiate deportation proceedings until the commission of two misdemeanors. Bock relayed that information to Fang, who relied at least in part on the information and pleaded guilty to family member assault. However, in 1996, Congress enacted a new immigration statute (see 8 U.S.C. 1227(a)(2)(E)(i)) that provides that domestic violence

convictions are deportable offenses. Several weeks after pleading guilty, Fang received a notice to appear and face deportation. After hiring new counsel, Fang moved to withdraw the guilty plea. The District Court granted the motion on grounds that the failure of Bock to inform Fang of the possibility of removal to China constituted ineffective assistance of counsel, and the INS agreed to suspend further proceedings until the resolution of charges against Fang. Based on the advice of his new counsel, Fang reached a plea agreement with the Gallatin County Attorney to plead guilty to an amended charge of assault. Following conviction, the INS again moved to deport Fang, and based on the fact that assault also constitutes a crime of violence against a protected person pursuant to federal immigration law, Fang was ordered to be deported. Fang then filed a complaint against Bock, seeking damages for professional negligence and negligent supervision and treble damages under 37-61-406. The District Court applied Lorash v. Epstein, 236 M 21, 767 P2d 1335 (1989), and determined that Fang could not satisfy the last element of the test for a prima facie case of professional negligence, which requires a showing that but for such negligence, Fang would have successfully defended against the offense. The court then summarily dismissed the case. Fang appealed, contending that because of Bock's advice, he was exposed to the possibility of removal from this country and had to spend substantial amounts of money to avoid that exposure. Pursuant to Lorash, the Supreme Court had to determine whether Fang would have been exposed to the possibility of removal from this country with or without Bock's advice, in light of the offenses to which Fang pleaded guilty, the statutory basis for deportation, and the immigration judge's explanation for the deportation order. Under either charge, Fang was guilty of an offense of violence against a protected person—his wife. The title of the offense was irrelevant because for purposes of immigration law, misdemeanor assault is considered just as much a crime of violence against a spouse as family member assault. Further, Fang's argument that a different result was compelled by the fact that the assault conviction was subsequently expunged based on a deferred prosecution also failed because under federal case law, no effect is to be given to a state action that purports to remove a guilty plea or conviction by operation of a state rehabilitative statute. Thus, Fang's situation was a result of the conduct that he admitted and was the same following correct legal advice as it was following Bock's incorrect advice. Although Bock misinformed Fang, that advice did not lead to Fang's predicament, nor would the money that he spent to have the first conviction set aside have changed the result. Fang could not prove that but for negligent legal advice he could have avoided deportation, and Bock was entitled to judgment as a matter of law. Fang v. Bock, 2001 MT 116, 305 M 322, 28 P3d 456 (2001).

Defaulting Buyer Under Unambiguous Written Contract Cannot Rely Upon Expectations Not Covered by Contract to Avoid Contract — Disposition of Downpayment Amounts Paid and Due — County Not Liable for Negligent Misrepresentation as to Recordability of Deeds and Seller's Title Insurer Not Liable for Loss in Marketability: Documents for the sale and purchase of two sections of land unambiguously showed, and it was undisputed, that the resale of 20-acre parcels by the buyer, the immediate acceptance by the county of 20-acre resale deeds of a type that would make subdivision review unnecessary, and the ability to resell without having to undergo subdivision review were not parts of the bargain. The parties knew that these things were contemplated, but the documents did not refer to them or make them a part of the contract. Before the contract was made, the county indicated that it would accept the 20-acre resale deeds. The deal fell through when the county changed its position after the contract was signed. The buyer failed to pay the whole downpayment, and the seller terminated the contract and kept the paid portion of the downpayment. Precontract discussions on the matter must be disregarded as parol evidence because the documents were unambiguous and did not refer to the matter. The buyer was not entitled to rescind the contract and have the paid portion of the downpayment returned based on mutual mistake or failure of consideration. There was no mutual mistake because the parties knew that it was not a certainty that the county would accept the deeds. There was no failure of consideration because the resale, county acceptance of the deeds, and avoidance of subdivision review were not part of the written contract. In addition, the need for a subdivision review would not make the land unmarketable; at most, its market value decreased and it would take longer to sell it. Furthermore, a party in default is not entitled to rescission. The seller was entitled to terminate the contract. The seller was also entitled to keep an amount of the paid portion of the downpayment equal to the amount by which the contract price for the land exceeded the market value of the land at the time of the breach. The seller was not entitled to keep the remainder of the paid portion of the downpayment or to a judgment for the unpaid portion of the downpayment because the contract did not provide for that remedy. The county was not liable in tort to the seller for negligent misrepresentation, and the buyer's title insurance company was not liable to the seller for the loss in the marketability of the land caused by the

need for subdivision review. Yellowstone II Dev. Group, Inc. v. First Am. Title Ins. Co., 2001 MT 41, 304 M 223, 20 P3d 755 (2001).

Negligence and Strict Liability Action for Damages by Pesticide Not Preempted by FIFRA — McAlpine Overruled: Plaintiffs brought an action for damages allegedly suffered when a pesticide was applied at the building where they worked. The District Court granted summary judgment for the pesticide manufacturer on the basis that the claims were preempted by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and McAlpine v. Rhone-Poulenc Ag Co., 285 M 224, 947 P2d 474 (1997), because all of the theories of liability were based on inclusions in or omissions from the pesticide labels. In particular, 7 U.S.C. 136v(b) provides that a state may not impose or continue in effect any requirement for labeling or packaging in addition to or different from those required under the federal law. On appeal, the Supreme Court overruled McAlpine and instead applied Medtronic, Inc. v. Lohr, 518 US 470 (1996), concluding that Congress, through FIFRA, intended only to preempt states from imposing positive law requirements in the form of regulations and laws and did not intend to extinguish damage remedies under state common law. The word "requirements" in section 136v(b) means enactments of positive law by legislative or administrative bodies, not state law damage actions. The case was reversed and remanded for further proceedings. Sleath v. West Mont Home Health Serv., Inc., 2000 MT 381, 304 M 1, 16 P3d 1042, 57 St. Rep. 1629 (2000).

Open-Range No Duty Rule — Applies Only to Relationship Between Livestock Owner and Other Landowners: Larson-Murphy struck a bull while driving at night and suffered extensive injuries. The lower court dismissed her case with no accompanying legal memorandum providing a legal basis for its decision. However, the bull's owners had argued that they could not be held liable based on the no duty rule of open-range law. The Supreme Court stated that open-range laws allow certain livestock to legally occupy a highway but that state laws also permit a motorist to legally occupy the same highway. There is no statute that provides that a livestock owner is not liable for injuries suffered by motorists colliding with the livestock owner's livestock. Therefore, the Supreme Court stated that any assertion of legal duties arising from the legal relationship between owners of livestock and motorists is beyond the scope of Montana's statutory open-range doctrine. The Supreme Court held that because both livestock and a motorist may have an equal right to lawfully occupy a highway, the livestock owner and the motorist each owe the other a legal duty to use the highway so as not to injuriously interfere with the other's right of use. Therefore, ascertaining the precise standard of care that each owes the other must be viewed in light of the circumstances under which the harm occurs. The Supreme Court reversed the directed verdict in favor of the defendants and remanded the case for a determination by the trier of fact to determine if the bull's owners had violated their duty of care to Larson-Murphy. Larson-Murphy v. Steiner, 2000 MT 334, 303 M 96, 15 P3d 1205, 57 St. Rep. 1411 (2000).

Real Estate Sale — Acknowledgment of Offer as Acceptance of Offer — Elements of Negligent Misrepresentation Fulfilled: When Frye, a real estate broker, brought May a written offer to purchase May's gas station, Frye asked that May initial the offer to show acknowledgment or receipt of the offer, and May initialed the line reading "Seller Signature". At some later time, some of the terms of the rejected offer were incorporated into a counteroffer above May's initials, and the counteroffer was accepted by the buyer without May's knowledge. May consummated the sale and then sued Frye. The Supreme Court held that the District Court improperly granted Frye's motion for summary judgment and held that May had shown sufficient evidence of negligent misrepresentation to survive a motion for summary judgment. May v. ERA Landmark Real Estate of Bozeman, 2000 MT 299, 302 M 326, 15 P3d 1179, 57 St. Rep. 1256 (2000).

Damages for Tort of Spoliation of Evidence: The speculative nature of damages is inherent in the uncertainties of proof relevant to the tort of spoliation of evidence, but the speculative nature of such damages should not bar recovery. Thus, the interest of plaintiff to recover the entire amount of damages that would have been received if the underlying action had been pursued successfully must be balanced with defendant's interest in not providing plaintiff with a windfall. Taking these interests into consideration, it is necessary that damages be discounted to account for the uncertainties. Therefore, damages arrived at through reasonable estimation based on relevant data should be multiplied by the significant possibility that plaintiff would have won the underlying suit had the spoliated evidence been available. Oliver v. Stimson Lumber Co., 1999 MT 328, 297 M 336, 993 P2d 11, 56 St. Rep. 1303 (1999). See also Holmes v. Amerex Rent-A-Car, 710 A2d 846 (D.C. 1998).

Independent Tort of Intentional Spoliation of Evidence Recognized — Elements: After a review of decisions in those jurisdictions that have recognized the tort of spoliation of evidence, the Supreme Court adopted the tort of intentional spoliation of evidence, although that tort was

not present in this case. Elements of intentional spoliation of evidence include: (1) the existence of a potential lawsuit; (2) defendant's knowledge of the potential lawsuit; (3) the intentional destruction of evidence designed to disrupt or defeat the potential lawsuit; (4) disruption of the potential lawsuit; (5) a causal relationship between the act of spoliation and the inability to prove the lawsuit; and (6) damages. As with negligent spoliation of evidence, a plaintiff bringing a claim for intentional spoliation of evidence is required to prove a causal relationship between the act of spoliation and the inability to prove the lawsuit and damages. Oliver v. Stimson Lumber Co., 1999 MT 328, 297 M 336, 993 P2d 11, 56 St. Rep. 1303 (1999). See also Coleman v. Eddy Potash, Inc., 905 P2d 185 (N. Mex. 1995).

Independent Tort of Negligent Spoliation of Evidence Recognized — Elements: After a review of decisions in those jurisdictions that have recognized the tort of spoliation of evidence, the Supreme Court adopted the tort of negligent spoliation of evidence. Elements of negligent spoliation include: (1) the existence of a potential civil action; (2) a legal or contractual duty to preserve evidence relevant to that action; (3) destruction of that evidence; (4) significant impairment of the ability to prove the potential civil action; (5) a causal connection between the destruction of the evidence and the inability to prove the lawsuit; (6) a significant possibility of success of the potential civil action if the evidence were available; and (7) damages. As with intentional spoliation of evidence, a plaintiff bringing a claim for negligent spoliation of evidence is required to prove a causal relationship between the act of spoliation and the inability to prove the lawsuit and damages. Oliver v. Stimson Lumber Co., 1999 MT 328, 297 M 336, 993 P2d 11, 56 St. Rep. 1303 (1999). See also Holmes v. Amerex Rent-A-Car, 710 A2d 846 (D.C. 1998).

Mutual Mistake of Fact Sufficient to Set Aside Release in FELA Action: A release in an action under the Federal Employers' Liability Act (FELA), 45 U.S.C. 51 through 60, may be set aside on the basis of mutual mistake of fact in executing the release. A mutual mistake of fact is sufficient to avoid a release only when the mistake goes to the nature of the injury and the mistaken belief is held by both parties. In the present case, Bevacqua signed releases purporting to settle all injury claims, but was lulled into signing because of repeated assurances by doctors who examined him at the employer's request, assured him that nothing was wrong, and authorized him to return to work. Under FELA, this mutual mistake of fact was sufficient to set aside the releases. Bevacqua v. Union Pac. RR Co., 1998 MT 120, 289 M 36, 960 P2d 273, 55 St. Rep. 469 (1998), following Callen v. Pa. RR Co., 332 US 625, 92 L Ed 242, 68 S Ct 296 (1948), and Counts v. Burlington N. RR Co., 952 F2d 1136 (9th Cir. 1991).

Failure of Stucco Product — No Agency Relationship Between Contractor-Applicator and Manufacturer — No Negligence or Strict Liability Found — Leave to Amend Complaint Denied: Sunset Point Partnership (Sunset), a condominium developer, sued Wolstein, d/b/a Stuc-O-Flex Systems; Stuc-O-Flex International, Inc.; and Melton and Fischer, d/b/a Melton Fischer Construction (Melton/Fischer). Sunset's complaint alleged breach of contract, breach of warranty, indemnity, negligence, and strict liability in tort because a stucco-like product that Wolstein, as a subcontractor with Melton/Fischer, applied to the exterior of condominium buildings developed problems. The District Court granted summary judgment in favor of Stuc-O-Flex International, Inc., on each of the five counts in Sunset's complaint, holding that there was no evidence of negligence or breach of contract or warranty by Stuc-O-Flex International, Inc., and no evidence of agency between Stuc-O-Flex International, Inc., and Melton/Fischer. Sunset appealed. Citing previous decisions by it to the effect that in order for there to be ostensible agency the principal and not the agent must have taken steps to lead a third party to the belief that an agency relationship existed, the Supreme Court held that there was no evidence of actual or ostensible agency between Melton/Fischer and Stuc-O-Flex International, Inc., As to Sunset's claim of negligence, the Supreme Court answered Sunset's argument that Stuc-O-Flex International, Inc., was negligent in failing to provide adequate training, supervision, and instruction to Wolstein by pointing out that Sunset's complaint only alleged negligence against the defendants in the "manner in which they applied" Stuc-O-Flex and that there was no record evidence indicating a duty on the part of Stuc-O-Flex International, Inc., to train and supervise Wolstein. Concerning Sunset's claim for strict liability, the Supreme Court noted that Sunset had only alleged defective application of Stuc-O-Flex and had not alleged a defective product. Moreover, the Supreme Court pointed out that Sunset's own expert testified that: (1) there was nothing inherently defective about Stuc-O-Flex; (2) Stuc-O-Flex International, Inc., did not sell a "system" consisting of the material on which the product was applied and the product, but only sold the product itself; and (3) therefore only that product was guaranteed. In its review of the District Court's denial of Sunset's motion to amend its complaint to add the seller of the product as a defendant, the Supreme Court affirmed the District Court's decision, pointing out that the litigation was 2 years old by the time that Sunset made its

untimely motion to amend. Sunset Point Partnership v. Stuc-O-Flex Int'l, Inc., 1998 MT 42, 287 M 388, 954 P2d 1156, 55 St. Rep. 141 (1998).

Premises Liability — Distinctions Between Natural and Altered Conditions Overruled — Restatement of Torts 343A(1) Adopted — Limberhand Followed: Donna took her child to school and, because it was winter and a plowed path led from her car to an entrance to the school, walked over the snow-covered path to reach the school. On her return over the same path, Donna slipped and fell, injuring herself. She sued the school district for negligence. The District Court granted the school district's motion for summary judgment, applying the standard for premises liability involving distinctions between altered and natural conditions upon the premises. The Supreme Court held that its past opinions had created confusion in the law of premises liability because those cases made artificial distinctions between natural and altered accumulations of snow and ice that are open and obvious and noted that the Supreme Court had previously decided other cases setting forth the standard that a property owner is absolved from liability because a dangerous condition upon the premises is open and obvious. The Supreme Court adopted the standard contained in section 343A(1) of the Restatement (Second) of Torts (1965) and discussed in Limberhand v. Big Ditch Co., 218 M 132, 706 P2d 491 (1985), that a landowner must be determined to have acted reasonably under the circumstances in order to escape liability. In so doing, the Supreme Court expressly overruled contrary language in Regedahl v. Safeway Stores, Inc., 149 M 229, 425 P2d 335 (1967), Luebeck v. Safeway Stores, Inc., 152 M 88, 446 P2d 921 (1968), Willis v. St. Peter's Hosp., 157 M 417, 486 P2d 593 (1971), Uhl v. Abrahams, 160 M 426, 503 P2d 26 (1972), Demaree v. Safeway Stores, Inc., 162 M 47, 508 P2d 570 (1973), Dunham v. Southside Nat'l Bank, 169 M 466 , 548 P2d 1383 (1976), Folda v. Bozeman, 177 M 537, 582 P2d 767 (1978), Cereck v. Albertson's, Inc., 195 M 409, 637 P2d 509 (1981), Krone v. McCann, 196 M 260, 638 P2d 397 (1982), Kronen v. Richter, 211 M 208, 683 P2d 1315 (1984), Boehm v. Alanon Club, 222 M 373, 772 P2d 1160 (1986), Blaskovich v. Noreast Dev. Corp, 242 M 326, 790 P2d 977 (1990), and Davis v. Church of Jesus Christ of LDS, 244 M 61, 796 P2d 181 (1990). Because the snow-covered path was known and obvious to Donna and because there was no testimony contradicting testimony for the school district that the path and sidewalks were appropriately maintained for persons going to and coming from the school, the Supreme Court affirmed the judgment of the District Court. Richardson v. Corvallis Pub. School District No. 1, 286 M 309, 950 P2d 748, 54 St. Rep. 1422 (1997).

Defendant's Statements at Trial Not Binding Judicial Admission — New Trial Not Warranted: The defendant's testimony at trial that the automobile accident was all the defendant's fault was either a legal conclusion based on the defendant's understanding of the facts as the defendant knew them or was the expression of the defendant's personal opinion. Therefore, the statements were not statements of fact and were not judicial admissions. The District Court did not err in denying the plaintiff's alternative motions for judgment notwithstanding the verdict and new trial. DeMars v. Carlstrom, 285 M 334, 948 P2d 246, 54 St. Rep. 1178 (1997), followed in Papich v. Quality Life Concepts, Inc., 2004 MT 116, 321 M 156, 91 P3d 553 (2004).

Damage to Crops by Herbicide — Extent of Preemption by FIFRA — Claims for Breach of Express and Implied Warranty Not Preempted — Negligence and Strict Liability Preempted — Remedy for Prevention of Discovery by Summary Judgment: McAlpine applied Weedone LV6, a herbicide manufactured by Rhone-Poulenc and distributed by Ben Taylor, to crops of barley and spring wheat. After several weeks of cool morning temperatures, McAlpine noticed damage to his crops, which experts from Montana State University (now Montana State University-Bozeman) and the Montana Department of Agriculture said was caused by cool temperatures after application of the herbicide. The McAlpines brought a civil action against Rhone-Poulenc, claiming damages from negligence, breach of express and implied warranty, and strict liability. The District Court granted summary judgment for the defendants on the basis that the plaintiffs' claims were based on deficiencies in the label on Weedone LV6 and that those claims were preempted by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Citing Wis. Pub. Intervenor v. Mortier, 501 US 597 (1991), and Cipollone v. Liggett Group, Inc., 505 US 504 (1992), the Supreme Court interpreted the FIFRA preemption statement, 7 U.S.C. 136v(b), to preempt only claims based upon negligence in labeling and not to preempt the appellants' claims based upon either express or implied warranty or strict liability. Therefore, the Supreme Court held that the appellants must be given the opportunity to prove that Rhone-Poulenc and Ben Taylor breached their warranty by designing, manufacturing, and marketing a product that was inherently defective and that the same defendants are strictly liable for designing, manufacturing, and marketing an unreasonably dangerous product. In response to Rhone-Poulenc's argument that the McAlpines failed to offer any evidence to defeat summary

judgment, the Supreme Court pointed out that because the District Court granted summary judgment, the McAlpines were prevented from conducting complete discovery and that until discovery was completed, it was premature for the Supreme Court to conclude that the McAlpines' evidence was insufficient. McAlpine v. Rhone-Poulenc Ag Co., 285 M 224, 947 P2d 474, 54 St. Rep. 1123 (1997), overruled in Sleath v. West Mont Home Health Serv., Inc., 2000 MT 381, 304 M 1, 16 P3d 1042, 57 St. Rep. 1629 (2000), holding that state common-law negligence and strict liability claims based on or implicating pesticide labels are not preempted by FIFRA. Following the 1997 remand, the McAlpines settled with Ben Taylor, Inc., and proceeded to trial against Rhone-Poulenc on a theory of strict products liability, claiming that Weedone LV6 was a defective product because its propensity to damage or destroy crops in conjunction with cold weather was a danger outside the expectations of the ordinary consumer. Rhone-Poulenc acknowledged that the crop damage was caused by the phenoxy herbicide, but argued that the damage was not unreasonably dangerous and that liability exists only when a product is sufficiently dangerous. The trial court instructed the jury that it must find that the herbicide was in a "defective condition unreasonably dangerous", rather than merely in a defective condition, and the jury returned a verdict for Rhone-Poulenc. The McAlpines appealed. The Supreme Court previously held in McJunkin v. Kaufman, 229 M 432, 748 P2d 910 (1987), that a product is defective if it is unreasonably dangerous, but a plaintiff is not required to show that a product is defective and also that it is unreasonably dangerous, because establishing that a product is unreasonably dangerous is merely a means of proving that it is defective. Thus, the "defective condition unreasonably dangerous" language creates a vague and imprecise dual test and should not have been submitted to the jury because it was not plain, clear, and concise. The jury should have been required to find merely that the product was in a defective condition, so the case was again remanded. Further, the decision in Sleath, id., also applied on remand, so evidence of the product label was admissible in further proceedings. McAlpine v. Rhone-Poulenc Ag Co., 2000 MT 383, 304 M 31, 16 P3d 1054, 57 St. Rep. 1644 (2000).

Bank Loan for Purchase of Contaminated Real Property — Negligent Misrepresentation, Constructive Fraud, and Punitive Damages — Summary Judgment Reversed: After the Department of Health and Environmental Sciences (now Department of Environmental Quality) discovered that soil had been contaminated with gasoline leaking from Habets' and other service station gas tanks in violation of 75-10-715, Habets entered into a buy-sell agreement for sale of his service station to Mattingly. Mattingly then met with First Bank Vice President Joe Dolan to secure financing. Dolan conducted a physical inspection of the service station property in order to obtain an impression of the value of the property and to determine whether First Bank would be secure in its loan. At the time of his inspection, Dolan was aware of the contamination caused by the service station gas tanks. The loan was approved by the First Bank loan committee made up of Dolan, Susan Hemmer, the bank president, and John Mulcare, an owner of another service station, all three of whom were aware of the contamination but did not discuss it with Mattingly or the loan committee. Mattingly learned of the contamination much later when he tried to sell the station. He then brought an action against Habets, Habets' realtor, and First Bank, alleging constructive fraud, negligence, and negligent misrepresentation by First Bank and seeking punitive damages. The District Court granted summary judgment to First Bank on all issues. The Supreme Court, following Kitchen Krafters, Inc. v. Eastside Bank of Mont., 242 M 155, 789 P2d 567 (1990), stated that a threshold issue in a claim of negligent misrepresentation is whether the defendant made a representation as to a past or existing material fact upon which the claim is based. The Supreme Court pointed out that except for some basic facts involving the existence of the contamination, Dolan's visit to the gas station, and the action of the loan committee, the parties disagreed over the nature, scope, and import of the valuation of the property; disagreed whether First Bank's appraisal of the property and approval of the Mattingly loan constituted a representation as to the value of the property; and, if it was a representation, disagreed over whether Mattingly relied upon that representation. Citing McGregor v. Cushman/Mommer, 220 M 98, 714 P2d 536 (1986), the Supreme Court also stated that special circumstances may support a claim for constructive fraud when a party makes misleading statements concerning the physical condition or commercial value of real estate and pointed out that a jury might find that representations by First Bank with regard to the property would constitute these "special circumstances". Concerning the requirement of 28-2-406 that in a claim for constructive fraud one party must gain an advantage over the other, the Supreme Court cited the fact that upon closing the sale of the station to Mattingly, First Bank was able to pay off a loan for the property made to Habets and that in making the loan to Mattingly, First Bank was able to collect interest income from the loan. Because there were facts in dispute as to the foregoing issues, the Supreme Court held that summary judgment was not appropriate and

that the District Court erred in granting summary judgment in favor of First Bank. Because 27-1-221 allows punitive damages against a party guilty of actual fraud or malice, the Supreme Court also reversed the District Court on the issue of punitive damages. Mattingly v. First Bank of Lincoln, 285 M 209, 947 P2d 66, 54 St. Rep. 1116 (1997).

Premises Liability — Conflict Between Deposition and Affidavit of Same Witness — Affidavit Not Based Upon Personal Knowledge: Herron sued Columbus Hospital, alleging that he had been injured by a malfunctioning automatic door in the hospital's professional building and that the hospital had knowledge of the defective condition of the door. The hospital moved for summary judgment, and Herron opposed the motion. In support of his opposition to the hospital's motion, Herron filed an affidavit of Lyle Skinner, a maintenance employee, alleging that the hospital knew of the defective condition of the doors. The hospital then deposed Skinner and filed parts of his deposition in further support of its motion for summary judgment. The Supreme Court pointed out that Skinner's affidavit and his deposition conflicted as to what doors in which building Skinner had performed maintenance on and also conflicted as to which doors Skinner had discussed with his superiors. Skinner's affidavit also stated that the doors would frequently malfunction, but his deposition showed that Skinner had not worked on the doors in question. Citing In re Estate of Michael v. Glacier Gen. Assurance Co., 264 M 261, 871 P2d 272 (1994), the Supreme Court held that when there is a conflict between an affidavit and the same witness's deposition, the affidavit statements do not raise a genuine issue of material fact for the purposes of summary judgment proceedings. Regarding those portions of the affidavit that did not conflict with the deposition, the Supreme Court, relying upon Cooper v. Sisters of Charity, 265 M 205, 875 P2d 352 (1994), held that an affidavit submitted for the purpose of summary judgment must be based upon personal knowledge of the affiant and that if the affidavit does not meet that requirement, it does not raise a genuine issue of material fact. Because Herron provided no evidence to resist the hospital's motion for summary judgment other than Skinner's affidavit, the Supreme Court held that Herron had not met his burden in the summary judgment proceeding and held that the District Court had properly granted the hospital's motion. Herron v. Columbus Hosp., 284 M 190, 943 P2d 1272, 54 St. Rep. 840 (1997).

Disposal of Section 1983 Federal Claim Requiring Gross Negligence Not Res Judicata as to Ordinary Negligence Claim Under State Law in State Court: To support her 42 U.S.C. 1983 claim in the federal courts, which denied the claim, plaintiff had to prove gross negligence. Therefore, those courts' findings that the conduct of the police officer who shot and killed her husband was reasonable and not a breach of duty did not constitute res judicata with respect to plaintiff's negligence action under state law against the same parties arising from the shooting. In the state court action, plaintiff only had to prove ordinary negligence, which was not considered or decided in the federal courts. Scott v. Henrich, 283 M 97, 938 P2d 1363, 54 St. Rep. 512 (1997).

Expert Testimony Not Needed on Insurance Agent's Standard of Care in Procuring Requested Insurance: In an insureds' negligence and contract action against an insurance agency for failure to procure requested coverage, an insurance agent testified as to the duties and responsibilities of an insurance agent when asked to procure specific insurance. Expert testimony on the insurance agent's standard of care and breach of the standard was not required. Fillinger v. NW. Agency, Inc., of Great Falls, 283 M 71, 938 P2d 1347, 54 St. Rep. 500 (1997).

Assumption of Risk Inapplicable to Contract Action — Harmless Error: Garrison sued Averill, a real estate broker, in contract for defrauding him by failing to disclose the true facts concerning an easement on real property purchased by Garrison. The District Court found that Garrison had "assumed the risk" of subsequent damages by failing to read the terms of the easement. The Supreme Court held that assumption of risk is ordinarily a tort term associated with personal injury actions, but held that because the District Court did not continue with any more analysis or conclusion after its reference to assumption of risk and because the District Court found that Averill did not breach his duty of care to Garrison, the reference by the District Court to assumption of risk was harmless error. Garrison v. Averill, 282 M 508, 938 P2d 702, 54 St. Rep. 454 (1997).

Evidence by Both Parties Regarding Elements of Liability — Summary Judgment Improper: When both parties produced evidence and testimony to support their arguments concerning the elements of negligence in contention, a summary or directed verdict was inappropriate. Because the determinative question was one of fact and both sides presented facts in support of their positions, the conflicting evidence on questions regarding duty, breach of duty, and causation precluded summary judgment in light of genuine issues of material fact. Contreras v. Vannoy Heating & Air Conditioning, Inc., 270 M 393, 892 P2d 557, 52 St. Rep. 246 (1995).

Standard of Care for Nonemergency Dental Care: Burlinghams sued dentist Mintz, alleging that Mintz's negligence caused Candance Burlingham's injury. Applying the standard of care set out in Negaard v. Feda, 152 M 47, 446 P2d 436 (1968), the District Court excluded two of Burlinghams' standard of care experts, one a suburban dentist from St. Louis and the other an oral surgeon from Albany, Oregon, on grounds that the experts had no idea of the standard of care in Eureka, Montana, or a similar community, and lacking expert testimony, the court summarily dismissed plaintiffs' case. On appeal, the Supreme Court held that the standard of care enunciated in Negaard was no longer appropriate for nonemergency dental care in Montana. The Supreme Court noted that the foundation for testimony must necessarily include evidence that the witness is familiar with the standard of care at the time when and the place where the alleged act of negligence occurred. Expert testimony may consist of direct or indirect knowledge of the standard of care in the community where the act occurred or in a similar community and may be based on evidence that the standard of care for a procedure at issue is the same in all communities, regardless of size or location. If the basis of the witness's familiarity with the applicable standard of care is that the standard is uniform throughout the country and evidence to the contrary is presented, then the issue raised by the contrary evidence goes to the weight of the witness's testimony but does not preclude its admission. In the case at hand, Burlinghams presented two appropriate experts who were familiar with the applicable nonemergency standard of care for dentists in the community, by either direct or indirect knowledge, thereby meeting their burden of establishing a prima facie case. The District Court erred by excluding the experts and granting summary judgment. Burlingham v. Mintz, 270 M 277, 891 P2d 527, 52 St. Rep. 181 (1995), overruling, to the extent in conflict, Negaard v. Feda, 152 M 47, 446 P2d 436 (1968).

Board Action in Seeking Injunction — No Intentional Interference With Business: The Board of Dentistry received a complaint from a dentist who claimed Kandarian was practicing dentistry without a license by performing temporomandibular joint dysfunction evaluations. The Board discussed the complaint in an open meeting, releasing the contents of the complaint to the press at the same time, and subsequently filed for an injunction seeking to enjoin Kandarian from the practice. The Board's action was not tortious but rather was authorized by statute. Thus, Kandarian's claim that the Board negligently released the contents of its complaint, negligently filed suit, and intentionally interfered with his business was properly dismissed by summary judgment. St. v. Kandarian, 268 M 408, 886 P2d 954, 51 St. Rep. 1381 (1994).

Mental Health Professional Testimony on Behavior Modification and Evaluation of Medical Emergency — Jury Verdict of No Negligence Supported by Substantial Evidence: Joshua died after suffering a seizure while in the custody of the Sheriff in a soft cell. Buhr, his personal representative, sued the county, the Sheriff, and others. At trial, Buhr's expert testified that anyone observing Joshua lying in the soft cell should have realized that he was having a medical emergency. However, a mental health professional and a Deputy Sheriff testified that they both observed Joshua and that what they saw was consistent with Joshua's being asleep. Another mental health professional also testified on the issue of the use of police officers to use force in putting Joshua in a police car in an attempt to break Joshua's violent outbursts, saying that those actions were an acceptable behavior modification approach. On both issues, the Supreme Court found that there was substantial credible evidence to support the jury's verdict. Buhr v. Flathead County, 268 M 223, 886 P2d 381, 51 St. Rep. 1258 (1994).

Assumption of Risk Not Separate Defense in Ski Area Operator Negligence Action: The defense of assumption of risk, other than as specified in Montana's skier responsibility statutes, is not a separate defense in a claim by skiers for injuries that are alleged to result from the negligence of ski area operators. Mead v. M.S.B., Inc., 264 M 465, 872 P2d 782, 51 St. Rep. 348 (1994).

Salesman Personally Liable for Negligent Misrepresentation: Plaintiffs purchased a subdivision parcel from defendant and subsequently contracted with defendant, a sales agent for a home center, to purchase a modular home to be placed on the parcel. Relying on defendant's advice and assurance that the property would be properly prepared, plaintiffs installed the home on concrete piers instead of a full foundation. Upon learning from engineering reports that extensive water damage to the home was caused by foundation instability, plaintiffs filed an action, alleging that the defendant had falsely misrepresented that the land had been properly prepared prior to installation of the home. Affirming the District Court decision, the Supreme Court ruled that the defendant was personally liable for selling property as appropriate for a modular home and for unreasonably representing to plaintiffs that the home was suitable for the pier-type foundation. Williams v. DeVinney, 259 M 354, 856 P2d 546, 50 St. Rep. 831 (1993).

Charitable Immunity Rejected: Montana has never adopted the doctrine of charitable immunity, and the District Court properly declined to allow the defense in a church member's action against a church for breach of fiduciary duty. Davis v. Church of Jesus Christ of Latter Day Saints, 258 M 286, 852 P2d 640, 50 St. Rep. 535 (1993).

No Applicability to "Management" of Children: This section does not impose liability on a parent for negligent "management" of children. J.L. v. Kienenberger, 257 M 113, 848 P2d 472, 50 St. Rep. 182 (1993), and distinguished, with regard to the inapplicability of the standard to civil rights cases brought under Title 49, ch. 2, commonly known as the Montana Human Rights Act, in Vortex Fishing Sys., Inc. v. Foss, 2001 MT 312, 308 M 8, 38 P3d 836 (2001).

Failure to Show Negligent Delay by Hospital of Request for Ambulance: A jury finding that the hospital did not negligently fail to timely transmit an ambulance request to the fire department was adequately supported by a hospital employee's testimony that she immediately relayed a telephoned request for an ambulance to the fire department and by evidence that the ambulance arrived about 7 minutes after victim collapsed. Testimony to the contrary was subject to contradictions. Hogan v. Flathead Health Center, Inc., 255 M 388, 842 P2d 335, 49 St. Rep. 997 (1992).

Limited Application of Nondelegable Duty Exception to Respondeat Superior Doctrine: Application of the nondelegable duty exception to the respondeat superior doctrine is limited to instances of safety in which the subject matter is inherently dangerous. The Supreme Court declined to modify the presently accepted version of the doctrine by adopting the exception, set out in section 214 of Restatement (Second) of Agency, that a master or other principal who is under a duty to provide protection for or to have care used to protect others or their property and who confides the performance or duty to a servant or other person is subject to liability to others for harm caused to them by the failure of the agent to perform the duty. Noting that there are several reasons for and against extending the liability of an employer when an intentional tort is committed only because or by virtue of the employment situation, the court opted to leave adoption of such a major doctrinal change to the Legislature. Maguire v. St., 254 M 178, 835 P2d 755, 49 St. Rep. 688 (1992), followed in Estate of Strever v. Cline, 278 M 165, 924 P2d 666, 53 St. Rep. 576 (1996).

Landowner Derivation of Economic Benefit as Voiding Liability Limitation: A private tennis/basketball court was not open to the public, and a valuable consideration was paid by members of a home owner's association for its use. The economic benefit derived by the association placed the property beyond the scope of the recreational use statute, 70-16-302, the clear intent of which is to grant a landowner relief from liability to any person gratuitously present for a recreational purpose. The valuable consideration need not flow directly from the injured party to the landowner in order to retain tort liability; the consideration need only be paid by someone to create access to the property for the ultimate user. Simchuk v. Angel Island Community Ass'n, 253 M 221, 833 P2d 158, 49 St. Rep. 473 (1992).

Substantial Evidence of Negligence:

Although in conflict with defendant's version of facts, substantial evidence existed to support plaintiff's claim. It was foreseeable that a freestanding light standard could fall and injure anyone in its path and that someone could act with a minimal amount of force in a manner to intervene with the standard's stability. The Supreme Court will not retry a case simply because the jury chooses to believe one side's evidence to the exclusion of the other and will not disturb a jury's negligence findings unless the results are inherently impossible to believe. Simchuk v. Angel Island Community Ass'n, 253 M 221, 833 P2d 158, 49 St. Rep. 473 (1992).

In reviewing the trial of a suit for damages suffered in a car accident, the Supreme Court refused to overturn a jury verdict of no negligence by respondent when the evidence indicated the following: (1) the respondent was traveling at a reasonable rate of speed; (2) respondent's headlamps were on and aimed properly; and (3) appellant and his companion were walking on the road, facing away from traffic, and wearing dark clothes on a dark night. Kukuchka v. Ziemet, 219 M 155, 710 P2d 1361, 42 St. Rep. 1916 (1985).

Statements of Counsel as Binding on Client — New Trial Warranted: In closing arguments during a negligence trial that resulted in a jury finding of no negligence on behalf of defendant, defense counsel made unequivocal statements which, when taken in full context with the rest of his closing argument, constituted judicial admissions on the issue of negligence of his client that had the effect of a confessory pleading. Noting that the admissions of counsel are binding on the client, the Supreme Court granted a new trial, notwithstanding counsel's assertion that the statements were merely suggestions on the theory of the case. Kohne v. Yost, 250 M 109, 818 P2d 360, 48 St. Rep. 886 (1991), distinguished in DeMars v. Carlstrom, 285 M 334, 948 P2d 246, 54 St. Rep. 1178 (1997).

No Negligence Regarding Repayment Term of Loan: Borrowers argued that bank was negligent in structuring a loan, but they cited no authority to support the proposition that a negligence action may be based on a repayment term of a lawful contract bargained between two parties. Absent the existence of a fiduciary duty, which bank did not have with respect to the loan, the law does not support such a claim. Richland Nat'l Bank & Trust v. Swenson, 249 M 410, 816 P2d 1045, 48 St. Rep. 730 (1991).

Negligence Action for Failure to Prevent Suicide — General Rule — Exceptions: Plaintiff brought a wrongful death action founded on negligence for failure of defendant to prevent the suicide of plaintiff's uncle. Regarding civil liability for suicide, the Supreme Court expressly adopted the general rule set out in 41 ALR 4th 353 that negligence actions for the suicide of another will generally not lie because the act of suicide is considered a deliberate intervening act exonerating the defendant from legal responsibility. The two narrow exceptions deal with: (1) causing another to commit suicide; and (2) allowing the imposition of a duty to prevent suicide but only in a custodial situation where suicide is foreseeable. A landlord-tenant relationship did not meet the criteria for establishing a custodial relationship. Krieg v. Massey, 239 M 469, 781 P2d 277, 46 St. Rep. 1839 (1989), cited in Marazzato v. Burlington N. RR Co., 249 M 487, 817 P2d 672, 48 St. Rep. 804 (1991).

Relationship of Negligent Misrepresentation to Fraud and Negligence Liability: Depending on circumstances, negligent misrepresentation can give rise to a case of constructive fraud under 28-2-406. Yet under Restatement (Second) of Torts 552, a negligent misrepresentation may be insufficient to constitute actual or constructive fraud but nevertheless give rise to negligence liability under this section through the want of ordinary care of the defendant in managing his property or person. In the latter case, the test of liability is the exercise of reasonable care and is subject to comparative negligence. Bottrell v. Am. Bank, 237 M 1, 773 P2d 694, 46 St. Rep. 561 (1989), followed in Mattingly v. First Bank of Lincoln, 285 M 209, 947 P2d 66, 54 St. Rep. 1116 (1997).

Establishment of Professional Negligence Action Against Attorney — Proof Required: To establish a professional negligence action, the plaintiff must prove that the professional owed him a duty and that the professional failed to live up to that duty, causing damages to the plaintiff. In pursuing a negligence or breach of contract action against an attorney, the plaintiff must initially establish the existence of an attorney-client relationship. The plaintiff must then establish that the acts constituting negligence or breach of contract occurred, proximately causing damages to the plaintiff. Finally, the plaintiff must establish that but for the negligence or breach of contract, the client would have been successful in the prosecution or defense of the action. Lorash v. Epstein, 236 M 21, 767 P2d 1335, 46 St. Rep. 151 (1989), followed in Merzlak v. Purcell, 252 M 527, 830 P2d 1278, 49 St. Rep. 139 (1992), Kane v. Miller, 258 M 182, 852 P2d 130, 50 St. Rep. 488 (1993), Fang v. Bock, 2001 MT 116, 305 M 322, 28 P3d 456 (2001), and Babcock Place Ltd. Partnership v. Berg, Lilly, Andriolo, & Tollefsen, P.C., 2003 MT 111, 315 M 364, 69 P3d 1145 (2003), and citing Christy v. Saliterman, 179 NW 2d 288 (Minn. 1970).

Liquor Liability Provision Unambiguous — No Separate Theory of Negligence: The plaintiff, injured by an automobile driver served liquor by the defendant tavern owner, sued the owner on negligence theory. The plaintiff argued that the tavern owner's liability based on negligence is distinguished from liability based on the sale or service of liquor. The court disagreed, holding that summary judgment was proper because the insurance policy provision excluding liquor liability coverage was clear and unambiguous and all claims against the tavern owner relate to the sale or service of liquor. Sheffield Ins. Co. v. Lighthouse Properties, Inc., 234 M 395, 763 P2d 669, 45 St. Rep. 1999 (1988). An amended complaint was later filed that attempted to set forth an additional theory of liability not based on the sale of alcohol. The theory was that an ordinary duty of due care was owed the bar patron based on his status as business invitee and that the bartender breached that duty by allowing patron to leave the bar in the company of an obviously intoxicated person. However, the amended complaint was still based on actions related to the sale of alcohol and was therefore barred by res judicata. The District Court did not err when it held that the insurance policy also excluded liability for acts alleged in the amended complaint. Sheffield Ins. Co. v. Lighthouse Properties, Inc., 252 M 321, 828 P2d 1369, 49 St. Rep. 274 (1992), followed in Cusenbary v. USF&G Co., 2001 MT 261, 307 M 238, 37 P3d 67 (2001).

Power Company Liable for Poorly Maintained Outside Wire That Caused Fire That Destroyed Building: In an action against the power company for negligently inspecting and maintaining a power line to a building, resulting in a fire that destroyed the building, substantial evidence existed to support the jury verdict and to deny a motion for judgment notwithstanding the verdict. Two tenants testified that just before the fire their lights flickered and their radio was making static, the two tenants and another person witnessed arcing, a tenant and fireman

witnessed a loose wire, an expert testified that the fire was caused by the wire, and pictures appeared to show that other power lines in the area were poorly maintained. Stout v. Mont. Power Co., 234 M 303, 762 P2d 875, 45 St. Rep. 1926 (1988).

Real Estate Transaction — Liability for Latent and Obvious Defects: Defendant bought a house without knowledge of latent defects and sold it to plaintiff, who purchased under the same circumstances. Defendant asserted plaintiff's unreasonable failure to investigate constituted contributory negligence. The District Court allowed plaintiff recovery for latent defects but denied recovery for obvious defects, which distinction properly addressed plaintiff's contributory negligence. By carefully apportioning the burden of the defects between the parties, the court properly balanced the responsibilities of buyer and seller in the transaction. Wagner v. Cutler, 232 M 332, 757 P2d 779, 45 St. Rep. 1092 (1988).

Unlawful Conduct Not Necessarily Bar to Negligence Action: Plaintiff and defendant were engaged in the illegal activity of hunting coyotes from defendant's airplane without a proper permit when the plane crashed. The pari delicto doctrine, found in 1-3-215, does not bar plaintiff's negligence action against the defendant as pilot. Conduct prohibited by law that is not strongly condemned by public policy as a matter of serious criminal conduct or delinquency may not be sufficient to bar recovery. The hunting statute in issue is not of a type involving conduct of which the law so strongly disapproves as a matter of public policy that access to the courts should be denied for tort purposes. In light of this holding, the court overrules two prior Montana cases that relied on the pari delicto doctrine to bar lawsuits. The two are Melville v. Butte-Balaklava Copper Co., 47 M 1, 130 P 441 (1913), and Jackson v. Lomas, 60 M 8, 198 P 434 (1921). Waller v. Engelke, 227 M 470, 741 P2d 385, 44 St. Rep. 1241 (1987). However, see Patten v. Raddatz, 271 M 276, 895 P2d 633, 52 St. Rep. 439 (1995), in which the court applied the doctrine of in pari delicto to bar recovery when prostitution and drug consumption constituted the primary purpose of the contract.

Nuisance Action — Contributory Negligence as Defense: The Supreme Court cited 58 Am. Jur. 2d Nuisances 221 in holding that contributory negligence can be a defense in a nuisance action. Wilhelm v. Great Falls, 225 M 251, 732 P2d 1315, 44 St. Rep. 211 (1987), clarified, with regard to the distinction between an absolute nuisance and a qualified nuisance, in Barnes v. Thompson Falls, 1999 MT 77, 294 M 76, 979 P2d 1275, 56 St. Rep. 321 (1999).

No Invasion of Legally Protected Interest — Damage Award Reversed: The Supreme Court, applying the test outlined in Johnson v. Super Save Mkt., Inc., 211 M 465, 686 P2d 209, 41 St. Rep. 1495 (1984), reversed the award of damages as they related to emotional distress because the evidence failed to disclose any invasion of a legally protected interest in bringing about the severe emotional distress. Proto v. Elliot, 222 M 293, 722 P2d 625, 43 St. Rep. 1358 (1986).

Interspousal Tort Immunity Abolished: The defense of interspousal tort immunity is abolished, overruling previous decisions to the contrary. The historical reasons for retention of immunity, i.e., unity of husband and wife as one person, family harmony, and the possibility of fraud and collusion, are no longer valid. Miller v. Fallon County, 222 M 214, 721 P2d 342, 43 St. Rep. 1185 (1986).

Pre-Injury Release Form: The trial court committed reversible error by granting summary judgment to defendant employer on the basis of a pre-injury release form signed by the plaintiff. The fact the waiver is a private contract is not determinative in this case. Such waiver is invalid and violates public policy if it seeks to exempt one from liability for those actions specified in 28-2-702. Miller v. Fallon County, 222 M 214, 721 P2d 342, 43 St. Rep. 1185 (1986). See also McDermott v. Carie, LLC, 2005 MT 293, 329 M 295, 124 P3d 168 (2005).

Sudden Emergency Instruction — No Longer to Be Used: The Supreme Court held that the sudden emergency instruction may no longer be used because the instruction, which provided a test for actions done in the course of a sudden emergency, added nothing to the established law applicable to any negligence case and might only leave an impression in the minds of jurors that a driver is somehow excused from the ordinary standard of care because an emergency existed. Simonson v. White, 220 M 14, 713 P2d 983, 43 St. Rep. 133 (1986).

Negligence Special Verdict Form — Harmless Error on Strict Liability Instruction: Plaintiff contended that it was error for the trial court to give a particular instruction as he contended it was an incomplete and misleading statement of the law of strict liability. The Supreme Court held that any alleged error was harmless because the plaintiff did not object to a special verdict form that required the jury to decide the case on negligence alone. Kleinsasser v. Superior Derrick Serv., Inc., 218 M 371, 708 P2d 586, 42 St. Rep. 1662 (1985). See also Drilcon, Inc. v. Roil Energy Corp., Inc., 230 M 166, 749 P2d 1058, 45 St. Rep. 114 (1988).

Abnormally Dangerous Activity — Strict Liability for Resulting Personal Injury: A person who carries on an abnormally dangerous activity is strictly liable for harm to persons resulting

from such activity, although the person engaged in such activity has exercised the utmost care to prevent the harm. In so holding, the Supreme Court adopted the general rule set forth in Restatement (Second) of Torts, section 519 (1976), and also adopted the definition of abnormally dangerous activity contained in section 520 of the Restatement. Matkovic v. Shell Oil Co., 218 M 156, 707 P2d 2, 42 St. Rep. 1482 (1985).

Personal Injury From Abnormally Dangerous Activity — Contributory Negligence No Defense: The doctrine of contributory negligence is not a defense to an action to recover damages for personal injury arising from an abnormally dangerous activity conducted by a defendant. Matkovic v. Shell Oil Co., 218 M 156, 707 P2d 2, 42 St. Rep. 1482 (1985).

Sufficient Proof of Existence, Cause, and Permanency of Physical Injury: In a tort suit for damages for a back injury, plaintiff was competent to testify as to his past and present condition and his testimony was sufficient for the jury to determine whether there was an injury. However, the testimony was not sufficient to prove permanency or cause of the injury when his testimony was disputed and permanency and cause were not apparent from the injury itself. Since the trial court gave the issue of permanency to the jury with insufficient proof, error occurred and a new trial on the issue of damages was ordered. Cain v. Stevenson, 218 M 101, 706 P2d 128, 42 St. Rep. 1428 (1985), followed in Moralli v. Lake County, 255 M 23, 839 P2d 1287, 49 St. Rep. 872 (1992).

Respondeat Superior — Accident Caused by Insurance Agent: Defendant insurance company's agent participated in a Dillon rodeo, went to a barbecue at his Dillon home, and in the evening consumed alcohol at several Dillon bars. On the way home from the bars, he struck plaintiff while driving an auto the agent leased from insurer's wholly owned service company, which had a common board of directors with insurer. Plaintiff sued defendants under respondeat superior. There was evidence agent sold insurance as a result of participating in group recreational and social activities. Summary judgment for insurer was refused because there was a fact question as to whether agent's activities during the night in question were within the course and scope of his work as an insurance agent. However, summary judgment was granted in favor of the service company as there was no evidence that agent was acting as the agent of the service company at the time of the accident. Vollmer v. Bramlette, 594 F. Supp. 243, 41 St. Rep. 1964 (D.C. Mont. 1984).

Test of Whether Emotional Distress Merits Compensation: The Supreme Court adopted the species of case approach that requires a factual analysis of each case to determine whether the alleged "emotional distress" merits compensation. In determining whether the distress is compensable absent a showing of physical or mental injury, the court looks to whether tortious conduct results in a substantial invasion of a legally protected interest and causes a significant impact upon the person of plaintiff. In the instant case, plaintiff's right to liberty was violated when he was arrested, handcuffed, frisked, booked, and charged for issuing a bad check for which he had made restitution months before. Johnson v. Super Save Markets, Inc., 211 M 465, 686 P2d 209, 41 St. Rep. 1495 (1984).

Malpractice in Prescribing Medication — Where Tort Is Committed: A Fergus County resident traveled to Yellowstone County, where a Billings doctor prescribed medicine that allegedly caused seizures and other injuries. She sued the doctor for malpractice. Any malpractice occurred in Yellowstone County, where the diagnosis and prescription were made. That is where the tort was committed, not in Fergus County where the medicine was taken and the injury occurred. Therefore, proper venue was in Yellowstone County. The mere allegation that the doctor failed to monitor the patient's use of the medication did not on its face allege that a tort was committed in Fergus County. Howard v. Dooner Laboratories, Inc., 211 M 312, 688 P2d 279, 41 St. Rep. 1381 (1984), distinguished in Carter v. Nye, 266 M 226, 879 P2d 729, 51 St. Rep. 781 (1994).

Motor Vehicle Accident — Sudden Emergency Instruction Usually Improper: As defendant passed codefendant driving downhill, codefendant speeded up and defendant cut in front of him while only 20 feet from an oncoming vehicle. Codefendant overturned in the other lane, and the next two oncoming vehicles were involved in a collision with him. Defendant's proposed sudden emergency doctrine instruction was properly refused. The instruction should not be given in an ordinary motor vehicle accident case. It is unnecessary and confusing, and the ordinary rules of negligence are applicable and sufficient. Further, a test for giving the instruction is that the perilous situation was not created by the person confronted by it and whom the instruction favors; in this case, whether defendant was negligent was very much in dispute, and the instruction was a comment on the evidence as it implied no negligence on his part. Ewing v. Esterholt, 210 M 367, 684 P2d 1053, 41 St. Rep. 1095 (1984).

Negligence Instruction Commenting on Evidence — Theory of Instruction Covered by Other Instructions: Defendant's instruction based on the theory that codefendant was 100% negligent

was denied because the court believed it commented on the evidence. Other instructions adequately covered the theory that codefendant was 100% negligent, and the jury found the codefendant 100% negligent. The instruction was thus properly denied. Ewing v. Esterholt, 210 M 367, 684 P2d 1053, 41 St. Rep. 1095 (1984).

Legal Malpractice Complaint — Upheld Under Liberal Rules of Pleading: In a legal malpractice suit, the defendant-attorney moved to dismiss the action on the grounds that the complaint did not state a cause of action because the complaint did not specifically allege that had it not been for the negligence of the attorney, the client would have won the lawsuit. The District Court dismissed the case. The Supreme Court reversed, ruling that under Montana's liberal rules of pleading, the complaint was sufficient. R.H. Schwartz Constr. Specialties, Inc. v. Hanrahan, 207 M 105, 672 P2d 1116, 40 St. Rep. 1926 (1983).

Directed Verdict for Plaintiff Upheld: A directed verdict was proper when no evidence was presented at the trial to prove that the defendant breached any duty which caused the damages complained of by the plaintiff. Robertson v. Hughes, 204 M 515, 668 P2d 1025, 40 St. Rep. 1041 (1983).

Limitations of Actions — Nuisances: If a nuisance is abatable, it cannot be considered a permanent nuisance. Therefore the nuisance is of a temporary and continuous character and gives rise to a separate cause of action each time it causes damage. The applicable Statute of Limitations is 2 years. Haugen Trust v. Warner, 204 M 508, 665 P2d 1132, 40 St. Rep. 1036 (1983).

Prior Guilty Plea — Irrelevant to Misconduct or Punitive Damages: Defendant and plaintiff, who was 16, were drinking and driving at a high rate of speed in Anaconda. Defendant was driving plaintiff's car when he lost control and hit a house. Plaintiff was severely injured. At a trial for damages based on negligence, plaintiff's counsel sought to introduce evidence of defendant's having pleaded guilty to two prior incidents of supplying intoxicating beverages to minors. Defendant's attorney moved for a motion in limine, which was denied. The jury awarded compensatory and punitive damages. On appeal the Supreme Court reversed, holding that the evidence of appellant's prior guilty pleas did not have the tendency to make the existence of his alleged willful and wanton misconduct on the night in question more or less probable. The evidence was irrelevant to establishing misconduct on the night in question or for establishing a basis for punitive damages. The fact that defendant had purchased alcohol for minors did not go toward establishing his operation of the vehicle in a reckless fashion, the act complained of. Therefore the evidence was also irrelevant toward showing a basis for punitive damages. Derenberger v. Lutey, 207 M 1, 674 P2d 485, 40 St. Rep. 902 (1983), overruled on another point in Martel v. Mont. Power Co., 231 M 96, 752 P2d 140, 45 St. Rep. 460 (1988).

No Interspousal Immunity for Property Damages: There is no interspousal tort immunity for property damage claims by one spouse against the other. Norick v. Dove Constr., 204 M 57, 662 P2d 1318, 40 St. Rep. 660 (1983).

No Parental Immunity: A parent is not immune from a negligence suit brought against him by a child under the age of emancipation injured in the operation of a motor vehicle. Transamerica Ins. Co. v. Royle, 202 M 173, 656 P2d 820, 40 St. Rep. 12 (1983).

Defendant Entirely Liable — Evidence Not Permitting Apportionment: Plaintiff injured his back when the seat in the locomotive he was operating broke and threw him backward. Plaintiff had had two prior back injuries which had been successfully treated. Defendant objected to the following instruction, contending it was an improper statement of the law: "Where a pre-existing condition exists which has been aggravated by the accident, it is your duty, if possible, to apportion the amount of disability and pain between that caused by the pre-existing condition and that caused by the accident. But if you find that the evidence does not permit such an apportionment, then the defendant is liable for the entire disability." The Supreme Court found the instruction proper, relying on an analogous situation in Azure v. Billings, 182 M 234, 596 P2d 460 (1979), and held that a plaintiff should not go uncompensated should the evidence not permit an apportionment of injuries and damages. Callihan v. Burlington N., Inc., 201 M 350, 654 P2d 972, 39 St. Rep. 2158 (1982), followed in Bevacqua v. Union Pac. RR Co., 1998 MT 120, 289 M 36, 960 P2d 273, 55 St. Rep. 469 (1998).

Assumption of Risk Standards Not to Be Included in Negligence Instructions: A jury instruction in a negligence action provided that one aspect of contributory negligence was whether or not plaintiff had assumed the risk. Another instruction provided the traditional "reasonable and prudent person" standard for negligence. Because assumption of risk is governed by a subjective standard and traditional negligence is governed by an objective standard, the two instructions were contradictory. The doctrine of assumption of risk is no longer applicable in Montana. Jury instructions may not contain any of the subjective standards of

assumption of risk. Abernathy v. Eline Oil Field Services, Inc., 200 M 205, 650 P2d 772, 39 St. Rep. 1688 (1982), followed in Mead v. M.S.B., Inc., 264 M 465, 872 P2d 782, 51 St. Rep. 348 (1994).

Conflicting Special Verdicts — New Trial Ordered: After becoming stuck in a snowdrift on the highway, the plaintiff got out of his vehicle to shovel it out, leaving his son in the vehicle. Plaintiff was injured and his son was killed when their vehicle was struck by defendant's truck. The jury found that the defendant's negligence was the proximate cause of plaintiff's injuries but not the son's death. Because two conflicting verdicts were reached from the same evidence, a new trial was required. Abernathy v. Eline Oil Field Services, Inc., 200 M 205, 650 P2d 772, 39 St. Rep. 1688 (1982).

Dangerous Instrumentalities — Negligence Proved by Circumstantial Evidence: While a coemployee was showing plaintiff a large projectile, it exploded and both of plaintiff's legs were severed. Plaintiff gave circumstantial evidence that the projectile was similar to those used at State's National Guard firing range, that the coemployee collected junk items and had found the projectile, that other persons had found similar shells at the range, and that there were no other sources where coemployee could have found the projectile. Defendants gave evidence that the projectile had not been used at the range. It could not be said there was a complete absence of proof preventing plaintiff from having a jury resolution of his suit against the Guard, the State, and the State's Department of Military Affairs. A jury of 12 could infer without resort to speculation that the projectile came from the firing range and was not compelled to accept defendants' testimony, which could be properly weighed against plaintiff's proof, leaving the jury free to make the factual determination. There was substantial credible evidence to affirm the finding that the projectile was negligently left at the range. Jacques v. Mont. Nat'l Guard, 199 M 493, 649 P2d 1319, 39 St. Rep. 1565 (1982).

Auto Negligence Suit — Admission of Reinjury Evidence — Denial of Evidence on Workers' Compensation Claim for Reinjury: Evidence that personal injury tort claimant reinjured his back at work some 10 months after accident in which his back was injured as a result of defendant's alleged negligence was properly admitted into evidence, but evidence that he had a pending workers' compensation claim arising from the reinjury was properly excluded by the trial judge. Allers v. Willis, 197 M 499, 643 P2d 592, 39 St. Rep. 745 (1982).

Dismissal of Battery Counterclaim — Sole Evidence Claimant's Self-Contradicted Testimony: Dismissal of battery counterclaim made in personal injury case arising from motor vehicle collision was not reversible error where defendant's only evidence on the alleged battery was his own testimony, his testimony was contradicted by his statements in a deposition, and he had refused a discovery request to produce his physician's medical report and had not called his physician to the stand. The counterclaim was frivolous, fanciful, gauzy, or merely suspicious, even when construed in the light most favorable to defendant. Allers v. Willis, 197 M 499, 643 P2d 592, 39 St. Rep. 745 (1982).

Excessiveness of Damages — Award for Back Injury and Loss of Earnings: Award of approximately $75,000 for impairment of earning capacity, $52,000 compensatory damages, and $15,000 punitive damages to plaintiff whose auto was hit from the rear on an icy road by defendant who was intoxicated did not constitute excessive damages. Plaintiff alleged that his back and neck were permanently injured and that as a result he would experience pain for the rest of his life whenever he participated in strenuous activities. He had been a manual laborer all his adult life, was out of work for 6 months after the accident, and fell and reinjured his back 9 months after the collision and had not returned to work as of the date of the opinion on appeal, April 15, 1982. Allers v. Willis, 197 M 499, 643 P2d 592, 39 St. Rep. 745 (1982).

Negligence in Performing Contractual Duty — No Privity Required: A prime contractor contracted separately with a steel supplier to supply steel and with a subcontractor to erect the steel. Because the supplier was delayed in delivering the steel, the subcontractor suffered financial losses. The subcontractor could properly maintain an action against the supplier for negligence in the performance of its duties arising out of the steel supply contract with the prime contractor. Privity of contract was not required. Hawthorne v. Kober Constr. Co., 196 M 519, 640 P2d 467, 39 St. Rep. 294 (1982), followed in Tynes v. Bankers Life Co., 224 M 350, 730 P2d 1115, 43 St. Rep. 2243 (1986), and Jim's Excavating Serv., Inc. v. HKM Associates, 265 M 494, 878 P2d 248, 51 St. Rep. 623 (1994), in which it was held that a third-party contractor may successfully recover for purely economic loss against a project engineer or architect when the design professional knew or should have foreseen that the particular plaintiff or an identifiable class of plaintiffs was at risk in relying on the information supplied.

Jury Instruction — Attorney Negligence: In action for damages arising when the wrong person was sued in a prior action and the suit was pursued to default judgment against plaintiff,

who notified defendant that it had sued the wrong person but did not defend the suit, the District Court did not err in giving the standard negligence instruction instead of defendant's requested instruction tailored to the duty owed by an attorney. Shahrokhfar v. St. Farm Mut. Auto. Ins. Co., 194 M 76, 634 P2d 653, 38 St. Rep. 1669 (1981).

Availability of Wrongful Death Remedy Under Former Law: The defendants in this wrongful death and survival action owned a rental house leased to the plaintiff. The plaintiff's husband died of an electrical shock received through the plumbing of the house. The plaintiff appealed the granting of a summary judgment motion to the defendants. The Residential Landlord and Tenant Act was adopted after this case arose, so its adoption of the doctrine of implied warranty of habitability was inapplicable. The Supreme Court here examined case law prior to the new statute and overruled a holding in the Dier case that if the landlord fails to repair, after notice, the tenant may himself repair, within a certain limit, or move out; but he has no redress in damages for injury to person or property consequent upon the landlord's failure to repair. That holding was not applicable to cases involving tenant suits for personal injuries against a landlord. Citing Art. II, sec. 16, Mont. Const., the court said that it would be patently unconstitutional to deny a tenant all causes of action for personal injuries or wrongful death arising out of the alleged negligent management of rental premises by a landlord. A repair and deduct statute provides no alternative remedy for damages caused by personal injury or wrongful death. The duty of care in section 58-607, R.C.M. 1947, now 27-1-701, was held applicable. This is a duty to exercise ordinary care in the management of the premises to avoid exposing persons thereon to an unreasonable risk of harm, subject to the defenses of contributory negligence or assumption of risk. Corrigan v. Janney, 192 M 99, 626 P2d 838, 38 St. Rep. 545 (1981).

Corporate Defendant's Right of Indemnity From Joint Tortfeasor — Fraudulent Misrepresentation: Where the plaintiff sued for damages caused by the defendants' fraud in the execution of a contract for deed for the sale of a shale and concrete block plant, alleging misrepresentation by the defendant company and its president, and the record showed that both the company's plant manager and its president made misrepresentations concerning the status of the company's compliance with air and water pollution control laws, the court erroneously required the company's president to indemnify the company for the judgment against it. Because the company is responsible as a principal for the fraudulent misrepresentations of its plant manager, the company and its president were joint tortfeasors and were in pari delicto. As a general rule, one compelled to pay damages for the negligent or tortious act of another is not entitled to indemnity from the latter where both parties are joint tortfeasors or in pari delicto. Poulsen v. Treasure St. Indus., Inc., 192 M 69, 626 P2d 822, 38 St. Rep. 218 (1981).

Damage to Prescriptive Easement — Injunction Denied: The District Judge properly denied the plaintiffs' request for an injunction and their claim for damages for rutting and disrepair of the roadway where the testimony showed that plaintiffs kept the roadway up despite use of it by defendants and defendants' use of the roadway was consistent with defendants' interest in the land. Marta v. Smith, 191 M 179, 622 P2d 1011, 38 St. Rep. 28 (1981).

Negligence in Maintenance of an Irrigation Ditch: Although plaintiffs' contention that an owner of an irrigation ditch is not an absolute insurer is correct, where the testimony shows: (1) that there were erosion and cutting away of the cross-claimants' soil on both sides of the ditch; (2) that there had been "bad washing"; and (3) that it would take $5,500 to make the irrigation system suitable to prevent further washing on cross-claimants' land and to repair past damage, there was substantial evidence to support the findings of negligence and damages of $5,500. Marta v. Smith, 191 M 179, 622 P2d 1011, 38 St. Rep. 28 (1981).

Availability of Affirmative Defenses to Railroad — Absolute Liability: Plaintiff was employed by a subsidiary of Burlington Northern and was injured in an accident involving Burlington's railroad cars. The Supreme Court decided the federal Safety Appliance Act applied despite the fact the railroad cars involved in the accident were on a siding where loading operations were handled by the subsidiary. Noting that the U.S. Supreme Court has declared that the question of whether a railroad can assert contributory negligence or assumption of risk as defenses in a case involving a nonrailroad employee depends entirely on state law, the Supreme Court cited its 1966 holding that, where the theory of absolute liability applies, liability is established when it is proved that a statute has been violated and there is a proximate cause connection between the violation and the resulting injuries. Proximate cause in a case under the Safety Appliance Act is decided using the definition that prevails under state law. Comparing the 1966 case under the Scaffolding Act with this case, the Supreme Court denied the defendant the two defenses. The Supreme Court also noted that railroad employees are entitled to a more liberal standard

imposing liability than nonrailroad employees. Reynolds v. Burlington N., Inc., 190 M 383, 621 P2d 1028, 37 St. Rep. 1883 (1980).

Evidence of Prior Accidents: Evidence of prior accidents, while inadmissible for the purpose of proving negligence, is nevertheless admissible for the purpose of showing the existence of a danger or defect and notice thereof. Such evidence of prior accidents, however, must show situations substantially similar to or not too remote from the accident in question, although absolute identity of circumstances is not necessary. Here, where there was no offer of proof as to what the prior accidents would have shown, the Supreme Court could not determine admissibility, and therefore no reversible error was committed. Runkle v. Burlington N., Inc., 188 M 286, 613 P2d 982 (1980). See also Kissock v. Butte Convalescent Center, 1999 MT 322, 297 M 307, 992 P2d 1271, 56 St. Rep. 1288 (1999).

Postaccident Installation of Signals: In a negligence action concerning a train-truck collision, the trial court excluded evidence of the railroad later placing electric signal devices at the crossing where the accident occurred. In this case, experts testified for the railroad that the crossing was not extrahazardous. The fact the automatic signals were installed on the crossing after the accident would have been relevant for the purpose of impeachment as well as to show feasibility. It was prejudicial error to exclude this evidence. Runkle v. Burlington N., Inc., 188 M 286, 613 P2d 982 (1980).

Standard of Care of Youthful Motorist: A youth driving an automobile is held to the same standard of care as an adult, which is the degree of care that would be exercised by a reasonable and prudent operator under the same circumstances. In Montana, the general rule is that after a child has reached the age of 14 years he is presumed, as a matter of law, to be capable of contributory negligence. Wollaston v. Burlington N., Inc., 188 M 192, 612 P2d 1277 (1980).

Intentional Torts Arising During Worker's Compensation Settlement: An injured employee brought suit against the workers' compensation insurance carrier and the insurance adjuster for the intentional torts of fraud, conversion, and infliction of emotional distress. The suit was brought after the injured employee prevailed in his claim for workers' compensation. The Supreme Court said this suit is not barred by the exclusivity provision of 39-71-411. The claimed injury is distinct from the original on-the-job injury; it occurred after the employment relation terminated and it is not covered by the Workers' Compensation Act. Hayes v. Aetna Fire Underwriters, 187 M 148, 609 P2d 257 (1980), followed in Spadaro v. Midland Claims Serv., Inc., 227 M 445, 740 P2d 1105, 44 St. Rep. 1221 (1987).

Jury Instruction — Assumption of Risk: Plaintiff contends that it was error to instruct the jury concerning assumption of risk because the facts of this case do not involve the type of negligent behavior to which assumption of risk applies. Plaintiff contends assumption of risk applies only to a relationship between a plaintiff and a defendant, not between a plaintiff and a third party. The instruction was a correct statement of the law as it existed at the time. Conflicting evidence was admitted at trial as to whether plaintiff assumed the risk of his injuries by riding with an incompetent driver, so the instruction was properly given. Penn v. Burlington N., Inc., 185 M 223, 605 P2d 600 (1980).

Jury Instruction — Evidence to Be Offered: Plaintiff contends that it was error to fail to instruct the jury that the Public Service Commission was negligent as a matter of law for failing to act on the petition of the Rosebud County Commissioners requesting installation of warning devices at the railroad crossing where the accident occurred. Such an instruction would have injected an issue upon which neither side offered any evidence at trial. It is not error to refuse an instruction that is not supported by the evidence. Penn v. Burlington N., Inc., 185 M 223, 605 P2d 600 (1980).

Negligent Entrustment: Negligent entrustment, a theory which provides that an actor is negligent if he allows a third party to use an object under the actor's control when the actor knows or has reason to know of an unreasonable risk of harm to others, is a type of contributory negligence imputed to the entrustor, not the entrustee. Penn v. Burlington N., Inc., 185 M 223, 605 P2d 600 (1980). See also McGinnis v. Hand, 1999 MT 9, 293 M 73, 972 P2d 1126, 56 St. Rep. 39 (1999).

Tort Actions Arising Out of Breach of Contract: A party has a cause of action in tort arising out of a breach of contract only if the defaulting party, by breaching the contract, also breaches a duty owed to the complaining party independently of the contract. Boise Cascade Corp. v. First Sec. Bank of Anaconda, 183 M 378, 600 P2d 173 (1979), following First Sec. Bank of Bozeman v. Goddard., 181 M 407, 593 P2d 1040 (1979).

Evidence of Alteration of Accident Scene After the Accident Excluded: Evidence of subsequent repairs or improvements by a defendant altering the scene of an accident may not be admitted in evidence to show negligence on the part of the defendant. The evidence erroneously admitted

here put before the jury the idea that the State, by constructing an additional guardrail at the scene of the accident after the accident, admitted to antecedent negligence. Cech v. St., 183 M 75, 598 P2d 584 (1979), affirmed on rehearing, 184 M 522, 604 P2d 97 (1979).

Railroad Crossings — Deceased Violating Statute: Notwithstanding prior negligence of railroad, where deceased was negligent and in violation of statutes at time of collision, liability will not attach to railroad. Roberts v. Burlington N., Inc., 171 M 143, 556 P2d 1243 (1976).

Condition of Exterior Steps: Steps used for ingress and egress to a restaurant do not come within the exception to the general rule that an abutting owner is not liable for the condition of the sidewalk in front of his premises. Steen v. Grenz, 167 M 279, 538 P2d 16 (1975).

Notice of Train at Railroad Crossing: Ordinarily a train moving over a crossing is effective and adequate warning of its presence. A railroad company may be negligent only when there are peculiar and unusual facts and circumstances rendering the situation unusually hazardous. Frank v. Burlington N., Inc., 167 M 293, 538 P2d 333 (1975).

Reckless and Wanton Misconduct: Contributory negligence is no bar to recovery for injuries caused by reckless and wanton misconduct, and where the defendant was driving on the wrong side of the road at night with his lights off, the court was in error in refusing to instruct the jury as to willful and wanton negligence. Mallory v. Cloud, 167 M 115, 535 P2d 1270 (1975).

Joint Tortfeasor — Obligation — In Pari Delicto: A joint tortfeasor is not entitled to contribution or indemnity. If a wrongdoer merely furnishes a condition for a subsequent wrongdoer, the tortfeasors are not in pari delicto, but if their independent acts concur in establishing the basis for liability, they are in pari delicto and indemnity is allowed. Auto. Ins. Co. v. Toyota Motor Sales, 166 M 221, 531 P2d 1337 (1975).

Sudden Emergency: The court properly instructed the jury in the doctrine of sudden emergency, where a driver who was legally passing a logging truck which suddenly turned left in front of her was too close to stop, and so chose to dodge between the truck and another vehicle in order to avoid a collision. Beebe v. Johnson, 165 M 96, 526 P2d 128 (1974); but see Simonson v. White, 220 M 14, 713 P2d 983, 43 St. Rep. 133 (1986).

Purpose of Statute: The purpose of this statute is twofold: (1) to fix primary responsibility and liability on the tortfeasor whose conduct occasioned the loss or injury; and (2) to make the victim whole. Haynes v. County of Missoula, 163 M 270, 517 P2d 370, 69 ALR 3d 1008 (1973).

Release Void as Contrary to Public Policy: This section, together with 28-2-701(2) and 1-3-204, was broad enough to render illegal any exculpatory clause or release relieving a potential tortfeasor from all liability for future negligent conduct where such clause or release was contrary to public policy or against the public interest; release relieving County Fair Board from any liability to livestock while on fairgrounds was illegal and unenforceable as contrary to public policy and against public interest and precluded county from disclaiming liability in negligence action for exhibitor's horses killed in barn fire on county fairgrounds; suppression of release in exhibitor's negligence action was not error or ground for new trial. Haynes v. County of Missoula, 163 M 270, 517 P2d 370, 69 ALR 3d 1008 (1973).

Livestock on Highway: It was not negligent for owner of livestock to pasture horses in area of open range country in which horses might wander onto highway during course of grazing, in absence of evidence that owner willfully and intentionally drove horse onto highway right-of-way. Bartsch v. Irvine Co., 149 M 405, 427 P2d 302 (1967), overruled, to the extent that Bartsch holds that a livestock owner, pursuant to Montana's open-range doctrine, owes absolutely no duty to motorists on public highways in open-range areas, in Larson-Murphy v. Steiner, 2000 MT 334, 303 M 96, 15 P3d 1205, 57 St. Rep. 1411 (2000).

Employee of Foreign Corporation — Removal to Federal Court: Where employee of foreign corporation allegedly placed crate of oranges in aisle of corporation's store, resulting in injury to customer when he tripped over the crate, action against foreign corporation and its resident employee, who was joined as John Doe, was not served with process, and did not appear, was not removable by corporation to federal court on ground of diversity of citizenship. Jensen v. Safeway Stores, Inc., 24 F. Supp. 585 (D.C. Mont. 1938).

Instruction Substantially in Words of Statute: If error was committed by instructing the jury in a personal injury action, substantially in the words of this section, that a person is responsible for an injury occasioned to another by his want of ordinary care or skill, etc., objected to as declaring that defendant was responsible for the injuries sustained by plaintiff, it was cured by an instruction that the court was not to be understood as intimating that defendant in what he did was negligent. Mellon v. Kelly, 99 M 10, 41 P2d 49 (1935).

No Abuse of Discretion in Jury Instructions Regarding Negligence, Res Ipsa Loquitur, and Exception to HIV Informed Consent Provision: Howard contended that the trial court abused its discretion by providing insufficient jury instructions that did not allow the jury to determine whether defendant acted recklessly, by failing to inform the jury that the AIDS Prevention Act required defendant to pay per se damages if defendant acted negligently or recklessly by failing to get consent from Howard's alleged significant other prior to administering an HIV test, and by refusing an instruction on res ipsa loquitur permitting proof by circumstantial evidence. The Supreme Court found no abuse of the trial court's discretion. The jury found no breach of defendant's standard of care, so there could be no finding that defendant acted recklessly, and the issue of damages was moot. A res ipsa loquitur instruction was unnecessary because restraints applied on Howard at the hospital were not necessarily the cause of Howard's back injury, which also may have been caused by a seizure rather than the hospital's actions. Last, a material question existed whether Howard's girlfriend was actually a significant other under the AIDS Prevention Act, so the trial court's instruction on the guidelines regarding when an HIV test may be ordered without informed consent adequately informed the jury on the issue. Howard v. St. James Community Hosp., 2006 MT 23, 331 M 60, 129 P3d 126 (2006).

Preclusion of Evidence of Duty of Care to Supervise Ranch Help — Summary Judgment Proper: Elizabeth sued her husband, Robert, for damages that she received while helping perform chores on Robert's ranch, including being accidentally injected with sheep serum by Robert's father. However, Elizabeth failed to produce any evidence that Robert had any duty to supervise his father, so the trial court granted Robert's motion in limine, precluding any evidence or testimony regarding the accidental injection, including evidence by Elizabeth's expert regarding the cause of her injuries, and ultimately granted summary judgment to Robert. Elizabeth appealed, but the Supreme Court affirmed. In order to recover for personal injuries, Elizabeth was required to establish a legal duty, a breach of that duty, and damages proximately caused by the breach. Elizabeth did not establish a legal duty, so partial summary judgment for Robert was proper. Absent a legal duty, the evidence regarding the accidental injection and the expert's opinion concerning Elizabeth's injury was irrelevant and properly excluded. Without expert testimony, Elizabeth was unable to present evidence regarding causation and could not prevail on the negligence claim, so summary judgment for Robert was proper. Nelson v. Nelson, 2005 MT 263, 329 M 85, 122 P3d 1196 (2005).

No Showing That Defendants' Actions in School Bus Incident More Than Likely Caused Student's Physical and Mental Injuries — Factors in Judicial Determination of Duty of Care — Summary Dismissal of School District Liability Proper: A student returning home on a school bus from a performance with the school pep band asked the director to stop the bus so that the student could use the restroom, but the director refused. The student was subsequently disciplined by the school for various actions related to the incident and soon after became seriously ill. The student and his parents filed an action against the school district, the director, and the bus driver, alleging that various breaches of the duty of care triggered or accelerated the student's development of diabetes and caused his posttraumatic stress disorder. The District Court granted summary judgment for defendants, and on appeal, the Supreme Court affirmed. The existence of a duty of care depends on the foreseeability of the risk and on a weighing of the policy considerations for and against the imposition of liability, including: (1) moral blame attributable to defendant's conduct; (2) prevention of future harm; (3) extent of the burden placed on defendant; (4) consequences to the public of imposing a duty; and (5) availability of insurance for the risk involved. Further, the law of torts holds a defendant liable only for injuries to others that were to the defendant at the time reasonably foreseeable. A defendant owes a duty with respect to risks and hazards whose likelihood made the conduct unreasonably dangerous and hence negligent in the first instance. The specific injury need not be foreseeable, rather the question is whether defendant could have foreseen that the conduct would result in injury to plaintiff. The District Court here concluded that defendants owed no duty of care because the student's injuries were not foreseeable, which was an erroneous focus on the particular injury rather than on the foreseeability that defendants' conduct could result in the injury. However, if a plaintiff fails to offer proof of any one of the elements of negligence—duty, breach, causation, and damages—then summary judgment in favor of defendant is proper. The question remained whether plaintiffs' experts adequately established causation, and the Supreme Court held that they did not. The experts testified that defendants' conduct could have caused or accelerated the student's injuries, but under Butler v. Domin, 2000 MT 312, 302 M 452, 15 P3d 1189 (2000), the testimony did not meet the threshold of establishing that defendants' actions more than likely caused the injuries. Absent a causal connection between defendants' actions and the student's

injuries, summary judgment for defendants was proper. Hinkle v. Shepherd School District No. 37, 2004 MT 175, 322 M 80, 93 P3d 1239 (2004), distinguishing Kolar v. Bergo, 280 M 262, 929 P2d 867 (1996).

Attorney's Duty of Care Owed to Estate Beneficiary — Standing of Estate to Bring Legal Malpractice Action: A personal representative brought a legal malpractice damage suit on behalf of the estate against an attorney who drafted a trust document and will. Before granting summary judgment to the attorney, the District Court raised the issue of whether the estate and personal representative had standing to bring the suit, based on a questionable fiduciary relationship between the plaintiffs and the attorney. On appeal, the Supreme Court concluded that as a representative of the decedent, the estate stood in the shoes of the decedent and was thus considered to be in privity with the attorney, so the estate had standing to bring a malpractice claim. Further, the question of whether the trust and the personal representative had standing was a question of fact to be determined at trial, so summary judgment was precluded and the case remanded for further proceedings. Watkins Trust v. Lacosta, 2004 MT 144, 321 M 432, 92 P3d 620 (2004).

No Violation of Pretrial Order Precluding Evidence of Negligence by Plaintiff's Employer — New Trial Properly Denied: Plaintiff was employed by a vocational day-care program that took developmentally disabled persons on day outings. Plaintiff was assaulted by a developmentally disabled person from a group home managed by defendant corporation and sued the corporation for negligence for failing to control the assailant. Before trial, the District Court granted plaintiffs' motion to exclude any evidence of negligence by plaintiff's employer and ruled that defendant had a special relationship of custody and control over the disabled person and thus had a legal duty of care to those placed within the foreseeable zone of risk created by any breach of that duty. Nevertheless, the jury found for defendant, and plaintiffs' motion for a new trial was denied. On appeal, plaintiffs contended that when defense counsel repeatedly referred to the individual planning process for the assailant, in which plaintiff's employer was a partner, blame for the injury was thereby shifted to plaintiff's employer in violation of the pretrial order and prevented plaintiffs from receiving a fair trial. The Supreme Court disagreed, pointing out that plaintiffs opened the door by presenting evidence regarding the individual planning process in questioning plaintiffs' first witness and that both parties subsequently presented evidence about the process. Further, evidence regarding the individual planning process was relevant to a limit on defendant's ability to monitor the assailant and did not equate to evidence of negligence by plaintiff's employer, nor did defense counsel ever attempt to establish that any breach of legal duty by the employer led to plaintiff's injury. Thus, the District Court did not manifestly abuse its discretion in denying plaintiffs' motion for a new trial, and the verdict was affirmed. Papich v. Quality Life Concepts, Inc., 2004 MT 116, 321 M 156, 91 P3d 553 (2004), distinguishing Cech v. St., 183 M 75, 598 P2d 584 (1979), Durden v. Hydro Flame Corp., 1998 MT 47, 288 M 1, 955 P2d 160 (1998), St. v. Ingraham, 1998 MT 156, 290 M 18, 966 P2d 103 (1998), Unmack v. Deaconess Medical Center, 1998 MT 262, 291 M 280, 967 P2d 783 (1998), and Lopez v. Josephson, 2001 MT 133, 305 M 446, 30 P3d 326 (2001).

Sufficient Evidence That Group Home Not Negligent in Failing to Control Resident: Plaintiff was employed by a vocational day-care program that took developmentally disabled persons on day outings. Plaintiff was assaulted by a developmentally disabled person from a group home managed by defendant corporation and sued the corporation for negligence for failing to control the assailant. Before trial, the District Court granted plaintiffs' motion to exclude any evidence of negligence by plaintiff's employer and ruled that defendant had a special relationship of custody and control over the disabled person and thus had a legal duty of care to those placed within the foreseeable zone of risk created by any breach of that duty. Nevertheless, the jury found for defendant, and plaintiffs' motion for a new trial was denied. On appeal, plaintiffs contended that the jury's finding was not supported by sufficient evidence, but the Supreme Court disagreed. Credible evidence was presented that defendant followed protocols regarding the assailant's behavioral medication and behavioral modification program, that it adequately communicated information on the assailant's condition through incident reports, daily logs, and a 24-hour call system, and that the state monitoring agency had no issues with the way defendant conducted business. The evidence was sufficient for the jury to find that defendant did not breach the duty of care, and the Supreme Court declined to disturb the verdict. Papich v. Quality Life Concepts, Inc., 2004 MT 116, 321 M 156, 91 P3d 553 (2004).

Duty of Contractor to Adhere to Building Code — Liability for Radon Damage Properly Submitted to Jury: A contractor built an indoor tennis facility, and the facility developed water leakage and radon damage. The District Court submitted the question of radon mitigation damages to the jury, which the contractor contended was error because neither the construction

contract nor building codes required radon mitigation. However, the building code did require installation of a subsurface vapor barrier and proper sized gravel, which the contractor did not install, and breach of the duty to install the barrier and proper gravel resulted in damages, including radon damages. Thus, submission of radon damages to the jury was proper. Glacier Tennis Club at The Summit, LLC v. Treweek Constr. Co, Inc., 2004 MT 70, 320 M 351, 87 P3d 431 (2004).

No Attorney Negligence Given Reasonable Representation — Jury Verdict Affirmed: Plaintiffs contended that defendant, their attorney, was negligent by failing to obtain and review all relevant documents in order to explain the nature of a business transaction in order for plaintiffs to make an informed decision and that by failing in this duty, the attorney negligently allowed plaintiffs to make a binding commitment to sell the business. After 5 days of trial, which included conflicting testimony from experts for both parties, a jury found that the attorney was not negligent. After reviewing the record, the Supreme Court affirmed. When viewed in the light most favorable to the attorney, there was sufficient credible evidence to support the jury's conclusion that the attorney met the duty of care to plaintiffs. Moreover, it was within the standard of care for the attorney to rely on the opinion of a financial consultant as to the reasonableness of the financial tests contained in the sale agreement. The court declined to reverse a jury verdict that was supported by substantial credible evidence. Byers v. Cummings, 2004 MT 69, 320 M 339, 87 P3d 465 (2004).

Duty of State to Maintain University Library in Safe Condition: Plaintiff's child fell through the second story railing at the Montana State University-Bozeman library and suffered brain injuries. Just weeks before, another child fell thorough the same stairway. In determining negligence, the District Court granted plaintiff partial summary judgment on the issue of duty of care and breach of the duty. The state appealed. The Supreme Court affirmed, holding that the state had a duty of ordinary care to prevent children from falling through the railing at the public building and that the state breached that duty because the state had notice from the previous accident that there was a defect, yet the state did not cure, remove, or warn of the defect. Foreseeability was established at the time of the previous accident, so the state was liable despite a relatively accident-free history at the library and the fact that the building was grandfathered in under an older version of the building code in effect when the building was constructed. Henricksen v. St., 2004 MT 20, 319 M 307, 84 P3d 38 (2004), following Wiley v. Glendive, 272 M 213, 900 P2d 310 (1995).

Failure to Instruct Jury on Greater Duty of Care in Situation of Greater Danger — Reversible Error: The Schuffs were injured while riding in Jackson's boat when Jackson failed to negotiate a submerged rock formation that he knew was there. Jackson admitted error during operation of the boat but maintained that his conduct nevertheless conformed to that of an ordinary prudent boater under the same or similar circumstances. The jury found that Jackson was not negligent, and the Schuffs appealed. The Supreme Court agreed. The fact that Jackson admitted error did not establish negligence per se. Evidence was sufficient for the jury to find that Jackson was operating the boat in a manner consistent with other ordinarily prudent boaters under the same circumstances. Further, the Schuffs failed to timely object to Jackson's interjection of the defenses of unavoidable accident and assumption of risk, so motion for a new trial was properly denied on those grounds. However, the Supreme Court found that the jury instructions did not include information regarding the possible greater duty of care in situations in which the danger is known to be greater or on Jackson's statutory duty not to operate the boat at a speed greater than would permit stopping the boat within an assured clear distance. Failure to properly instruct the jury was prejudicial error, so the case was remanded for a new trial. Schuff v. Jackson, 2002 MT 215, 311 M 312, 55 P3d 387 (2002), followed in Dale v. Three Rivers Tel. Co-ops, Inc., 2004 MT 74, 320 M 401, 87 P3d 489 (2004).

Failure to Produce Evidence in Contradiction of Investigating Officer's Conclusions Regarding Cause of Accident — Summary Judgment Proper: Ten-year-old Vivier was riding her bicycle and, turning unexpectedly in front of a vehicle, was struck and injured. Vivier's parents sued the state Department of Transportation and Lewis and Clark County for negligently failing to make the road safe. The District Court granted summary judgment to the county on grounds that the county did not have a duty with respect to the design and construction of the road and granted summary judgment to the Department on grounds that the Department did not have a duty to undertake road reconstruction simply because standards of construction had changed since the road was originally constructed. The court also determined that the Viviers failed to submit evidence tending to show that the accident was caused by a design or construction problem. The Viviers appealed, but the Supreme Court affirmed. A cause of action for negligence has four elements, including duty, breach, causation, and damages, and summary judgment is

proper if the moving party establishes that one element lacks any genuine issue of material fact and the nonmoving party does not come forward with proof that a genuine issue exists. In this case, regardless of whether the county or the Department had a duty to improve the road, the evidence showed that the accident occurred because the child turned in front of the vehicle before the driver had a chance to react, not because the condition of the road prevented the driver from maneuvering to avoid the accident. The Viviers failed to produce any facts to contradict the investigating officer's conclusions with regard to the cause of the accident, and the District Court's grant of summary judgment to the county and Department was correct. Vivier v. Dept. of Transportation, 2001 MT 221, 306 M 454, 35 P3d 958 (2001).

No Negligence by Irrigation District for Failure to Warn of Unforeseeable Flood: Plaintiffs' property was damaged by an unprecedented flood caused by an ice jam on the Clark Fork River. Plaintiffs alleged that the local irrigation district was liable for breaching its duty to construct and maintain an irrigation system that would protect the property and for failing to warn of the flooding conditions to allow plaintiffs the opportunity to protect their property. The District Court held that the irrigation district had no duty to prevent the flood or to warn of the impending natural disaster, and the Supreme Court affirmed. The first element that plaintiffs must establish in a negligence action is the existence of a duty of care, and the measure of a duty of care owed is the scope of the risk that the negligent conduct foreseeably entails. Thus, the primary factor in determining whether the irrigation district owed a duty of care was whether it was foreseeable, as a matter of law, that the district's acts or omissions would pose a risk of injury to plaintiffs. Here, substantial evidence supported the conclusion that the risk that flooding would damage plaintiffs' property was unforeseeable, so the district had no duty to erect or maintain flood control structures to prevent the unforeseeable event. The district also exercised reasonable care in the maintenance of the irrigation system that was in place. Further, plaintiffs failed to advance any applicable authority that would impose upon the district a duty to warn of the unforeseeable flood because mere knowledge of the dangerous situation, of which plaintiffs themselves had become aware the night of the flood, did not impose a legal duty to warn. Gaudreau v. Clinton Irrigation District, 2001 MT 164, 306 M 121, 30 P3d 1070 (2001), following Estate of Strever v. Cline, 278 M 165, 924 P2d 666 (1996).

When Claim for Relief Accrues for Failure of Construction Contract to Be Awarded to Lowest Bidder — No Negligence by Engineering Firm in Handling of Bidding Process on Public Works Contract: The city of Glasgow hired an engineering firm to prepare plans, specifications, and bid documents for a municipal sewer improvement project, including review of bid results and bid award recommendations. Debcon, Inc. (Debcon), submitted the lowest bid, but the engineering firm's review showed significant mathematical errors in Debcon's bid and some question as to the ability of Debcon to perform. The engineering firm recommended that the contract be awarded to a different bidder, and Debcon sued both the city and the engineering firm, alleging negligence in the award of the construction contract. The District Court concluded that Debcon lacked standing to assert a duty of care owed to it by the city and that the negligence claim against the engineering firm must also fail as a matter of law because the firm owed no duty of care to Debcon, an essential element for asserting negligence as a claim for relief. Debcon did not appeal the judgment in favor of the city, but did appeal the judgment in favor of the firm. The Supreme Court cited a long line of cases back to 1910 for the proposition that, absent a duty, no breach of duty can be established and no negligence action can be maintained. An unsuccessful bidder has no standing in mandamus or otherwise to control the discretion in the award of a contract to the lowest responsible bidder, which may not be the lowest pecuniary bidder. A claim for relief from the award of a public contract accrues under the following conditions: (1) plaintiff must timely assert its claim as an aggrieved taxpayer; (2) the claim must seek a remedy, such as an injunction, writ of mandamus, or declaratory judgment, that will protect the rights of the aggrieved taxpayer from the potential harm that will occur; and (3) plaintiff must then show that the process by which the public works contract was awarded resulted from an abuse of discretion, i.e., that discretion was tainted by an act of bad faith, fraud, corruption, or arbitrariness. The Supreme Court in this case declined to follow Debcon's contention that a new duty of care should be constructed from whole cloth that would allow Debcon, as the aggrieved low bidder, to recover lost profits or other expectancy damages under a negligence theory. The District Court properly concluded that the engineering firm, serving as project engineer for the city of Glasgow, did not owe Debcon, as a failed bidder, a duty of care in its handling of the public works contract bidding process under a negligence theory. Debcon's claim for relief was a claim for which relief could not be granted as a matter of law. Further, Debcon did not enjoy contractual privity with the engineering firm, so absent a statutory provision that would sustain a bad faith claim, a claim of bad faith did not lie. Summary judgment in favor of the engineering firm was proper. Debcon,

Inc. v. Glasgow, 2001 MT 124, 305 M 391, 28 P3d 478 (2001), following O'Brien v. Drinkenberg, 41 M 538, 111 P 137 (1910), and its progeny, Koich v. Cvar, 111 M 463, 110 P2d 964 (1941), and State ex rel. Sletten Constr. Co. v. Great Falls, 163 M 307, 516 P2d 1149 (1973), and followed, with regard to standing to challenge the letting of a contract to provide public school transportation, in Hickey v. Baker School District No. 12, 2002 MT 322, 313 M 162, 60 P3d 966 (2002).

No Duty of Volunteer Fire Department to Direct Traffic During "Boot Drive" Fundraiser: The Laurel Volunteer Fire Department sponsored a Fourth of July fireworks display for the benefit of the community, which included a "boot drive" fundraiser to help raise money for the display. The fundraiser entailed fire department personnel standing near the edge of the road while holding a cowboy boot and inviting people driving by to contribute by throwing money or checks into the boot. Two fire department personnel conducted a boot drive at an interstate highway exit ramp on the night of July 4, 1994. Jacobs and Coates exited the freeway and got in line behind a string of slow-moving vehicles, slowly advancing and then stopping each time that a vehicle went through the stop sign. Bruce exited the freeway behind Jacobs and Coates but did not notice the line of cars until it was too late to avoid a collision. Jacobs and Coates were injured and sued the fire department, claiming that the boot drive caused traffic to build up on the exit ramp and that as the sponsors of the fireworks display, the fire department owed a duty to warn people about and manage the traffic. The District Court granted the fire department's motion in limine and dismissed the action as a matter of law, concluding that no causation existed between the accident and the boot drive. Jacobs and Coates appealed, but the Supreme Court affirmed. Citing Jackson v. St., 1998 MT 46, 287 M 473, 956 P2d 35 (1998), the court noted that a judicial determination of duty involves various policy considerations, including: (1) the moral blame attributable to the defendant's conduct; (2) the prevention of future harm; (3) the extent of the burden placed on the defendant; (4) the consequences to the public of imposing that duty; and (5) the availability of insurance for the risk involved. Although a duty may have been owed by the fire department to ensure safe passage at the event itself, the fire department had no duty to ensure that every spectator arrived safely at the event. The fire department did not spill anything or block traffic on the freeway, nor did it create a hazardous condition for travelers coming to and from fire department property. Thus, after evaluating the factors regarding duty, the Supreme Court found no duty owed by the fire department to regulate traffic on or around the interstate highway. Further, in order to sustain a negligence claim, Jacobs and Coates needed to prove not only negligence on the part of the fire department but also a causal relationship between that negligence and the injury. Here, Jacobs and Coates offered no evidence of a causal connection between the accident and the boot drive. Neither of them saw fire department personnel at the off ramp or soliciting donations prior to the accident, no witness testified to any negligent behavior by the fire department personnel who conducted the boot drive, and Jacobs and Coates did not even produce a witness who saw the boot drive at all during that evening. Dismissal as a matter of law was therefore proper. Jacobs v. Laurel Volunteer Fire Dept., 2001 MT 98, 305 M 225, 26 P3d 730 (2001).

Lack of Justification in Relying on Allegedly False Information — Claim of Negligent Misrepresentation Properly Dismissed: Following termination from employment with Bitterroot International Systems, Inc. (Bitterroot), Knutson sought to exercise his buyout rights under the shareholders' agreement. Bitterroot refused to pay and sought rescission on grounds of negligent misrepresentation, alleging that Bitterroot relied on Knutson's allegedly false information regarding the value of stock acquired through purchase of another company. However, the definition of negligent misrepresentation set out in St. Bank of Townsend v. Maryann's, Inc., 204 M 21, 664 P2d 295 (1983), requires that the party asserting that defense was justified in relying on the allegedly false information. In this case, Spencer, majority shareholder and president of both Bitterroot and the company that was acquired, knew the respective values of both companies and their stocks and knew that the book values were disparate at the time of the transaction. Thus, Spencer's assertion that he was misled by Knutson was neither credible nor supported by the record, and the District Court correctly dismissed Spencer's claim of negligent misrepresentation. Knutson v. Bitterroot Int'l Sys., Inc., 2000 MT 203, 300 M 511, 5 P3d 554, 57 St. Rep. 800 (2000).

Misvaluation of Corporate Stock Not Constituting Breach of Fiduciary Duty: Following termination from employment with Bitterroot International Systems, Inc. (Bitterroot), Knutson sought to exercise his buyout rights under the shareholders' agreement. Bitterroot refused to pay and sought rescission on grounds that Knutson breached his fiduciary duty to Bitterroot, arguing that Knutson's mistaken valuation of stock acquired during the purchase of another business constituted a breach of that duty. Bitterroot did not contend that Knutson acted in bad

faith, but only that he was wrong about the stock value. Applying the standard in 35-1-443, the Supreme Court found that Knutson's inaccurate stock valuation did not constitute a breach of fiduciary duty and that the District Court did not err in dismissing Bitterroot's claim that Knutson breached his fiduciary obligation. Knutson v. Bitterroot Int'l Sys., Inc., 2000 MT 203, 300 M 511, 5 P3d 554, 57 St. Rep. 800 (2000). See also 18A Am. Jur. 2d Corporations §451 and 18B Am. Jur. 2d Corporations §1705.

Duty of City to Inspect City Property for Hazards: Plaintiff was injured after tripping on a fence wire while walking her dog at night in an unmaintained grassy area on city right-of-way next to a city street. Plaintiff contended that the city was negligent in allowing a dangerous and hazardous condition to exist on a public right-of-way and guilty of negligence per se under 81-4-105 for allowing a public nuisance. The District Court granted summary judgment, determining as a matter of law that the city owed plaintiff no duty of care because: (1) she was not walking on a sidewalk, street, or path of any kind; (2) the city did not invite her to travel in that area; and (3) there were no city lights or signs in the vicinity. On appeal, plaintiff cited Richardson v. Corvallis Pub. School District No. 1, 286 M 309, 950 P2d 748 (1997), contending that the city ignored its duty to maintain the public streets, sidewalks, and rights-of-way within corporate limits in a reasonably safe condition for public travel by never going onto the premises, mowing it, raking it, or removing debris and that if routine maintenance had been done, the wire would have been found and removed. The Supreme Court agreed. The city's contention that it did not owe a duty of care in this case, because there was nothing in the area suggesting that it was a walkway or inviting the public to use it as such, failed under the Richardson test because of the city's neglect in exercising ordinary care or skill in the management of its property. Reasonable minds could differ on whether the city should have taken some action to inspect or maintain the property, so summary judgment was improper and thus reversed for a jury determination of negligence, including possible contributory negligence. Dobrocke v. Columbia Falls, 2000 MT 179, 300 M 348, 8 P3d 71, 57 St. Rep. 718 (2000).

Double Analysis of Foreseeability in Dispute Over Intervening Act of Third Party — Duty of Police to Protect Hospital Worker From Intoxicated Person in Voluntary Custody: Havre police received a report of two girls fighting downtown. They responded and found two intoxicated women fighting, one of whom appeared to require medical treatment. LaTray was working as a nurse at a hospital emergency room when police officers delivered the woman for treatment, accompanied by her sister. The injured woman was placed in protective custody, but neither woman was arrested. When attempting to administer medical care to the injured woman, LaTray was intentionally assaulted and injured by the sister, and LaTray filed an action against the city police officers for negligently failing to exercise proper control over the sister. The District Court found that because the intentional assault was not reasonably foreseeable as a matter of law, there was no duty owed LaTray by the city, and summary judgment was granted to the city. The Supreme Court held that intervening criminal acts of third persons are not automatically unforeseeable as a matter of law, but rather must be addressed in the foreseeability context on a case-by-case basis (see Starkenburg v. St., 282 M 1, 934 P2d 1018 (1997)). Although foreseeability is ordinarily analyzed only under the duty element of negligence, in a dispute over intervening criminal acts of a third party, foreseeability must be analyzed twice: first with regard to the existence of a legal duty and, second, with regard to proximate causation (see Lopez v. Great Falls Pre-Release Serv., Inc., 1999 MT 199, 295 M 416, 986 P2d 1081 (1999)). The city relied on Phillips v. Billings, 233 M 249, 758 P2d 772 (1988), arguing that because LaTray did not claim the existence of a special relationship or otherwise show that the officers owed LaTray a greater duty of care than that owed to the general public, the city owed LaTray no duty of care. The Supreme Court noted that Phillips has been clarified in Nelson v. Driscoll, 1999 MT 193, 295 M 363, 983 P2d 972 (1999), which stated that a duty to protect third persons arises only when a police officer actually makes an arrest or otherwise takes possession or custody of an individual. Although the officers did not actually arrest the sister or otherwise have a basis for taking her into custody in this case, the officers voluntarily undertook possession or custody in transporting her to the hospital and consequently harbored the ability to control her actions and prevent an unreasonable risk of harm to third persons like LaTray, who falls within the scope of the risk that negligent supervision would foreseeably entail. Thus, the Supreme Court held that, as a matter of law, the city owed a duty of reasonable care to adequately supervise the sister so as to prevent harm to a third person who would foreseeably be placed within the scope of risk arising from negligent supervision. Whether the city breached that duty is an issue for the jury because the causal issue of intervening acts of third parties normally involves questions of fact. Viewed in the light most favorable to LaTray, there was sufficient evidence of the sister's irascible conduct to raise a jury question as to

whether she posed a danger to those around her on the day in question, and reasonable jurors could differ as to whether she presented a foreseeable risk of injury to persons in her immediate vicinity. These contested issues of material fact precluded a grant of summary judgment as a matter of law, and the case was reversed and remanded for a new trial. LaTray v. Havre, 2000 MT 119, 299 M 449, 999 P2d 1010, 57 St. Rep. 497 (2000). See also Morrow v. FBS Ins. Montana-Hoiness LaBar, Inc., 230 M 262, 749 P2d 1073 (1988), and Estate of Strever v. Cline, 278 M 165, 924 P2d 666 (1996).

No Duty Constituting Negligence When Danger or Risk Unforeseeable — Summary Judgment Proper Absent Material Fact Regarding Legal Duty: The father could not reasonably foresee that, by giving his child permission to go to a friend's house to play, the child would go to the house of a different friend, participate along with other children in burning a photograph using gasoline, and be burned when another friend accidentally kicked the container of flaming gasoline onto his child. The duty element of negligence turns primarily on foreseeability, and if a reasonably prudent defendant can foresee neither any danger of direct injury nor any risk from an intervening cause, there is no negligence. Ordinarily, negligence actions involve questions of fact and are not susceptible to summary judgment, but in this case, reasonable minds could not differ regarding the absence of material fact regarding any duty owed by the father, so summary judgment was proper as a matter of law. Poole v. Poole, 2000 MT 117, 299 M 435, 1 P3d 936, 57 St. Rep. 489 (2000), following Busta v. Columbus Hosp. Corp., 276 M 342, 916 P2d 122 (1996). See also Lopez v. Great Falls Pre-Release Serv., Inc., 1999 MT 199, 295 M 416, 986 P2d 1081 (1999).

Inherent Danger of Trenching Activity — Vicarious Liability of Employer for Injuries Caused by Subcontractor's Failure to Reduce Risks: Beckman was working to replace a waterline in a trench in Butte when the trench collapsed. At the time, Beckman was an employee of an independent contractor who had been hired by a developer to replace the city waterline as part of the upgrade to another project that the developer was constructing, as required by Butte-Silver Bow. Beckman filed a complaint against Butte-Silver Bow, seeking damages for personal injuries sustained in the collapse. Under Umbs v. Sherrodd, Inc., 246 M 373, 805 P2d 519 (1991), employers are generally not liable for the torts of their independent contractors, except when: (1) there is a nondelegable duty based on a contract; (2) the activity is inherently or intrinsically dangerous; and (3) the general contractor negligently exercises control reserved over a subcontractor's work. The District Court found that trenching activity was not inherently or intrinsically dangerous and granted Butte-Silver Bow's motion for summary judgment. The court, citing Kemp v. Bechtel Constr. Co., 221 M 519, 720 P2d 270 (1986), ruled as a matter of law that trenching activities did not fall under the inherently dangerous exception because Beckman's injury could have been avoided through standard precautions. On appeal, the Supreme Court decided that the analysis of the inherently dangerous activity exception in Kemp was manifestly wrong, and overruled that case and its progeny. Instead, the court reaffirmed the holding in Ulmen v. Schwieger, 92 M 331, 12 P2d 856 (1932), in which it was determined that the vicarious liability of an employer of a subcontractor was contingent on the nature of the work performed and not on the existence of standard precautions. An employer is therefore vicariously liable for injuries to others caused by a subcontractor's failure to take precautions to reduce unreasonable risks associated with engaging in an inherently dangerous activity. Risks associated with people working in trenches where a cave-in can cause death or serious bodily injury are well recognized in the construction industry as intrinsically or inherently dangerous and are recognized as such as a matter of law. Beckman v. Butte-Silver Bow County, 2000 MT 112, 299 M 389, 1 P3d 348, 57 St. Rep. 466 (2000), overruling Micheletto v. St., 244 M 483, 798 P2d 989 (1990), and Kemp v. Big Horn County Elec. Co-op, Inc., 244 M 437, 798 P2d 999 (1990).

Material Question Whether County Negligently Exercised Control Over Subcontractor as Precluding Summary Judgment: Beckman was working to replace a waterline in a trench in Butte when the trench collapsed. At the time, Beckman was an employee of an independent contractor who had been hired by a developer to replace the city waterline as part of the upgrade to another project that the developer was constructing, as required by Butte-Silver Bow. Beckman filed a complaint against Butte-Silver Bow, seeking damages for personal injuries sustained in the collapse. Under Umbs v. Sherrodd, Inc., 246 M 373, 805 P2d 519 (1991), employers are generally not liable for the torts of their independent contractors, except when: (1) there is a nondelegable duty based on a contract; (2) the activity is inherently or intrinsically dangerous; and (3) the general contractor negligently exercises control reserved over a subcontractor's work. The District Court cited Micheletto v. St., 244 M 483, 798 P2d 989 (1990), and Kemp v. Big Horn County Elec. Co-op, Inc., 244 M 437, 798 P2d 999 (1990), in holding that the county did not assume a nondelegable duty of safety by contract, finding that Butte-Silver

Bow never agreed to supervise the safety of the trenching operations and therefore did not assume a nondelegable duty based on contract that extended to Beckman. Thus, summary judgment was granted to Butte-Silver Bow. On appeal, the Supreme Court noted that the District Court correctly recognized the distinction between a nondelegable contractual duty and a duty based on the negligent exercise of retained control. However, Micheletto and Kemp provide an incorrect statement of the doctrine of retained control. Here, despite the lack of a written contract, the county retained the means with which to both discover and cure any unreasonably dangerous conditions. The terms of the water mains extension document, which provided that the county may supervise the water extension project, required the county to furnish a qualified construction inspector to monitor work performed during the installation of the water supply system and required that the materials and methods of construction conform to county requirements. The terms, combined with the fact that county employees were present during the trenching operation, constituted sufficient facts to preclude summary judgment for the county. The case was reversed and remanded. Beckman v. Butte-Silver Bow County, 2000 MT 112, 299 M 389, 1 P3d 348, 57 St. Rep. 466 (2000). See also Stepanek v. Kober Constr., 191 M 430, 625 P2d 51 (1981).

Improper Jury Instruction Regarding Speed of Train — Applicable Law of Case: Mickelson was injured when the fire truck that he was driving was struck by a Montana Rail Link (MRL) train and sought damages. MRL moved for summary judgment, arguing that the subject of train speed was preempted by CSX Transp., Inc. v. Easterwood, 507 US 658, 123 L Ed 2d 387, 113 S Ct 1732 (1993). The District Court denied MRL's motion, ruling that a negligence action based on a state law duty to slow or stop a train to avoid a specific individual hazard was not preempted under CSX. Nevertheless, the court's instructions to the jury stated that "Under the laws governing the speed of trains, a train crew has no duty to slow a train until a reasonable and prudent train operator has reason to believe, based upon the circumstances present, that the operator of a motor vehicle will not yield to the train and there is a substantial risk of a collision" and that "Montana law does not provide the driver of an emergency vehicle any special privilege in relation to railroad crossings. Emergency vehicle drivers must follow the requirements when approaching and crossing railroad crossings as any other vehicle driver". Following jury deliberations, MRL was found not liable. The Supreme Court held that the District Court abused its discretion in instructing the jury on the speed of trains because the instructions did not state the applicable law of the case. As set out in Runkle v. Burlington N., Inc., 188 M 286, 613 P2d 982 (1980), whether a railroad is negligent in a particular manner, such as failing to reduce train speed, is a question of fact for the jury. Here, the jury instructions improperly removed the question of train speed from jury consideration, compelling the jury to conclude that the train crew did not have a duty to do anything more than they did, rather than deciding whether the facts and circumstances of this case constituted a specific individual hazard. Mickelson v. Mont. Rail Link, Inc., 2000 MT 111, 299 M 348, 999 P2d 985, 57 St. Rep. 446 (2000).

Expert Testimony Necessary to Establish Applicable Standard of Care Owed by Physician Who Treats Referred Patient — Functional Capacities Evaluation: Even though a physician-patient relationship may not exist when a test is administered at the request of a third party, a physician nevertheless owes a duty to an examinee who is not that physician's patient to exercise care commensurate with the examiner's professional training and experience. The standard of care applicable to the administration of a functional capacities evaluation (FCE) can be established only through expert testimony that takes into account the training and experience of the physical therapist relative to administering the FCE. Romans v. Lusin, 2000 MT 84, 299 M 182, 997 P2d 114, 57 St. Rep. 363 (2000). See also Webb v. T.D., 287 M 68, 951 P2d 1008, 54 St. Rep. 1502 (1997).

School District Not Liable for Injury of Child on Playground — Witness Credibility as Question for Jury — Limited Review of Jury Verdict: The Morgans complained that the school district was liable for a teacher's negligence because their daughter, who needed close supervision, was injured on playground equipment at recess. The jury found in favor of the teacher. The Morgans sought a new trial on grounds of insufficient evidence to support the verdict. The Supreme Court's review of a jury verdict is necessarily very limited, and a jury verdict will not be reversed if it is supported by substantial credible evidence. The gist of the Morgans' appeal concerned the credibility and consistency of statements made by the only witness to the accident—the teacher. Witness credibility is a matter for determination by the jury after proper instruction from the court. Thus, the Supreme Court deferred to the properly instructed jury's evaluation of the teacher's credibility and affirmed the verdict. Morgan v. Great Falls School District No. 1, 2000 MT 28, 298 M 194, 995 P2d 422, 57 St. Rep. 134 (2000), following Whiting v. St., 248 M 207, 810 P2d 1177, 48 St. Rep. 396 (1991), Lee v. Kane, 270 M 505, 893 P2d

854, 52 St. Rep. 268 (1995), and Sandman v. Farmers Ins. Exch., 1998 MT 286, 291 M 456, 969 P2d 277, 55 St. Rep. 1165 (1998). Morgan was followed, with regard to the limited scope of review of a jury verdict and the test for substantial credible evidence, in Benson v. Diverse Computer Corp., 2004 MT 114, 321 M 140, 89 P3d 981 (2004).

Duty to Preserve Evidence in Relation to Third-Party Spoliator: Generally, in order to prevail in a tort action, plaintiff must show by a preponderance of evidence that defendant breached a legal duty to plaintiff and that the breach was the cause of plaintiff's damages. A duty to preserve evidence may arise in relation to a third-party spoliator when: (1) the spoliator voluntarily undertakes to preserve the evidence and a person reasonably relies on it to that person's detriment; (2) the spoliator entered into an agreement to preserve the evidence; (3) there has been a specific request to the spoliator to preserve the evidence; or (4) there is a duty to do so based upon a contract, statute, regulation, or some other special circumstance or relationship. Oliver v. Stimson Lumber Co., 1999 MT 328, 297 M 336, 993 P2d 11, 56 St. Rep. 1303 (1999). See also Johnson v. United Serv. Auto. Ass'n, 79 Cal. Rep. 2d 234 (Cal. Ct. App. 1998).

Special Relationship of Custody or Control by Prerelease Center — Responsibility for Public Safety Within Zone of Risk — Foreseeability: A prerelease center entered a contract with the Department of Corrections to supervise residents like Gardipee, who walked away from the center and subsequently injured Lopez. The District Court granted summary judgment for the center on grounds that the attack on Lopez was unforeseeable. Generally, there is no duty to protect others against harm by third persons, but in this case, the contract created a special relationship of custody or control, in turn creating a special responsibility upon the center to protect those members of the public who would be placed within the foreseeable zone of risk created by negligent supervision of a prerelease resident. As a matter of law, the center owed a duty of reasonable care to all persons present within the zone of danger created by the center's failure to exercise reasonable care in supervising Gardipee. Here, reasonable minds could differ as to whether it was reasonably foreseeable by the center that a failure to supervise Gardipee could pose an unreasonable risk of harm to Lopez in particular. There was a genuine issue of material fact as to whether the center knew or should have known that there was enmity between Gardipee and Lopez and a possibility of violence if Gardipee escaped, as well as whether Gardipee's attack was a superseding cause of the harm to Lopez. Both questions were suitable for resolution by a trier of fact, precluding summary judgment. The Supreme Court reversed and remanded for a trial on the merits. Lopez v. Great Falls Pre-Release Serv., Inc., 1999 MT 199, 295 M 416, 986 P2d 1081, 56 St. Rep. 771 (1999).

Actionable Section 1983 Claim Under State-Created Danger Theory: A government official who, while acting under color of state law, deprives an individual of constitutionally protected rights may be subject to personal liability for civil damages pursuant to 42 U.S.C. 1983. Generally, a government official's failure to protect an individual from harm does not constitute a due process violation. Inaction by the state, even when a danger is known, does not trigger a due process obligation except under the "state-created danger" theory, derived from DeShaney v. Winnebago County Dept. of Social Services, 489 US 189, 103 L Ed 2d 249, 109 S Ct 998 (1989), which provides that a constitutional duty to protect may be imposed when state actors have affirmatively acted to create plaintiff's danger or to render plaintiff more vulnerable to it. Adopting the test in Huffman v. County of Los Angeles, 147 F3d 1054 (9th Cir. 1998), the Supreme Court held that to assert an actionable 42 U.S.C. 1983 claim under the state-created danger theory, plaintiff must demonstrate that the state acted affirmatively, with deliberate indifference, in creating a foreseeable danger to plaintiff, leading to deprivation of plaintiff's constitutional rights. In the present case, material facts existed as to whether an officer affirmatively and with deliberate indifference placed a woman in danger, increased her vulnerability to danger, or deprived her of her right to life; thus, summary dismissal of her husband's personal liability claim against the officer was reversible error. Nelson v. Driscoll, 1999 MT 193, 295 M 363, 983 P2d 972, 56 St. Rep. 744 (1999). See also Wood v. Ostrander, 879 F2d 583 (9th Cir. 1989), and Kneipp v. Tedder, 95 F3d 1199 (3rd Cir. 1996).

Public Duty Doctrine as Applied to Law Enforcement Personnel — Exception in Cases of Special Relationship: Trina admitted that she had been drinking when stopped in her vehicle by Officer Driscoll, who nevertheless believed that sufficient probable cause did not exist to arrest the woman. Instead, thinking Trina might be impaired, the officer suggested a ride home or that Trina walk the 2-mile distance and warned Trina about returning to the vehicle. Trina decided instead to walk to a phone and call for a ride and was killed in traffic. Trina's husband brought suit for civil damages under 42 U.S.C. 1983, claiming that the officer breached the duty to protect, in violation of Trina's due process rights. The District Court summarily dismissed the claim, holding that because no probable cause existed for Trina's arrest, the officer had no duty to

protect Trina from harm and that without a duty, the action failed. The public duty doctrine provides that a police officer's duty to protect and preserve the peace is owed to the public at large rather than to a particular person, unless a special relationship exists, thus giving rise to a special duty that is more particular than that owed to the public. A special relationship is established: (1) by a statute intended to protect a specific class of persons, of which the plaintiff is a member, from a particular type of harm; (2) when a government agent undertakes specific action to protect a person or property; (3) by governmental actions that reasonably induce detrimental reliance by a member of the public; and (4) under certain circumstances when the agency has actual custody of the plaintiff or of a third person who harms the plaintiff. Relying on Stewart v. Standard Publishing Co., 102 M 43, 55 P2d 694 (1936), the Supreme Court agreed that although the officer may not have initially owed Trina a duty to protect, that duty was assumed as a matter of law when the officer prevented the woman from driving her car and ensured that she did not attempt to drive. The question of whether the duty to protect was breached is a question of fact for the jury, so summary dismissal was improper. Nelson v. Driscoll, 1999 MT 193, 295 M 363, 983 P2d 972, 56 St. Rep. 744 (1999), clarifying and distinguishing Phillips v. Billings, 233 M 249, 758 P2d 772 (1988), followed in Massee v. Thompson, 2004 MT 121, 321 M 210, 90 P3d 394 (2004). Nelson was followed, as to elements of exception to the public duty doctrine (nonlaw enforcement case), in Orr v. St., 2004 MT 354, 324 M 391, 106 P3d 100 (2004). See also Krieg v. Massey, 239 M 469, 781 P2d 277, 46 St. Rep. 1839 (1989), Busta v. Columbus Hosp. Corp., 276 M 342, 916 P2d 122 (1996), and Eves v. Anaconda-Deer Lodge County, 2005 MT 157, 327 M 437, 114 P3d 1037 (2005).

Sufficient Evidence of No Manufacturing Defect in Tractor Kingpin: Having been properly instructed in product liability law, the jury found that a kingpin, which is the device by which a trailer is attached to a tractor, did not have a manufacturing or design defect at the time of sale that rendered it a defectively designed product, for the manufacture of which liability would ascribe. On appeal, the Supreme Court affirmed, finding the following substantial evidence in support of the jury's decision: (1) two experts testified that any component subject to cyclic loading will develop fatigue cracking in service; (2) an expert testified that the kingpin was adequately radiused with a stress relief groove that allowed the kingpin to properly bottom on the attachment plate, opining that if the kingpin were designed with a larger radius, the stress relief groove would be eliminated and the kingpin would not properly bottom on the attachment plate; and (3) gouges in the kingpin indicated that it may have been abused or misused during its lifetime. The jury's findings were not inherently impossible to believe, so judgment was affirmed. Baldauf v. Arrow Tank & Eng'r Co., Inc., 1999 MT 81, 294 M 107, 979 P2d 166, 56 St. Rep. 337 (1999).

Question of Duty of Highway Contractors to Maintain Road Construction Site in Reasonably Safe Condition — Summary Judgment Precluded: Schmidt was injured on his motorcycle in a road construction area. He sued the contractor, Washington Contractors Group, and the subcontractor, Alpine Construction, for personal injuries. The District Court entered summary judgment for Washington and Alpine, concluding that significant uncontroverted evidence supported the theory that neither breached its standard of care. On appeal, the Supreme Court noted that both Washington and Alpine had a duty of ordinary care in maintaining the road construction site in a reasonably safe condition, not the duty of a possessor of premises as in Richardson v. Corvallis Pub. School District No. 1, 286 M 309, 950 P2d 748, 54 St. Rep. 1422 (1997), but rather the duty of acting as a reasonable, prudent person would under the circumstances. Questions of fact remained as to: (1) whether the contractors complied with the Manual of Uniform Traffic Control Devices (MUTCD) and, if so, whether mere compliance equated with the exercise of due care, given the condition of the exit ramp; (2) where warning road signs were placed and whether the placement complied with the MUTCD; (3) whether the pavement height differential was unreasonably dangerous to motorcycles; and (4) whether evidence of three other motorcycle accidents that happened at the same spot within 72 hours of Schmidt's accident was sufficient to raise a genuine issue of material fact regarding whether the contractors were on notice of an unreasonably dangerous condition that required remediation and possibly warnings over and above the requirements of the MUTCD. Reasonable minds could differ regarding whether a breach of the contractors' duty of ordinary care caused Schmidt's accident and subsequent damages; therefore, summary judgment was precluded, and the case was reversed and remanded for further proceedings. Schmidt v. Washington Contractors Group, Inc., 1998 MT 194, 290 M 276, 964 P2d 34, 55 St. Rep. 814 (1998), distinguishing Wiley v. Glendive, 272 M 213, 900 P2d 310 (1995).

No Duty of Attorney to Nonclient in Child Custody Case: An attorney must be able to vigorously advocate a client's interests in litigation without being compromised by obligations to

nonclients. If an attorney were considered to owe the same duty of care to both a parent and child in an adversarial custody case, neither parent nor child would be served effectively. Because the interests of a parent and those of a child may not be identical, the attorney's duty runs solely to the client except if the conduct rises to the level of deceit or collusion or is intentionally reckless. Rhode v. Adams, 1998 MT 73, 288 M 278, 957 P2d 1124, 55 St. Rep. 303 (1998). See also Crane Creek Ranch, Inc. v. Cresap, 2004 MT 351, 324 M 366, 103 P3d 535 (2004).

Full and Accurate Disclosure of Adoption Information Required: The Jacksons' adoptive son required extensive medical and psychological therapy. The Jacksons sued the state, contending that the state had a legal duty to inform them of the boy's condition and of his parents' medical backgrounds and that failure to do so constituted negligent misrepresentation, negligent nondisclosure, negligence based on lack of informed consent, and negligent supervision. The state contended that the imposition of a common-law or statutory duty to disclose the background information would conflict with its duty to maintain confidentiality of the birth parents' medical records. The District Court dismissed the claims, concluding that the state owed the Jacksons no duty of care upon which the negligence claims could be premised. Citing the opinions of several courts of other states, the Supreme Court held that recognizing a cause of action for negligent misrepresentation in the adoption context would promote public policy and ensure that adoptive parents would assume parenting responsibilities in an informed manner. Anything less than the exercise of due care in the dissemination of information to prospective adoptive parents is unacceptable. Although a slight burden is imposed on the state in providing the information, that burden is justified in light of the compelling need for adoptive parents to receive all available information regarding a child who might soon be a permanent member of the family. Full disclosure of a child's medical and familial background is warranted not only to enable adoptive parents to obtain timely and appropriate medical care for the child but also to enable them to make an intelligent and informed decision to adopt. Summary judgment was reversed. (Note: See 42-3-101, wherein the 1997 Legislature enacted a statutory requirement that social and medical histories of the birth families must be provided to a prospective adoptive parent.) Jackson v. St., 1998 MT 46, 287 M 473, 956 P2d 35, 55 St. Rep. 183 (1998).

Physician's Standard of Care Toward Examinee Sent to Physician by Examinee's Employer or Insurer or by Some Other Third Party: At the request of the workers' compensation insurer of an injured worker's employer, a physician examined the worker. He reported his findings to, and his fee was paid by, the insurer. He wrote the worker a letter telling her that she had a back sprain, that no treatment was needed, and that she had an impairment rating of 2% of the whole person. She went back to work, suffered a severely herniated disc in her back, and has significant physical limitations as a result. She sued the doctor for negligence. He claimed that he did not have a physician-patient relationship with her and therefore had no duty of care toward her. The Supreme Court held that based on this section, a physician who performs an examination of an employee, insured, or other person at the request of a third party has a duty to exercise the level of care required by the physician's professional training and experience and the duty to exercise ordinary care to: (1) discover those conditions that pose imminent danger to the examinee's physical and mental well-being; (2) take reasonable steps to communicate any such condition to the examinee; and (3) ensure that when the physician advises an examinee about a condition, the advice comports with the standard of care for the profession. The court stated that it was not thereby concluding that the physician has the same duty of care as toward a patient. Webb v. T.D., 287 M 68, 951 P2d 1008, 54 St. Rep. 1502 (1997).

Absence of Evidence of Defective Vehicle Window Design — Failure to Warn Not Defect — Jury Verdict Affirmed: As Wise drove a Ford Escort through a car wash, one of the side windows imploded when water was sprayed on it, injuring Wise, who sued Ford Motor Company for damages. The District Court properly applied the standards of product tort liability, including Ford's liability for failure to warn of a danger in its product as a separate theory of product liability. Alternate causes of the breakage were not necessarily eliminated, and the jury could have found that Wise did not meet his burden of proof by way of circumstantial evidence. The jury found in favor of Ford. Evidence supported the verdict that the vehicle was not defectively designed or defective for Ford's failure to warn that the side windows could break. Because the jury had substantial evidence upon which to base its decision that the vehicle did not have an unreasonably dangerous defective condition, judgment was affirmed. Wise v. Ford Motor Co., 284 M 336, 943 P2d 1310, 54 St. Rep. 909 (1997).

Mortgagee's Right to Assert, on Mortgagee's Behalf, Mortgagor's Contract and Tort Claims for Damage to Property: The mortgagee alleged that the engineering firm hired by the mortgagor knowingly laid improper pipe in the land, resulting in the state's disapproval of the pipe. The mortgagee could not sue the engineering firm for breach of contract and for breach of

professional duty owed to the mortgagor under the theory that the mortgagee was a direct creditor of the mortgagor and was entitled to execute on any asset of the mortgagor and that the contract and breach of professional duty claims were assets. The mortgagee would have to be a judgment creditor of the mortgagor with a claim against the mortgagor that had been reduced to judgment before the mortgagee could sue the engineering firm for breach of the firm's contract with and professional duty to the mortgagor. Turner v. Kerin & Associates, 283 M 117, 938 P2d 1368, 54 St. Rep. 522 (1997).

Insurance Agent's Failure to Procure Requested Coverage — Duty of Insured to Read Policy and Confirm Requested Coverage: The jury reasonably found that it was not unreasonable for husband and wife to have not read the insurance policy covering their outfitting business and that it was reasonable for them to act in reliance upon the representations of their insurance agent. The insureds did not have an absolute duty to read the policy. Failure to read a policy might amount to contributory negligence, but that is a question for the jury. The husband testified that he asked the agent for a policy that would cover everything, especially if someone were hurt on a horse, and that he was told that it would. He asked the same question for a number of years each time that the policy was renewed and was always given an affirmative answer. The agent testified that the husband frequently asked about and was concerned about "horse rider" coverage. When an accident occurred involving a horse, the agent told the husband that the bills would be paid. However, the insurance company failed to pay the bills, and the insured sued the agent for negligence and breach of contract. Fillinger v. NW. Agency, Inc., of Great Falls, 283 M 71, 938 P2d 1347, 54 St. Rep. 500 (1997).

Parole Officer Duty of Care to Supervise Parolees — Jury Instruction Properly Given: Corliss was paroled, after serving time for an execution-style slaying with a handgun, under the condition that he not possess a firearm. While on a visit, with the approval of his parole officer, to Washington state to look for work, Corliss failed to return to Montana within the established time, failed to see a parole officer in Washington, had a temporary restraining order obtained against him by a girlfriend because of threats made to her and her family, and had an altercation with his wife involving a handgun. In neither instance of violence did Corliss's parole officer investigate the circumstances of the violence. Later, Corliss shot and killed one friend of his girlfriend and injured another. Both the estates of the deceased woman and the wounded woman brought actions against the state for negligent supervision of Corliss's parole. The state objected to an instruction given by the District Court concerning a parole officer's duty of care, claiming that there must be some special relationship between the parole officer and the person injured by a parolee in order for a duty of care to arise. The Supreme Court reviewed statutes defining negligence, statutes describing the general duty of one individual toward another, and statutes concerning parole and concluded that Robbins had a general duty to exercise reasonable care in the supervision of Corliss and had a duty to the killed and injured women in particular. Starkenburg v. St., 282 M 1, 934 P2d 1018, 54 St. Rep. 214 (1997). See also Lopez v. Great Falls Pre-Release Serv., Inc., 1999 MT 199, 295 M 416, 986 P2d 1081, 56 St. Rep. 771 (1999).

Federal Law — Duty of Care Owed by General Contractor to Subcontractor's Employee — Inherent Danger Exception: Felling of trees in a right-of-way corridor in a national forest where over 20% of the trees were snags and where all trees had to be felled was inherently dangerous under Montana law. Therefore, the United States had a nondelegable duty to ensure that the logging contractor employed proper safety precautions, and breach of duty rendered the United States liable to an injured logger under the Federal Tort Claims Act. McMillan v. U.S., 112 F3d 1040 (9th Cir. 1997).

Duty of Care of Firearm Owner — Independent Intervening Criminal and Negligent Acts as Superseding Firearm Owner's Negligent Breach of Duty: An 11-year-old boy died as the result of a gunshot wound inflicted with a handgun stolen by the boy and three friends from under the seat of Susanj's vehicle. The boy's mother brought a negligence action against Susanj, claiming that his act of leaving the vehicle unattended and unlocked in a public thoroughfare contributed to the boy's death. The District Court summarily dismissed the action after determining that Susanj owed no legal duty to the boy because: (1) Susanj was unaware of previous thefts in the area that would compel him to lock his vehicle; (2) Susanj did not allow entry into the vehicle; (3) Susanj did not have an open display of the firearm that would lure the boys into the vehicle to steal the weapon; and (4) the boy was not an innocent party, but rather a participant in the burglary. However, the Supreme Court stated that given the foreseeability of the risk involved in the improper and unsafe use and storage of a firearm and the strong policy considerations favoring safe and prudent use and storage, as a matter of law, a firearm owner has a duty to the general public to use and store a firearm in a safe and prudent manner, taking into consideration the type of firearm, whether it is loaded or unloaded, whether the ammunition is in close

proximity or easily attainable, and the location and circumstances of its use and storage. Susanj's failure to exercise ordinary care in storing a dangerous instrumentality like a loaded handgun and ammunition under the seat of his unlocked vehicle constituted a breach of the duty of care. However, the boys' two intervening criminal acts of theft from the vehicle and the intervening grossly negligent act of one boy waving the gun around with his finger on the trigger and trying to unload the gun while high on marijuana were reasonably unforeseeable and cut off all liability on Susanj's part for the boy's death. Summary dismissal of the negligence action was proper based on the independent superseding criminal and grossly negligent acts. (See 27-1-709.) Estate of Strever v. Cline, 278 M 165, 924 P2d 666, 53 St. Rep. 576 (1996), citing Prosser and Keaton on Torts 33, 34, and 44 and Restatement (Second) of Torts (1965) 298 and 302B, following Mang v. Eliasson, 153 M 431, 458 P2d 777 (1969), Limberhand v. Big Ditch Co., 218 M 132, 706 P2d 491 (1985), Phillips v. Billings, 233 M 249, 758 P2d 772 (1988), Maguire v. St., 254 M 178, 835 P2d 755 (1992), and Busta v. Columbus Hosp. Corp., 276 M 342, 916 P2d 122 (1996), overruling Lencioni v. Long, 139 M 135, 361 P2d 455 (1961), Brown v. First Fed. S&L Ass'n of Great Falls, 154 M 79, 460 P2d 97 (1969), and Schafer v. St., 181 M 102, 592 P2d 493 (1979), to the extent that those cases hold that no recovery can be allowed for an injury that results from an intervening act of a third party, overruling that portion of King v. St., 259 M 393, 856 P2d 954 (1993), stating that if a plaintiff's injury is caused by the intervening acts of a third party, the defendant's actions cannot be viewed as the proximate cause of the injury, and distinguished in Cusenbary v. Mortensen, 1999 MT 221, 296 M 25, 987 P2d 351, 56 St. Rep. 864 (1999).

Sale of Home by Realtors — Negligent Misrepresentation, Actual and Constructive Fraud, and Real Estate Licensing and Consumer Protection Laws — Expert Witnesses Unnecessary to Prove Standard of Care: Durbins purchased a home through the seller's realtors. Contrary to the representations of the realtors, Durbins discovered that the property had no legal septic system, that the household water was unsafe to use for any purpose, and that the access road was located on the neighbor's property. Durbins brought an action against the realtors, alleging negligent misrepresentation, actual and constructive fraud, and statutory violations involving the Montana real estate licensing laws and the Montana Unfair Trade Practices and Consumer Protection Act of 1973. The defendants sought and achieved dismissal of the case on the grounds that Durbins failed to prove through expert testimony the applicable standard of care of the realtors. The Supreme Court held that because Durbins did not allege professional misrepresentation, the issues of whether the realtors negligently misrepresented the facts, were guilty of actual or constructive fraud, or were guilty of the statutory violations alleged by Durbins, were questions resolvable by common knowledge. The questions did not turn on a standard peculiarly within the knowledge of an expert witness, and scientific, technical, or other specialized knowledge was not necessary to assist the jury. The Supreme Court therefore held that Durbins were not required to provide expert standard of care testimony to establish any of the violations. Durbin v. Ross, 276 M 463, 916 P2d 758, 53 St. Rep. 471 (1996).

Landowner's Duty Toward Employee-Painter Who Fell off Ladder: Porter and his wife owned a business named Personal Touch Services. Galarneau hired them to do miscellaneous work at his house, including cleaning, grounds maintenance, repairs, and painting. While preparing to paint a 22-foot-high inside wall, Porter fell off a ladder that he had borrowed. He died later in the day. Galarneau was in his business office in Minnesota at the time of the fall. Galarneau had no common-law landowner duty toward Porter beyond maintaining his premises in a reasonably safe condition and warning of hidden or lurking dangers, and there was no evidence that he breached that duty. Porter v. Galarneau, 275 M 174, 911 P2d 1143, 53 St. Rep. 99 (1996).

Negligent Failure to Illuminate Sidewalk as Question of Fact — Resolution by Jury Rather Than Summary Judgment: Brown was injured on Demaree's unlit sidewalk stepdown landing while delivering a newspaper. The trial court granted Demaree's motion for summary judgment, holding that while a property owner has a duty to maintain sidewalks in a reasonably safe condition and to warn of hidden and lurking dangers, Demaree had done all that society could reasonably ask in this regard. The court noted that Brown had carried a flashlight but chose not to use it and that requiring a home owner to constantly illuminate property would place an unreasonable burden on the home owner that the law did not contemplate. Ordinarily, negligence actions involve questions of fact and are not susceptible to summary judgment. In this case, reasonable minds could differ on whether Demaree should have illuminated the sidewalk or warned of the sidewalk stepdown landing and the question should have been resolved by a jury. The test to be applied by the jury is not whether some other landowner under different factual circumstances is or is not required to illuminate property, but rather whether the landowner keeps a premises reasonably safe and warns of hidden dangers while taking into

consideration the use to which the property is put and its setting, location, and other physical characteristics, along with the type of person who would foreseeably visit the premises and the type of hazard or unsafe condition alleged. Summary judgment was reversed, and the case was remanded for further proceedings. Brown v. Demaree, 272 M 579, 901 P2d 567, 52 St. Rep. 819 (1995), following Limberhand v. Big Ditch Co., 218 M 132, 706 P2d 491 (1985), and distinguishing Fuchs v. Huether, 154 M 11, 459 P2d 689 (1969). See also Welton v. Lucas, 283 M 202, 940 P2d 112, 54 St. Rep. 562 (1997).

Duty of Seller of Used Automobile — Jury Instructions: The jury found defendant not negligent in the death of the plaintiff's wife by carbon monoxide poisoning resulting from a faulty exhaust system on a used car sold by defendant. Plaintiff appealed on grounds that the District Court failed to properly instruct the jury based on the evidence presented and the applicable law. The Supreme Court affirmed, holding that the District Court has discretion when deciding how to instruct a jury and the Supreme Court will not overturn that decision absent an abuse of discretion. The seller of used automobiles has a duty to discover and repair defects that are patent and discoverable through a reasonable inspection. After the vehicle is sold, the owner has a duty to maintain the vehicle in a reasonably safe condition. Foley v. Harrison Ave. Motor Co., 267 M 200, 883 P2d 100, 51 St. Rep. 1042 (1994).

Ski Area's Duties Not Limited to Statutory Duties: In response to an injured skier's allegations of negligence, the ski area asserted that its duties were limited to those set forth in 23-2-733 and that because the skier did not allege any breach of the statutory duties, the ski area was entitled to judgment as a matter of law. Applying a court's role in statutory construction to simply ascertain and declare what is contained in the section's terms and substance without inserting what has been omitted, the Supreme Court found that in neither the original enactment of 23-2-733 nor in subsequent amendments did the Legislature provide that a ski area's only duties were those enumerated in that section and that there was no other duty of due care owed by operators to skiers. The duty of due care is imposed by this section. In holding that the operator's duties were not limited to those listed in 23-2-733, the court interpreted the statute in a way that would give it effect rather than in a way that would render it unconstitutional. Mead v. M.S.B., Inc., 264 M 465, 872 P2d 782, 51 St. Rep. 348 (1994).

Malpractice Action Against Veterinarians to Be Supported by Expert Testimony: Zimmerman argued that the lower court erred in dismissing his suit for malpractice against Robertson, a veterinarian, on the basis that Zimmerman had failed to produce any expert medical testimony supporting his claims. In a case of first impression, the Supreme Court extended the requirement for expert testimony to malpractice suits against veterinarians. Zimmerman v. Robertson, 259 M 105, 854 P2d 338, 50 St. Rep. 703 (1993), followed in Newville v. St., 267 M 237, 883 P2d 793, 51 St. Rep. 758 (1994), requiring expert testimony in a negligence action against a counselor. Newville was followed in May v. ERA Landmark Real Estate of Bozeman, 2000 MT 299, 302 M 326, 15 P3d 1179, 57 St. Rep. 1256 (2000), requiring expert testimony to establish a standard of care in a negligence action against a real estate agent.

National Standard of Care Rejected to Ensure Provision of Medical Services to Rural Communities — Expert Witness Subject to Locality Rule: Falcon brought a medical malpractice suit on behalf of his mother's estate, alleging that the treatment she had received in 1988 was not up to the legal standard of medical care promulgated by the national accrediting organization under which the hospital had elected to operate. The Supreme Court held that, as a matter of public policy, in order to ensure that medical services would be provided to rural communities, the national standards did not apply. The court also affirmed the lower court's decision to exclude the testimony of the plaintiff's expert witness because the witness was not familiar with the standard of practice in Glasgow or a similar Montana locality. The court also held that a defendant doctor is entitled to summary judgment as a matter of law if the plaintiff fails to establish the applicable standard of care by competent medical testimony. Falcon v. Cheung, 257 M 296, 848 P2d 1050, 50 St. Rep. 276 (1993).

Licensee or Invitee — Duty of Care: While visiting her son Brian and his family in Texas for the holidays, Doris was asked to show the family home to prospective buyers while Brian was at work. To enhance the appearance of the kitchen, Doris washed and waxed the floor, but she slipped on a wet spot and broke her hip and then sued Brian for negligence. Doris maintained that she was an invitee because her showing the house conferred an economic benefit on Brian and that Brian therefore had a duty to exercise reasonable care to eliminate a condition that posed an unreasonable risk of harm to her, of which he had either actual or constructive knowledge. Brian maintained that his mother was only a licensee because the primary purpose of her visit was to spend time with the family and that the incidental chores undertaken by her as licensee did not convert her status to that of invitee. (See also Prestwood v. Taylor, 728 SW 2d

455 (Tex. Ct. App. 1987).) The trial court properly held that Doris was a licensee because there was no evidence of business dealings between the parties or actual pecuniary benefit to Brian. Brian's liability was conditioned on his actual knowledge that the defect existed and that it was dangerous. (See also St. v. Tennison, 509 SW 2d 560 (Tex. 1974).) Absent proof of his actual knowledge of the dangerous condition, Brian had no duty to warn Doris or to repair the defect. Barrows v. Barrows, 256 M 78, 844 P2d 119, 49 St. Rep. 1145 (1992).

No Direct Relationship Between Outrageous Event and Third Party — No Extension of Liability for Emotional Distress: Maguire's mentally disabled daughter was raped and impregnated while a resident at the Montana Developmental Center (MDC). The District Court allowed Maguire to maintain an action in tort for emotional distress related to the stress caused by Maguire's being required to make her daughter's pregnancy decisions. Applying the guidelines in Versland v. Caron Transport, 206 M 313, 671 P2d 583 (1983), for determining whether there was a negligent infliction of emotional distress, the Supreme Court held that because no direct relationship existed between any outrageous act and Maguire, to find an independent cause of action went beyond the rationale of Versland and the requirement of the victim's physical presence at the accident or event. Faced with the question of whether the causation and the foreseeability requirements were met when the presence requirement was not, the court found that MDC did not assume a duty of care toward Maguire. Refusing to increase the spiral of liability beyond that determined by other jurisdictions, the court declined to extend liability to allow Maguire to recover for either negligent or intentional infliction of severe emotional distress. Maguire v. St., 254 M 178, 835 P2d 755, 49 St. Rep. 688 (1992), followed in Estate of Strever v. Cline, 278 M 165, 924 P2d 666, 53 St. Rep. 576 (1996).

State's Duty to Provide Institutional Care: The state has a duty under 53-20-142, not inconsistent with the theories of negligent hiring, negligent supervision, and agency, to provide proper care for persons admitted to a residential facility, and it was error for the District Court to refuse to instruct on those theories in a case in which that statutory duty was called into question. Maguire v. St., 254 M 178, 835 P2d 755, 49 St. Rep. 688 (1992).

Evidence of Adequate Medical Care — Jury Finding of Lack of Medical Malpractice Affirmed: On appeal from judgment based on a jury verdict finding no medical malpractice for injuries sustained by a premature infant, the Supreme Court affirmed, finding sufficient evidence derived from expert testimony to establish a reasonable basis for the jury conclusion that medical care met or exceeded the applicable standard of care under the circumstances. Silvis v. Hobbs, 251 M 407, 824 P2d 1013, 49 St. Rep. 62 (1992).

Landowner's Act Increasing Hazard: The defendant landowner argued that it could not be held liable for the plaintiff's injury when its only affirmative act was to remove the accumulated snow on a walkway. The Supreme Court held that the question of whether a landowner's action increased an existing hazard was a proper one for the jury. Davis v. Church of Jesus Christ of Latter Day Saints, 244 M 61, 796 P2d 181, 47 St. Rep. 1302 (1990), overruled, as to the distinction between liability based upon natural versus altered accumulations of ice or snow that are open and obvious, in Richardson v. Corvallis Pub. School District No. 1, 286 M 309, 950 P2d 748, 54 St. Rep. 1422 (1997).

Employer's Duty of Care in Termination of Employees: The plaintiff, based upon a theory of negligence, alleged that the employer had a duty to exercise reasonable care in carrying out decisions concerning the termination of employees. The Supreme Court held that an employer had no duty to use reasonable care in decisionmaking. The court went on to state that a terminated employee's claim could be based only on the covenant of good faith and fair dealing. A breach of the covenant must be based on an intentional act by the employer. Heltborg v. Modern Mach., 244 M 24, 795 P2d 954, 47 St. Rep. 1254 (1990), followed in Kittelson v. Archie Cochrane Motors, Inc., 248 M 512, 813 P2d 424, 48 St. Rep. 535 (1991).

Theory of Nondelegable Duty Inapplicable to Provision of Nonemergency Hospital Services: Plaintiffs contended that they were entitled to partial summary judgment on the issue of a hospital's vicarious liability under the theory that the hospital had a nondelegable duty to provide safe radiology services to the public, relying on Jackson v. Power, 743 P2d 1376 (Alaska 1987). The Supreme Court distinguished Jackson as limited to emergency room treatment by a doctor provided by a hospital and not extending to the situation where a patient is treated by his own doctor in an emergency room provided by the hospital as a convenience to doctors. The court affirmed the general rule that a hospital is not liable for the negligence of a physician functioning as an independent contractor and that the doctor rather than the hospital has the primary duty to provide for the treatment of his patients. Estates of Milliron v. Francke, 243 M 200, 793 P2d 824, 47 St. Rep. 1134 (1990).

Near Privity Rule Applied to Accountants: The plaintiff brought an action against an accountant for negligent performance of an audit and negligent misrepresentation of financial information. The plaintiff had not retained the defendant but had relied on the audit in purchasing a business from the party that had requested the audit. The Supreme Court adopted the "near privity" rule, stating that an accountant may owe a duty to a third party but only if the accountant knows that a specific third party intends to rely on his work and only if the reliance is in connection to a particular transaction of which the accountant is aware. Thayer v. Hicks, 243 M 138, 793 P2d 784, 47 St. Rep. 1082 (1990), followed in Durbin v. Ross, 276 M 463, 916 P2d 758, 53 St. Rep. 471 (1996).

General Practitioner's Standard of Care — Geographical Limitation Eliminated: The Supreme Court adopted a new standard of care to be applied prospectively to treatment extended to patients, commencing on March 31, 1990. The court ruled that a nonboard-certified general practitioner is held to the standard of care of a reasonably competent general practitioner acting in the same or similar circumstances in the same or a similar community in the United States. The new rule abandons the "locality" rule that was limited to Montana communities and reverses anything to the contrary in Tallbull v. Whitney, 172 M 326, 564 P2d 162 (1977). Chapel v. Allison, 241 M 83, 785 P2d 204, 47 St. Rep. 101 (1990).

No Duty Owing to Student Injured in Extracurricular Activity During Summer: The plaintiff, a high school student, sustained injuries while attending a privately sponsored summer cheerleading clinic. She sued her high school district as the party responsible for its students during extracurricular activities and as principal of its agent, the cheerleading adviser, for negligent supervision. In the plaintiff's appeal of summary judgment in favor of the school district, the Supreme Court held that a school does not owe a duty to a student for an extracurricular activity during the summer months when the activity is governed by independent parties. Rollins v. Blair, 235 M 343, 767 P2d 328, 46 St. Rep. 39 (1989).

No Duty to Protect Absent Probable Cause to Arrest — No Police Negligence: A car driven by Buffalohorn entered an intersection against a red light and collided with a car occupied by Phillips and Hake, who suffered injuries. Buffalohorn was intoxicated at the time of the accident. About 2 hours prior to the accident, police detained and questioned Buffalohorn in connection with another accident, but at that time it was determined that Buffalohorn was not involved or extremely intoxicated. The Supreme Court rejected Phillips' argument that under Restatement (Second) of Torts 319 (1965), the officers had a duty to control Buffalohorn's potentially dangerous actions because imposition of a duty under section 319 depends on the ability to control the third person. Absent probable cause to arrest, no duty flowed from the officers to Phillips to protect Phillips from later actions of Buffalohorn, and Phillips' claim of police negligence was summarily dismissed. Phillips v. Billings, 233 M 249, 758 P2d 772, 45 St. Rep. 1463 (1988), followed in Estate of Strever v. Cline, 278 M 165, 924 P2d 666, 53 St. Rep. 576 (1996), and distinguished in Nelson v. Driscoll, 1999 MT 193, 295 M 363, 983 P2d 972, 56 St. Rep. 744 (1999), clarifying that the imposition of a duty to protect under Restatement (Second) of Torts 319 (1965) depends on whether the officer takes charge of the alleged dangerous person and that the officer's duty to protect is owed to third persons, not to the person with whom the officer has a custodial relationship.

Standard of Care of Licensed Minor Driver: It was error for the District Court to give an instruction in a pedestrian/automobile accident case stating that a child is not held to the same standard of care as an adult. On appeal, the Supreme Court held that a 16-year-old with a valid Montana driver's license is held to the same standard of care while driving an automobile as an adult in the same circumstances. Cooper v. Rosston, 232 M 186, 756 P2d 1125, 45 St. Rep. 978 (1988).

Attorney Not Negligent for Preparation of Fill-in-the-Blank Contracts: Defendant sought indemnification for damages from his former attorney, alleging that but for the attorney's negligence, he would not be in breach of contract. The attorney had prepared fill-in-the-blank contracts for defendant's use in land purchases. The attorney was absolved from liability for defendant's failure to perform under the contract terms because the attorney drafted the contracts with a reasonable degree of care for defendant's purposes, he based the contract on information supplied by defendant, and he made no guarantee of the validity of the instrument. Schilke v. Bean, 232 M 125, 755 P2d 565, 45 St. Rep. 930 (1988).

FELA, Not State Statutory Law, as Providing Remedy for Common Law Claims: Claimant sought compensation from a Federal Employers' Liability Act (FELA) self-insurer for an alleged breach of the common law duty of good faith and fair dealing. Claimant argued that because FELA did not specifically address the problem of unfair claims settlement practices, the duties imposed by Montana statutory and common law were not preempted by FELA and should apply.

The federal District Court found no authority for this novel proposition in holding that the rights and duties of an employee and employer subject to FELA depend on the terms of the Act itself and on common law as interpreted by the federal courts; therefore, FELA presents the exclusive remedy in all actions falling within the ambit of the Act to the exclusion of state statutory and common law. Toscano v. Burlington N. RR Co., 678 F. Supp. 1477, 45 St. Rep. 367 (D.C. Mont. 1987).

Summary Judgment Proper Upon Failure to Show Evidence of Due Care: When a fire, caused by a floating power line, burned plaintiff's house and property, the District Court granted partial summary judgment, ruling that Montana Power Company (MPC) negligently failed to exercise the proper duty of care in the inspection and maintenance of its utility lines. On appeal, the Supreme Court affirmed the grant of summary judgment, ruling that when the defendant has a high standard of care and the plaintiff provides clear evidence of negligence, it becomes incumbent upon the defendant to provide evidence to show due care was exercised. If the defendant fails to provide such evidence, summary judgment is proper. Ogden v. Mont. Power Co., 229 M 387, 747 P2d 201, 44 St. Rep. 2068 (1987).

Ranch Owner Not "Keeper" of Dog — Summary Judgment Proper: A meter reader bitten by a dog while delivering a company calendar sued both the ranch foreman who owned the dog and the ranch owner, contending the ranch owner was jointly responsible as "keeper" of the dog. The District Court found that the ranch owner was not the "keeper" of the dog, as described in 3A C.J.S. Animals 205(b), since he did not own, have possession of, manage, control, or care for the animal as owners are accustomed to do. Since the ranch owner had provided materials to the foreman to build a fence and dog pen and an agreement was made to keep the dog in the pen unless accompanied by the foreman, the ranch owner clearly met the duty of reasonable and ordinary care required of Montana landowners. There being no factual question whether the ranch owner was the animal's "keeper", summary judgment was proper. Criswell v. Brewer, 228 M 143, 741 P2d 418, 44 St. Rep. 1408 (1987), followed in Vennes v. Miller, 1998 MT 23, 287 M 263, 954 P2d 736, 55 St. Rep. 84 (1998).

Failure of Alter Ego and Principal/Agency Theories in Proving Duty of Parent Company to Provide Safe Workplace — No Separate Liability for Injury Covered by Subsidiary's Workers' Compensation: Plaintiff was an employee of a subsidiary company and argued that the subsidiary was so controlled by the parent company that the corporate cloak should be cast aside allowing suit against the parent company. The Supreme Court found no suggestion that the parent company was engaged directly in the business of the subsidiary or that the parent company was an operating entity engaged in operating its business at the place of injury. There was no indication that the subsidiary was used as a subterfuge to defeat public convenience, justify wrong, or perpetuate fraud; therefore, summary judgment was not precluded by the alter ego or principal/agency theory. Further, the subsidiary had discharged its responsibility for plaintiff by securing workers' compensation insurance, with the result that neither the parent company nor its subsidiary would be separately subject to liability for the injury which was covered by workers' compensation. Thornock v. Pack River Management Co., 227 M 524, 740 P2d 1119, 44 St. Rep. 1284 (1987).

Duty of Care Owed by General Contractor to Subcontractor's Employee — Inherent Danger Exception: Montana follows the general rule that absent reserved control over the subcontractor's operations, the general contractor and owner are not liable for injuries to subcontractor's employees. However, the duty of care is not delegable by the general contractor or owner to the subcontractor if the work is "inherently dangerous" or involves "peculiar risks", in which case the general contractor or owner must exercise reasonable care to ensure measures are taken to mitigate the risk. In this case, a subcontractor's employee was injured when a ditch he was digging caved in. Standard safety measures had not been employed by the subcontractor although required by the contract. The court found that ditchdigging is not inherently dangerous when done with the standard precautions, and therefore there was no nondelegable duty under the inherent danger exception. A strongly worded dissent joined by three justices would have applied the exception and remanded for a determination by a jury whether there was inherent danger and, if so, whether the general contractor exercised reasonable care to mitigate the danger. Kemp v. Bechtel Constr. Co., 221 M 519, 720 P2d 270, 43 St. Rep. 1022 (1986), overruled in Beckman v. Butte-Silver Bow County, 2000 MT 112, 299 M 389, 1 P3d 348, 57 St. Rep. 466 (2000). See McCall v. U.S. Dept. of Energy, 914 F2d 191 (9th Cir. 1990), in which the court of appeals, relying on Kemp, held that because Montana has adopted sections 416 and 427 of the Restatement (Second) of Torts, under the Federal Tort Claims Act, the government may not be held vicariously liable for the negligence of an independent contractor but may be held liable when its own employees through their own negligent conduct have breached the nondelegable

duty to ensure a safe workplace for employees of independent contractors engaged in inherently dangerous work. Kemp and McCall were followed in McMillan v. U.S., 112 F3d 1040 (9th Cir. 1997).

Questions of Anticipated Harm and Duty of Ordinary Care as Material Issues of Fact — Summary Judgment Improper: In reversing a summary judgment as improper, the Supreme Court found that material questions of fact for a jury existed on the issues of whether: (1) the town of Whitehall should have anticipated that harm would be caused by the condition of the sidewalk despite the knowledge and obviousness of the condition; and (2) the town of Whitehall exercised ordinary care to keep the sidewalk reasonably safe. Even if it appeared that recovery under these issues was very remote, they constituted genuine issues of material fact; therefore, summary judgment was not appropriate. Kaiser v. Whitehall, 221 M 322, 718 P2d 1341, 43 St. Rep. 846 (1986). However, see Yager v. Deane, 258 M 453, 853 P2d 1214, 50 St. Rep. 610 (1993).

Duty to Warn of Known Danger — Lack of Warning of Known Danger as Defect: In a tort action over injury caused by a hay baler, the Supreme Court held, based on the holding of Brown v. N. Am. Mfg. Co., 176 M 98, 576 P2d 711 (1978), that it was error to instruct the jury that a manufacturer has no duty to warn a person who claims to be entitled to a warning if the person actually knows of the danger. Under the facts of this case, there is a duty to warn of a known danger if the product is unreasonably dangerous and lack of such warning can make an otherwise nondefective product defective. Tacke v. Vermeer Mfg. Co., 220 M 1, 713 P2d 527, 43 St. Rep. 123 (1986). Recognition of a failure to warn claim and the Brown criteria were applied in Riley v. Am. Honda Motor Co., Inc., 259 M 128, 855 P2d 196, 50 St. Rep. 714 (1993). See also Emery v. Federated Foods, Inc., 262 M 83, 863 P2d 426, 50 St. Rep. 1454 (1993).

Attractive Nuisance Not Applicable to Certain Artificial Streams or Bodies of Water: The degree of care of one who maintains on his land an artificial stream or body of water for a useful purpose, where the stream or body of water has natural characteristics, is no greater than the degree of care required of one through whose land flows a natural stream or whose land contains a natural body of water. The owner or user of an artificial stream or body of water having natural characteristics is bound to no special duty of care or precaution for the protection of children who may enter therein, unless there is in or about the artificial stream or body of water some peculiar danger, in the nature of a hidden peril or trap for the unwary, of which the owner or user has or ought to have notice. The doctrine of attractive nuisance as such does not apply to such artificial streams or bodies of water any more than it applies to natural streams or bodies of water. Limberhand v. Big Ditch Co., 218 M 132, 706 P2d 491, 42 St. Rep. 1460 (1985). Following Limberhand, the court of appeals held that under Montana law, the duty of care owed by a landowner does not depend on whether the injured party was a trespasser, licensee, or invitee. Berge v. Boyne USA, Inc., 779 F2d 1445 (9th Cir. 1986).

Duty of Care Not Dependent on Status of Injured Party: The duty of care of a property owner does not depend on the status of a party injured on the property, whether tenant, social guest, invitee, or trespasser. The question is always whether the landowner exercised ordinary care in the circumstances. Limberhand v. Big Ditch Co., 218 M 132, 706 P2d 491, 42 St. Rep. 1460 (1985), overruling Cereck v. Albertson's Inc., 195 M 409, 637 P2d 509 (1981), following Corrigan v. Janney, 192 M 99, 626 P2d 838 (1981), and followed in Kaiser v. Whitehall, 221 M 322, 718 P2d 1341, 43 St. Rep. 846 (1986), Estate of Strever v. Cline, 278 M 165, 924 P2d 666, 53 St. Rep. 576 (1996), and Richardson v. Corvallis Pub. School District No. 1, 286 M 309, 950 P2d 748, 54 St. Rep. 1422 (1997). However, see Yager v. Deane, 258 M 453, 853 P2d 1214, 50 St. Rep. 610 (1993).

Extension of Landowner's Liability to Hazards on Adjoining Land: The fact that an irrigation ditch in which plaintiff's son drowned is not on property owned by defendant apartment owner but on adjoining land does not as a matter of law bar plaintiff's wrongful death action against defendant landowner. Limberhand v. Big Ditch Co., 218 M 132, 706 P2d 491, 42 St. Rep. 1460 (1985).

Contractor's Duty to Subcontractor: Sections 50-71-201 and 50-71-202 require a contractor to furnish a subcontractor with a safe place to work. A subcontractor is an employee of the contractor for purposes of 50-71-201. Cain v. Stevenson, 218 M 101, 706 P2d 128, 42 St. Rep. 1428 (1985).

Jury Instructions — "Locality Rule" Standard Not Relevant for Judging Medical Specialist — "Loss of Chance": Woman sued her doctor, a national board certified orthopedic surgeon, for damages for alleged negligent medical treatment. Defendant had treated plaintiff for misdiagnosed knee problems for 4 months without ordering diagnostic X-rays before referring plaintiff for surgery to out-of-state doctor who discovered a giant cell tumor in plaintiff's knee. Plaintiff alleged that defendant's failure to order diagnostic films early in treatment resulted in her losing any chance to have less radical surgery and preserve her natural knee. Jury returned

verdict in favor of defendant, and plaintiff appealed. Supreme Court vacated District Court judgment and remanded for new trial. Supreme Court held that District Court committed reversible error by instructing jury on the "locality rule" as appropriate standard of care rather than giving plaintiff's proposed instruction holding board certified specialists to national standards of the specialty. Supreme Court also held that on retrial, plaintiff is entitled to a "loss of chance" instruction. The trier of fact should determine whether defendant's negligence was a substantial factor in reducing plaintiff's chances of obtaining a better result rather than whether plaintiff would have obtained a better result with earlier diagnosis. Aasheim v. Humberger, 215 M 127, 695 P2d 824, 42 St. Rep. 235 (1985); holding explained and extended to include Board-certified family practitioners in Glover v. Ballhagen, 232 M 427, 756 P2d 1166, 45 St. Rep. 1168 (1988).

Expert Testimony Required for Title Insurance Company Standard of Care: In 1975, plaintiff negotiated to sell his property and a commitment for title insurance was ordered from defendant. The defendant issued a title commitment, but it contained no reference to a quiet title action or decree whereby plaintiff and his father had determined separate ownership of various parcels. In 1977, a judgment against plaintiff's father was entered and a Writ of Execution was levied on the father's and plaintiff's property. Plaintiff then brought an action to amend the judgment in the quiet title action nunc pro tunc to reflect the separate ownership. Plaintiff then brought this action to recover costs of the nunc pro tunc action. Plaintiff presented no expert testimony as to the standard of care of a title insurance company. Defendant appealed from an adverse judgment, contending the absence of expert testimony failed to establish a prima facie case of negligence. The Supreme Court, relying on Prosser, Law of Torts, 4th Ed. (1971), and Hill v. Squibb & Sons, 181 M 199, 592 P2d 1383 (1979), held that title examination is complex and intricate and beyond the common understanding of lay persons. Plaintiff must produce expert testimony to establish the standard of care required of a title insurance company. Without such testimony a prima facie case of negligence was not established. Doble v. Lincoln County Title Co., 215 M 1, 692 P2d 1267, 42 St. Rep. 128 (1985), distinguished in Old Republic Nat'l Title Ins. Co. v. Realty Title Co., 1999 MT 69, 294 M 6, 978 P2d 956, 56 St. Rep. 286 (1999).

Duty to Warn of Known Dangers on Ingress or Egress: Baide operates a trailer park adjacent to the Clinton Elementary School. In the past a loop road, with a bridge spanning an irrigation ditch, connected the park to a main street. The irrigation ditch and bridge were on Baide's property. The bridge was destroyed by a truck. Baide then barricaded the bridge, piled gravel in front of the ditch, and put up a warning sign. Four months later, Baide conveyed the property to the Clinton School District. Three months later, plaintiff took a tenant to Baide's trailer park, went down the loop road, and drove into the irrigation ditch. She brought suit for damages to her property and for personal injuries. The District Court granted Baide's motion for summary judgment. On appeal, the Supreme Court held that Baide would owe no duty to plaintiff if he were a mere vendor of the land. However, as a landowner and operator of the trailer park, he owed a duty to invitees on his premises to have the premises reasonably safe or to warn of hidden dangers. The duty of an occupier of premises extends beyond the premises to the entrances into and exits from the premises, and it is his duty to warn his customers of hidden hazards upon, around, or beyond the premises if he would reasonably expect use of the adjacent area in connection with his invitation. Since Baide's barriers and warning signs were not in place at the time of the accident, a significant question of fact existed as to whether he had provided safe egress. Summary judgment was reversed. Piedalue v. Clinton Elementary School District, 214 M 99, 692 P2d 20, 41 St. Rep. 2344 (1984).

Products Liability — Applicable to Commercial Case — Duty of Care: Plaintiffs sued manufacturer of chemical potato sprout suppressant when use of the product caused erratic growing results in potato crop. District Court jury found defendant liable for damages based on theories of strict liability, negligence, and breach of warranty. Supreme Court affirmed. Supreme Court held that jury was properly charged that a manufacturer has a duty to use reasonable care to give warning of dangerous condition of a product to those he expects to use the product or those endangered by its foreseeable use. Use of accepted form of instructions for personal injury cases that was modified to fit a property damage case was not error. Streich v. Hilton-Davis, 214 M 44, 692 P2d 440, 41 St. Rep. 2310 (1984), followed in Krueger v. Gen. Motors Corp., 240 M 266, 783 P2d 1340, 46 St. Rep. 2114 (1989), and Wood v. Old Trapper Taxi, 286 M 18, 952 P2d 1375, 54 St. Rep. 1263 (1997).

Negligent Hiring and Negligent Entrustment: Insurer's agent participated in a Dillon rodeo, went to a barbecue at his Dillon home, and then went drinking in Dillon bars. While driving home in a vehicle he leased from a service company that was a wholly owned subsidiary of and had a common board of directors with insurer, he struck plaintiff, who sued insurer for negligent

hiring and service company for negligent entrustment of the vehicle to agent. Insurer and service company sought summary judgment. That one to whom a vehicle is entrusted is licensed does not alone negate a finding of negligent entrustment. Since the record showed agent had at least once before been in an accident while intoxicated and it was alleged service company knew or should have known the agent had a propensity to drive while intoxicated, there was a material question of fact whether service company breached the duty not to entrust a vehicle to an incompetent driver, and summary judgment as to the service company was denied. Insurer's motion for summary judgment on the negligent hiring issue was denied, the court stating that it could find no Montana case on the negligent hiring doctrine. The questions of whether insurer should have foreseen that it was hiring a dangerous driver, that it was negligent in hiring the agent, and that the negligence proximately caused plaintiff's injuries were considered to be questions of fact not properly disposed of on summary judgment. The court also indicated that whether agent was acting within the scope of his employment at the time of the accident was not an issue. Vollmer v. Bramlette, 594 F. Supp. 243, 41 St. Rep. 1964 (D.C. Mont. 1984).

Negligence Resulting in Imprisonment — Damages for Emotional Distress: Plaintiff brought an action for damages resulting from appellant's negligence in causing an arrest and imprisonment. Plaintiff's wife issued a check on his account to Super Save without plaintiff's knowledge. The check was dishonored for insufficient funds. Super Save referred the matter to a collection agency. Although plaintiff later paid Super Save, the collection agency and County Attorney's office were never so apprised by Super Save. Almost a year after writing the check, plaintiff was arrested, handcuffed, frisked, booked, and fingerprinted. The District Court, in a jury trial, awarded $17,000 in damages. The Supreme Court held that Super Save owes its patrons the duty to exercise reasonable care to avoid arrest and criminal charges for nonpayment of a bad check for which restitution has been made. It breached that duty by cashing the check without requiring the proper identification and by failing to terminate the collection process. Damages for emotional distress were upheld in spite of the fact that there was no injury. Johnson v. Super Save Markets, Inc., 211 M 465, 686 P2d 209, 41 St. Rep. 1495 (1984).

Duty of Invitor to Invitee — Obvious Danger: A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them unless the possessor should anticipate the harm despite such knowledge or obviousness. Kronen v. Richter, 211 M 208, 683 P2d 1315, 41 St. Rep. 1312 (1984), followed in Cooper v. Sisters of Charity of Leavenworth Health Serv. Corp., 265 M 205, 875 P2d 352, 51 St. Rep. 484 (1994). Kronen was overruled, as to the standard that a property owner is absolved of liability because a dangerous condition upon the premises is open and obvious, in Richardson v. Corvallis Pub. School District No. 1, 286 M 309, 950 P2d 748, 54 St. Rep. 1422 (1997).

Elevators on Premises — Highest Duty of Care: Plaintiff was injured when she opened an elevator door and fell 15 feet because the elevator car was not on the floor level. In determining the duty of care the building owner owed to plaintiff, the parties agreed that plaintiff was an invitee. A property owner's duty of care toward an invitee is to use ordinary care to keep the premises reasonably safe and to warn the invitee of any hidden or lurking dangers. The Supreme Court adopted a higher duty of care in the operation of an elevator, however. The elevator performs the function of a common carrier in transporting people from one floor to another. Experience teaches that the public reposes trust in those who furnish that carriage that they will be transported safely from one floor to another. With respect to the operation of the elevator itself, the premises owner owes the highest degree of care. Cash v. Otis Elevator Co., 210 M 319, 684 P2d 1041, 41 St. Rep. 1077 (1984).

Jury Instructions — No Determinable Basis for Imposing Higher Standard of Care Upon Contractors: In an action to recover for injuries against several contractors who were allegedly negligent in the construction of a dumbwaiter that injured plaintiff, the court gave a general instruction on negligence. The court rejected proposed instructions regarding a manufacturer's duty of care, since no manufacturing was involved. The court also rejected instructions delineating the contractor's duties and requiring a higher standard of care than that chargeable to a lay person. On appeal, the Supreme Court found that the District Court had properly rejected the proposed instructions and distinguished this case from Williams v. Mont. Nat'l Bank, 167 M 24, 534 P2d 1247 (1975). The court found that there was no statutory or other basis determinable which would have required that the jury be instructed to apply a higher level of care to the independent contractors than to the landowner. Gee v. Egbert, 209 M 1, 679 P2d 1194, 41 St. Rep. 515 (1984).

Employee Suit Against Employer's Parent Corporation — Mere Holding Company Not Liable: Under the workers' compensation law provision that an employee may sue a third party in tort for causing injury to an employee, the employee may sue the parent corporation of a subsidiary

corporation for which the employee works but must establish that the parent corporation had an independent duty toward the employee. In the present case, the facts failed to establish that any duty was breached by the parent corporation. The parent corporation was simply a holding company that carried on no business other than operating through its subsidiaries. Any negligence of the subsidiary employer in regard to employee's products liability theory could not be passed on to the parent corporation. Mitchell v. Shell Oil Co., 579 F. Supp. 1326, 41 St. Rep. 278 (D.C. Mont. 1984).

Children Under One's Control — Duty of Care: A father sued YMCA for injury allegedly incurred by his 6-year-old son, who was found submerged in the YMCA pool. The jury was properly charged that when a person undertakes the control or supervision of a child, he has the duty to use reasonable care to protect the child from injury and that though he is not an insurer of the child's safety he is required to use reasonable care commensurate with the reasonably foreseeable risk of harm to which the child might be subjected while under the person's control and supervision. The instruction expressed the idea that the reasonable care to be accorded must be commensurate with the child's age and maturity. The father's counsel fully argued the proper standard of care, and the father's substantial rights were not prejudiced by failure to give his requested instructions stating that a greater degree of care is owed to a child than to an adult. Johnson v. YMCA, 201 M 36, 651 P2d 1245, 39 St. Rep. 1937 (1982).

Locomotives — Standards of Care — Writ of Supervisory Control: Petition for Writ of Supervisory Control, brought by plaintiff suing railroad in crossing accident case, was granted where District Court incorrectly decided that federal law preempted the field of warning devices on locomotives and that the jury could thus not deliberate on the question of whether railroad had the duty to equip its locomotives with devices other than those required by federal law. A jury trying a railroad crossing accident case should be allowed to decide whether a railroad has a common-law duty to equip its locomotives with various warning devices. Henry v. District Court, 198 M 8, 645 P2d 1350, 39 St. Rep. 430 (1982).

Snowbanks From Plowing Parking Lot — Business Invitee: In a customer's suit against a supermarket for injuries sustained when she fell while climbing over a snowbank created by the plowing of the parking lot, summary judgment for the supermarket was reversed and the case remanded for trial, as it could reasonably be inferred that the piling of snow in front of the store entrance increased the hazard created by the natural accumulation of snow and ice and that the supermarket should have anticipated the injuries received as a result of the dangerous condition. The snowbank was between the parking lot and the store and had a path cut through it that customer did not use as it had a water puddle in it and she assertedly believed she could not step over it. Customer walking from a snowplowed shopping center parking lot toward entrance to a supermarket was a business invitee for purpose of determining the duty owed her by supermarket while she was on the premises. Cereck v. Albertson's, Inc., 195 M 409, 637 P2d 509, 38 St. Rep. 1986 (1981), partially overruled in Limberhand v. Big Ditch Co., 218 M 132, 706 P2d 491, 42 St. Rep. 1460 (1985), and overruled, as to the distinction between liability based upon natural versus altered accumulations of ice or snow that are open and obvious and as to the standard that a property owner is absolved of liability because a dangerous condition upon the premises is open and obvious, in Richardson v. Corvallis Pub. School District No. 1, 286 M 309, 950 P2d 748, 54 St. Rep. 1422 (1997).

Grounds for Denial of Proposed Jury Instruction — Primary Duty of Avoiding Collision: The appellant claimed error in the trial court's denial of his proposed jury instruction stating that the primary duty of avoiding an accident is on a vehicle approaching from the rear when the vehicle in front has signaled for 100 feet. This was an inaccurate statement of the law, and as given, the jury instructions adequately explained the duties of the passing motorist and the left-turning motorist. Even if it had been a correct statement of the law, the proposed statement would have added nothing to the jury's understanding of the applicable law. Burns v. U & R Express, 191 M 343, 624 P2d 487, 38 St. Rep. 302 (1981). See also Wheeler v. Bozeman, 232 M 433, 757 P2d 345, 45 St. Rep. 1173 (1988).

Dog Bite — No Duty of Defendant to Plaintiff: Where the defendant purchased a duplex subject to a preexisting lease that allowed the lessee to keep a dog in the duplex and required the defendant to give the lessee 15 days' notice to dispose of the dog if it created a nuisance and the plaintiff's child was later bitten by the dog 8 days after the defendant purchased the duplex, the court did not err in granting summary judgment for the defendant. Before a claim for relief may be made against a defendant for negligence, the existence of a duty to the plaintiff must be shown. The defendant had no legal duty to the plaintiff because the defendant had no control over the dog and no right to dispose of it prior to the child's injury. Roy v. Neibauer, 191 M 224,

623 P2d 555, 38 St. Rep. 173 (1981), cited in Ganz v. U.S. Cycling Fed'n, 273 M 360, 903 P2d 212, 52 St. Rep. 1030 (1995).

Duty to Provide Safe Working Place — Railroad Employee: In a case brought by an employee injured while working for a subsidiary of a railroad, the Supreme Court held that the plaintiff was owed the duty to provide him with a safe place to work. Noting that giving the jury information about the subsidiaries might well have been highly prejudicial to the defendant railroad, the Supreme Court nonetheless felt obliged to consider it in this case. The plaintiff was working directly in the operations of the railroad in every sense of the word. The railroad would not be absolved of the responsibility to provide a safe place to work for employees who are technically employed by a subsidiary corporation but whose employment is directly related to the operations of a railroad. Closeness of the businesses of the parent and subsidiary companies was a factor in the court's conclusion that both corporations owed the duty to provide the plaintiff with a safe place to work. Reynolds v. Burlington N., Inc., 190 M 383, 621 P2d 1028, 37 St. Rep. 1883 (1980).

Icy Condition — Social Guest — Duty of Landlord: Rennick, a social guest of Hoover's tenant, slipped on ice in a common area of Hoover's apartment and broke his ankle. The issue is whether the landlord owes a duty to Rennick to remove a known icy condition in a common area. The duty owed a social guest of a tenant is the same as the duty owed an invitee, which is to use ordinary care to keep the premises reasonably safe and to warn the invitee of any hidden or lurking danger. This duty is satisfied if the condition is actually known or obvious. Under Montana law the icy condition is not unreasonably dangerous, and since the plaintiff had actual knowledge of the condition of the premises, there is no duty, no breach of duty, and no negligence as a matter of law. Rennick v. Hoover, 186 M 167, 606 P2d 1079 (1980), overruled, as to the standard that a property owner is absolved of liability because a dangerous condition upon the premises is open and obvious, in Richardson v. Corvallis Pub. School District No. 1, 286 M 309, 950 P2d 748, 54 St. Rep. 1422 (1997).

Summary Judgment — Failure to Show Breach of Duty: Scott was hired by Robson to fell trees. Scott was injured while engaging in a stage of the operation that he had no obligation to perform. In a suit to recover for his injuries, Scott failed to show that Robson breached any duty to keep the premises reasonably safe or to warn of any hidden or lurking danger. Foreseeability is of prime importance in establishing the element of duty. The District Court properly granted summary judgment in favor of Robson as a result of Scott's failure to establish a breach of duty. Scott v. Robson, 182 M 528, 597 P2d 1150 (1979), followed in J.L. v. Kienenberger, 257 M 113, 848 P2d 472, 50 St. Rep. 182 (1993).

No Negligence in the Absence of a Duty: It is not negligence to fail to anticipate injury that can come about only as a result of the negligence of another. Green v. Hagele, 182 M 155, 595 P2d 1159 (1979), followed in Anderson v. Werner Enterprises, Inc., 1998 MT 333, 292 M 284, 972 P2d 806, 55 St. Rep. 1350 (1998). However, see Pierce v. ALSC Architects, P.S., 270 M 97, 890 P2d 1254, 52 St. Rep. 93 (1995).

Duty of Landlord — Unsafe Condition: A landlord is liable for repairs that are negligently made only if four elements are present: (1) the landlord must make a negligent repair or improvement; (2) the repair or improvement must make the land more dangerous or give a deceptive appearance of safety; (3) the lessee can neither know nor should he know of the danger; (4) there must be physical harm caused by the condition. Upon discovery of the dangerous condition, the duty shifts to the tenant to either make the premises safe or to warn. Knowledge of the condition precludes the tenant's recovery. Hayes v. U.S., 475 F. Supp. 681 (D.C. Mont. 1979), following Parrish v. Witt, 171 M 101, 555 P2d 741 (1976).

Breach of Duty to Warn: Corporation was liable for death of plaintiff's dairy cows pastured on a strip of land adjoining electric substation of corporation and for losses occasioned by poisoning resulting from its use upon grass and weeds of chemical spray that it knew was dangerous to animals, where it failed to warn plaintiff of the danger. Hopkins v. Ravalli County Elec. Co-op, Inc., 144 M 161, 395 P2d 106, 12 ALR 3d 1096 (1964).

NEGLIGENCE AS A MATTER OF LAW

Jury Instruction on Comparative Negligence Improper Absent Evidence of One Party's Negligence: A landlord who failed to maintain rental property in a safe condition was negligent per se. Pursuant to Reed v. Little, 209 M 199, 680 P2d 937 (1984), even in negligence per se cases, the factfinder must apportion negligence between the parties in reaching a verdict. Therefore, the trial court in this case gave the jury an instruction on comparative negligence. However, there was no evidence to show that plaintiff was negligent in any way, and all liability for plaintiff's injury on defendant's rental property lay with defendant. Thus, giving the instruction

on comparative negligence was an abuse of the trial court's discretion. Edie v. Gray, 2005 MT 224, 328 M 354, 121 P3d 516 (2005).

Landlord Who Fails to Provide Safe Rental Property Negligent Per Se — Summary Judgment on Liability Proper: Plaintiff was injured in a fall in the staircase of a rental home because the stairwell light was not functional. Plaintiff claimed that the defendant landlord was negligent for failing to provide a safe and habitable premises and moved for partial summary judgment on the liability issue. The trial court denied the motion, and the jury found for defendant. On appeal, the Supreme Court reversed. Under 70-24-303, a landlord is required to keep rental premises in a fit and habitable condition and to maintain electrical facilities in good and safe working order. Defendant could have avoided liability by entering a separate written agreement signed by all parties in which plaintiff agreed to repair the light, but no such agreement existed, so defendant was negligent per se, and summary judgment for plaintiff was proper. Defendant's attempt to shift responsibility to plaintiff for failing to notify defendant of the inoperative light was misplaced because the duty of repair is on the landlord and there is no duty of the tenant to notify. Edie v. Gray, 2005 MT 224, 328 M 354, 121 P3d 516 (2005).

Summary Judgment on Negligence Claim Affirmed Absent Showing of Breach of Duty of Care: Bonilla claimed that the University of Montana was negligent in providing a chair at a concert that Bonilla attended when the chair broke and Bonilla was injured. Ordinarily, the determination of whether a defendant breached a legal duty is not susceptible to summary judgment unless the evidence is undisputed or susceptible to only one conclusion by reasonable people. However, Bonilla failed to produce any evidence explaining how or why the chair broke and whether it was due to the breach of any duty by the University. Bonilla never reported the incident, so the University had no record of the incident. The only evidence offered to support a negligence claim was Bonilla's own testimony that the chair would not have broken unless there was a problem with it. University officials explained their policy of assuring the safety of their chairs and of selecting chairs for durability and quality. The University met its burden of demonstrating the absence of material fact regarding any breach of a duty of care, while Bonilla did not meet the burden of showing that the University breached a duty of care. Summary judgment for the University was affirmed. Bonilla v. Univ. of Mont., 2005 MT 183, 328 M 41, 116 P3d 823 (2005).

No Right to Expectation of Privacy in Public Criminal Records or Negligence in Use of Records: In 1998, Barr applied for a part-time airport security officer position and consented to a background check. A 10-year check revealed no arrests, and Barr was hired. About 1 month later, another security officer requested a criminal background check on Barr, which revealed a 1968 arrest in Alaska for criminal nonsupport. Prior to the end of Barr's probationary period, his employment was terminated, and he sued the airport authority. Barr's claim was summarily dismissed. On appeal, the Supreme Court held that under 44-5-103, Barr's Alaska arrest was public information that anyone could access and its dissemination was not improper and that coupled with Barr's consent to the background check, Barr had no constitutional expectation of privacy in the criminal record. Barr's negligence claims also failed because he failed to offer proof of all elements of common-law negligence. Summary judgment for defendants was affirmed. Barr v. Great Falls Int'l Airport Authority, 2005 MT 36, 326 M 93, 107 P3d 471 (2005).

Violation of Federal Railroad Safety Regulations Negligence Per Se — Evidence of Contributory Negligence Disallowed: Railroad employee Woods accompanied track supervisor Holloway to inspect a section of track. Holloway exceeded the authorized limits of the track warrant and proceeded another 4 miles down the track where the inspection vehicle was struck by a train and Woods was killed. Following an investigation, the railroad concluded that Holloway's violation of the working limits caused Woods's death. Woods's widow moved for partial summary judgment that the railroad was negligent per se, but the motion was denied. The widow then requested a ruling that Woods was not contributorily negligent, but the motion was denied as untimely. The jury found that Woods was 50% negligent, and the award to the widow was reduced by half. On appeal, the Supreme Court reversed. The Federal Employers' Liability Act (FELA) governing the case is a remedial statute, the specific intent of which is to prevent railroad accidents and casualties. Federal railroad administration regulations are reviewed and construed as a comprehensive scheme of protection for railroad workers, and an interpretation of federal railroad administration regulations that leads to an unreasonable or absurd result will be rejected in favor of an interpretation that leads to a reasonable result. To conclude that federal railroad administration regulations define working limits but do not prohibit exceeding them would lead to an absurd result. Thus, the trial court erred in concluding that violation of the working limits of the track warrant was not negligence per se. FELA also provides that an employee will not be held liable for contributory negligence when a railroad's

violation of any statute enacted for the safety of employees contributed to an employee's injury or death, and the restriction against the use of contributory negligence as a defense applies to regulation violations as well, so it was also error for the trial court to allow the railroad to argue Woods's contributory negligence. The case was remanded for judgment reinstating the entire jury award. Woods v. Burlington N. & Santa Fe Ry., 2004 MT 332, 324 M 151, 104 P3d 1037 (2004), following Bevacqua v. Union Pac. RR Co., 1998 MT 120, 289 M 36, 960 P2d 273 (1998).

Legal Duty of Sheriff to Protect Domestic Violence Victim — Exception to Public Duty Doctrine Immunity Created Between Sheriff and Victim: Plaintiffs' mother was a domestic violence victim who was killed by her husband. Plaintiffs sued the County Sheriff for negligently failing to take action to protect the victim. A jury found the Sheriff negligent and awarded plaintiffs $358,000. The Sheriff moved for judgment as a matter of law, and the District Court granted the motion and vacated the jury verdict, finding that no special relationship existed between the victim and the Sheriff under the domestic violence statutes that would trigger a legal duty upon the Sheriff to protect the victim. On appeal, the Supreme Court noted an exception to the public duty doctrine's immunity provision in cases when a special relationship between the victim and an officer has been created. The domestic violence statutes created such a special relationship, which gave rise to a special duty by virtue of the victim's status as a member of a protected class. The Sheriff had a statutory duty to protect the victim with a notice of her rights under 46-6-602, and by failing to give the victim the required notice, the jury could conclude that the Sheriff was negligent and, arguably, negligent per se. Although arrest of the husband was discretionary, the Sheriff also had a mandatory duty under 46-6-603 to seize the husband's weapon, which had been displayed during a prior domestic dispute, but failed to do so. Thus, the jury had sufficient evidence to conclude that the Sheriff's negligence or negligent per se conduct led to the victim's death, and the District Court committed reversible error in granting judgment to the contrary. Massee v. Thompson, 2004 MT 121, 321 M 210, 90 P3d 394 (2004), following Nelson v. Driscoll, 1999 MT 193, 295 M 363, 983 P2d 972 (1999).

Preservation of Right to Argue Sufficient Evidence of Negligence on Appeal From Judgment as Matter of Law: Plaintiffs' mother was a domestic violence victim who was killed by her husband. Plaintiffs sued the County Sheriff for negligently failing to take action to protect the victim. A jury found for the plaintiffs. The Sheriff moved for judgment as a matter of law, and the District Court granted the motion and vacated the jury verdict, finding that the domestic violence statutes did not trigger mandatory legal duties upon the Sheriff regarding arrest and seizure. On appeal, the Sheriff argued that because plaintiffs did not specifically appeal from the District Court's refusal to instruct the jury that violations of the arrest and weapon seizure provisions of the domestic violence law were negligence per se, plaintiffs could not argue on appeal that evidence that the statutes were violated supported the verdict. The Supreme Court examined the definitions of common-law negligence and negligence per se, noting that the jury was given the full panoply of instructions on common-law negligence and that despite the fact that negligence per se instructions were not given, plaintiffs nevertheless argued that violation of the statutes was evidence of negligence. Pursuant to Nehring v. LaCounte, 219 M 462, 712 P2d 1329 (1986), even if a violation of a statute does not constitute negligence per se, the violation may nonetheless be considered as evidence of negligence. Because plaintiffs appealed from the judgment as a matter of law, they preserved their right to argue on appeal that the jury had before it sufficient evidence of negligence. Massee v. Thompson, 2004 MT 121, 321 M 210, 90 P3d 394 (2004).

Disallowance of Jury Instruction Regarding Heightened Standard of Care of Driver in Vicinity of Children: Fifteen-year-old Hanson was struck by Edwards's car while crossing an intersection near a school. The intersection had no sidewalks, curbs, or painted lines delineating a crosswalk. Hanson sought a jury instruction that a motorist operating in an area in which children are known to likely be present has a heightened standard of care, relying on Okland v. Wolf, 258 M 35, 850 P2d 302 (1993). The instruction was denied. On appeal, the Supreme Court noted that a person's duty of care varies depending on the circumstances at the time and place in question, so in this case, as in Okland, the standard negligence instruction permitted Hanson to argue that the circumstances required a heightened standard and was thus considered adequate. Hanson v. Edwards, 2000 MT 221, 301 M 185, 7 P3d 419, 57 St. Rep. 907 (2000).

Disallowance of Jury Instruction Regarding Motorist's Affirmative Duty to Ascertain Whether Intersection Clear and to Anticipate Presence of Pedestrians: Hanson was struck by Edwards's car while crossing an intersection that had no sidewalks, curbs, or painted lines delineating a crosswalk. Hanson sought a jury instruction that a motorist has an affirmative duty to ascertain whether an intersection is clear before proceeding and a duty to anticipate that pedestrians may be present in the intersection. The instruction was denied. On appeal, the Supreme Court held

that the instruction that was given, which clarified a driver's obligation to yield the right-of-way to a pedestrian in a crosswalk and a pedestrian's obligation to avoid moving into the path of a vehicle that is too close for the driver to yield, was a proper statement of law under 61-8-504 and that the trial court did not err in refusing to give Hanson's proposed instruction regarding a driver's affirmative duties. Hanson v. Edwards, 2000 MT 221, 301 M 185, 7 P3d 419, 57 St. Rep. 907 (2000).

Unmarked Crosswalk at Every Intersection: Hanson was struck by Edwards's car while crossing an intersection that had no sidewalks, curbs, or painted lines delineating a crosswalk. Hanson moved for a directed verdict on grounds that because he was in an unmarked crosswalk, which gave him the right-of-way, Edwards was negligent as a matter of law. The motion was denied, and the trial court refused to instruct the jury that an unmarked crosswalk exists at every intersection pursuant to 61-1-209 (now repealed, see 61-8-101). The Supreme Court examined legislative intent and, reading 61-1-209 (now repealed, see 61-8-101) in pari materia with 61-8-502, concluded that Montana law provides for a crosswalk on any portion of a roadway at an intersection. The jury should have been so instructed, and failure to do so was reversible error. Hanson v. Edwards, 2000 MT 221, 301 M 185, 7 P3d 419, 57 St. Rep. 907 (2000).

Classification of Nuisances — Per Se or Per Accidens — Absolute or Qualified: A nuisance action may be based upon conduct of a defendant that is either intentional, negligent, reckless, or ultrahazardous. Thus, negligence is merely one type of conduct upon which liability for nuisance may be based. In general, a nuisance may be classified as either a nuisance per se or at law or as a nuisance per accidens or in fact. A nuisance per se is an inherently injurious act, occupation, or structure that is a nuisance at all times and under any circumstances, without regard to location or surroundings. A nuisance per accidens is one that becomes a nuisance by virtue of circumstances and surroundings. In turn, nuisances may be classified as either absolute or qualified. An absolute nuisance, similar to a nuisance per se, is a nuisance the substance of which is not negligence and that obviously exposes a person to probable injury. A qualified nuisance is a nuisance dependent on negligence that consists of anything done lawfully but so negligently or carelessly done or permitted as to create a potential and unreasonable risk of harm, which in due course results in injury to another. When determining how a plaintiff can bring a nuisance action against a defendant who is engaged in a statutorily authorized endeavor, when 27-30-101(2) indicates that authorized activities may not be considered a nuisance, the Supreme Court held that the plaintiff must show, pursuant to a particularized assessment of the authorizing statute, that: (1) the defendant completely exceeded its statutory authority, resulting in a nuisance; or (2) the defendant was negligent in carrying out its statutory authority, resulting in a qualified nuisance. In the present case, the city of Thompson Falls was statutorily authorized to construct the city's storm and sewer drain system, which Barnes alleged to be a nuisance. Given a verdict of no negligence, the city was not negligent in its operation or maintenance of the storm drain behind Barnes's duplex and thus would not have been liable for a qualified nuisance because of the incidental flooding of Barnes's property. Therefore, the District Court did not abuse its discretion in refusing Barnes's proposed instructions on nuisance because the instructions constituted a misstatement of the law. Barnes v. Thompson Falls, 1999 MT 77, 294 M 76, 979 P2d 1275, 56 St. Rep. 321 (1999), citing 58 Am. Jur. 2d Nuisances §9 and 66 C.J.S. Nuisances §§3, 5.

Limited Applicability of Involuntary Action Rule to Negligence Per Se in Driving Accidents When Driver Violates Traffic Law While Reacting to Highway Obstacle or Hazard: Seeking to reconcile past disparate holdings regarding liability of a motor vehicle driver who violates a traffic law while reacting to a highway obstacle or hazard and injures another party who has complied with traffic laws, the Supreme Court held that drivers must anticipate certain obstacles and adverse driving conditions that are common to Montana roads, such as small furry animals, deer, chuckholes, and swirling snow. Only under extremely limited circumstances, such as sudden brake failure, will a violation of a motor vehicle statute not constitute negligence per se. In this case, Craig was involved in an auto accident when the other vehicle swerved to avoid a deer and the driver and passenger in the other vehicle died. Injuries resulting from swerving to miss the deer arose from negligence per se, and Craig's motion for partial summary judgment on the issue of liability should have been granted. Craig v. Schell, 1999 MT 40, 293 M 323, 975 P2d 820, 56 St. Rep. 167 (1999), following Duchesneau v. Silver Bow County, 158 M 369, 492 P2d 926 (1971), overruling Lyndes v. Scofield, 180 M 177, 589 P2d 1000 (1979), and clarifying Graham v. Rolandson, 150 M 270, 435 P2d 263 (1967), Farris v. Clark, 158 M 33, 487 P2d 1307 (1971), Kudrna v. Comet Corp., 175 M 29, 572 P2d 183 (1977), Eslinger v. Ringsby Truck Lines, Inc., 195 M 292, 636 P2d 254, 38 St. Rep. 1863 (1981), Simonson v. White, 220 M 14, 713 P2d 983, 43 St. Rep. 133 (1986), Palmer v. Farmers Ins. Exch., 233 M 515, 761 P2d 401, 45 St.

Rep. 1694 (1988), and Cameron v. Mercer, 1998 MT 134, 289 M 172, 960 P2d 302, 55 St. Rep. 531 (1998).

Violation of Statute or Regulation as Negligence Per Se Under FELA: In an action under the Federal Employers' Liability Act (FELA), 45 U.S.C. 51 through 60, the violation of a statute or regulation automatically constitutes breach of the employer's duty and negligence per se and results in liability if the violation contributed in fact to the employee's injury. The presence of negligence per se precludes the necessity for the employee to prove foreseeability or other common-law components of negligence. Bevacqua v. Union Pac. RR Co., 1998 MT 120, 289 M 36, 960 P2d 273, 55 St. Rep. 469 (1998), following Kernan v. Am. Dredging Co., 355 US 426, 2 L Ed 2d 382, 78 S Ct 394 (1958), and Walden v. Ill. Cent. Gulf RR, 975 F2d 361 (7th Cir. 1992), and followed in Woods v. Burlington N. & Santa Fe Ry., 2004 MT 332, 324 M 151, 104 P3d 1037 (2004).

Lengthy Instructions Not Erroneous if Law Properly Stated: Joshua Lloyd suffered a seizure after being transferred to the Kalispell Regional Hospital's security room. His personal representative sued the hospital and others. During trial, the District Court instructed the jury on negligence per se by giving lengthy instructions that counsel claimed were too complicated for the jury to understand. Citing Walden v. St., 250 M 132, 818 P2d 1190 (1991), the Supreme Court held that if the instructions properly state the law, the fact that the instructions are lengthy serves no basis for reversing the District Court. Buhr v. Flathead County, 268 M 223, 886 P2d 381, 51 St. Rep. 1258 (1994). See also Tanner v. Dream Island, Inc., 275 M 414, 913 P2d 641, 53 St. Rep. 208 (1996).

No Error in Instruction Quoting Statute Verbatim: Joshua Lloyd suffered a seizure after being transferred to the Kalispell Regional Hospital's security room. His personal representative sued the hospital and others. During trial, the District Court instructed the jury on negligence per se by quoting mental health statutes verbatim to the jury. The Supreme Court said that giving jury instructions by quoting directly from the statutes may not be the best practice, but noted that the instructions proposed by opposing counsel were also direct quotations of mental health statutes. Given that situation, the Supreme Court held that there was no error in giving jury instructions in the form of direct quotations from the statutes. Buhr v. Flathead County, 268 M 223, 886 P2d 381, 51 St. Rep. 1258 (1994).

No Negligence Per Se by Mental Health Cooperative Evaluation at Variance With Statute — Jury Verdict Supported by Substantial Evidence: Joshua died after suffering a seizure while in the custody of the Sheriff in a soft cell. Buhr, his personal representative, sued the county, the Sheriff, and others. Testimony at trial showed that despite the implication in 53-21-129(2) that Joshua be examined by a professional person, he was instead examined by Russell, who was not a professional person. Testimony showed that Russell then consulted with Harris, who was a professional person. Based upon the consultation, Harris agreed that Joshua needed to be placed in an emergency mental health hold status. The Supreme Court noted that although conflicting evidence may have been presented as to whether this procedure violated the statute, the evidence was presented to the jury based upon an appropriate instruction to which there was no objection. The Supreme Court held that the jury's verdict finding no negligence was supported by substantial evidence. Buhr v. Flathead County, 268 M 223, 886 P2d 381, 51 St. Rep. 1258 (1994).

Disputed Facts — No Error in Failure to Direct Verdict of Negligence Per Se: Chad was hit, while on his bicycle, by a car driven by Matt. Matt testified that he stopped and looked at the intersection but did not see Chad on his bicycle. Chad's counsel requested that the District Court direct the jury to find that Matt was negligent as a matter of law, which the District Court refused to do. Citing Payne v. Sorenson, 183 M 323, 599 P2d 362 (1979), the Supreme Court held that a directed verdict would have been appropriate only if the undisputed facts showed that Matt was negligent. Here, there was a dispute as to whether Chad could have been seen if Matt had looked to see what could be seen. Because of the conflicting evidence, only the jury could resolve the issue. Chambers v. Pierson, 266 M 436, 880 P2d 1350, 51 St. Rep. 921 (1994).

Actions Causing Injury Not Reasonably Foreseeable — Liability Absolved: Broadbrooks escaped from custody, apparently became intoxicated, passed out in his apartment while smoking, and then started a fire when he allowed his cigarette to fall onto the couch, damaging the apartment. The apartment insurer brought suit against the Sheriff for negligently allowing Broadbrooks to escape and for negligently failing to apprehend Broadbrooks after the escape was discovered. The District Court summarily dismissed the claim, holding that as a matter of law, the negligence action must fail because the required element of proximate cause could not be proved. The Supreme Court applied the ordinarily prudent person standard set out in Kiger v. Dept. of Institutions, 245 M 457, 802 P2d 1248 (1990), holding that Broadbrooks' actions and their consequences were not reasonably foreseeable and acted as supervening causes of the

insurer's injuries, thereby absolving the Sheriff of liability. USF&G v. Camp, 253 M 64, 831 P2d 586, 49 St. Rep. 372 (1992).

Failure of Bicyclist to Wear Helmet — Evidence Inadmissible on Question of Negligence or Damages: Applying the rationale set out in Kopischke v. First Cont. Corp., 187 M 471, 610 P2d 668 (1980), the Supreme Court held that because Montana law does not require a bicyclist to wear a helmet, the bicyclist's failure to wear a helmet ordinarily does not constitute negligence on the part of the state. Therefore, the jury was properly instructed that the bicyclist's failure to wear a helmet was not a legal cause of the accident and did not constitute negligence on the part of the state. The evidence was not admissible on the question of damages under the Kopischke rationale. Walden v. St., 250 M 132, 818 P2d 1190, 48 St. Rep. 893 (1991).

Failure to Yield as Negligence as Matter of Law — Summary Judgment Proper: Defendant, who was involved in an automobile collision, admitted that he failed to yield the right-of-way to plaintiff's vehicle. Because defendant had a duty to yield, his failure to do so was negligence as a matter of law, and the District Court erred in denying defendant partial summary judgment. Olson v. Parchen, 249 M 342, 816 P2d 423, 48 St. Rep. 718 (1991), distinguished in Okland v. Wolf, 258 M 35, 850 P2d 302, 50 St. Rep. 412 (1993).

Finding of Negligence Not Necessary in Every Accident: Plaintiff was a passenger in a truck involved in a collision in which each driver claimed the other was negligent, but the jury attributed negligence to neither. Plaintiff cited Aemisegger v. Herman, 215 M 347, 697 P2d 925 (1985), in claiming he was entitled to a new trial because that kind of accident cannot happen absent negligence and because a violation of basic traffic rules constitutes negligence per se. The Supreme Court distinguished *Aemisegger* because in that case, there was clear evidence of fault. The Supreme Court noted that simply because there is an accident does not mean someone must be negligent. The trial court did not err in refusing plaintiff's motion for a new trial on the basis that defendants were negligent as a matter of law. Brookings v. Thompson, 248 M 249, 811 P2d 64, 48 St. Rep. 418 (1991).

Failure to Follow National Accounting Standards Not Negligence as Matter of Law: An accountant certified that his audit would be completed in accordance with certain national accounting standards. At the time, those standards had not been adopted by the Montana Board of Public Accountants. The lower court instructed the jury that failure to follow the standards was negligence as a matter of law. The Supreme Court ruled that it was error on the lower court's part to so instruct the jury; however, the accountant had stated that he would follow the national standards and therefore was bound by them, making the lower court's instruction harmless error. Thayer v. Hicks, 243 M 138, 793 P2d 784, 47 St. Rep. 1082 (1990).

Violation of Maintenance and Design Standards — Negligence Per Se: Violations of maintenance and design standards intended to protect the public are negligence per se. Martel v. Mont. Power Co., 231 M 96, 752 P2d 140, 45 St. Rep. 460 (1988).

Disposal of Personal Injury Case by Summary Judgment — Negligence as a Matter of Law: Summary judgment is rarely proper in personal injury cases because of the peculiarly exclusive nature of the concept of negligence. Negligence is normally a question of fact; however, in certain cases where reasonable minds cannot differ, the cause of an accident may be a question of law for the court to determine. In determining comparative negligence between a driver who passed while visibility in the left lane was obstructed and the state's obligation to provide and maintain safe highways, the only conclusion to be reached was that the driver's negligence exceeded that of the state. Summary judgment was proper in determining negligence as a matter of law. Brohman v. St., 230 M 198, 749 P2d 67, 45 St. Rep. 139 (1988), citing Hartley v. Washington, 698 P2d 77 (Wash. 1985), followed in Medders v. Joyes, 233 M 183, 758 P2d 769, 45 St. Rep. 1409 (1988), Christopherson v. White, Inc., 250 M 118, 817 P2d 1165, 48 St. Rep. 891 (1991), and Pappas v. Midwest Motor Express, Inc., 268 M 347, 886 P2d 918, 51 St. Rep. 1288 (1994), and distinguished in Dillard v. Doe, 251 M 379, 824 P2d 1016, 49 St. Rep. 85 (1992), in which there was substantial active negligence by both parties upon which reasonable minds could differ as to the degree of comparative negligence. Dillard was followed in Craig v. Schell, 1999 MT 40, 293 M 323, 975 P2d 820, 56 St. Rep. 167 (1999). See also Okland v. Wolf, 258 M 35, 850 P2d 302, 50 St. Rep. 412 (1993).

Strict Liability for Railroad Safety Under Federal Act — Contributory Negligence No Factor — Summary Judgment Proper: A motion for summary judgment was properly granted to claimant when the railroad admitted violation of portions of the federal Safety Appliance Act, 45 U.S.C. 1, et seq., since under the Act violation by a carrier of a specific safety requirement is held to constitute negligence as a matter of law regardless of a showing of negligence on an employee's part. Plouffe v. Burlington N., Inc., 224 M 467, 730 P2d 1148, 43 St. Rep. 2341 (1986).

Propane Explosion Injuring Electricians — Landowners Not Negligent: Electricians were injured by an explosion in a residential water pump house caused by leaking propane from a tank uphill of the pump house. The Supreme Court held that there was substantial evidence to uphold the jury's verdict that the landowners were not negligent. Harden v. Yerger, 222 M 234, 721 P2d 751, 43 St. Rep. 1225 (1986).

Negligence as Proper Basis for Recovery — Wrongful Discharge: A negligence claim and a claim for breach of implied covenant of good faith and fair dealing may arise out of the same occurrence, include the same facts, and only involve different theories of law; therefore, negligence is a proper basis for recovery in wrongful termination cases. Flanigan v. Prudential Fed. S&L Ass'n, 221 M 419, 720 P2d 257, 43 St. Rep. 941 (1986), following Crenshaw v. Bozeman Deaconess Hosp., 213 M 488, 693 P2d 487, 41 St. Rep. 2251 (1984), and followed in Rupnow v. Polson, 234 M 66, 761 P2d 802, 45 St. Rep. 1734 (1988).

Negligence as Matter of Law Incompatible With Issue of Comparative Negligence: It would be error to find negligence as a matter of law in a case in which a question of comparative negligence exists. Kukuchka v. Ziemet, 219 M 155, 710 P2d 1361, 42 St. Rep. 1916 (1985).

Surgeon's Failure to Remove Foreign Object Negligence Per Se: In this medical malpractice action, the Supreme Court adopted the rule of negligence per se in holding that a surgeon is negligent as a matter of law when he leaves a foreign object inside his patient during surgery. The surgeon bears the responsibility of the surgical procedure. Other persons also may be negligent and liable as concurrent tortfeasors or subsequent tortfeasors, but the surgeon who initially was negligent and whose original negligence set in motion the concurrent and following negligent acts or omissions should not be allowed to avoid his liability. Rudeck v. Wright, 218 M 41, 709 P2d 621, 42 St. Rep. 1380 (1985), distinguished, with regard to liability for negligent design and supervision of a water pipeline project, in Jim's Excavating Serv., Inc. v. HKM Associates, 265 M 494, 878 P2d 248, 51 St. Rep. 623 (1994).

Failure to Prevent Rear-End Collision — Negligence as Matter of Law: Appellant was stopped at a traffic light. The road conditions were icy. Respondent approached the intersection in the same lane and direction of travel as the appellant. Respondent braked and slowed his vehicle but failed to reach a complete stop and collided with appellant's vehicle. Respondent's exercise of care was not sufficient to avoid the collision, and under the facts of this case he was negligent as a matter of law. Aemisegger v. Herman, 215 M 347, 697 P2d 925, 42 St. Rep. 420 (1985), distinguished in Brookings v. Thompson, 248 M 249, 811 P2d 64, 48 St. Rep. 418 (1991), in which it was held that simply because there is an accident does not mean someone must be negligent.

Motor Vehicle Negligence as Matter of Law — Motion Granted: The trial court properly granted motion for judgment notwithstanding the verdict, since defendant is guilty of negligence as a matter of law for failure to keep a proper lookout. At the time defendant "rear ended" plaintiff, the road was dry and the weather clear and sunny. No contributory negligence was alleged or proved. The only reasonable conclusion is that defendant negligently failed to keep a proper lookout. Garza v. Peppard, 213 M 25, 689 P2d 279, 41 St. Rep. 1922 (1984).

Evidence Sufficient to Instruct on Driving Under Influence — Statutory Violation and Proximate Cause Instructions: During the course of a tort trial involving an automobile accident, some evidence was produced indicating the driver may have consumed some alcohol prior to the accident, and drug paraphernalia was found in his car. There was sufficient evidence to instruct the jury regarding driving under the influence. It was not error to give a jury instruction stating that a Montana statute makes it unlawful to drive under the influence because the instruction must be read in conjunction with other instructions, one of which provides that although conduct in violation of a statute constitutes negligence as a matter of law, such a violation is of no consequence unless it was the proximate cause of an injury suffered by the plaintiff. Foreman v. Minnie, 211 M 441, 689 P2d 1210, 41 St. Rep. 1478 (1984).

Violation of Administrative Code — Evidence of Negligence: Plaintiff was injured when she opened an elevator door and fell 15 feet because the elevator car was not at the floor level. The trial court found defendants negligent as a matter of law and submitted causation and contributory negligence to the jury. Defendants appealed. The trial court's negligence ruling was premised on defendant's violation of an administrative safety code. The Supreme Court held that with respect to the operation of an elevator, the premises owner owes the highest degree of care. The court relied on Stepanek v. Kober Constr., 191 M 430, 625 P2d 51, 38 St. Rep. 385 (1981), to hold that violation of an administrative code is evidence of negligence but is not negligence per se. The fact that the Legislature mandated the adoption of the administrative code does not change this holding. The Legislature did not adopt the code by reference. Therefore, violation of the code was evidence of negligence and not negligence per se. Because this evidence was unrefuted as regards the premises owner, who merely defended by showing reliance on the

elevator company, the trial court was correct in directing a finding of negligence against the premises owner. The premises owner would be liable under nondelegable duty. The elevator company judgment was vacated to determine if a code violation existed at the time of the last inspection. Cash v. Otis Elevator Co., 210 M 319, 684 P2d 1041, 41 St. Rep. 1077 (1984).

Negligence Per Se — Membership in Protected Class Required: Solberg was involved in a one-vehicle accident. He was taken to jail and charged with driving while intoxicated and driving without a valid driver's license. He pleaded guilty to both offenses on the following day, was unable to pay the fine imposed, and was ordered to serve time in jail. Two days later Solberg was found dead in his cell from alcohol-related withdrawal symptoms. Solberg's personal representative brought a wrongful death action against Yellowstone County. At the trial, the District Court refused to give an instruction finding defendant negligent as a matter of law. On appeal, the Supreme Court held that 53-24-303, as interpreted in Azure v. Billings, 182 M 234, 596 P2d 460 (1979), was not applicable, as Solberg was not a member of the class protected by the statute, the publicly intoxicated. Solberg was charged with two criminal offenses to which he pleaded guilty. Whether defendant breached the common-law duty owed by a jailer to a prisoner was a question for the jury. Solberg v. Yellowstone County, 203 M 79, 659 P2d 290, 40 St. Rep. 308 (1983).

Jury Instruction — Negligence Per Se: Section 69-4-201 specifically incorporates only the construction standards of the National Electrical Safety Code rather than the code in its entirety. In the absence of specific statutory incorporation, the provisions of the National Electrical Safety Code can only furnish evidence of a standard of care to be considered in determining negligence. Therefore, the District Court's refusal to instruct the jury that violation of any provision of the National Electrical Safety Code constitutes negligence per se was proper. Barmeyer v. Mont. Power Co., 202 M 185, 657 P2d 594, 40 St. Rep. 23 (1983), overruled in Martel v. Mont. Power Co., 231 M 96, 752 P2d 140, 45 St. Rep. 460 (1988), and followed with respect to the Architects' Handbook of Professional Practice in Taylor, Thon, Thompson & Peterson v. Cannaday, 230 M 151, 749 P2d 63, 45 St. Rep. 102 (1988). See also Harwood v. Glacier Elec. Co-op, Inc., 285 M 481, 949 P2d 651, 54 St. Rep. 1257 (1997).

Violation of Regulation Not Negligence Per Se: In an action brought by an employee of a subcontractor against the defendant general contractor for damages for injuries in a fall from the subcontractor's scaffolding, the Supreme Court declined to hold that violations by the subcontractor of OSHA scaffolding regulations constituted negligence per se. As the general rule has been to consider the violation of regulations as merely evidence of negligence, the Supreme Court adopted the general rule. Stepanek v. Kober Constr., 191 M 430, 625 P2d 51, 38 St. Rep. 385 (1981). The general rule was applied in Hash v. St., 248 M 155, 807 P2d 1363, 48 St. Rep. 277 (1991), and Harwood v. Glacier Elec. Co-op, Inc., 285 M 481, 949 P2d 651, 54 St. Rep. 1257 (1997).

Jury Instruction on Negligence as Matter of Law — Effect of Department Manual: Plaintiff contended that it was error to refuse to instruct the jury that the state and Burlington Northern were negligent as a matter of law in failing to place signals on the railroad crossing where the accident occurred in conformity with the Department of Highways' (now Department of Transportation's) Manual on Traffic Control Devices. The manual, however, does not have equal dignity with statutory law. Before the defendants can be charged with negligence in violating the manual, it must first be determined that the crossing was extrahazardous and that failure to install additional warning signals was the proximate cause of defendant's injuries. These were questions of fact for the jury since conflicting evidence was offered at trial, so no error was committed by failing to give the requested instructions. Penn v. Burlington N., Inc., 185 M 223, 605 P2d 600 (1980).

CAUSATION

Preclusion of Evidence of Duty of Care to Supervise Ranch Help — Summary Judgment Proper: Elizabeth sued her husband, Robert, for damages that she received while helping perform chores on Robert's ranch, including being accidentally injected with sheep serum by Robert's father. However, Elizabeth failed to produce any evidence that Robert had any duty to supervise his father, so the trial court granted Robert's motion in limine, precluding any evidence or testimony regarding the accidental injection, including evidence by Elizabeth's expert regarding the cause of her injuries, and ultimately granted summary judgment to Robert. Elizabeth appealed, but the Supreme Court affirmed. In order to recover for personal injuries, Elizabeth was required to establish a legal duty, a breach of that duty, and damages proximately caused by the breach. Elizabeth did not establish a legal duty, so partial summary judgment for Robert was proper. Absent a legal duty, the evidence regarding the accidental injection and the

expert's opinion concerning Elizabeth's injury was irrelevant and properly excluded. Without expert testimony, Elizabeth was unable to present evidence regarding causation and could not prevail on the negligence claim, so summary judgment for Robert was proper. Nelson v. Nelson, 2005 MT 263, 329 M 85, 122 P3d 1196 (2005).

Use of Settlement Evidence Allowed to Show Bias of Witness, Not Liability: Rule 408, M.R.Ev. (Title 26, ch. 10), does not allow for evidence of settlements in order to prove or disprove liability. Plaintiffs contended that the District Court improperly allowed settlement evidence when defendant cross-examined plaintiffs' contractor regarding a settlement between the contractor and plaintiffs. Citing Pula v. St., 2002 MT 9, 308 M 122, 40 P3d 364 (2002), the Supreme Court disagreed. The witness was not asked about the settlement in order to address issues of liability, but rather to illustrate the bias of the witness. Inquiry into the settlement, including the settlement amount, was pertinent to the credibility of the witness, and the District Court did not abuse its discretion in allowing the evidence. Tripp v. Jeld-Wen, Inc., 2005 MT 121, 327 M 146, 112 P3d 1018 (2005).

Violation of Federal Railroad Safety Regulations Negligence Per Se — Evidence of Contributory Negligence Disallowed: Railroad employee Woods accompanied track supervisor Holloway to inspect a section of track. Holloway exceeded the authorized limits of the track warrant and proceeded another 4 miles down the track where the inspection vehicle was struck by a train and Woods was killed. Following an investigation, the railroad concluded that Holloway's violation of the working limits caused Woods's death. Woods's widow moved for partial summary judgment that the railroad was negligent per se, but the motion was denied. The widow then requested a ruling that Woods was not contributorily negligent, but the motion was denied as untimely. The jury found that Woods was 50% negligent, and the award to the widow was reduced by half. On appeal, the Supreme Court reversed. The Federal Employers' Liability Act (FELA) governing the case is a remedial statute, the specific intent of which is to prevent railroad accidents and casualties. Federal railroad administration regulations are reviewed and construed as a comprehensive scheme of protection for railroad workers, and an interpretation of federal railroad administration regulations that leads to an unreasonable or absurd result will be rejected in favor of an interpretation that leads to a reasonable result. To conclude that federal railroad administration regulations define working limits but do not prohibit exceeding them would lead to an absurd result. Thus, the trial court erred in concluding that violation of the working limits of the track warrant was not negligence per se. FELA also provides that an employee will not be held liable for contributory negligence when a railroad's violation of any statute enacted for the safety of employees contributed to an employee's injury or death, and the restriction against the use of contributory negligence as a defense applies to regulation violations as well, so it was also error for the trial court to allow the railroad to argue Woods's contributory negligence. The case was remanded for judgment reinstating the entire jury award. Woods v. Burlington N. & Santa Fe Ry., 2004 MT 332, 324 M 151, 104 P3d 1037 (2004), following Bevacqua v. Union Pac. RR Co., 1998 MT 120, 289 M 36, 960 P2d 273 (1998).

No Contemporaneous Impact Requirement for Determining Negligent Infliction of Emotional Distress — Sacco Rule Applicable: Wages' son was injured by a vehicle driven by defendant's insured. Although Wages did not witness the accident, he sued defendant insurer for severe emotional distress as a result of the insured's negligent operation of the vehicle. Both parties moved for summary judgment. The District Court cited Treichel v. St. Farm Mut. Auto. Ins. Co., 280 M 443, 930 P2d 661 (1997), for the proposition that an individual who witnesses a family member sustain injury or death states a claim for negligent infliction of emotional distress, but an individual who is not at the scene to witness the accident may state a claim for loss of consortium. The court granted summary judgment to defendant. Wages appealed, and the Supreme Court reversed. The court distinguished Treichel and held that the District Court should instead have applied the rule from Sacco v. High Country Independent Press, Inc., 271 M 209, 896 P2d 411 (1995), that an independent cause of action for infliction of emotional distress will arise in circumstances in which serious or severe emotional distress to a claimant was the reasonably foreseeable consequence of a negligent or intentional act or omission. Duty and foreseeability are inextricably linked, and both must be determined by the trial court. The case was remanded for further proceedings in light of Sacco. Wages v. First Nat'l Ins. Co. of America, 2003 MT 309, 318 M 232, 79 P3d 1095 (2003).

State Not Liable for Unforeseeable Accident — Intervening Criminal Act of Third Person — Expert Testimony on Foreseeability Proper: Samson's son was killed by Bercier, a youth who walked away from a nonsecure, supervised licensed youth group home. Samson sued the state for negligence. The jury returned a verdict for the state, and Samson appealed. Rather than retry the case and evaluate the facts to determine whether the state was negligent, the Supreme Court

reviewed the verdict to determine if there was substantial evidence to support it and determined that there was. In order to sustain a negligence action, plaintiff must establish a legal duty on the part of defendant, a breach of that duty, causation, and damages. In cases involving a dispute over the intervening criminal act of a third party, foreseeability must be analyzed twice—first with regard to the existence of a legal duty and second with regard to proximate causation. Samson contended that the District Court erred in allowing the state to present evidence in the form of expert testimony and to argue that the shooting was an unforeseeable accident. The state argued that the expert testimony was relevant and aided the jury. Given the need to determine the foreseeability of Bercier's actions, the expert testimony was properly allowed. Further, in cases alleging an intervening cause, juries must be instructed that the specific injury to plaintiff need not have been foreseen. Samson v. St., 2003 MT 133, 316 M 90, 69 P3d 1154 (2003), affirming Lacock v. 4B's Restaurants, Inc., 277 M 17, 919 P2d 373 (1996). See also Lopez v. Great Falls Pre-Release Serv., Inc., 1999 MT 199, 295 M 416, 986 P2d 1081 (1999), and St. v. LaTray, 2000 MT 262, 302 M 11, 11 P3d 116 (2000).

Failure to Prove Conduct a Cause in Fact of Alleged Damage — Summary Judgment Proper: Abraham's townhouse basement flooded, so Nelson, the builder of the townhouse, was sued for negligently designing and building the residence, breaching implied warranties of quality workmanship, good construction, and habitability, and causing the basement to flood. Causation is one of four elements that must be proved in a negligence action, and except in cases of intervening cause, proof of causation is satisfied by proof that a party's conduct was a cause in fact of the damage alleged. Here, when Nelson presented Abraham's deposition testimony that Abraham did not know the cause of the flooding, Nelson met the initial burden of demonstrating that no material question of fact existed regarding the element of causation, and the burden shifted to Abraham to provide facts to prove causation. However, Abraham could not merely point to lack of evidence as the factor creating a material question, nor did Abraham's suspicions or unsupported conclusory or speculative statements raise a genuine issue of material fact. Abraham could not merely rest on evidence of Nelson's negligence, but rather was required to show that Nelson's negligence was the cause in fact of Abraham's injury. Abraham failed to submit facts to create a material question upon which the District Court could determine whether Nelson's actions in designing and building the townhouse were the cause in fact of the flooding, so summary judgment for Nelson was proper. Abraham v. Nelson, 2002 MT 94, 309 M 366, 46 P3d 628 (2002). See also Busta v. Columbus Hosp. Corp., 276 M 342, 916 P2d 122 (1996), and Gentry v. Douglas Hereford Ranch, Inc., 1998 MT 182, 290 M 126, 962 P2d 1205 (1998).

Admissibility of Evidence of Intervening Negligence Relevant to Issue of Causation: Pula sued in federal court, alleging negligence against the city of Chinook, Blaine County, three Chinook police officers, the County Sheriff, and the state, related to an incident of rape of Pula by another inmate while Pula was incarcerated in Blaine County jail. All the claims were settled except the claim against the state, which was dismissed and subsequently refiled in state District Court. At trial, the District Court allowed evidence concerning the actions of Blaine County. Pula alleged that the evidence improperly allowed the state to apportion blame or responsibility to nonparty defendants, in violation of substantive due process and the holding in Plumb v. District Court, 279 M 363, 927 P2d 1011 (1996). The Supreme Court disagreed. The issue here was not how to apportion blame among several liable parties, but whether the state's acts or omissions could be said to be the cause of the intervening negligence of another. Evidence of the county's conduct was relevant to the issue of causation in Pula's negligence claim and thus was properly admitted. Pula v. St., 2002 MT 9, 308 M 122, 40 P3d 364 (2002), followed in Tripp v. Jeld-Wen, Inc., 2005 MT 121, 327 M 146, 112 P3d 1018 (2005).

Failure to Produce Evidence in Contradiction of Investigating Officer's Conclusions Regarding Cause of Accident — Summary Judgment Proper: Ten-year-old Vivier was riding her bicycle and, turning unexpectedly in front of a vehicle, was struck and injured. Vivier's parents sued the state Department of Transportation and Lewis and Clark County for negligently failing to make the road safe. The District Court granted summary judgment to the county on grounds that the county did not have a duty with respect to the design and construction of the road and granted summary judgment to the Department on grounds that the Department did not have a duty to undertake road reconstruction simply because standards of construction had changed since the road was originally constructed. The court also determined that the Viviers failed to submit evidence tending to show that the accident was caused by a design or construction problem. The Viviers appealed, but the Supreme Court affirmed. A cause of action for negligence has four elements, including duty, breach, causation, and damages, and summary judgment is proper if the moving party establishes that one element lacks any genuine issue of material fact and the nonmoving party does not come forward with proof that a genuine issue exists. In this

case, regardless of whether the county or the Department had a duty to improve the road, the evidence showed that the accident occurred because the child turned in front of the vehicle before the driver had a chance to react, not because the condition of the road prevented the driver from maneuvering to avoid the accident. The Viviers failed to produce any facts to contradict the investigating officer's conclusions with regard to the cause of the accident, and the District Court's grant of summary judgment to the county and Department was correct. Vivier v. Dept. of Transportation, 2001 MT 221, 306 M 454, 35 P3d 958 (2001).

Proximate Cause Determination Needed in Alleging Negligence Per Se or Common-Law Negligence in Swimming Pool Drowning — Summary Judgment Proper: Following a drowning at the swimming pool of Custer's Inn, the estate of the victim filed a wrongful death action, alleging that the inn's negligence per se in failing to comply with state swimming pool safety statutes and regulations was the proximate cause of the drowning. In granting the inn's motion for summary judgment, the District Court ruled that the estate had failed to plead common-law negligence. On appeal, the Supreme Court outlined the five elements established in VanLuchene v. St., 244 M 397, 797 P2d 932 (1990), to prove negligence per se and the four elements established by the court in numerous decisions necessary to prove common-law negligence. In affirming the District Court's grant of summary judgment for the inn, the court ruled that under either theory of negligence, a plaintiff's claim must fail as a matter of law if the defendant's conduct did not cause the alleged damages. In this case, the estate failed to establish any material dispute that the failure of the inn to comply with swimming pool safety statutes and regulations was the proximate cause of the victim's drowning death. Schwabe v. Custer's Inn Associates, 2000 MT 325, 303 M 15, 15 P3d 903, 57 St. Rep. 1370 (2000).

Failure to Establish Negligence Per Se When City Not Owner of Fence That Caused Injury: Plaintiff was injured after tripping on a fence wire while walking her dog at night in an unmaintained grassy area on city right-of-way next to a city street. Plaintiff contended that the city was negligent per se for creating or maintaining a public or private nuisance in violation of 81-4-105. The District Court found, and the Supreme Court agreed, that the city was not negligent per se because in order to establish negligence per se, it must be proved among other things that a defendant violated a particular statute and that the statute was intended to regulate a member of the defendant's class. Section 81-4-105 applies to the owner of a nuisance fence, but nothing in the record indicated that the city owned a fence in the area of the accident that would make the city a member of the regulated class or that the city created or maintained a nuisance fence. The city could not be in violation of a statute that it had no duty to observe. Dobrocke v. Columbia Falls, 2000 MT 179, 300 M 348, 8 P3d 71, 57 St. Rep. 718 (2000).

Notice of Defect Not Required Before Landowner's Duty of Care Exists Toward Persons Injured on Property — Sullivan and Buck Overruled: Plaintiff was injured after tripping on a fence wire while walking her dog at night in an unmaintained grassy area on city right-of-way next to a city street. The District Court determined that under Montana law, a city must have notice of a defect in its streets and sidewalks before being held liable for an accident occurring as a result of the defect, citing Wiley v. Glendive, 272 M 213, 900 P2d 310 (1995), and since the city had no notice of the wire, it could not be held liable. The Supreme Court distinguished the Wiley pronouncement of required notice as based largely on dicta and went on to examine the cases that Wiley was based on, including Sullivan v. Butte, 104 M 225, 65 P2d 1175 (1937), and Buck v. St., 222 M 423, 723 P2d 210 (1986). The court then overruled Sullivan and Buck to the extent that notice of a defect is required before a landowner, whether it be the state, a city, a corporation, or a private individual, has a duty of care to persons injured on the landowner's property and instead applied Richardson v. Corvallis Pub. School District No. 1, 286 M 309, 950 P2d 748 (1997), which established the standard for premises liability based on the landlord's exercise of ordinary care or skill in the management of property. A property owner who never maintains the land will never have notice of defects until someone is injured. It would not make sense to hold that landowners who never inspect or maintain their property are not exposed to liability because they could not discover a defect, while landowners who do inspect and maintain their property are exposed to liability. Thus, the District Court erred in concluding that the city's failure to have notice of the wire precluded relief against it as a matter of law. Dobrocke v. Columbia Falls, 2000 MT 179, 300 M 348, 8 P3d 71, 57 St. Rep. 718 (2000). See also Brown v. Demaree, 272 M 579, 901 P2d 567 (1995).

Defense of Comparative Negligence Inapplicable to Medical Malpractice Case When Patient's Pretreatment Behavior Furnishes Need for Care That Later Becomes Subject of Malpractice Claim: Plaintiff's daughter had asthma, was allergic to horses, and had a long history of breathing difficulties, but nevertheless went horseback riding. She stopped breathing and collapsed, ultimately suffering irreversible brain damage and death. The mother sued the

physicians at the hospitals where the daughter was taken for treatment, alleging that the physicians were negligent in failing to intubate the daughter immediately and that the physicians' negligence caused the daughter's injury and death. The physicians argued that the daughter had already suffered a severe brain injury because of oxygen deprivation brought on by her asthma and that it was her own negligence, not that of the physicians, that caused her death. The District Court allowed the physicians to present arguments and jury instructions on comparative negligence. In assisting a jury to decide a case involving a patient's fault as a defense in a medical malpractice case, it is necessary to first clarify the sequence of events in relation to the interwoven doctrines of contributory or comparative negligence, proximate cause, and avoidable consequences (see Bryant v. Calontone, 669 A2d 286 (N.J. Super. Ct. App. Div. 1996). The temporal headings under which the patient's conduct is to be examined are: (1) the pretreatment period; (2) the treatment period during which the alleged malpractice occurred; and (3) the postmalpractice period. A patient's conduct before seeking medical treatment is merely a factor that a physician should consider in treating the patient. When the patient's negligent act merely precedes that of the physician and provides the occasion for medical treatment, contributory negligence is not a permissible defense and the physician's negligent act is considered an intervening act that does not bar a patient from recovering (see Durphy v. Kaiser, 698 A2d 459 (D.C. 1977). In the present case, the patient's actions were clearly pretreatment conduct and not to be considered as evidence of fault that could offset any negligent conduct by the physicians. Thus, the Supreme Court held that the District Court abused its discretion in giving instructions on comparative negligence because in a medical malpractice action, jury instructions on a patient's comparative negligence are appropriate only when the patient's negligent conduct occurs contemporaneous with or subsequent to treatment. Further, allowing evidence of the daughter's prior acts denied the mother a fair and impartial trial, and the District Court also abused its discretion in failing to grant the mother's motion for a mistrial, constituting reversible error. Harding v. Deiss, 2000 MT 169, 300 M 312, 3 P3d 1286, 57 St. Rep. 696 (2000), followed, with regard to treatment at an accident scene by law enforcement personnel responding to allegedly negligent conduct of DUI that occurred prior to the accident, in Cutler v. Jim Gilman Excavating, Inc., 2003 MT 314, 318 M 255, 80 P3d 1203 (2003).

Proof Required to Show Causation in Action Alleging Spoliation of Evidence: A third-party spoliator should not be forced to pay damages to a plaintiff who has only a frivolous underlying claim, so some threshold showing of causation and damages is required. Recovery for loss of a plaintiff's ability to prove the underlying case and a third party's interest in only compensating plaintiff for the third party's harmful conduct must be balanced in determining the standard of proof for causation in an independent cause of action for negligent or intentional spoliation of evidence. Balancing those interests requires plaintiff to show a nexus between the destroyed evidence and the impairment of proving the underlying suit. Therefore, in order to prove causation, plaintiff must show that: (1) the underlying claim was significantly impaired because of the spoliation of evidence; (2) a causal relationship exists between the projected failure of success in the underlying action and the unavailability of the destroyed evidence; and (3) the underlying action would enjoy a significant possibility of success if the spoliated evidence still existed. With respect to the third prong of causation, plaintiff must demonstrate a substantial and realistic possibility of succeeding, but need not demonstrate that success was more likely than not. Oliver v. Stimson Lumber Co., 1999 MT 328, 297 M 336, 993 P2d 11, 56 St. Rep. 1303 (1999). See also Holmes v. Amerex Rent-A-Car, 710 A2d 846 (D.C. 1998).

Clarification of General Requirement of Substantially Similar Circumstances as Precedent to Admission of Evidence of Prior Accident: Evidence of prior accidents, although inadmissible to prove negligence, may be admitted for other purposes, such as to show: (1) the existence of a particular physical condition or defect; (2) the dangerousness of the condition or defect; (3) the possibility that the condition or defect might cause an accident or injury of the type alleged; (4) cause in fact; and (5) knowledge of the condition or defect. (See Modern Evidence: Doctrine and Practice, Mueller & Kirkpatrick, §4.8 at 281, 282 (1995), and McCormick on Evidence §200 at 844-847, 4th Ed. (1992).) Regarding the degree of identity of circumstances required when offering prior accident evidence for the sole purpose of notice or knowledge, the general requirement of substantially similar circumstances is relaxed or less strict when the evidence is proffered to show notice rather than dangerousness or causation, and a lack of exact similarity of conditions will not preclude admission under these circumstances if the accident was of a kind that should have served to warn defendant. In proving notice, there may be dissimilarities between the accidents; however, the differences affect the weight of the evidence, but not necessarily the admissibility. Here, Kissock slipped and fell in defendant's parking lot. The District Court excluded proffered evidence of a fall by another person in the same parking lot

days earlier because it occurred at a different time of day under different physical circumstances. The Supreme Court disagreed and reversed, holding that the minor spatial and temporal differences existing between the two slip-and-fall accidents went to the weight rather than admissibility of the evidence in supporting an inference that defendant had notice or knowledge of the icy conditions. The circumstances surrounding the prior accident were not so remote or dissimilar from Kissock's accident that the probative value was substantially outweighed by unfair prejudice to defendant. Kissock v. Butte Convalescent Center, 1999 MT 322, 297 M 307, 992 P2d 1271, 56 St. Rep. 1288 (1999). See also Runkle v. Burlington N., Inc., 188 M 286, 613 P2d 982, 37 St. Rep. 995 (1980), Bailey v. S. Pac. Transp. Co., 613 F2d 1385 (5th Cir. 1980), and Kalanick v. Burlington N. RR Co., 242 M 45, 788 P2d 901, 47 St. Rep. 532 (1990).

Substantial Credible Evidence to Support Jury Verdict — Verdict Affirmed: Plaintiff was injured when a donkey savagely bit her arm. Defendant treated her at the local hospital. Plaintiff endured several surgeries and eventually lost her arm below the elbow. She sued defendant, claiming that defendant's negligence subjected her to an increased risk of harm and lessened her chances for a better result. The jury found that defendant was negligent but that the negligence did not cause injury to plaintiff. On appeal, the Supreme Court found that there was substantial credible evidence in the record to support the jury's verdict. Much of the testimony of plaintiff's expert witness was contradicted by defendant's expert witnesses. An attack upon a jury verdict alleging that it is not supported by the evidence is proper only when there is a complete absence of any credible evidence in support of the verdict. The District Court did not abuse its discretion in denying the motion to alter or amend the judgment or for a new trial. Campbell v. Canty, 1998 MT 278, 291 M 398, 969 P2d 268, 55 St. Rep. 1137 (1998).

FELA — Stipulation That Jury Awards Not Be Added Together — Greater Award Subsuming Smaller Awards: Under the Federal Employers' Liability Act (FELA), 45 U.S.C. 51 through 60, an injured railroad worker is entitled to recover damages if the negligence of the railroad played any part, no matter how slight, in causing the injury or death for which damages are sought. In the present case, the jury found independent railroad negligence and causation in each of three work-related incidents that played a part in the condition of Bevacqua's knee. Under FELA, Bevacqua was entitled to judgment of $200,000 for a 1973 injury, $320,000 for a 1980 injury, and $40,000 for a 1990 injury. However, the parties stipulated that the jury awards for each incident would not be added together, precluding any double recovery. The Supreme Court held that Bevacqua was entitled to $320,000, the greatest of the jury awards, and that under the terms of the stipulation, the smaller awards were subsumed in the greater award. Bevacqua v. Union Pac. RR Co., 1998 MT 120, 289 M 36, 960 P2d 273, 55 St. Rep. 469 (1998), following Rogers v. Mo. Pac. RR Co., 352 US 500, 1 L Ed 2d 493, 77 S Ct 443 (1957).

Jury's Use of Dictionary Definitions Conflicting With Instructions: The jury used an ordinary dictionary and a legal dictionary, improperly given to the jury by the bailiff at the jury's request, to look up the terms "proximate cause" and "prudent". The definitions relating to causation did not contain the foreseeability element that was contained in an instruction given to the jury. The jury's conduct constituted improper independent research on extraneous material that redefined the critical element of causation by effectively eliminating from the instruction any reference to foreseeability. This was sufficient to demonstrate probable prejudice and potential injury to defendant, against whom the jury returned a verdict in this action. At the very least, there was a reasonable probability that the jury's misconduct influenced its decision, and as a consequence, defendant's substantial rights were compromised, along with his right to a fair trial. The trial judge's denial of a new trial was reversed, and the case was remanded. Allers v. Riley, 273 M 1, 901 P2d 600, 52 St. Rep. 920 (1995).

New Standard for Negligent or Intentional Infliction of Emotional Distress — Proof of Serious or Severe Emotional Stress Required: A photographer for a Belgrade newspaper sued the newspaper and a city police officer, alleging that both falsely and maliciously conspired to criminally prosecute the photographer for stealing photographs from the newspaper. After the District Court granted the newspaper and officer a summary judgment motion, the Supreme Court, after reviewing cases using the traditional approach, reversed and remanded the case for determination under a new standard for negligent or intentional infliction of emotional distress. Applying the new standard, the Supreme Court held that an independent cause of action for infliction of emotional distress will arise in circumstances in which serious or severe emotional distress to a claimant, as defined in Comment j of the Restatement (Second) of Torts, was the reasonably foreseeable consequence of a negligent or intentional act or omission. The difference between negligent infliction and intentional infliction lies not in the elements of the tort but in the nature and culpability of the defendant's conduct. Punitive damages may be requested in a cause of action for intentional infliction of emotional distress. It is for the court to determine

whether the evidence of serious or severe emotional distress can be found; it is for the jury to determine whether, on the evidence, it has in fact existed. Sacco v. High Country Independent Press, Inc., 271 M 209, 896 P2d 411, 52 St. Rep. 407 (1995), followed in Maloney v. Home & Inv. Center, Inc., 2000 MT 34, 298 M 213, 994 P2d 1124, 57 St. Rep. 144 (2000), Winslow v. Mont. Rail Link, Inc., 2000 MT 292, 302 M 289, 16 P3d 992, 57 St. Rep. 1238 (2000), Winslow v. Mont. Rail Link, Inc., 2001 MT 269, 307 M 269, 38 P3d 148 (2001), Wages v. First Nat'l Ins. Co. of America, 2003 MT 309, 318 M 232, 79 P3d 1095 (2003), and McConkey v. Flathead Elec. Co-op, 2005 MT 334, 330 M 48, 125 P3d 1121 (2005), distinguished, with regard to the inapplicability of the standard to civil rights cases brought under Title 49, ch. 2, commonly known as the Montana Human Rights Act, in Vortex Fishing Sys., Inc. v. Foss, 2001 MT 312, 308 M 8, 38 P3d 836 (2001), and clarified in Henricksen v. St., 2004 MT 20, 319 M 307, 84 P3d 38 (2004), to the extent that when there is a physical manifestation of bodily harm resulting from emotional distress, such as posttraumatic stress disorder, this bodily harm is sufficient evidence that the emotional distress is genuine and severe. See also Turner v. Burlington N. Santa Fe RR Co., 338 F3d 1058 (9th Cir. 2003).

Components of Causation Element of Negligence Claim: The causation element of a negligence claim includes two components: (1) that the defendant's act is the cause in fact of the injury; and (2) that the injury is the direct or indirect result, proximately caused by the negligent act. Stated another way, proximate cause is an act or omission that, in a natural and continuous sequence unbroken by any new, independent cause, produces injury and without which the injury would not have occurred. In the case at hand, a lapse of from 45 seconds to 1 minute between the entry of a snowplow onto the highway and the subsequent accident led to the conclusion that the manner in which the plow entered that highway was not the proximate cause of the accident. Hatch v. Dept. of Highways, 269 M 188, 887 P2d 729, 51 St. Rep. 1512 (1994).

Injury While Lifting Door Not Part of Continuous Sequence Establishing Proximate Cause: Bossard injured his arm while lifting a sliding door on Johnson's property back onto its track. The Supreme Court held that although Johnson knew that the door could come off its track, he could not foresee that Bossard would injure his arm lifting the door into place and that therefore there was a link missing in the chain of causation, thus negating proximate cause. Bossard v. Johnson, 265 M 272, 876 P2d 627, 51 St. Rep. 494 (1994).

Insufficient Evidence of Causation — Summary Judgment Properly Granted: Logan was discharged from her job at Metra and later obtained employment with the Yellowstone County Sheriff's office, where she suffered a repetitive motion injury. She sued Yellowstone County, claiming that the county breached her employment contract. The county moved for summary judgment, claiming that there was insufficient evidence of causation to support the action, and the District Court dismissed the action. The Supreme Court held that there was no substantial evidence from which the trier of fact could find that Logan's discharge from her job at Metra caused her repetitive motion injury because the injury was not foreseeable. Logan v. Yellowstone County, 263 M 218, 868 P2d 565, 51 St. Rep. 22 (1994).

No Causal Link Between Lack of Warning and Accidental Injury — Directed Verdict Proper: As set out in Brown v. N. Am. Mfg. Co., 176 M 98, 576 P2d 711 (1978), a showing of proximate cause is a necessary predicate to plaintiff's recovery in strict liability. In arguing the causation element, Riley contended that: (1) his testimony relating to his respect for machinery and concern for safety was sufficient evidence from which to infer that he would have ridden a motorcycle differently had a warning of the propensity to wobble been given; and (2) alternatively, he was entitled to a rebuttable presumption that he would have followed a warning had one been given. However, Riley's testimony on respect and concern was general rather than direct, unequivocal testimony that he would have altered his conduct had a warning been given, which is necessary to support a causal relationship. Although the Supreme Court has cited Comment j of Restatement (Second) of Torts 402A (1965) in recognizing the failure to warn claim itself, the specific language of the Comment that gives rise to the rebuttable presumption has not been adopted. Rather than adopt the Comment wholesale, the court, consistent with Brown and its successors, required a showing of a causal link between the lack of a warning and the accident and injuries in a failure to warn claim. Absent that showing, a directed verdict on the claim was proper. Riley v. Am. Honda Motor Co., Inc., 259 M 128, 855 P2d 196, 50 St. Rep. 714 (1993), followed in Wood v. Old Trapper Taxi, 286 M 18, 952 P2d 1375, 54 St. Rep. 1263 (1997).

Collision of Third Vehicle at Accident Site Not Foreseeable: After a car owned by Nigg rolled into the median of the interstate highway, O'Connor slowed his vehicle to look at the accident scene and was struck from behind by Drapella. O'Connor sued Nigg, but the District Court held that O'Connor's injury was not proximately caused by Nigg's negligence and granted summary

judgment. The Supreme Court held that summary judgment was proper because Nigg could not be held to foresee O'Connor's negligence in slowing to watch the accident scene and that O'Connor's negligence was an independent, intervening cause breaking the chain of causation. O'Connor v. Nigg, 254 M 416, 838 P2d 422, 49 St. Rep. 817 (1992).

Parolee's Shooting of Plaintiff Not Foreseeable: The Department of Institutions miscalculated the prisoner's parole eligibility date and paroled him before he was eligible to be released. The plaintiff was shot by the parolee and sued the Department for negligence. The Supreme Court affirmed the lower court's ruling that the Department was not liable because it could not have reasonably foreseen that the parolee would shoot someone. Kiger v. St., 245 M 457, 802 P2d 1248, 47 St. Rep. 2206 (1990), followed, with regard to applicability of the ordinarily prudent person standard in determining negligence for intervening acts, in USF&G v. Camp, 253 M 64, 831 P2d 586, 49 St. Rep. 372 (1992), and in King v. St., 259 M 393, 856 P2d 954, 50 St. Rep. 848 (1993).

Failure to Instruct on Proximate Cause: The defendant argued that the lower court erred in not giving a jury instruction on the necessity of the plaintiff proving proximate cause. The Supreme Court ruled that it was error to fail to give a proximate cause instruction but that it was not reversible error because the defendant had never argued that there was an intervening event breaking the chain of causation. Davis v. Church of Jesus Christ of Latter Day Saints, 244 M 61, 796 P2d 181, 47 St. Rep. 1302 (1990), followed in Busta v. Columbus Hosp. Corp., 276 M 342, 916 P2d 122, 53 St. Rep. 428 (1996).

Accountant Negligence — Subsequent Events Not Intervening Causes: The plaintiff relied on the defendant's audit and purchased a business that the audit showed as profitable when in reality it was insolvent. The defendant argued that subsequent events, such as the loss of employees, competition, and the lack of market, were intervening causes. The Supreme Court held that not all intervening events cut off the defendant's liability. Only if the intervening cause is reasonably unforeseeable will it be considered a supervening event breaking the chain of causation. The court found that substantial evidence existed to support the jury's finding of liability on the defendant's part. Thayer v. Hicks, 243 M 138, 793 P2d 784, 47 St. Rep. 1082 (1990).

Jury to Examine Chain of Causation: The Supreme Court reversed and remanded the verdict in favor of the plaintiff on the basis that the jury had not been properly instructed on the chain of causation. The court held that the jury was to consider whether or not the damages suffered by the plaintiff were a foreseeable consequence of the defendant's acts or whether the damages were the result of subsequent intervening events. Kitchen Krafters, Inc. v. Eastside Bank of Mont., 242 M 155, 789 P2d 567, 47 St. Rep. 602 (1990), followed in Sizemore v. Mont. Power Co., 246 M 37, 803 P2d 629, 47 St. Rep. 2252 (1990), Whiting v. St., 248 M 207, 810 P2d 1177, 48 St. Rep. 396 (1991), and Gibby v. Noranda Minerals Corp., 273 M 420, 905 P2d 126, 52 St. Rep. 1042 (1995), distinguished in Califato v. Gerke, 258 M 68, 852 P2d 121, 50 St. Rep. 428 (1993), and overruled, as to consideration of "foreseeability" in cases not involving intervening causes, in Busta v. Columbus Hosp. Corp., 276 M 342, 916 P2d 122, 53 St. Rep. 428 (1996). See also Lacock v. 4B's Restaurants, Inc., 277 M 17, 919 P2d 373, 53 St. Rep. 492 (1996).

Developer Unable to Prove Reliance on County Representations Sole Cause of Damages: In a prior appeal, the Supreme Court held that the developer had not shown that representations by the county were the sole cause of his damages. Upon remand, the developer argued that he was entitled to an evidentiary hearing to prove that the representations were the sole cause of damages. The Supreme Court held that no right to an evidentiary hearing existed because the court had held as a matter of law that the developer was not justified in relying on the county's opinion and the developer had no right to try and prove in a second hearing that which he could not prove in the first. Young v. Flathead County, 241 M 223, 786 P2d 658, 47 St. Rep. 226 (1990).

Builders Not Liable for Negligence After Relinquishment of Control: The liability of builders is terminated once work is finished and control and ownership is transferred to the subsequent owners. Papp v. Rocky Mtn. Oil & Minerals, Inc., 236 M 330, 769 P2d 1249, 46 St. Rep. 400 (1989).

Summary Judgment Proper — No Reasonable Difference of Opinion That Defendant Did Not Cause Injury: Plaintiff parents appealed a summary judgment order in an action alleging a university's negligence caused injury to their minor daughter who had consumed alcohol and was involved in a motorcycle accident while under the supervision of a university program. Although the university assumed a custodial role similar to that of a high school when it undertook to have plaintiffs' daughter live on its campus, supervised by university personnel, and thus was charged with exercising reasonable care, there was no room for a reasonable difference of opinion as to whether someone other than the defendant university was the

intervening cause of the daughter's injury. Therefore, summary judgment for the university based on proximate cause was proper. Graham v. Mont. St. Univ., 235 M 284, 767 P2d 301, 45 St. Rep. 2389 (1988).

Duty of Plaintiff When Multiple Causes of Damage Appear: The Supreme Court cited Valley Inland Pac. Constructors, Inc. v. Clackamas Water District, 603 P2d 1381 (Oreg. 1979), in holding that when more than one possible cause of damage appears, the plaintiff must eliminate causes other than those for which the defendant is responsible. Failure to separate causes and damage barred plaintiff from arguing proximate cause. Young v. Flathead County, 232 M 274, 757 P2d 772, 45 St. Rep. 1047 (1988), followed in USF&G v. Camp, 253 M 64, 831 P2d 586, 49 St. Rep. 372 (1992).

"Proximate Cause" Defined: In Montana, proximate cause is one in which "a natural and continuous sequence, unbroken by any new, independent cause, produces injury, and without which the injury would not have occurred". Young v. Flathead County, 232 M 274, 757 P2d 772, 45 St. Rep. 1047 (1988), citing Jimison v. U.S., 267 F. Supp. 674 (D.C. Mont. 1967), and Sztaba v. Great N. Ry. Co., 147 M 185, 411 P2d 379 (1966), and followed in Bickler v. The Racquet Club Heights Associates, 258 M 19, 850 P2d 967, 50 St. Rep. 409 (1993). See also Sizemore v. Mont. Power Co., 246 M 37, 803 P2d 629, 47 St. Rep. 2252 (1990), and Hatch v. Dept. of Highways, 269 M 188, 887 P2d 729, 51 St. Rep. 1512 (1994).

Indemnification Action — Defense of Contributory Negligence Unavailable: Contributory negligence is not available in Montana as a defense in an action for indemnification. Jones v. Aero-Chem Corp., 680 F. Supp. 338, 45 St. Rep. 360 (D.C. Mont. 1987).

Comparative Negligence Consideration Properly Precluded Where One Party Not Negligent: District Court awarded damages to a commercial trout company upon a finding that failure of the trout farm was proximately caused by a breach of contract and misrepresentation by the bank and its agent. Upon appeal, bank claimed trial court erred in failing to compare conduct of agent with trout company's principal shareholders. The Supreme Court found no legal error in trial court's decision to preclude consideration of comparative negligence by trout company shareholders where there was insufficient evidence to indicate any negligent action by those shareholders. Crystal Springs Trout Co. v. First State Bank of Froid, 225 M 122, 732 P2d 819, 44 St. Rep. 90 (1987).

Removal of IV Not Proximate Cause of Death: Following surgery and upon doctor's order, a nurse removed an internal jugular vein catheter (IV) from patient Juedeman. Shortly after removal of the IV, Juedeman lapsed into a coma and died 11 days later. Survivors brought an action against the hospital, alleging that negligent removal of the IV had caused an air embolism, resulting in the death. The District Court returned a verdict for the hospital. On appeal, the survivors claimed the court erred in giving a "proximate cause" rather than "legal cause" jury instruction. They maintained that the hospital's negligence, along with Juedeman's preexisting condition, were concurring causes of the death. The Supreme Court, however, affirmed the District Court decision, stating that no evidence supported the survivors' argument that the hospital's negligence was a substantial cause of Juedeman's death. Juedeman v. Mont. Deaconess Medical Center, 223 M 311, 726 P2d 301, 43 St. Rep. 1747 (1986).

Summary Judgment — Failure to Show Proximate Cause: Dvorak was a welder for Beall, which repaired truck tankers used to haul commodities. Matador delivered to Beall for repairs a tanker that had hauled substances contaminated by toxic hydrogen sulfide. Despite Dvorak's discovery and report of remaining contaminants, a Beall foreman ordered him to enter the tank to complete the repairs. Dvorak subsequently collapsed and received injuries as a result of exposure to the hydrogen sulfide. Dvorak filed suit, claiming that Beall and Matador were liable under an intentional tort exception to the exclusivity provision of workers' compensation laws. The District Court granted Beall's summary judgment motion. On appeal, Dvorak argued that Matador was strictly liable for engaging in an abnormally dangerous activity and negligent for failing to warn of the protections needed against hydrogen sulfide dangers. The District Court granted Matador's summary judgment motion, concluding that Beall's conduct was the sole proximate cause of Dvorak's injuries. On appeal, the Supreme Court stated that without Beall's negligent conduct Dvorak's injuries would not have occurred. Thus, Matador's failure to warn was not the proximate cause of the accident. Accordingly, since Beall's conduct proximately caused the accident, Matador was not strictly liable. Dvorak v. Matador Serv., Inc., 223 M 98, 727 P2d 1306, 43 St. Rep. 1562 (1986), distinguished, with regard to foreseeability and its relation to proximate cause, in Sizemore v. Mont. Power Co., 246 M 37, 803 P2d 629, 47 St. Rep. 2252 (1990).

Driver as Sole Proximate Cause of Accident Without Consideration of Continuing Negligence — Improper Jury Instruction: Issues of fact were submitted to the jury on a special verdict

devised by the District Court. The jury decided that the state and county were both negligent but that the negligence was not a proximate cause of the accident. On the basis of the special verdict, the District Court entered judgment in favor of the state and county. On appeal, the Supreme Court reversed, holding that one of the District Court's instructions improperly allowed the jury to determine that the driver was the sole proximate cause of the injuries to herself and her passengers without giving consideration to the continuing nature of the negligence of the state and county to and through the time of the accident. Buck v. St., 222 M 423, 723 P2d 210, 43 St. Rep. 1384 (1986), distinguished in Yager v. Deane, 258 M 453, 853 P2d 1214, 50 St. Rep. 610 (1993), and overruled, to the extent that notice of a defect is required before a landowner, whether it be the state, a city, a corporation, or a private individual, has a duty of care to persons injured on the landowner's property, in Dobrocke v. Columbia Falls, 2000 MT 179, 300 M 348, 8 P3d 71, 57 St. Rep. 718 (2000).

Rear-End Collision — Liability of Following Driver Who Must Make Sudden Stop: Although the court has held that a following driver has the primary duty of avoiding a collision with a driver in front of him, the court has never addressed a situation where the following defendant must make an emergency stop when the plaintiff in front unexpectedly collides with a third vehicle that suddenly pulls in front of the plaintiff. Summary judgment for the following defendant was proper where he was not speeding and all the evidence showed the driver who pulled in front of the plaintiff was at fault and not the defendant. The mere fact that defendant was behind plaintiff and hit her vehicle was not prima facie evidence of negligence. Birky v. Johnson, 220 M 413, 716 P2d 198, 43 St. Rep. 488 (1986).

Bar Selling to Intoxicated Minor — Liability to Minor: A bar or tavern operator who serves an intoxicated minor may be liable in damages for injuries subsequently sustained by the minor. The imbiber's acts of drinking alcoholic beverages served by the bar or tavern operator and then becoming involved in an injury-producing accident may be reasonably foreseeable events that may no longer protect a defendant from liability for negligence. Under the state's system of comparative negligence, it is for the jury to determine the degree of negligence attributable to the plaintiff and defendant. Neither the plaintiff's nor the defendant's acts have to be the sole proximate cause of the injuries. Bissett v. DMI, Inc., 220 M 153, 717 P2d 545, 43 St. Rep. 252 (1986).

"Substantial Factor" Rule to Apply: The substantial factor rule applies when two causes concur to bring about an injury and either cause would have been sufficient for the result. Thus, it applied in this case when the necessity for amputation of the leg of a state prison inmate could have been caused either by the inmate's preexisting condition of arteriosclerosis of the blood vessels of the legs or by the negligence of doctors treating him for an ingrown toenail. Kyriss v. St., 218 M 162, 707 P2d 5, 42 St. Rep. 1487 (1985), distinguished in Juedeman v. Mont. Deaconess Medical Center, 223 M 311, 726 P2d 301, 43 St. Rep. 1747 (1986). See also Niles v. Big Sky Eyewear, 236 M 455, 771 P2d 114, 46 St. Rep. 504 (1989).

Hit-and-Run Synonymous With Cause-and-Run — Physical Contact of Vehicles Not Required: While approaching a bridge, insured swerved to avoid a vehicle that had crossed the centerline into insured's lane. Insured hit a bridge abutment, his passenger was injured, and the other driver continued on and was never found. The insured's uninsured motorist coverage required physical contact between the two vehicles, though 33-23-201 did not. The court held, in a case of first impression, that the physical contact requirement defeated the purpose of and was repugnant to the statute and that coverage attached. The court also stated that, in other states in which the issue had arisen, there had been no flood of fraudulent claims involving so-called phantom vehicles and that the terms "hit-and-run" and "cause-and-run" were synonymous in this context, the former being a baseball colloquialism used to describe violation of a statute requiring a motorist involved in an accident to stop and render assistance and identification whether or not there was physical contact. The court cited with approval Hammon v. Farmers Ins. Group, 692 P2d 1202 (Idaho App. 1984), which ruled a physical contact requirement void as contrary to a statute strikingly similar to and in pertinent part the same as 33-23-201. McGlynn v. Safeco Ins. Co. of America, 216 M 379, 701 P2d 735, 42 St. Rep. 882 (1985).

Negligent Restoration of Electricity to Structure — Not Proximate Cause of Fire: Plaintiff presented expert witness testimony of a professor of electrical engineering to support its contention that its grain elevator burned as a direct result of negligent restoration of electrical power to the elevator. Defendant power company presented as expert witnesses three experienced linemen who testified that the power was properly restored to the elevator, but that it caught fire due to negligence by elevator employees in not curing defective wiring that had caused the transformer to trip and a small fire to start before restoration of power and ultimate destruction of the elevator. The jury found defendant company negligent, but that its negligence

was not the proximate cause of the fire. On appeal, the Supreme Court refused to reverse the jury decision. The plaintiff's evidence was not so overwhelming that there was no room for an honest difference of opinion on the issue of causation. Farmers Union GTA v. Mont. Power Co., 216 M 289, 700 P2d 994, 42 St. Rep. 815 (1985).

Jury Instructions — "Locality Rule" Standard Not Relevant for Judging Medical Specialist — "Loss of Chance": Woman sued her doctor, a national board certified orthopedic surgeon, for damages for alleged negligent medical treatment. Defendant had treated plaintiff for misdiagnosed knee problems for 4 months without ordering diagnostic X-rays before referring plaintiff for surgery to out-of-state doctor who discovered a giant cell tumor in plaintiff's knee. Plaintiff alleged that defendant's failure to order diagnostic films early in treatment resulted in her losing any chance to have less radical surgery and preserve her natural knee. Jury returned verdict in favor of defendant, and plaintiff appealed. Supreme Court vacated District Court judgment and remanded for new trial. Supreme Court held that District Court committed reversible error by instructing jury on the "locality rule" as appropriate standard of care rather than giving plaintiff's proposed instruction holding board certified specialists to national standards of the specialty. Supreme Court also held that on retrial, plaintiff is entitled to a "loss of chance" instruction. The trier of fact should determine whether defendant's negligence was a substantial factor in reducing plaintiff's chances of obtaining a better result rather than whether plaintiff would have obtained a better result with earlier diagnosis. Aasheim v. Humberger, 215 M 127, 695 P2d 824, 42 St. Rep. 235 (1985).

Evidence Sufficient to Instruct on Driving Under Influence — Statutory Violation and Proximate Cause Instructions: During the course of a tort trial involving an automobile accident, some evidence was produced indicating the driver may have consumed some alcohol prior to the accident, and drug paraphernalia was found in his car. There was sufficient evidence to instruct the jury regarding driving under the influence. It was not error to give a jury instruction stating that a Montana statute makes it unlawful to drive under the influence because the instruction must be read in conjunction with other instructions, one of which provides that although conduct in violation of a statute constitutes negligence as a matter of law, such a violation is of no consequence unless it was the proximate cause of an injury suffered by the plaintiff. Foreman v. Minnie, 211 M 441, 689 P2d 1210, 41 St. Rep. 1478 (1984).

Legal Malpractice Complaint — Upheld Under Liberal Rules of Pleading: In a legal malpractice suit, the defendant-attorney moved to dismiss the action on the grounds that the complaint did not state a cause of action because the complaint did not specifically allege that had it not been for the negligence of the attorney, the client would have won the lawsuit. The District Court dismissed the case. The Supreme Court reversed, ruling that under Montana's liberal rules of pleading, the complaint was sufficient. R.H. Schwartz Constr. Specialties, Inc. v. Hanrahan, 207 M 105, 672 P2d 1116, 40 St. Rep. 1926 (1983).

Parked and Disabled Vehicle Not Proximate Cause of Accident — Verdict Supported by Substantial Evidence: Where the defendant parked his stalled pickup truck at the side of a frontage road and turned on the floodlights of the hay grinder he was pulling before leaving the truck to seek help, but the truck was nevertheless struck by the plaintiff's vehicle, the Supreme Court found that the jury verdict for the defendant was supported by substantial evidence. The record showed that the plaintiff had seen the defendant's lights from one-half mile away but failed to avoid the accident. The jury found defendant 0% negligent and plaintiff 100% negligent; it was entitled to conclude, as it did, that no negligence on the part of the defendant was the proximate cause of the accident. Griffel v. Faust, 205 M 372, 668 P2d 247, 40 St. Rep. 1370 (1983).

Trailer Swinging Into Wrong Lane When Driver Swerves to Avoid Collision — No Negligence — No New Trial: Undisputed evidence showed plaintiff was partly in defendant's lane on two-lane road while driving through a curve and that the approaching defendant responded by swerving to the right to avoid a head-on collision. The swerve caused a trailer that defendant was hauling behind his tractor-trailer truck to swing into plaintiff's lane and collide with plaintiff. There was no evidence that defendant was driving unsafely prior to that or that he was in any way negligent. Defendant acted reasonably and prudently, and plaintiff's actions supported a finding that he was the proximate cause of his injuries. The jury verdict found defendant was not negligent. It was an abuse of discretion and reversible error for the court to grant plaintiff a new trial, for there was sufficient evidence to support the verdict. Shannon v. Hulett, 205 M 345, 668 P2d 228, 40 St. Rep. 1349 (1983).

Proximate Cause — Circumstantial Evidence — Standard of Proof: Circumstantial evidence sufficient to prove proximate cause in a civil action need not exclude every reasonable conclusion other than the conclusion sought to be established. It is sufficient if it affords a basis for a

reasonable inference by the trier of fact, even if there are other reasonable inferences that might be drawn by that trier of fact. Jacques v. Mont. Nat'l Guard, 199 M 493, 649 P2d 1319, 39 St. Rep. 1565 (1982).

Superseding Cause — Jury Instruction: Although an instruction on superseding cause did not involve the clearest or best language possible, it essentially stated the rules set down in Halsey v. Uithof, 166 M 319, 532 P2d 686 (1975). Goodnough v. St., 199 M 9, 647 P2d 364, 39 St. Rep. 1170 (1982).

Inferring Injury Caused by Auto Accident: Jury trying personal injury action could properly choose to infer from the evidence presented that an auto accident allegedly caused by negligence of defendant was the direct cause of plaintiff's injuries, and Supreme Court would not supplant jury's findings with one of its own. Allers v. Willis, 197 M 499, 643 P2d 592, 39 St. Rep. 745 (1982), followed in Moralli v. Lake County, 255 M 23, 839 P2d 1287, 49 St. Rep. 872 (1992).

Concurrent Negligence: Plaintiff tenants alleged that a fire which destroyed the building was caused by the landlord's negligence, and there was evidence that the fire started in rooms leased by one of the tenants. An instruction that when the negligent conduct of two or more persons contributes concurrently as the proximate causes of an injury, the conduct of each person is a proximate cause of the injury, regardless of the extent to which each contributes to the injury, and that a cause is concurrent if it was operative at the moment of the injury and acted with another cause to produce the injury was fairly designed to meet an issue raised by the evidence, and it was not error to give the instruction. Swenson v. Buffalo Bldg. Co., 194 M 141, 635 P2d 978, 38 St. Rep. 1588 (1981).

"Mere Happening" Instruction — Propriety — No Inference Except Res Ipsa Loquitur: Plaintiff, a mail carrier, was attempting to negotiate a left turn. Evidence was unclear as to whether he signaled for the turn. The roadway into which he was attempting to turn was a private driveway, open to public use. While turning he was struck by defendant who was attempting to pass. The road was lined for passing and visibility was clear. The jury was instructed that "[t]he mere fact that an accident happened, considered alone, does not give rise to legal inference that it was caused by negligence or that any party to this action was negligent or otherwise at fault." The Supreme Court said that it can be confusing to a jury to give this instruction and recommended against it. It was not prejudicial error to give this instruction in this case in light of the facts of the case and other instructions given. The Supreme Court affirmed that the "mere happening" instruction is totally incompatible in res ipsa loquitur cases. It is the law in negligence cases that negligence may not be inferred from the happening of an accident but that res ipsa loquitur is an exception to the rule. Sampson v. Snow, 194 M 392, 632 P2d 1122, 38 St. Rep. 1441 (1981).

Person Causing Injury to Himself: One who has been proximately the cause of loss or injury to himself cannot be heard to say that someone else should compensate him for his loss, even though such other person had brought about the condition, in the order of causation, which produced the injury. This is the rule declared in this section. County of Silver Bow v. Davies, 40 M 418, 107 P 81 (1910).

RES IPSA LOQUITUR

No Abuse of Discretion in Jury Instructions Regarding Negligence, Res Ipsa Loquitur, and Exception to HIV Informed Consent Provision: Howard contended that the trial court abused its discretion by providing insufficient jury instructions that did not allow the jury to determine whether defendant acted recklessly, by failing to inform the jury that the AIDS Prevention Act required defendant to pay per se damages if defendant acted negligently or recklessly by failing to get consent from Howard's alleged significant other prior to administering an HIV test, and by refusing an instruction on res ipsa loquitur permitting proof by circumstantial evidence. The Supreme Court found no abuse of the trial court's discretion. The jury found no breach of defendant's standard of care, so there could be no finding that defendant acted recklessly, and the issue of damages was moot. A res ipsa loquitur instruction was unnecessary because restraints applied on Howard at the hospital were not necessarily the cause of Howard's back injury, which also may have been caused by a seizure rather than the hospital's actions. Last, a material question existed whether Howard's girlfriend was actually a significant other under the AIDS Prevention Act, so the trial court's instruction on the guidelines regarding when an HIV test may be ordered without informed consent adequately informed the jury on the issue. Howard v. St. James Community Hosp., 2006 MT 23, 331 M 60, 129 P3d 126 (2006).

Inference of Negligence Based on Res Ipsa Loquitur — Mere Happening of Accident Not Considered Evidence of Negligence: Bonilla was injured when a chair allegedly collapsed at a University of Montana concert. Bonilla asserted that under the doctrine of res ipsa loquitur, the

collapse of the chair in and of itself allowed the inference that the chair broke as a result of some negligence by the University. The Supreme Court cited Restatement (Second) of Torts 328D, regarding when the inference of negligence pursuant to res ipsa loquitur may arise: (1) the event is of a kind that ordinarily does not occur in the absence of negligence; (2) other responsible causes, including the conduct of plaintiff and third persons, are sufficiently eliminated by the evidence; and (3) the indicated negligence is within the scope of the defendant's duty to the plaintiff. Here, Bonilla's own action, although perhaps innocent, may well have precipitated the collapse of the chair, and Bonilla offered no evidence that the University owed him any duty of care that was breached. Because other responsible causes, including Bonilla's own conduct, were not eliminated by evidence, the District Court properly found that res ipsa loquitur did not apply, and the Supreme Court affirmed. Bonilla v. Univ. of Mont., 2005 MT 183, 328 M 41, 116 P3d 823 (2005).

Plaintiff's Burden to Establish Prima Facie Case Not Relieved by Res Ipsa Loquitur: In order for the doctrine of res ipsa loquitur to apply, permitting an inference of negligence on the part of one in control of an instrumentality that causes injury, not only must the elements of the doctrine be met, but plaintiff also has the burden of making a prima facie case that defendant breached a duty of care. Here, plaintiff did not establish the standard of care applicable to administration of a functional capacities evaluation through expert testimony, nor did plaintiff establish a breach of the standard by the person who administered the test. Absent a prima facie case, res ipsa loquitur did not apply and summary judgment for defendant was proper. Romans v. Lusin, 2000 MT 84, 299 M 182, 997 P2d 114, 57 St. Rep. 363 (2000). See also Clark v. Norris, 226 M 43, 734 P2d 182, 44 St. Rep. 444 (1987).

Medical Malpractice — Res Ipsa Loquitur Not Applicable to Prove Prima Facie Case — Exclusive Control Element Missing: Plaintiff's hip replacement surgery was terminated after an incision was made because an improperly sized prosthetic device was shipped by the supplier and was not discovered by hospital staff prior to surgery. The doctrine of res ipsa loquitur is not applicable because the prosthetic device was not under the exclusive control of the defendant hospital at the time of the injury. The doctrine is not applicable to allow plaintiff to avoid producing the expert testimony required to establish a prima facie case of duty of care and breach of that duty. Dalton v. Kalispell Regional Hosp., 256 M 243, 846 P2d 960, 50 St. Rep. 54 (1993), followed in Estate of Nielsen v. Pardis, 265 M 470, 878 P2d 234, 51 St. Rep. 591 (1994).

Fire of Unknown Origin — Res Ipsa Loquitur Inapplicable: The doctrine of res ipsa loquitur is not usually applicable in cases of fires of unknown origin, which may occur in the absence of negligence. Valley Properties Ltd. Partnership v. Steadman's Hardware, Inc., 251 M 242, 824 P2d 250, 49 St. Rep. 13 (1992), following Wright v. U.S., 472 F. Supp. 1153 (D.C. Mont. 1979).

Res Ipsa Loquitur Not Applicable in Medical Malpractice Case: The doctrine of res ipsa loquitur does not apply in a medical malpractice case where there is no evidence to show that the result ordinarily would not have occurred had the defendant exercised due care or that the result was not to be anticipated. Hunter v. Missoula Community Hosp., 230 M 300, 750 P2d 106, 45 St. Rep. 220 (1988), citing Negaard v. Estate of Feda, 152 M 47, 446 P2d 436 (1968), and overruled on other grounds in Burlingham v. Mintz, 270 M 277, 891 P2d 527, 52 St. Rep. 181 (1995).

Test for Medical Malpractice: Before the doctrine of res ipsa loquitur can be applied in a medical malpractice case, the plaintiff must prove that the result complained of rarely occurs and that it is not an inherent risk of the procedure. Clark v. Norris, 226 M 43, 734 P2d 182, 44 St. Rep. 444 (1987), followed in Estate of Nielsen v. Pardis, 265 M 470, 878 P2d 234, 51 St. Rep. 591 (1994).

Res Ipsa Loquitur — Products Liability — Auto Accident — Not Applicable to Manufacturer and Seller: Res ipsa loquitur is generally applied to human conduct, not to defective products. The control that manufacturer and seller of used auto exercised over it with respect to the time it was involved in accident was so remote that any causal connection between their duty toward purchaser, who was driving it when it went out of control and crashed, and purchaser's injuries was broken. In addition, other reasonable causes of the accident were not eliminated and the allegations of purchaser and her passenger were purely speculative. Therefore, no reasonable inference that manufacturer and seller were negligent could be made and res ipsa loquitur did not apply. Brothers v. Gen. Motors Corp., 202 M 477, 658 P2d 1108, 40 St. Rep. 226 (1983), followed in Rix v. Gen. Motors Corp., 222 M 318, 723 P2d 195, 43 St. Rep. 1296 (1986).

"Res Ipsa" Doctrine Inapplicable to Grass and Forest Fire: A grass and forest fire burned a large area in a canyon near Missoula. Property owners sued a power company for damages, alleging among other things that the fire was caused by a malfunction in a powerline running through the canyon. The trial court refused plaintiff's requested res ipsa loquitur instruction. The Supreme Court affirmed the trial court's action, ruling that an element necessary to the

application of the res ipsa doctrine was missing, i.e., that the event is of a kind which ordinarily does not occur in the absence of negligence. The court stated that in this case it is not possible to say that a fire not physically connected with defendant's line speaks of negligence on the part of the defendant in the construction or maintenance of its line. Barmeyer v. Mont. Power Co., 202 M 185, 657 P2d 594, 40 St. Rep. 23 (1983).

Res Ipsa Loquitur — Exclusive Control Not Essential: To establish the liability of a pilot in an airplane crash, the plaintiff asserted the theory of res ipsa loquitur. Because the defendant offered evidence of defective equipment to negate a presumption of the pilot's negligence, the trial court refused to submit the issue of res ipsa loquitur to the jury. The trial court erred. Although proof of exclusive control assists a plaintiff in establishing res ipsa loquitur, concurrent causes may exist and yet not foreclose reliance on the theory. In this case, proof of equipment failure did not deny the application of the theory because pilot error may have combined with equipment failure to produce the crash. Tompkins v. NW. Union Trust Co. of Helena, 198 M 170, 645 P2d 402, 39 St. Rep. 845 (1982).

Res Ipsa Loquitur — Unexplainable Accident — Equally Plausible Causes: Each side produced testimony seeking to explain an otherwise unexplainable airplane crash. The theory of res ipsa loquitur could be applied because this testimony did not amount to two equally plausible causes. Tompkins v. NW. Union Trust Co. of Helena, 198 M 170, 645 P2d 402, 39 St. Rep. 845 (1982), distinguished in Barmeyer v. Mont. Power Co., 202 M 185, 657 P2d 594, 40 St. Rep. 23 (1983).

Inference of Res Ipsa Loquitur — Modular Home Defects: When an instrumentality that causes injury without any fault of the injured person is under the exclusive control of another at the time of the injury, and the injury does not occur in the ordinary course of things if the one having control uses proper care, and each of these elements of res ipsa loquitur is found to exist, the law infers negligence on the part of the one in control as the cause of the injury. In modular home purchasers' suit against manufacturer for damages arising from, among other things, leaky roof and defects caused by sagging floor, where manufacturer contended that the floor defects could have been caused by purchasers' structural remodeling below the floor and that the purchasers had exclusive control of the house before the roof began to leak, there was a factual question whether all the elements of res ipsa loquitur existed, and a jury instruction on the doctrine was proper where it was made conditional on a finding by the jury that all elements of the doctrine existed. Little v. Grizzly Mfg., 195 M 419, 636 P2d 839, 38 St. Rep. 1994 (1981).

"Mere Happening" Instruction — Propriety — No Inference Except Res Ipsa Loquitur: Plaintiff, a mail carrier, was attempting to negotiate a left turn. Evidence was unclear as to whether he signaled for the turn. The roadway into which he was attempting to turn was a private driveway, open to public use. While turning he was struck by defendant who was attempting to pass. The road was lined for passing and visibility was clear. The jury was instructed that "[t]he mere fact that an accident happened, considered alone, does not give rise to legal inference that it was caused by negligence or that any party to this action was negligent or otherwise at fault." The Supreme Court said that it can be confusing to a jury to give this instruction and recommended against it. It was not prejudicial error to give this instruction in this case in light of the facts of the case and other instructions given. The Supreme Court affirmed that the "mere happening" instruction is totally incompatible in res ipsa loquitur cases. It is the law in negligence cases that negligence may not be inferred from the happening of an accident but that res ipsa loquitur is an exception to the rule. Sampson v. Snow, 194 M 392, 632 P2d 1122, 38 St. Rep. 1441 (1981).

Res Ipsa Loquitur — Elements — Conflicting Evidence on Causation: The elements necessary for the application of res ipsa loquitur are as follows: (1) The instrumentality which caused the injury must be within the exclusive control of the defendant. (2) The injury must be one that does not ordinarily occur if the party in control uses proper care. (3) The injury must not be due to any fault on the part of the injured person. There was conflicting testimony concerning the pitman arm on the Ford automobile. One expert said the pitman arm broke, causing the accident, while another expert said the pitman arm broke as a result of the accident. Under these facts and circumstances, the doctrine of res ipsa is not applicable because the second element cannot be shown to exist. Mets v. Granrud, 186 M 265, 606 P2d 1384 (1980), overruled in Tomkins v. NW. Union Trust Co. of Helena, 198 M 170, 645 P2d 402, 39 St. Rep. 845 (1982).

Res Ipsa Applied in Fire Case: A rebuttable presumption of negligence arises when an instrumentality which causes injury, without any fault of the injured person, is under the exclusive control of the defendant at the time of the injury and the injury is such that in the ordinary course of things it does not occur if the one having such control uses proper care. The court applied the above stated rule of res ipsa loquitur where the cause of the fire in question

involved a truck, soiled sleeping bags, and a warehouse in the possession of defendant. Wright v. U.S., 472 F. Supp. 1153 (D.C. Mont. 1979).

Res Ipsa Loquitur — Elements Generally: Four elements are necessary in res ipsa loquitur cases: (1) defendant's exclusive knowledge of the cause of the accident; (2) lack of fault by the injured person; (3) that such an injury as the plaintiff's would not normally occur absent the defendant's negligence; and (4) the defendant's exclusive control at the time of the injury of the instrument that caused the injury. Hash v. Mont. Power Co., 164 M 493, 524 P2d 1092 (1974).

Application to Fire Started at Electrical Box: The doctrine of res ipsa loquitur does not apply to a fire that started at an electrical meter box attached to plaintiff's building, where the exact cause of the fire had not been determined, the plaintiff was in control of the circuit breakers and electrical devices within the building, the meter box was vulnerable to the entry of moisture, dust, and foreign objects, and there was a dearth of any evidence that the fire would not have happened without negligence on the part of the defendant. Hash v. Mont. Power Co., 164 M 493, 524 P2d 1092 (1974).

WILLFUL ACTS

Sufficient Evidence of City's Willful or Wanton Misconduct to Preclude Summary Judgment — Negligence Claim Against City Barred by Recreational Use Statute: Plaintiff was injured on June 20, 2001, after falling through a damaged plank on the Polson city dock, and filed suit against the city for negligently maintaining the premises and for failing to warn of the unsafe condition. The District Court granted summary judgment for the city on grounds that plaintiff failed to present evidence in support of the claim that the city was aware of the defective plank before June 20 or that the city acted willfully or wantonly. The court also concluded that plaintiff's negligence claim was precluded by 70-16-302, the recreational use statute. On appeal, the Supreme Court concluded that the facts, when considered in a light most favorable to plaintiff, were sufficient to raise a genuine issue as to whether the city's failure to timely repair the damaged plank or warn plaintiff of the danger constituted willful or wanton misconduct, precluding summary judgment and warranting a trial on the issue. However, the Supreme Court agreed that the recreational use statute barred plaintiff's negligence claim. Jobe v. Polson, 2004 MT 183, 322 M 157, 94 P3d 743 (2004).

Mortgage Against Party's Interest in Property Granted Pursuant to Dissolution — No Tortious Interference With Business, Prima Facie Tort, or Intentional Infliction of Emotional Distress: When George and Joyce were divorced, the District Court granted George exclusive possession of the ranch until it could be sold and the proceeds divided between the parties. During the course of the dissolution proceedings, Joyce took out several loans for living expenses. After the dissolution, Joyce consolidated the $150,000 in loans, and the bank executed a mortgage on Joyce's interest in the ranch to secure the loan. When George found out about the mortgage and security interest, he became distraught because he believed that he would not be able to obtain loans on the property to enable him to conduct ranch obligations and meet his operations. George subsequently filed suit against Joyce, the bank, and the bank president, who was Joyce's son-in-law, alleging tortious interference with business relationships, prima facie tort, and intentional infliction of emotional distress. The District Court granted the defendants' motion for summary judgment, and George appealed. The Supreme Court affirmed. Applying Farrington v. Buttrey Food & Drug Stores Co., 272 M 140, 900 P2d 277 (1995), the court concluded that the acts of Joyce and the bank were legal and that, standing alone, the acts did not give rise to any presumption or inference that the acts were done to harm George. The court also declined to recognize a separate cause of action for prima facie tort under the facts of this case. Applying Sacco v. High Country Independent Press, Inc., 271 M 209, 896 P2d 411 (1995), the court further concluded that because the defendants' acts were legal, no claim for emotional distress could arise from those acts. Absent material facts evidencing malicious intent or damages, summary judgment was proper. Pospisil v. First Nat'l Bank of Lewistown, 2001 MT 286, 307 M 392, 37 P3d 704 (2001).

Damages Proper for Emotional Distress Based on Sale of Real Estate — Punitive Damages Appropriate: The Maloneys were promised an option to purchase property adjacent to their own, hoping to build their retirement home near Glacier Park. The real estate agent who listed the property was aware of the Maloneys' option but sold to another instead. That person then developed the property, building a 3,000-square-foot home on the very site that the Maloneys had desired and within sight of the Maloneys' residence, and then listed the newly developed property for almost six times what the Maloneys could have paid had the option been properly offered. A special master concluded, and the District Court agreed, that the Maloneys had suffered and were entitled to compensation for the shock, worry, anger, disappointment, and

frustration that they had suffered and would continue to suffer in light of the inherent duration of the Maloneys' adjacent ownership. The Supreme Court affirmed, noting that under French v. Ralph E. Moore, Inc., 203 M 327, 661 P2d 844, 40 St. Rep. 481 (1983), emotional distress damages may result from negligent or intentional damage to property arising from interference with the use and enjoyment of land and that under Johnson v. Murray, 201 M 495, 656 P2d 170, 39 St. Rep. 2257 (1982), compensatory damages could include compensation for humiliation, embarrassment, distress, and ridicule associated with interference with plaintiffs' use of their private property. The private property interest at issue here sufficiently involved the use and enjoyment of land to fall within these holdings. Further, the award of punitive damages was also affirmed in this instance despite defendant's claims of the special master's improper estimation of net worth, a syntax error, and the special master's improper recognition of punitive damages assessed against defendant in a prior case. Maloney v. Home & Inv. Center, Inc., 2000 MT 34, 298 M 213, 994 P2d 1124, 57 St. Rep. 144 (2000). See also Recovery for Negligent Infliction of Emotional Distress Attendant to Economic Loss: A Reassessment, Sandor & Berry, 37 Ariz. L. Rev. 1247 (1995).

Intentional Infliction of Emotional Distress — Pressuring Church Member Not to Sue Church for Accident: In an action by a church member injured in a fall on church property, the District Court properly determined that the church's conduct was not sufficiently outrageous to support a separate tort claim for intentional infliction of emotional distress. Plaintiff claimed that the church denied her an award status indicating membership in good standing, denied a church calling, threatened excommunication, pressured her to sign releases, stated she was unworthy and dishonest, and attempted to dissuade her from going to court. The first three items were not admissible in evidence. Davis v. Church of Jesus Christ of Latter Day Saints, 258 M 286, 852 P2d 640, 50 St. Rep. 535 (1993).

Tortious Interference With Business as Creating Liability for Punitive Damages Over and Above Contract Damages: The Supreme Court, relying on Bolz v. Meyers, 200 M 286, 651 P2d 606 (1982), held that a party may breach a contract and may also separately and distinctly engage in conduct, outrageous in nature, that tortiously interferes with the other party's business relations. A prima facie case of interference with contractual or business relations requires intentional and willful acts: (1) calculated to cause damage to the plaintiff or the plaintiff's business; (2) done with the unlawful purpose of causing damage or loss, without justifiable cause on the part of the actor; and (3) resulting in actual damages and loss. Defendants' tortious interference with plaintiff's business relationships entitled plaintiff to punitive damages. Daniels v. Dean, 253 M 465, 833 P2d 1078, 49 St. Rep. 535 (1992).

No Tortious Interference With Borrower's Business Relationships: To establish a prima facie case of tortious interference with business relations, a person must show intentional and willful acts that are calculated to damage the person's business without right or justifiable cause and that are done with the unlawful purpose of causing damage or loss. Lender bank was merely exercising its right granted by a security agreement when, prior to notifying borrower, bank notified a business with which borrower had an account receivable that bank had a specific assignment from borrower of accounts receivable and requested the business to issue future payments with both bank and borrower as payees. Bank did not commit tortious interference with borrower's business relationships. Richland Nat'l Bank & Trust v. Swenson, 249 M 410, 816 P2d 1045, 48 St. Rep. 730 (1991), followed in St. v. Kandarian, 268 M 408, 886 P2d 954, 51 St. Rep. 1381 (1994), and, with respect to the test for tortious interference with a business relationship, Farrington v. Buttrey Food & Drug Stores Co., 272 M 140, 900 P2d 277, 52 St. Rep. 667 (1995).

Intentional Interference With Third-Party Contract: The defendant claimed to have a personal service contract with the plaintiff. When the plaintiff refused to honor the alleged service contract, the defendant contacted the lessee of a gravel pit owned by the defendant and ordered the lessee to refuse to honor a contract the lessee had with the plaintiff to sell gravel to the plaintiff. The plaintiff had to obtain the needed gravel elsewhere at an additional cost of $7,500. The Supreme Court affirmed that the defendant had no right to interfere with the contract, based on the defendant's ownership of the quarry, and that the defendant's interference was intentional and resulted in a loss to the plaintiff, making the defendant liable for the damages suffered by the plaintiff. Tindall v. Konitz Contracting, Inc., 240 M 345, 783 P2d 1376, 46 St. Rep. 2182 (1989).

Intentional Trespass: The Supreme Court affirmed the jury's verdict that defendants were not liable for intentional trespass for flood damage to plaintiffs' property. The defendants' dam had been built before they purchased the property, making it clear that they had not

intentionally caused any water to enter the plaintiffs' land. Guenther v. Finley, 236 M 422, 769 P2d 717, 46 St. Rep. 477 (1989).

Intentional Infliction of Emotional Distress — Not Yet Recognized: The Supreme Court stated that, while it has yet to decide under what facts it will recognize the tort, it has at least decided some situations where it will not. See Frigon v. Morrison-Maierle, Inc., 233 M 113, 760 P2d 57, 45 St. Rep. 1344 (1988), First Bank-Billings v. Clark, 236 M 195, 771 P2d 84, 46 St. Rep. 291 (1989), and Doohan v. Bigfork School District No. 38, 247 M 125, 805 P2d 1354, 48 St. Rep. 121 (1991). Phillip R. Morrow, Inc. v. FBS Ins. Mont.-Hoiness Labar, Inc., 236 M 394, 770 P2d 859, 46 St. Rep. 455 (1989). See also Foster v. Albertsons, Inc., 254 M 117, 835 P2d 720, 49 St. Rep. 638 (1992), in which a directed verdict, granted solely on the basis that an intentional infliction of emotional distress claim was brought as a separate cause of action, was remanded on grounds that the prima facie case evidence established the threshold level of conduct necessary to survive a motion for a directed verdict. However, see Sacco v. High Country Independent Press, Inc., 271 M 209, 896 P2d 411, 52 St. Rep. 407 (1995), in which the court adopts a new standard for negligent or intentional infliction of emotional distress in circumstances in which serious or severe emotional distress to the claimant was the reasonably foreseeable consequence of a negligent or intentional act or omission. See also Maloney v. Home & Inv. Center, Inc., 2000 MT 34, 298 M 213, 994 P2d 1124, 57 St. Rep. 144 (2000), in which the Sacco standard was applied and the relevance of First Bank-Billings v. Clark, 236 M 195, 771 P2d 84, 46 St. Rep. 291 (1989), was affirmed because it addressed the "serious" or "severe" element articulated in Sacco, which is synonymous with the "significant impact" element found in Johnson v. Supersave Mkt., Inc., 211 M 465, 686 P2d 209, 41 St. Rep. 1495 (1984).

Intentional Interference With Prospective Economic Advantage: The trial court granted defendant's motion for directed verdict, dismissing the intentional interference claim on the basis that plaintiff failed to show that defendant improperly interfered in the award of a subcontract to another instead of to the plaintiff. The Supreme Court reversed, stating that although early cases required proof of improper motive as an essential part of plaintiff's cause of action, it is now agreed that upon a showing of an intentional interference with an existing contractual relation, the burden of proving that the interference was justified rests with the defendant. Phillip R. Morrow, Inc. v. FBS Ins. Mont.-Hoiness Labar, Inc., 236 M 394, 770 P2d 859, 46 St. Rep. 455 (1989).

Emotional Distress — Endorsing Standard in Restatement (Second) of Torts: The Supreme Court endorsed the standard found in the Restatement (Second) of Torts that a cause of action for emotional distress arises only if the invasion of the party's interest is substantial and the impact significant. The court indicated that the endorsement was not a departure from prior law but rather a new interpretation of the existing significant impact requirement. First Bank-Billings v. Clark, 236 M 195, 771 P2d 84, 46 St. Rep. 291 (1989), followed in Lueck v. United Parcel Serv., 258 M 2, 851 P2d 1041, 50 St. Rep. 401 (1993), and affirmed in Maloney v. Home & Inv. Center, Inc., 2000 MT 34, 298 M 213, 994 P2d 1124, 57 St. Rep. 144 (2000), to the extent that it addressed the "serious" or "severe" element articulated in Sacco v. High Country Independent Press, Inc., 271 M 209, 896 P2d 411, 52 St. Rep. 407 (1995), which is synonymous with the "significant impact" element found in Johnson v. Supersave Mkt., Inc., 211 M 465, 686 P2d 209, 41 St. Rep. 1495 (1984). See also Sacco v. High Country Independent Press, Inc., 271 M 209, 896 P2d 411, 52 St. Rep. 407 (1995).

Malicious Prosecution Not to Be Asserted as Cross-Complaint or Counterclaim: The Supreme Court ruled that one of the basic elements of malicious prosecution is the termination of a prior proceeding in favor of the alleging party necessarily implying that an action for malicious prosecution cannot be asserted by cross-complaint or counterclaim in the original proceeding. The court further held that use of the legal process to resolve a good faith controversy cannot constitute a basis for damages. First Bank-Billings v. Clark, 236 M 195, 771 P2d 84, 46 St. Rep. 291 (1989).

Comparison Where Willful or Wanton Misconduct by Both Parties: While Derenberger v. Lutey, 207 M 1, 674 P2d 485, 40 St. Rep. 902 (1983), held that there may not be a comparison between negligence and willful or wanton misconduct because they represent different kinds of conduct, it is not inconsistent to allow comparison of like conduct of parties, regardless of its label, for the purpose of ascertaining damages. Although such comparison between negligence and willful or wanton misconduct by both parties may not be directly compared under the comparative negligence statute at 27-1-702, such a rule would be consistent with both 27-1-702 and 27-1-701. Simonson v. White, 220 M 14, 713 P2d 983, 43 St. Rep. 133 (1986). See also Flanigan v. Prudential Fed. S&L Ass'n, 221 M 419, 720 P2d 257, 43 St. Rep. 941 (1986).

Insurer Exemption for Intentional Bodily Injury: Insurer was properly granted a summary judgment on its claims that it had no obligation to defend or pay a judgment against the insured, who had struck a coworker in the face twice. The policy excluded bodily injury either expected or intended from the standpoint of the insured. Whether insured intended the specific injuries (left cheekbone broken in three places) was not a question of fact precluding summary judgment. When an assailant strikes another in the face, it is irrelevant for purposes of such an insurance exclusion that the assailant causes a different injury than he subjectively intended. The court will not impose upon the insurer the impossible task of proving that the insured specifically intended to break the victim's cheekbone in three places by striking him with his fist. Mut. Serv. Cas. Ins. Co. v. McGehee, 219 M 304, 711 P2d 826, 42 St. Rep. 2038 (1985), followed in Burns v. Underwriters Adjusting Co., 234 M 508, 765 P2d 712, 45 St. Rep. 2089 (1988), and in Am. States Ins. Co. v. Willoughby, 254 M 218, 836 P2d 37, 49 St. Rep. 708 (1992).

Commission of Bad Faith Tort Against Depositor by Bank: The District Court did not err in instructing the jury to consider recovery by bank depositor against the bank under bad faith tort principles and to accordingly consider punitive damages. The depositor and his nephew opened a checking account with a card requiring the signatures of both on checks. They then formed a partnership. The nephew induced the bank to change the card so that he could issue checks without the depositor's signature. The bank did not notify the depositor of the change or obtain his authorization for it. The bank told depositor his signature was not needed but did not tell him about the new card, and depositor disagreed. Later the bank told him it would not change its policy of honoring checks signed only by the nephew. When depositor's attorney told bank not to do so, the bank stated the card required only one signature and the bank would not change the card unless both the nephew and the depositor requested it. The bank then told depositor the card was lost but later that day produced both cards. Depositor sued, and the bank subsequently took various negative and detrimental actions against his credit status, refused loans of a type formerly granted, canceled his ready reserve account, and refused to pay several items presented before he was notified that the account had been canceled. Tribby v. NW. Bank of Great Falls, 217 M 196, 704 P2d 409, 42 St. Rep. 1133 (1985).

Law Review Articles

Tort Liability for Bad Faith in Montana: The End of the Story, Roth, 57 Mont. L. Rev. 567 (1996).

The King's Resurrection: Sovereign Immunity Returns to Montana, Kutzman, 51 Mont. L. Rev. 529 (1990).

Tort Liability for Employers Who Create Workplace Conditions "Substantially Certain" to Cause Injury or Death, Tucker, 50 Mont. L. Rev. 371 (1989).

Hidden-But-Discoverable Defects: Resolving the Conflicts Between Real Estate Buyers and Brokers, Culum, 50 Mont. L. Rev. 331 (1989).

Liability of Franchisors for the Torts of Their Montana Franchisees, Phillips, 49 Mont. L. Rev. 123 (1988).

The "Substantial Factor Test" for Causation: Juedeman v. Montana Deaconess Medical Center, Lester, 48 Mont. L. Rev. 391 (1987).

The Liability of Purveyors of Alcoholic Beverages for Torts of Intoxicated Consumers, d. The Impact of Comparative Negligence on Dramshop Actions, Heard, 47 Mont. L. Rev. 507 (1986).

Landowner Liability in Montana, Nelson, 47 Mont. L. Rev. 109 (1986).

Tort Liability for Serving Alcohol: An Expanding Doctrine, Bender, 46 Mont. L. Rev. 381 (1985).

Wrongful Life Recognized in Washington: Harbeson v. Parke-Davis, Jarrett, 44 Mont. L. Rev. 291 (1983).

Montana Supreme Court Survey, Hursh, 43 Mont. L. Rev. 279, 327 (1982).

Limitations on Manufacturer Liability in Second Collision Actions, Reichert, 43 Mont. L. Rev. 109 (1982).

Such Damages as Are Just: A Proposal for More Realistic Compensation in Wrongful Death Cases, Strong & Jacobsen, 43 Mont. L. Rev. 55 (1982).

Public Policy Implications of Liability Regimes for Injuries Caused by Persons With Alzheimer's Disease, Richards, 35 Ga. L. Rev. 621 (2001).

The John W. Wade Conference on the Third Restatement of Torts, 54 Vand. L. Rev. 639 (2001).

Interference With Contract in the Competitive Marketplace, 15 Wm. Mitchell L. Rev. 453 (1989).

Collateral References

Negligence *key* 1, et seq.

65 C.J.S. Negligence §2, et seq.

57A Am. Jur. 2d Negligence §27, et seq.

31 Am. Jur. POF2d Insurer's breach of covenant of good faith and fair dealing—first-party claims, pp. 323 through 442.

Tort liability of public schools and institutions of higher learning for accident involving motor vehicle operated by student. 85 ALR 5th 301.

Comparative negligence, contributory negligence and assumption of risk in action against owner of store, office, or similar place of business by invitee falling on tracked-in water or snow. 83 ALR 5th 589.

Liability of insurance agent or broker on ground of inadequacy of liability-insurance coverage procured. 60 ALR 5th 165.

Governmental tort liability as to highway median barriers. 58 ALR 4th 559.

Civil liability of undertaker in connection with transportation, burial, or safeguarding of body. 53 ALR 4th 360.

Joint venturers' comparative liability for losses, in absence of express agreement. 51 ALR 4th 371.

Personal liability of owner of condominium unit to one sustaining personal injuries or property damage by condition of common areas. 39 ALR 4th 98.

Liability to adult social guest injured otherwise than by condition of premises. 38 ALR 4th 200.

Insurer's tort liability for wrongful or negligent issuance of life policy. 37 ALR 4th 972.

Liability of wharf owner or operator for personal injuries to invitees or licensees resulting from condition of premises or operation of equipment. 34 ALR 4th 572.

Liability for injury or death resulting when object is manually brought into contact with, or close proximity to, electric line. 33 ALR 4th 809.

Liability of termite or other pest control or inspection contractor for work or representations. 32 ALR 4th 682.

Employer's liability for injury to babysitter in home or similar premises. 29 ALR 4th 304.

Liability of operator of store, office, or similar place of business to invitee slipping on spilled liquid or semiliquid substance. 26 ALR 4th 481.

Liability of operator of grocery store to invitee slipping on spilled liquid or semiliquid substance. 24 ALR 4th 696.

Modern status of rules conditioning landowner's liability upon status of injured party as invitee, licensee, or trespasser. 22 ALR 4th 294.

Liability of owner of store, office, or similar place of business to invitee falling on tracked-in water or snow. 20 ALR 4th 438.

Liability of theater owner or operator for injury to or death of patron resulting from lighting conditions on premises. 19 ALR 4th 1110.

Liability of telephone company for injury resulting from condition or location of telephone booth. 17 ALR 4th 1308.

Extent of liability of seller of livestock infected with communicable disease. 14 ALR 4th 1096.

Liability of storekeeper for injury to customer arising out of pursuit of shoplifter. 14 ALR 4th 950.

Liability of owner or occupant of premises for injury or death resulting from contact of crane, derrick, or other movable machine with electric line. 14 ALR 4th 913.

Liability for injury or death of participant in automobile or horse race at public track. 13 ALR 4th 623.

Liability of insurer for damages resulting from delay in passing upon an application for life insurance. 1 ALR 4th 1202.

Liability for injury on, or in connection with, escalator. 1 ALR 4th 444.

Liability of insurance agent or broker on ground of inadequacy of life, health, and accident insurance coverage procured. 72 ALR 3d 735.

Liability of insurance broker or agent to insured for failure to procure insurance. 64 ALR 3d 398.

Duty of injured person to submit to nonsurgical medical treatment to minimize tort damages. 62 ALR 3d 70.

Duty of injured person to submit to surgery to minimize tort damages. 62 ALR 3d 9.

27-1-702. Comparative negligence — extent to which contributory negligence bars recovery in action for damages.

Compiler's Comments

1997 Amendments: Chapter 293 near end of section, before "attributable", substituted "percentage of negligence" for "amount of negligence"; and made minor changes in style. Amendment effective April 18, 1997.

Chapter 429 at beginning substituted "Contributory fault does not bar recovery" for "Contributory negligence shall not bar recovery"; after "recover" substituted "tort damages for death of a person" for "damages for negligence resulting in death"; after "property" substituted "if the contributory fault was not greater than the fault of the defendant or the combined fault of all defendants and nonparties" for "if such negligence was not greater than the negligence of the person or the combined negligence of all persons against whom recovery is sought"; near end, after "diminished", substituted "in proportion to the percentage of fault attributable" for "in the proportion to the amount of negligence attributable"; and made minor changes in style. Amendment effective on occurrence of contingency.

Preamble: The preamble attached to Ch. 293, L. 1997, provided: "WHEREAS, the Montana Supreme Court, in Plumb v. District Court, 927 P.2d 1011, 53 St. Rep. 1187 (1996), recently declared unconstitutional portions of Montana's comparative negligence statute because it failed to provide an opportunity for a nonparty to defend oneself, and it required the plaintiff to act in a dual capacity by requiring that the plaintiff represent nonparties; and

WHEREAS, the Montana Supreme Court also recognized in *Plumb* that parties who settle represent the single exception for fair apportionment of liability under third-party practice rules; and

WHEREAS, the Montana Supreme Court has recognized that the Legislature may alter tort causes of action to promote legitimate state interests; and

WHEREAS, the Legislature believes that the policy of the state is that claimants, defendants, and other potentially liable persons should be held responsible to the extent of individual fault; and

WHEREAS, the Legislature has retained joint and several liability, but modified it because of that policy; and

WHEREAS, the current system of modified joint and several liability must permit a consideration of the fault attributable to parties who settle or are released for the modified system to be operative; and

WHEREAS, the Legislature believes that a claimant who enters into a settlement or covenant not to sue does so because the claimant has made a considered judgment that the agreement is in the claimant's best interests; and

WHEREAS, the Legislature intends that the liability of persons who settle or are released and who may share in the responsibility for a tort cause of action be considered by the trier of fact and apportioned a percentage of damages according to their negligence; and

WHEREAS, the Legislature believes that the percent credit rule, rather than the dollar credit rule, more accurately reflects the basis for comparative negligence, which apportions liability according to the percentage of individual negligence.

THEREFORE, the Legislature finds it appropriate to pass legislation addressing the concerns raised by the Montana Supreme Court and to accomplish the Legislature's objectives of allocating liability on the basis of individual negligence, encouraging fair settlements that accurately reflect potential liability, and permitting the allocation of a percentage of liability to persons who settle or are released and are found to be partially or wholly responsible."

The preamble attached to Ch. 429, L. 1997, provided: "WHEREAS, efforts of the Legislature to amend the comparative negligence statute, which is premised on a modified joint and several liability scheme, have repeatedly been struck down by the Montana Supreme Court; and

WHEREAS, the Montana Supreme Court rulings prohibiting the consideration of fault attributable to nonparties impair the effectiveness of the current modified joint and several liability system in Montana; and

WHEREAS, the Legislature intends that the policy of the state should be a system of comparative fault in which persons are held responsible only to the extent to which they cause or contribute to the harm; and

WHEREAS, the current system of joint and several liability, which apportions all liability only among parties to the action, fails to apportion liability among all tortfeasors according to their equitable share of fault; and

WHEREAS, the Legislature recognizes that public policy favors fair settlements that accurately reflect the liability of settled or released parties; and

WHEREAS, the Legislature is concerned with the present inequitable results of solvent defendants having to pay for the liability of insolvent, immune, or settled parties; and

WHEREAS, the present system of joint and several liability for all tort actions does not reflect the state's policy of liability in proportion to fault; and

WHEREAS, the Legislature recognizes that joint and several liability should be retained for certain situations; and

WHEREAS, at least ten other states have abrogated the doctrine of joint and several liability, except for specific situations; and

WHEREAS, the Legislature has the power to alter tort causes of action to promote legitimate state interests.

THEREFORE, the Legislature declares that the doctrine of joint and several liability is abolished, except for specific causes of action, and is replaced with a comparative fault system utilizing the principles of several liability."

Applicability: Section 4, Ch. 293, L. 1997, provided: "[This act] [27-1-702, 27-1-703, and 27-1-704] applies to causes of action that arise on or after [the effective date of this act]." Effective April 18, 1997.

Nonseverability: Section 5, Ch. 293, L. 1997, was a nonseverability clause.

Severability: Section 9, Ch. 429, L. 1997, was a severability clause.

1987 Amendment: Near end of section, after "person", inserted "or the combined negligence of all persons".

Severability: Section 3, Ch. 505, L. 1987, was a severability section.

Case Notes

Assumption of Risk 790
General 792

ASSUMPTION OF RISK

Indemnity Agreement Redundant of Protection Afforded by Contributory Negligence: Langemo had an agreement with Montana Rail Link and Burlington Northern Santa Fe Railroad to establish access via a private railroad crossing to Langemo's property. After Langemo was injured at the crossing, the railroads counterclaimed against Langemo for indemnification pursuant to the private crossing agreement. The District Court held that although 28-2-702 precluded the railroads from being indemnified for their own negligence, the indemnity agreement was enforceable as applied to Langemo's negligent acts or omissions and allowed the railroads to enforce their indemnity claim at the same time that they claimed the right to a reduction in Langemo's damage award based on contributory negligence. The Supreme Court reversed, concluding that the indemnity agreement was redundant of the protection afforded by the contributory negligence statute. Langemo's recovery would already be reduced by any negligence attributable to Langemo, so the railroads could not rely on additional protection from the indemnity agreement. Langemo v. Mont. Rail Link, Inc., 2001 MT 273, 307 M 293, 38 P3d 782 (2001).

No Assumption of Risk in Purchase of Damaged Real Property — Summary Judgment Reversed: Koelzer owned an inn by a mining and power generation site near Colstrip. Koelzer discovered that mining activity had damaged the inn and filed a complaint in 1994 against the mining and power generation companies, but did not pursue the damage claim. In 1996, Dale and Shawonda Lewis approached Koelzer about purchasing the inn, and the issue of the damages and Koelzer's claim came up. The Lewises inspected the inn and discovered additional damages, which led Koelzer to reassert the damage claim, but the claim was again unresolved. Nevertheless, the Lewises offered to buy the inn, and title was eventually conveyed to Dale's parents, who were able to secure financing. Koelzer notified the companies by fax that the inn had been sold and requested that the companies work with Dale on the structural damage discussed in the past. About 1 year later, Dale received an estimate of $91,000 to repair the damages and filed a nuisance complaint and a complaint seeking compensation from the companies for damages, after the Lewises acquired title to the inn in 1998. The District Court dismissed the Lewises' claim for damages arising after title was acquired on grounds that the Lewises had assumed the risk of those damages when they purchased the property. On appeal, the District Court was reversed on the issue of postpurchase damages. Under Mead v. M.S.B., Inc., 264 M 465, 872 P2d 782 (1994), assumption of risk is no longer available as a separate affirmative defense in negligence cases. Instead, that defense now merges into the general liability scheme of comparative negligence in which the conduct of the parties is compared based on evidence of negligence and contributory negligence, as established by reasonable and prudent person standards. Here the questions of whether the Lewises negligently purchased an inn that

they knew might be subject to future damages or whether those future damages were sufficiently foreseeable to be taken into account in the purchase price of the inn were questions of fact for a jury and should not have been dismissed by summary judgment. Lewis v. Puget Sound Power & Light Co., 2001 MT 145, 306 M 37, 29 P3d 1028 (2001).

Irrelevant and Prejudicial Evidence of Consumption of Alcohol by Plaintiff: Violette pulled out of a store's parking lot in front of Havens, and the two collided. Havens sued the state, claiming negligent failure to place a stoplight at the parking lot entrance. It was not error to deny Havens' motion to exclude evidence of his alcohol consumption before the accident when the state opposed the motion by stating that it would show that the consumption was a cause of the accident. However, this forced Havens to introduce evidence of, and to address, his alcohol consumption. In addition, the state offered no evidence that Havens' alcohol consumption helped cause the accident and the state's medical expert and a law enforcement officer both testified that Havens was not negligent. Evidence of the alcohol consumption prejudiced the whole trial. It was reversible error to deny a motion for a new trial. Havens v. St., 285 M 195, 945 P2d 941, 54 St. Rep. 1108 (1997), followed in St. v. Ingraham, 1998 MT 156, 290 M 18, 966 P2d 103, 55 St. Rep. 611 (1998).

Assumption of Risk Defense Precluded Under Federal Employers' Liability Act: A railroad employee sued the railroad for injuries he received on the job. The railroad sought to introduce the defense of contributory negligence. The Supreme Court affirmed the lower court's ruling that in reality the railroad was attempting to introduce the defense of assumption of risk, which is precluded under the Federal Employers' Liability Act. Kalanick v. Burlington N. RR Co., 242 M 45, 788 P2d 901, 47 St. Rep. 532 (1990).

Personal Injury From Abnormally Dangerous Activity — Assumption of Risk as Defense — Apportionment: Although in Montana a person is strictly liable for injury to persons resulting from his abnormally dangerous activity, the defense of assumption of risk is available, and where found it is to be treated like the defense of contributory negligence and apportioned as under this section. Matkovic v. Shell Oil Co., 218 M 156, 707 P2d 2, 42 St. Rep. 1482 (1985).

Strict Liability — Assumption of Risk Governed by Section: Assumption of risk is an available defense in a strict liability case, and if the defense is found to exist, plaintiff's conduct must be compared with that of the defendant. The same Montana law that governs comparison of contributory negligence controls comparison of assumption of risk. Kuiper v. Goodyear Tire & Rubber Co., 207 M 37, 673 P2d 1208, 40 St. Rep. 1861 (1983).

Products Liability — Assumption of Risk: Assumption of risk is an available defense in a strict liability case. The defense must establish that plaintiff voluntarily and unreasonably exposed himself to a known danger. If the defense is found to exist, then plaintiff's conduct must be compared with that of defendant. The same Montana law which governs comparison of contributory negligence controls comparison of assumption of risk. Zahrte v. Sturm, Ruger, & Co., Inc., 203 M 90, 661 P2d 17, 40 St. Rep. 316 (1983), followed in Krueger v. Gen. Motors Corp., 240 M 266, 783 P2d 1340, 46 St. Rep. 2114 (1989), and in Greytak v. RegO Co., 257 M 147, 848 P2d 483, 50 St. Rep. 204 (1993).

Assumption of Risk Standards Not to Be Included in Negligence Instructions: A jury instruction in a negligence action provided that one aspect of contributory negligence was whether or not plaintiff had assumed the risk. Another instruction provided the traditional "reasonable and prudent person" standard for negligence. Because assumption of risk is governed by a subjective standard and traditional negligence is governed by an objective standard, the two instructions were contradictory. The doctrine of assumption of risk is no longer applicable in Montana. Jury instructions may not contain any of the subjective standards of assumption of risk. Abernathy v. Eline Oil Field Services, Inc., 200 M 405, 650 P2d 772, 39 St. Rep. 1688 (1982), followed in Mead v. M.S.B., Inc., 264 M 465, 872 P2d 782, 51 St. Rep. 348 (1994).

Application of Comparative Negligence Law to Assumption of Risk: The U.S. District Court found that Montana law is unclear as to absorption of the former affirmative defense of assumption of risk into the comparative negligence law but that latest Montana cases indicate assumption of risk has been abolished as an absolute defense and that it was therefore error to instruct jury on assumption of risk question. However, since defendants contended assumption of risk was absolute defense and requested the erroneous instruction, they invited the error; hence, motion for judgment notwithstanding the verdict and motion to amend judgment must be denied. Ingram v. Dick-Char, Inc., 39 St. Rep. 96 (D.C. Mont. 1982) (apparently not reported in Federal Supplement).

Assumption of Risk — Instruction Not Warranted by Evidence: In action for damages sustained when defendant sued the wrong person, plaintiff, and pursued the suit to default

judgment against plaintiff, who had notified defendant that it had sued the wrong person but refused to defend the action, it was not an abuse of discretion to refuse to instruct the jury on assumption of risk where there was no evidence that plaintiff fully appreciated the risk of not obtaining legal counsel. Shahrokhfar v. St. Farm Mut. Auto. Ins. Co., 194 M 76, 634 P2d 653, 38 St. Rep. 1669 (1981).

Assumption of Risk — Scope of Application: The assumption of risk defense is rooted in the employer/employee relationship, and its application to tortious conduct outside that relationship should be narrowly confined. Shahrokhfar v. St. Farm Mut. Auto. Ins. Co., 194 M 76, 634 P2d 653, 38 St. Rep. 1669 (1981).

Assumption of Risk — Subjective Standard: The essence of the assumption of risk defense is a contention that plaintiff voluntarily exposed himself to a danger which he fully appreciated. Plaintiff's conduct is measured by a subjective standard rather than the objective standard applicable to contributory negligence. Shahrokhfar v. St. Farm Mut. Auto. Ins. Co., 194 M 76, 634 P2d 653, 38 St. Rep. 1669 (1981).

Assumption of Risk — Comparative Negligence Apportionment Applicable: Assumption of risk is to be treated like any other form of contributory negligence and apportioned under the Montana comparative negligence statute. Johnson v. U.S., 496 F. Supp. 597, 37 St. Rep. 1581 (D.C. Mont. 1980).

Contractual and Noncontractual Assumptions of Risk: The District Court did not err in refusing to give instructions on plaintiff's alleged contractual and noncontractual assumptions of risk because the elements of such doctrine are not present in this case. However, the Supreme Court indicated that if such elements were present, it would follow the modern trend and treat assumption of the risk like any other form of contributory negligence and apportion it under the comparative negligence statute. Kopischke v. First Cont. Corp., 187 M 471, 610 P2d 668 (1980).

GENERAL

Jury Instruction on Comparative Negligence Improper Absent Evidence of One Party's Negligence: A landlord who failed to maintain rental property in a safe condition was negligent per se. Pursuant to Reed v. Little, 209 M 199, 680 P2d 937 (1984), even in negligence per se cases, the factfinder must apportion negligence between the parties in reaching a verdict. Therefore, the trial court in this case gave the jury an instruction on comparative negligence. However, there was no evidence to show that plaintiff was negligent in any way, and all liability for plaintiff's injury on defendant's rental property lay with defendant. Thus, giving the instruction on comparative negligence was an abuse of the trial court's discretion. Edie v. Gray, 2005 MT 224, 328 M 354, 121 P3d 516 (2005).

No Error in Failure to Apportion Percentage of Contributory Negligence to Defendants When Plaintiff Found Fifty-One Percent Negligent: Eight of 12 jurors agreed that defendants were negligent in contributing to the death of Payne's son, and of the eight, six agreed that the son was more than 51% negligent. Given the son's negligence, the jury asked whether it needed to apportion negligence percentages for the defendants and was instructed that no further determination of negligence was required. Payne appealed on grounds that failure to apportion less than 50% of the negligence to defendants violated 27-1-703. The Supreme Court disagreed. Under this section, a plaintiff cannot recover if plaintiff's negligence exceeds the combined negligence of the defendants, so the trial court was within its discretion in instructing the jury not to proceed with apportioning negligence to the defendants. Payne v. Knutson, 2004 MT 271, 323 M 165, 99 P3d 200 (2004).

Sufficient Evidence That Plaintiff More Negligent Than Defendants — Verdict Affirmed: Payne's son was killed while transporting an antique tractor purchased from defendants. The jury found that more than 51% of the negligence was attributable to Payne's son, and Payne appealed. The Supreme Court affirmed, noting that the evidence showed that the son left the right brake on while driving the tractor, leading to deterioration of the brakes and to the son's inability to stop the tractor, which in turn led to his death. Payne v. Knutson, 2004 MT 271, 323 M 165, 99 P3d 200 (2004).

Degrees of Comparative Negligence in Automobile Accident — Summary Judgment on Comparative Negligence Improper: Issues of comparative negligence are particularly difficult to resolve as a matter of law. Normally, the issue of contributory negligence and the degree of comparative negligence, if any, is an issue for the trier of fact to resolve even if the opposing party is negligent as a matter of law. In this case, a question of material fact remained regarding the specific facts of an automobile accident, and the District Court erred in granting summary judgment to plaintiff after finding that defendant's negligence exceeded any negligence that could be found on plaintiff's part. The question of degrees of negligence was properly left to the

jury. Contreras v. Fitzgerald, 2002 MT 208, 311 M 257, 54 P3d 983 (2002), distinguishing Brohman v. St., 230 M 198, 749 P2d 67 (1988).

Workers' Compensation Claimant's Comparative Negligence Not Applicable in Determining Eligibility — Subrogation Appropriate Only After Claimant Made Whole: McMillan was injured in January 1987 while his employer was performing logging work for the U.S. government. McMillan filed a worker's compensation claim in Montana for which the state did not dispute liability, and he then filed an action under the Federal Tort Claims Act. The federal District Court determined that McMillan was entitled to recover $4,762,686 in damages from the United States, diminished by 45% for McMillan's comparative negligence to $2,619,477. The State Compensation Insurance Fund (State Fund) then sought a determination from the Workers' Compensation Court that the State Fund could assert a subrogation claim against McMillan's recovery from the United States and cease paying benefits. The Workers' Compensation Court held that the full measure of McMillan's loss was $4,762,686, the total amount of damages determined by the federal District Court, and that pursuant to the equitable "made whole" doctrine articulated in In re Zacher v. Am. Ins. Co., 243 M 226, 794 P2d 335 (1990), McMillan must recover that amount, plus the costs of recovery, before the State Fund was entitled to subrogation. The State Fund appealed, contending that the amount necessary to make McMillan whole was actually $2,619,477 after taking into account McMillan's comparative negligence, plus attorney fees and costs of recovery. The Supreme Court affirmed. The Zacher formula does not contemplate a deduction from a claimant's entire loss for comparative negligence, in accordance with state law, which does not consider a claimant's fault in determining eligibility. Reducing the calculation of McMillan's entire loss, and thus his eligibility for benefits, for comparative negligence would introduce a claimant's fault into the workers' compensation system in violation of Montana law. Thus, the State Fund's subrogation interest could be properly asserted only after McMillan recovered the full amount of the total amount of damages determined by the federal District Court. St. Comp. Ins. Fund v. McMillan, 2001 MT 168, 306 M 155, 31 P3d 347 (2001).

Defense of Comparative Negligence Inapplicable to Medical Malpractice Case When Patient's Pretreatment Behavior Furnishes Need for Care That Later Becomes Subject of Malpractice Claim: Plaintiff's daughter had asthma, was allergic to horses, and had a long history of breathing difficulties, but nevertheless went horseback riding. She stopped breathing and collapsed, ultimately suffering irreversible brain damage and death. The mother sued the physicians at the hospitals where the daughter was taken for treatment, alleging that the physicians were negligent in failing to intubate the daughter immediately and that the physicians' negligence caused the daughter's injury and death. The physicians argued that the daughter had already suffered a severe brain injury because of oxygen deprivation brought on by her asthma and that it was her own negligence, not that of the physicians, that caused her death. The District Court allowed the physicians to present arguments and jury instructions on comparative negligence. In assisting a jury to decide a case involving a patient's fault as a defense in a medical malpractice case, it is necessary to first clarify the sequence of events in relation to the interwoven doctrines of contributory or comparative negligence, proximate cause, and avoidable consequences (see Bryant v. Calontone, 669 A2d 286 (N.J. Sup. Ct. App. Div. 1996). The temporal headings under which the patient's conduct is to be examined are: (1) the pretreatment period; (2) the treatment period during which the alleged malpractice occurred; and (3) the postmalpractice period. A patient's conduct before seeking medical treatment is merely a factor that a physician should consider in treating the patient. When the patient's negligent act merely precedes that of the physician and provides the occasion for medical treatment, contributory negligence is not a permissible defense and the physician's negligent act is considered an intervening act that does not bar a patient from recovering (see Durphy v. Kaiser, 698 A2d 459 (D.C. 1977). In the present case, the patient's actions were clearly pretreatment conduct and not to be considered as evidence of fault that could offset any negligent conduct by the physicians. Thus, the Supreme Court held that the District Court abused its discretion in giving instructions on comparative negligence because in a medical malpractice action, jury instructions on a patient's comparative negligence are appropriate only when the patient's negligent conduct occurs contemporaneous with or subsequent to treatment. Further, allowing evidence of the daughter's prior acts denied the mother a fair and impartial trial, and the District Court also abused its discretion in failing to grant the mother's motion for a mistrial, constituting reversible error. Harding v. Deiss, 2000 MT 169, 300 M 312, 3 P3d 1286, 57 St. Rep. 696 (2000), followed, with regard to treatment at an accident scene by law enforcement personnel responding to allegedly negligent conduct of DUI that occurred prior to the accident, in Cutler v. Jim Gilman Excavating, Inc., 2003 MT 314, 318 M 255, 80 P3d 1203 (2003).

Admissibility of Evidence to Rebut Affirmative Defense — "Plain Visibility" of Oncoming Train: Mickelson was injured when the fire truck that he was driving was struck by a Montana Rail Link (MRL) train and sought damages. In basing its defense on Mickelson's comparative negligence in failing to see the train, MRL was allowed to allege and represent to the jury that the train was plainly visible, in part because of its yellow blinking light, thereby triggering Mickelson's alleged duty to stop for the train. Mickelson sought to refute that contention by offering testimony that the train's lighting configuration did not make the train visible to approaching motorists, but the evidence was held inadmissible on grounds that MRL met federal requirements regarding lighting and thus could not be held liable for its particular lighting configuration. However, Mickelson's evidence was not offered to impose liability upon MRL for failing to change its lighting configuration, but rather to demonstrate that, contrary to MRL's experts, the lighting configuration did not make the train so plainly visible that Mickelson was comparatively negligent for failing to see it. Under Pitasi v. Stratton Corp., 968 F2d 1558 (2nd Cir. 1992), evidence that is not admissible to prove culpability may nevertheless be introduced to rebut an affirmative defense. By denying Mickelson the right to rebut MRL's evidence in support of its contention that Mickelson was comparatively negligent, the trial court essentially directed a verdict in favor of MRL on the comparative negligence issue, which was an abuse of the court's discretion, constituting reversible error. Mickelson v. Mont. Rail Link, Inc., 2000 MT 111, 299 M 348, 999 P2d 985, 57 St. Rep. 446 (2000), distinguishing Marshall v. Burlington N., Inc., 720 F2d 1149 (9th Cir. 1983), and Herold v. Burlington N., Inc., 761 F2d 1241 (8th Cir. 1985).

Loss of Consortium Claim Independent as to Damages, but Derivative as to Liability: Mickelson was injured when the fire truck that he was driving was struck by a Montana Rail Link (MRL) train. His spouse and children sought damages for loss of consortium. The District Court held that the loss of consortium claims should be reduced by the percentage of negligence attributed to Mickelson. When a plaintiff's contributory negligence is determined to be not greater than the tortfeasor's negligence, then damages for loss of consortium, being independent and not contingent upon the rights or liabilities of a parent or spouse, may not be reduced by the other spouse's negligence. However, because the language in this section provides that any damages allowed must be diminished in the proportion to the amount of negligence attributable to the person recovering, a loss of consortium claim is considered independent as to damages and derivative as to liability. In other words, a defendant must be more liable for a plaintiff's injuries than the plaintiff before there can be any recovery, whether it is on the plaintiff's personal injury claim or on a loss of consortium claim stemming from those injuries. For example, if plaintiff is determined to be 50% or less contributorily negligent for plaintiff's injuries, then a spouse or child could recover 100% of a loss of consortium claim; however, if plaintiff is determined to be 51% or more contributorily negligent for plaintiff's injuries, then a spouse or child would recover nothing on a loss of consortium claim. Therefore, the Supreme Court directed that, on retrial, any contributory negligence attributable to Mickelson could not be imputed to the spouse and children to reduce a loss of consortium award, but if Mickelson was found more liable than MRL, there could be no recovery for loss of consortium. Mickelson v. Mont. Rail Link, Inc., 2000 MT 111, 299 M 348, 999 P2d 985, 57 St. Rep. 446 (2000), following Herold v. Burlington N., Inc., 761 F2d 1241 (8th Cir. 1985).

Clarification of General Requirement of Substantially Similar Circumstances as Precedent to Admission of Evidence of Prior Accident: Evidence of prior accidents, although inadmissible to prove negligence, may be admitted for other purposes, such as to show: (1) the existence of a particular physical condition or defect; (2) the dangerousness of the condition or defect; (3) the possibility that the condition or defect might cause an accident or injury of the type alleged; (4) cause in fact; and (5) knowledge of the condition or defect. (See Modern Evidence: Doctrine and Practice, Mueller & Kirkpatrick, §4.8 at 281, 282 (1995), and McCormick on Evidence §200 at 844-847, 4th Ed. (1992).) Regarding the degree of identity of circumstances required when offering prior accident evidence for the sole purpose of notice or knowledge, the general requirement of substantially similar circumstances is relaxed or less strict when the evidence is proffered to show notice rather than dangerousness or causation, and a lack of exact similarity of conditions will not preclude admission under these circumstances if the accident was of a kind that should have served to warn defendant. In proving notice, there may be dissimilarities between the accidents; however, the differences affect the weight of the evidence, but not necessarily the admissibility. Here, Kissock slipped and fell in defendant's parking lot. The District Court excluded proffered evidence of a fall by another person in the same parking lot days earlier because it occurred at a different time of day under different physical circumstances. The Supreme Court disagreed and reversed, holding that the minor spatial and temporal differences existing between the two slip-and-fall accidents went to the weight rather than

admissibility of the evidence in supporting an inference that defendant had notice or knowledge of the icy conditions. The circumstances surrounding the prior accident were not so remote or dissimilar from Kissock's accident that the probative value was substantially outweighed by unfair prejudice to defendant. Kissock v. Butte Convalescent Center, 1999 MT 322, 297 M 307, 992 P2d 1271, 56 St. Rep. 1288 (1999). See also Runkle v. Burlington N., Inc., 188 M 286, 613 P2d 982, 37 St. Rep. 995 (1980), Bailey v. S. Pac. Transp. Co., 613 F2d 1385 (5th Cir. 1980), and Kalanick v. Burlington N. RR Co., 242 M 45, 788 P2d 901, 47 St. Rep. 532 (1990).

Settlement by One Tortfeasor as Precluding Claims for Contribution and Indemnity Against Settling Tortfeasor Regardless of Underlying Tort Claim: In accordance with common-law principles and the public policy favoring settlements, a settlement by one tortfeasor precludes claims for both contribution and indemnity against the settling tortfeasor, regardless of the nature of the underlying tort claim. This is so even though 27-1-703 states that the trier of fact is to determine the degree of negligence among each of the joint tortfeasors. Actual recovery is allowed only against those tortfeasors who have not settled with the claimant. Durden v. Hydro Flame Corp., 1999 MT 186, 295 M 318, 983 P2d 943, 56 St. Rep. 721 (1999), following State ex rel. Deere & Co. v. District Court, 224 M 384, 730 P2d 396, 43 St. Rep. 2270 (1986).

Contributory Negligence Not to Be Used to Reduce Damages Caused by Insurance Fraud: By statute, contributory negligence can be used to reduce damages due from a defendant because of the defendant's negligence. In an action by the insureds against an insurance agent and his company, the insureds' contributory negligence could not be used to reduce damages caused by defendants' fraud. Cartwright v. Equitable Life Assurance Soc'y, 276 M 1, 914 P2d 976, 53 St. Rep. 268 (1996).

Contributory Negligence — Duty to Anticipate Negligence of Others: Rosauers Supermarket undertook remodeling for which ALSC was the architect. As a change order to the remodeling, Rosauers asked that a walk-in freezer be removed and that the access door to a walkway over the freezer be closed off. Unknown to Rosauers and its employee, Pierce, the door was never closed off even though the freezer was removed. Pierce was injured when he fell through a false ceiling after stepping off the walkway, assuming that the freezer was still in place and that it would support him. ALSC defended by claiming that Pierce was contributorily negligent in that he did not use a flashlight to enter the unlit walkway. Citing Green v. Hagele, 182 M 155, 595 P2d 1159 (1979), Pierce claimed that he was under no duty to anticipate that once directed to wall off the access door, ALSC would have been negligent in failing to do so. The Supreme Court held that ALSC was negligent as a matter of law for failing to follow the Uniform Building Code. Citing Okland v. Wolf, 258 M 35, 850 P2d 302 (1993), the Supreme Court noted that when a defendant is negligent as a matter of law, the issue of contributory negligence is normally for the trier of fact to determine. Reviewing the evidence in a light most favorable to defendant ALSC, the Supreme Court held that there was sufficient evidence of contributory negligence to submit the issue of contributory negligence to the jury. Pierce v. ALSC Architects, P.S., 270 M 97, 890 P2d 1254, 52 St. Rep. 93 (1995).

Court Error in Arriving at Conclusion of Law Before Finding Facts: The plaintiff, Marry, was injured in an automobile accident involving a Deputy Sheriff. The lower court found the parties equally at fault and ordered that neither receive damages. Marry appealed on the basis that even if she were 50% negligent, she suffered more damages and should receive some money from the defendant. On reconsidering the case, the lower court stated that it was its intention that the plaintiff not receive any money and amended one of its findings to hold that Marry's negligence was greater than the defendant's and she was not entitled to recovery. The Supreme Court reversed on the basis that the lower court did not reexamine the evidence in amending its order. It formulated its conclusion of law first and then changed the findings of fact to conform to the conclusion already arrived at. Marry v. Missoula County Sheriff's Dept., 263 M 152, 866 P2d 1129, 50 St. Rep. 1751 (1993).

Seatbelt Rendered Inoperable — Negligence Per Se: Pursuant to 61-9-409, there is a duty to maintain a motor vehicle in a way that seatbelts are available for the driver's and passenger's use in the event they choose to use them. Breach of that duty constitutes negligence per se. Nothing in 61-9-409, in 61-13-106, or in Kopischke v. First Cont. Corp., 187 M 471, 610 P2d 668 (1980), precludes evidence that seatbelts were unavailable and thus not in use at the time of an accident. Nor does the fact that the unavailability of a seatbelt was not the cause of the original accident relieve the duty under 61-9-409 to provide seatbelts. Califato v. Gerke, 258 M 68, 852 P2d 121, 50 St. Rep. 428 (1993).

Comparative Negligence Involved in Location of Power Lines in Construction Yard: The jury properly held a power company 65% responsible for an injury involving accidental contact by an I-beam with an overhead power line in a construction yard when evidence showed that: (1) the

company knew construction activity took place at the yard; (2) company employees had been at the yard approximately 100 times over the years preceding the accident; (3) a similar accident had occurred a few months prior and had involved the same power line; and (4) the company had been at the yard and buried cables several months before the accident. These facts rose to the level of substantial evidence needed to support the apportionment of damages. Sizemore v. Mont. Power Co., 246 M 37, 803 P2d 629, 47 St. Rep. 2252 (1990).

Failure to Keep Lookout at Light-Controlled Intersection — Liability as Matter of Law: With a green light, Vender pulled into an intersection to make a left-hand turn but had to wait for oncoming traffic before turning. While in the intersection, he was struck by Stone, who testified that he did not see a light and could not avoid colliding with the Vender car. The jury found 50% negligence with each driver. On appeal, the Supreme Court reversed, holding that as a matter of law, Stone was solely liable for the collision by failing to exercise reasonable care. A motorist's failure when approaching a controlled intersection to keep a lookout to see what is plainly visible or obviously apparent makes him chargeable for failure to see what he should have seen with the exercise of reasonable care. Vender v. Stone, 245 M 428, 802 P2d 606, 47 St. Rep. 2121 (1990).

Question of Contributory Negligence in Automobile Accident — Directed Verdict Inappropriate: Relying on the holding in Reed v. Little, 209 M 199, 680 P2d 937 (1984), that the defense of contributory negligence on the plaintiff's part is available to a defendant who has violated a traffic statute, the Supreme Court reversed the grant of a directed verdict in favor of plaintiff because reasonable persons could differ as to conclusions drawn from the evidence relating to the accident. The question should have been submitted to the jury and was inappropriate for a directed verdict. Hart-Anderson v. Hauck, 239 M 444, 781 P2d 1116, 46 St. Rep. 1817 (1989), followed in Ryan v. Bozeman, 279 M 507, 928 P2d 228, 53 St. Rep. 1258 (1996).

Forged Check — Plaintiffs' Contribution to Damages — Bank Not Liable: When there was substantial credible evidence that plaintiffs' actions contributed to their damages, the jury verdict in favor of defendant bank would not be overturned. When the complaint alleged negligence and bad faith on the part of the bank but not breach of a fiduciary duty, the Supreme Court refused to consider whether it was error to submit the issue of comparative negligence to the jury. Ahmann v. Am. Fed. S&L Ass'n, 235 M 184, 766 P2d 853, 45 St. Rep. 2305 (1988).

Real Estate Transaction — Liability for Latent and Obvious Defects: Defendant bought a house without knowledge of latent defects and sold it to plaintiff, who purchased under the same circumstances. Defendant asserted plaintiff's unreasonable failure to investigate constituted contributory negligence. The District Court allowed plaintiff recovery for latent defects but denied recovery for obvious defects, which distinction properly addressed plaintiff's contributory negligence. By carefully apportioning the burden of the defects between the parties, the court properly balanced the responsibilities of buyer and seller in the transaction. Wagner v. Cutler, 232 M 332, 757 P2d 779, 45 St. Rep. 1092 (1988), followed in Strom v. Logan, 2001 MT 30, 304 M 176, 18 P3d 1024 (2001).

Comparative Negligence — General Rule: The Montana Supreme Court adopted the interpretation set out by the Wisconsin Supreme Court in Bielski v. Schulze, 114 NW 2d 105 (1962), in holding that all forms of conduct amounting to negligence in any form, including but not limited to ordinary negligence, gross negligence, willful negligence, wanton misconduct, reckless conduct, and heedless conduct, are to be compared with any conduct that falls short of conduct intended to cause injury or damage. Martel v. Mont. Power Co., 231 M 96, 752 P2d 140, 45 St. Rep. 460 (1988), followed in Cooper v. Rosston, 232 M 186, 756 P2d 1125, 45 St. Rep. 978 (1988), overruling Derenberger v. Lutey, 207 M 1, 674 P2d 485, 40 St. Rep. 902 (1983), and clarified in Stephens v. Safeco Ins. Co. of America, 258 M 142, 852 P2d 565, 50 St. Rep. 467 (1993), in which it was held that conduct rising to the level of a tort may be compared to other conduct rising to the level of a tort, however when the other conduct does not involve a tort, but only a breach of contract as in this case, the conduct cannot be offset comparatively.

Jury Not Informed of Effect of Comparative Negligence on Verdict: It was error for the trial court to refuse to tell the jury the effect of comparative negligence on the verdict. Juries should be informed of the effect of their answers. Martel v. Mont. Power Co., 231 M 96, 752 P2d 140, 45 St. Rep. 460 (1988).

Defendant's Negligence Not Proximate Cause of Accident — Failure to Instruct on Comparative Negligence Improper: The District Court ruled and admonished counsel that the court wanted no argument to the jury relating to the effect of varying percentages of fault that the jury might find as between the parties. Defendant objected, but no instructions on comparative negligence were offered or given. The Supreme Court noted that special verdict forms indicated the jury should consider elements of contributory negligence. Further, the jury was confused by the concept of proximate cause, as evidenced by the fact that although the

defendant was found negligent, the negligence was not found to be a proximate cause of plaintiff's injuries. On retrial, instructions on comparative negligence were ordered to help the jury understand the effect of related questions in the special verdict forms. Smith v. Rorvik, 231 M 85, 751 P2d 1053, 45 St. Rep. 451 (1988).

Negligence of Driver Compared to State's Duty to Sign Highways — Proximate Cause Not Shown: A driver breached a duty by exceeding limitations on overtaking on the left, thus causing an accident. The driver failed to produce evidence from which it could be inferred that the state's negligent conduct in failing to sign a no-passing zone (in addition to the existing striped markings on the road) was the proximate cause of the driver's injuries. Summary judgment on negligence as a matter of law was proper. Brohman v. St., 230 M 198, 749 P2d 67, 45 St. Rep. 139 (1988), distinguished in Dillard v. Doe, 251 M 379, 824 P2d 1016, 49 St. Rep. 85 (1992), in which there was substantial active negligence by both parties upon which reasonable minds could differ as to the degree of comparative negligence. See also Okland v. Wolf, 258 M 35, 850 P2d 302, 50 St. Rep. 412 (1993).

Negligence Compared With Violation of Consumer Protection Act: The jury found the defendant violated the Consumer Protection Act and was negligent. The trial court applied the comparative negligence statute to reduce the plaintiffs' recovery under the Act. On appeal, the Supreme Court affirmed the reduction of damages, stating that the law as stated in the jury instructions does not allow the separation of the defendant's actions in violation of the Consumer Protection Act from its actions that were negligent. Evans v. Teakettle Realty, 226 M 363, 736 P2d 472, 44 St. Rep. 723 (1987).

Combined Negligence Rule — Percentage of Plaintiff's Negligence to Be Compared to Total Negligence of Joint Defendants: A jury found plaintiff 45% negligent, one defendant 40% negligent, and a second defendant 15% negligent. Defendants contended that since plaintiff's negligence exceeded that of each defendant, recovery of damages was barred. The District Court held, and the Supreme Court agreed, that where recovery is sought against multiple defendants, the percentage of negligence of the plaintiff is to be compared to the combined percentages of causal negligence of concurrent tortfeasors and damages then reduced by the percentage attributable to plaintiff. North v. Bunday, 226 M 247, 735 P2d 270, 44 St. Rep. 627 (1987).

Nuisance Action — Contributory Negligence as Defense: The Supreme Court cited 58 Am. Jur. 2d Nuisances 221 in holding that contributory negligence can be a defense in a nuisance action. Wilhelm v. Great Falls, 225 M 251, 732 P2d 1315, 44 St. Rep. 211 (1987), clarified, with regard to the distinction between an absolute nuisance and a qualified nuisance, in Barnes v. Thompson Falls, 1999 MT 77, 294 M 76, 979 P2d 1275, 56 St. Rep. 321 (1999).

Comparative Negligence Consideration Properly Precluded Where One Party Not Negligent: District Court awarded damages to a commercial trout company upon a finding that failure of the trout farm was proximately caused by a breach of contract and misrepresentation by the bank and its agent. Upon appeal, bank claimed trial court erred in failing to compare conduct of agent with trout company's principal shareholders. The Supreme Court found no legal error in trial court's decision to preclude consideration of comparative negligence by trout company shareholders where there was insufficient evidence to indicate any negligent action by those shareholders. Crystal Springs Trout Co. v. First State Bank of Froid, 225 M 122, 732 P2d 819, 44 St. Rep. 90 (1987).

Strict Liability for Railroad Safety Under Federal Act — Contributory Negligence No Factor — Summary Judgment Proper: A motion for summary judgment was properly granted to claimant when the railroad admitted violation of portions of the federal Safety Appliance Act, 45 U.S.C. 1, et seq., since under the Act violation by a carrier of a specific safety requirement is held to constitute negligence as a matter of law regardless of a showing of negligence on an employee's part. Plouffe v. Burlington N., Inc., 224 M 467, 730 P2d 1148, 43 St. Rep. 2341 (1986).

Bar Selling to Intoxicated Minor — Liability to Minor: A bar or tavern operator who serves an intoxicated minor may be liable in damages for injuries subsequently sustained by the minor. The imbiber's acts of drinking alcoholic beverages served by the bar or tavern operator and then becoming involved in an injury-producing accident may be reasonably foreseeable events that may no longer protect a defendant from liability for negligence. Under the state's system of comparative negligence, it is for the jury to determine the degree of negligence attributable to the plaintiff and defendant. Neither the plaintiff's nor the defendant's acts have to be the sole proximate cause of the injuries. Bissett v. DMI, Inc., 220 M 153, 717 P2d 545, 43 St. Rep. 252 (1986).

Comparison Where Willful or Wanton Misconduct by Both Parties: While Derenberger v. Lutey, 207 M 1, 674 P2d 485, 40 St. Rep. 902 (1983), held that there may not be a comparison between negligence and willful or wanton misconduct because they represent different kinds of

conduct, it is not inconsistent to allow comparison of like conduct of parties, regardless of its label, for the purpose of ascertaining damages. Although such comparison between negligence and willful or wanton misconduct by both parties may not be directly compared under the comparative negligence statute at 27-1-702, such a rule would be consistent with both 27-1-702 and 27-1-701. Simonson v. White, 220 M 14, 713 P2d 983, 43 St. Rep. 133 (1986). See also Flanigan v. Prudential Fed. S&L Ass'n, 221 M 419, 720 P2d 257, 43 St. Rep. 941 (1986).

Reduction of Damages by Percentage of Plaintiff's Negligence: A plaintiff's tort damage award must be reduced by the percent he is found to have been negligent. Cain v. Stevenson, 218 M 101, 706 P2d 128, 42 St. Rep. 1428 (1985).

Intoxicated Operator's Negligence — Sole Proximate Cause of Accident: In a civil action by the guardian of a person incapacitated in a motorcycle accident, the Supreme Court held that substantial credible evidence supported a finding that the operator, who was intoxicated at the time of the accident, was negligent; his negligence was the sole proximate cause of his accident. Although the state's design, construction, signing, and maintenance of the intersection at which the accident occurred were deficient, the plaintiff's own acts of negligence, including driving under the influence of alcohol, caused the accident. Any negligence by the state was not in any degree a proximate cause of the accident. Bartel v. St., 217 M 380, 704 P2d 1067, 42 St. Rep. 1266 (1985).

Negligence Instruction Commenting on Evidence — Theory of Instruction Covered by Other Instructions: Defendant's instruction based on the theory that codefendant was 100% negligent was denied because the court believed it commented on the evidence. Other instructions adequately covered the theory that codefendant was 100% negligent, and the jury found the codefendant 100% negligent. The instruction was thus properly denied. Ewing v. Esterholt, 210 M 367, 684 P2d 1053, 41 St. Rep. 1095 (1984).

Comparative Negligence — Application to Cases of Negligence Per Se: In an action for negligence involving a rear-end collision between the plaintiff's and defendant's automobiles in which the evidence showed that both parties could have been guilty of negligence per se by the violation of motor vehicle traffic laws, the Supreme Court held that the District Court erred in holding that the doctrine of comparative negligence did not apply. Comparative negligence has been mandated by the Legislature to apply in every case in which negligence is an issue, even in those cases in which statutory violations provide the necessary evidence of negligence, and it is for the finder of fact to determine the degree of negligence on the part of each party. Reed v. Little, 209 M 199, 680 P2d 937, 41 St. Rep. 644 (1984), followed in Okland v. Wolf, 258 M 35, 850 P2d 302, 50 St. Rep. 412 (1993), and distinguished in Aemisegger v. Herman, 215 M 347, 697 P2d 925, 42 St. Rep. 420 (1985).

Collision of Left-Turning and Approaching Vehicles — Failure to Maintain Lookout: Where the plaintiff brought an action against the defendant for damages sustained in a collision after the defendant stopped on a two-lane highway to turn left in front of a stopped truck and did not see the plaintiff's car approaching at approximately 50 mph toward her from behind the truck, the District Court did not err in denying the plaintiff's motion to set aside the jury's verdict finding the plaintiff 50% negligent for the resulting accident. There was substantial evidence of the plaintiff's failure to keep a lookout while she passed the truck to support the jury's verdict. Lackey v. Wilson, 205 M 476, 668 P2d 1051, 40 St. Rep. 1439 (1983).

Parked and Disabled Vehicle Not Proximate Cause of Accident — Verdict Supported by Substantial Evidence: Where the defendant parked his stalled pickup truck at the side of a frontage road and turned on the floodlights of the hay grinder he was pulling before leaving the truck to seek help, but the truck was nevertheless struck by the plaintiff's vehicle, the Supreme Court found that the jury verdict for the defendant was supported by substantial evidence. The record showed that the plaintiff had seen the defendant's lights from one-half mile away but failed to avoid the accident. The jury found defendant 0% negligent and plaintiff 100% negligent; it was entitled to conclude, as it did, that no negligence on the part of the defendant was the proximate cause of the accident. Griffel v. Faust, 205 M 372, 668 P2d 247, 40 St. Rep. 1370 (1983).

No Comparison Between Negligence and Willful or Wanton Misconduct: Defendant and plaintiff, who was 16, were drinking and driving at a high rate of speed in Anaconda. Defendant was driving plaintiff's car when he lost control and hit a house. Plaintiff was severely injured. The District Court instructed the jury that plaintiff's recovery could not be reduced by his contributory negligence if defendant was guilty of willful or wanton misconduct. The Supreme Court upheld the giving of the instruction, saying that willful and wanton misconduct differs in quality rather than degree from ordinary lack of care. The term "negligence" in the comparative negligence statutes does not encompass willful or wanton misconduct, and in an action based on

such conduct the comparative negligence statute is inapplicable and the plaintiff's own contributory negligence should not reduce his recovery. Derenberger v. Lutey, 207 M 1, 674 P2d 485, 40 St. Rep. 902 (1983), overruled in Martel v. Mont. Power Co., 231 M 96, 752 P2d 140, 45 St. Rep. 460 (1988).

Contributory Negligence — Application of Doctrine — Children Under Seven: A child under 7 years of age cannot be contributorily negligent. Johnson v. YMCA, 201 M 36, 651 P2d 1245, 39 St. Rep. 1937 (1982).

New Trial — Use of Juror Affidavit: Plaintiff broke her ankle by falling into a trench on defendant's construction project. The jury found plaintiff 85% negligent. The District Court granted plaintiff's motion for a new trial based on irregularity in the jury proceedings, and defendant appealed. Plaintiff's motion was supported by an affidavit of the jury foreman stating the jury did not understand the instructions on contributory negligence, comparative negligence, and mitigation of damages. Cases on use of juror affidavits in granting a new trial involve either external or internal influence on the jury. This case falls into the internal influence category. The District Court abused its discretion in granting a new trial on the basis of a juror affidavit purporting to impeach the verdict by delving into the thought processes of the jurors. Harry v. Elderkin, 196 M 1, 637 P2d 809, 38 St. Rep. 2076 (1981), followed in McGillen v. Plum Creek Timber Co., 1998 MT 193, 290 M 264, 964 P2d 18, 55 St. Rep. 808 (1998).

"Sudden Emergency" Instruction Not to Be Given in Ordinary Auto Accident Cases: The trial court allowed a "sudden emergency" instruction, which was relied upon by defendant, and no negligence was found on the part of defendant. The Supreme Court said that the giving of the "sudden emergency" instruction was reversible error. In view of Montana's adoption of comparative negligence, the court admonished trial courts not to give the instruction in ordinary automobile accident cases. This does not create a different standard or diminish the existing standard to be applied in an emergency. The conduct required is still that of a reasonable man under the circumstances as they would appear to one using proper care. The emergency is only one of the circumstances to be considered. Eslinger v. Ringsby Truck Lines, Inc., 195 M 292, 636 P2d 254, 38 St. Rep. 1863 (1981), followed in Ewing v. Esterholt, 210 M 367, 684 P2d 1053, 41 St. Rep. 1095 (1984).

Compensatory Damages Reduced by Contributory Negligence Even Though Not Proximate Cause: Compensatory damages award was reduced on appeal by the 16% that plaintiff was found to be contributorily negligent, even though his negligence was found not to be a proximate cause of his injury. Shahrokhfar v. St. Farm Mut. Auto. Ins. Co., 194 M 76, 634 P2d 653, 38 St. Rep. 1669 (1981).

Punitive Damages Not Reduced by Contributory Negligence: The purpose of punitive damages is to punish defendant, not to compensate plaintiff. Punitive damages awarded to the plaintiff cannot be reduced by the percentage of plaintiff's contributory negligence. Shahrokhfar v. St. Farm Mut. Auto. Ins. Co., 194 M 76, 634 P2d 653, 38 St. Rep. 1669 (1981).

Driving Under the Influence — Contributory Negligence of Passenger: An instruction that a motor vehicle passenger may be guilty of contributory negligence if the driver is under the influence and the driver's state contributes to some degree as a cause of an accident totally failed to state the essential proximate cause element of contributory negligence in that the intoxication of the driver must be a proximate cause of the accident. The instruction misled the jury to the prejudice of plaintiff and was reversible error in a wrongful death action. McAlpine v. Midland Elec. Co., 194 M 154, 634 P2d 1166, 38 St. Rep. 1577 (1981).

Existence of Contract — Payment of Tort Judgment as Precluding Determination: Plaintiffs sued defendant for damages claimed to have occurred to their farmlands when a seismographic hole drilled and shot by defendant brought a continuous water flow to the surface, damaging farmland. Defendants left the area and later tried unsuccessfully to plug the hole. The jury found for plaintiffs and awarded actual and punitive damages. Defendant paid the award for actual damages and appealed the award of punitive damages. Defendant claimed the case involved a contract and that punitive damages were not properly allowable. By satisfying the judgment for actual damages, defendant acceded to the correctness of the judgment and accepted its benefits. When a judgment is paid, it passes beyond the review of a superior court. The question of whether a contract existed was submitted to the jury. Their judgment was based on a tort theory, comparative negligence. Because this judgment was satisfied, the Supreme Court could not rule on whether a contract was involved. Dahl v. Petroleum Geophysical Co., 194 M 294, 632 P2d 1136, 38 St. Rep. 1474 (1981).

Horseback Riding Injury — Jury Instructions on Effect of Contributory Negligence Properly Given: Where, as a result of an injury occurring prior to the effective date of the comparative negligence statute, the plaintiff sued the defendant for injuries received when the plaintiff was

thrown from his horse, there was sufficient evidence from which the jury could find that the plaintiff was contributorily negligent and the District Court did not commit error in giving verbatim the Montana Jury Instruction Guide instruction No. 4 on the effect of contributory negligence. Waatti v. Dollan, 193 M 329, 631 P2d 1279, 38 St. Rep. 1060 (1981).

Comparative Negligence — Reduction in Damages Award: To the extent that plaintiff was negligent in a personal injury action, his recovery will be reduced by that amount. Johnson v. U.S., 510 F. Supp. 1039, 38 St. Rep. 599 (D.C. Mont. 1981).

Grounds for Denial of Proposed Jury Instruction — Primary Duty of Avoiding Collision: The appellant claimed error in the trial court's denial of his proposed jury instruction stating that the primary duty of avoiding an accident is on a vehicle approaching from the rear when the vehicle in front has signaled for 100 feet. This was an inaccurate statement of the law, and as given, the jury instructions adequately explained the duties of the passing motorist and the left-turning motorist. Even if it had been a correct statement of the law, the proposed statement would have added nothing to the jury's understanding of the applicable law. Burns v. U & R Express, 191 M 343, 624 P2d 487, 38 St. Rep. 302 (1981). See also Wheeler v. Bozeman, 232 M 433, 757 P2d 345, 45 St. Rep. 1173 (1988).

Comparative Fault in Strict Products Liability Actions: The U.S. District Court discussed at some length the changing trends in cases in which the plaintiff's injuries arguably occurred not from the crash of an airplane or automobile but from a product defect that allowed the plaintiff to become injured after the crash. Montana has not adopted the doctrine of comparative fault in products liability actions, but after noting some cases which approach that new trend, the U.S. District Court concluded that the Montana Supreme Court will apply comparative fault to strict products liability actions when presented with the issue. It is anticipated that the assumption of risk defense may be treated like any other form of contributory negligence and be apportioned under the comparative negligence statute. In this case, the federal court concluded that all of the plaintiff's conduct, regardless of labels attached to that conduct, was to be compared to the defendant's liability. Trust Corp. of Mont. v. Piper Aircraft Corp., 506 F. Supp. 1093, 38 St. Rep. 249 (D.C. Mont. 1981).

Availability of Affirmative Defenses to Railroad — Absolute Liability: Plaintiff was employed by a subsidiary of Burlington Northern and was injured in an accident involving Burlington's railroad cars. The Supreme Court applied the federal Safety Appliance Act despite the fact the railroad cars involved in the accident were on a siding where loading operations were handled by the subsidiary. Noting that the U.S. Supreme Court has declared that the question of whether a railroad can assert contributory negligence or assumption of risk as defenses in a case involving a nonrailroad employee depends entirely on state law, the Supreme Court cited its 1966 holding that, where the theory of absolute liability applies, liability is established when it is proved that a statute has been violated and there is a proximate cause connection between the violation and the resulting injuries. Proximate cause in a case under the Safety Appliance Act is decided using the definition that prevails under state law. Comparing the 1966 case under the Scaffolding Act with this case, the Supreme Court denied the defendant the two defenses. The Supreme Court also noted that railroad employees are entitled to a more liberal standard imposing liability than nonrailroad employees. Reynolds v. Burlington N., Inc., 190 M 383, 621 P2d 1028, 37 St. Rep. 1883 (1980).

Comparative Negligence Inapplicable in Strict Liability Action: Montana's comparative negligence statute has never been applied in a strict liability action. The statute, by its terms, applies only to recovery of "damages for negligence". Strict liability actions are not grounded in negligence. Thus, statutory comparative negligence should have no place in a strict liability action. Zahrte v. Sturm, Ruger & Co., 498 F. Supp. 389, 37 St. Rep. 1628 (D.C. Mont. 1980). (See also Thibault v. Sears, Roebuck & Co., 395 A. 2d 843 (N.H. 1978).)

No Retroactivity: The Montana comparative negligence law, 27-1-702, is not retroactive and therefore does not apply to a cause of action arising prior to July 1, 1975. Stenberg v. Neel, 188 M 333, 613 P2d 1007 (1980).

Evidence of Prior Accidents: Evidence of prior accidents, while inadmissible for the purpose of proving negligence, is nevertheless admissible for the purpose of showing the existence of a danger or defect and notice thereof. Such evidence of prior accidents, however, must show situations substantially similar to or not too remote from the accident in question, although absolute identity of circumstances is not necessary. Here, where there was no offer of proof as to what the prior accidents would have shown, the Supreme Court could not determine admissibility, and therefore no reversible error was committed. Runkle v. Burlington N., Inc., 188 M 286, 613 P2d 982 (1980). See also Kissock v. Butte Convalescent Center, 1999 MT 322, 297 M 307, 992 P2d 1271, 56 St. Rep. 1288 (1999).

Postaccident Installation of Signals: In a negligence action concerning a train-truck collision, the trial court excluded evidence of the railroad later placing electric signal devices at the crossing where the accident occurred. In this case, experts testified for the railroad that the crossing was not extrahazardous. The fact that automatic signals were installed on the crossing after the accident would have been relevant for the purpose of impeachment as well as to show feasibility. It was prejudicial error to exclude this evidence. Runkle v. Burlington N., Inc., 188 M 286, 613 P2d 982 (1980).

Motion to Conform to Evidence — Affirmative Defense: This case was decided under contributory negligence. Plaintiff at the close of his case moved that the pleadings be amended to conform to the evidence and offered an instruction that contributory negligence was not a bar to recovery for injuries caused by the reckless or wanton misconduct of Sanders County. The offered instruction incorrectly defined reckless and wanton misconduct and was properly denied. Implicit in appellant's contention regarding this instruction is the argument that the District Court should have granted the motion to amend the pleadings to conform to the evidence. This in effect raised the new issue of affirmative defense. Plaintiff would be entitled to the amendment and to instructions thereunder unless there was no evidence to support the motion to conform. In this case while evidence of negligence was presented, the evidence was lacking to show the elements necessary to constitute willful, wanton, or reckless negligence. In that situation, there was no abuse of discretion in refusing to change or add a legal theory or defense after the introduction of all the evidence. Wollaston v. Burlington N., Inc., 188 M 192, 612 P2d 1277 (1980).

No Seatbelt Defense: In light of the history and the numerous legislative problems that must be considered to effectively extend the seatbelt rule of law, the well-reasoned position of the Washington court in Amend v. Bell, 89 Wash. 2d 124, 570 P2d 138 (1977), produces the best rule. To adopt a seatbelt defense when the Legislature has failed to do so would be ill-advised. The trial court properly refused to allow defendant to introduce evidence that plaintiff's failure to use a seatbelt contributed to her injuries. Kopischke v. First Cont. Corp., 187 M 471, 610 P2d 668 (1980), distinguished in Califato v. Gerke, 258 M 68, 852 P2d 121, 50 St. Rep. 428 (1993), in cases in which a person breaches the duty to make seatbelts available by rendering the seatbelt inoperable.

Jury Instruction — Negligent Entrustment: Plaintiff argued that the District Court failed to charge the jury properly on the elements of negligent entrustment. He failed, however, to object to the instruction at trial. The contention that an instruction does not state the law cannot be considered on appeal absent a proper objection at trial. Penn v. Burlington N., Inc., 185 M 223, 605 P2d 600 (1980).

Negligent Entrustment: Negligent entrustment, a theory which provides that an actor is negligent if he allows a third party to use an object under the actor's control when the actor knows or has reason to know of an unreasonable risk of harm to others, is a type of contributory negligence imputed to the entrustor, not the entrustee. Penn v. Burlington N., Inc., 185 M 223, 605 P2d 600 (1980). See also McGinnis v. Hand, 1999 MT 9, 293 M 73, 973 P2d 1126, 56 St. Rep. 39 (1999).

Duty of Landlord — Unsafe Condition: The adoption by Montana of comparative negligence does not change the nature of the duty owed by a landlord to a tenant to make the premises safe or to warn of danger. Hayes v. U.S., 475 F. Supp. 681 (D.C. Mont. 1979).

No Third-Party Right to Indemnity or Contribution: A third party, sued by an injured employee, has no right to indemnity or contribution from a negligent employer if the employer and the employee are covered by the Workers' Compensation Act unless such a right were to arise out of some other legal transaction between the employer and third party. Cordier v. Stetson-Ross, Inc., 184 M 502, 604 P2d 86 (1979).

Comparative Negligence — Contribution Among Joint Tortfeasors: By a complaint filed before the effective date of the comparative negligence law, plaintiff sued the defendant airline company for injuries sustained on a city's airport runway, and the defendant airline company's complaint against the city for indemnity was dismissed. Because it was held in Dunham v. Southside Nat'l Bank of Missoula, 169 M 466, 548 P2d 1383 (1976), that the comparative negligence statute is not retroactive and because Consol. Freightways Corp. of Delaware v. Osier, 185 M 439, 605 P2d 1076 (1979), held contribution not applicable except in comparative negligence cases, there was no right of contribution between the airline and city. Rogers v. W. Airlines, 184 M 170, 602 P2d 171 (1979).

Last Clear Chance: The court was correct in refusing an instruction on the doctrine of last clear chance where the plaintiff did not lay a sufficient foundation at trial. This holding neither

approves nor disapproves the doctrine of last clear chance under Montana's comparative negligence statute. Payne v. Sorenson, 183 M 323, 599 P2d 362 (1979).

No Evidence of Contributory Negligence: Before the adoption of 27-1-702, contributory negligence on the part of a plaintiff barred his recovery. Plaintiff was not contributorily negligent as a matter of law, as there was no evidence to support a finding by the jury that plaintiff was contributorily negligent. Green v. Hagele, 182 M 155, 595 P2d 1159 (1979). However, see Pierce v. ALSC Architects, P.S., 270 M 97, 890 P2d 1254, 52 St. Rep. 93 (1995).

Duty of Landlord — Unsafe Condition: The adoption by Montana of comparative negligence does not change the nature of the duty owed by a landlord to a tenant to make the premises safe or to warn of danger. Hayes v. U.S., 475 F. Supp. 681 (D.C. Mont. 1979).

Through Road Intersections: Montana law does not contemplate that if a road is designated as "through", it becomes the duty of persons approaching intersections with such through roads to stop in the absence of stop signs. When two vehicles in this case collided in such an intersection, having entered at about the same time, the court assessed the negligence of each driver at 50%. Andrews v. U.S., 447 F. Supp. 434, 35 St. Rep. 350 (D.C. Mont. 1978).

Comparative Negligence Statute Not to Be Applied Retroactively: Summary judgment properly granted defendant where plaintiff was contributorily negligent in a slip and fall case as the comparative negligence statute is not a procedural law but a substantive law in nature with a presumption against retroactive effect and therefore does not apply to claims which might arise prior to its effective date. Dunham v. Southside Nat'l Bank of Missoula, 169 M 466, 548 P2d 1383 (1976), overruled, as to the distinction between liability based upon natural versus altered accumulations of ice or snow that are open and obvious, in Richardson v. Corvallis Pub. School District No. 1, 286 M 309, 950 P2d 748, 54 St. Rep. 1422 (1997).

Genuine Issues of Facts to Possible Contributory Negligence Resulting in Potential Diminution of Damages: Where plaintiff sought damages against railroad under Federal Employers' Liability Act, it was error for District Court to deny railroad's introduction of evidence to establish plaintiff's possible contributory negligence in diminution of damages where court granted partial summary judgment as to railroad's liability so that the only triable issue was damages. (Dissent by Justices Daly and John C. Harrison asserting summary judgment is not appealable.) McGee v. Burlington N., Inc., 167 M 485, 540 P2d 298 (1975).

Law Review Articles

Settlement or Release Under Montana's Multiple Defendant Statute, Neuhardt, 59 Mont. L. Rev. 113 (1998).

The Defense of Assumption of Risk Under Montana's Product Liability Law, Lukes, 58 Mont. L. Rev. 249 (1997).

Recognizing Parental Consortium: Montana Follows a National Trend in Pence v. Fox, Vannatta, 54 Mont. L. Rev. 149 (1993).

Assumption of Risk in Montana: An Analysis of the Supreme Court's Treatment of the Doctrine, Hayes, 53 Mont. L. Rev. 291 (1992).

Martel v. Montana Power Company: Liberating and Enlightening the Montana Comparative-Negligence Jury, Velk, 51 Mont. L. Rev. 221 (1990).

Assumption of Risk and Abnormally Dangerous Activities: A Proposal, DeWolf & Hander, 51 Mont. L. Rev. 161 (1990).

The Liability of Purveyors of Alcoholic Beverages for Torts of Intoxicated Consumers, d. The Impact of Comparative Negligence on Dramshop Actions, Heard, 47 Mont. L. Rev. 507 (1986).

Tort Liability for Serving Alcohol: An Expanding Doctrine, Bender, 46 Mont. L. Rev. 381 (1985).

Comparative Negligence in Montana, Ellingson, 37 Mont. L. Rev. 152 (1976).

Collateral References

Negligence *key* 97, 101.

65A C.J.S. Negligence §§169 through 173.

57B Am. Jur. 2d Negligence §§954, et seq., 974.

Applicability of comparative negligence doctrine to actions based on strict liability in tort. 9 ALR 4th 633.

27-1-703. Multiple defendants — determination of liability.

Compiler's Comments

1997 Amendments: Chapter 293 in (1), near beginning, substituted "party to an action" for "party in any action"; in (2), in first sentence before "attributable", substituted "percentage of negligence" for "amount of negligence" and in second sentence, before "attributable", substituted

"percentage" for "amount" and at end, after "claimant", inserted "and to any person with whom the claimant has settled or who the plaintiff has released from liability"; in third sentence of (4) substituted "liability of persons released from liability by the claimant and persons with whom the claimant has settled" for "liability of nonparties, including persons released from liability by the claimant and persons immune from liability to the claimant" and deleted former fifth sentence that read: "Contribution must be proportional to the liability of the parties against whom recovery is allowed"; at end of (6)(a), after "caused", substituted "in full or in part by a person with whom the claimant has settled or who the claimant has released from liability" for "in full or in part by a nonparty, which may be referred to as a nonparty defense"; in first sentence in (6)(b), after "negligence", substituted "of persons released from liability by the claimant or with whom the claimant has settled" for "of nonparties, including persons released from liability by the claimant and persons immune from liability to the claimant, if a nonparty defense is properly asserted in accordance with this subsection (6)" and in second sentence, after "negligence", substituted "of a person with whom the claimant has settled or who has been released from liability by the claimant" for "of a nonparty" and in two places substituted "person" for "nonparty"; inserted (6)(c) providing comparison of fault exceptions for specific persons other than persons who have settled with or have been released by the claimant; inserted (6)(d) providing that a release of settlement by a claimant constitutes an assumption of liability and reducing claim by the percentage of the release or equitable share of settlement; in (6)(e) substituted language concerning burden of proof for defendant alleging release or settlement for former language that read: "The burden of proof as to a nonparty's liability is on the defendant or defendants who affirmatively plead the nonparty defense, but this subsection (6) does not relieve the claimant of the burden of proving that negligence on the part of the defendant or defendants contributed as a proximate cause to the injury of the claimant or alter other proof requirements"; in (6)(f) substituted "A defendant alleging that a settled or released person is at fault in the matter shall affirmatively plead the settlement or release as a defense in the answer" for "A nonparty defense must be affirmatively pleaded as a part of the answer" and in last sentence, after "knowledge", substituted "of a settled or released person" for "of a nonparty defense" and after "defense" inserted "of settlement or release"; at end of (6)(f)(i) substituted "existence of a settled or released person" for "existence of a nonparty defense"; inserted (6)(f)(ii) authorizing defendant to plead defense of settlement or release with opportunity for settled or released person to intervene in the action; deleted former (6)(d)(iii) that read: "(iii) giving the claimant a reasonable opportunity, if appropriate, to add the nonparty as an additional defendant to the action before the expiration of the period of limitation applicable to the claim. However, this subsection (iii) does not extend the period of limitation or revive the action if the period of limitation has expired"; in first sentence of (6)(g), after "defendant", substituted "alleges that a settled or released person is at fault in the matter" for "asserts a nonparty defense" and after "notify" substituted "each person" for "each nonparty" and in second sentence, after "each", substituted "settled or released person at the person's last-known address" for "nonparty at the nonparty's last-known address"; and made minor changes in style. Amendment effective April 18, 1997.

Chapter 429 at beginning deleted exception clause that read: "Except as provided in subsections (2) and (3), whenever the negligence of a party in any action is an issue"; deleted (2) through (6) that read: "(2) A party whose negligence is determined to be 50% or less of the combined negligence of all persons described in subsection (4) is severally liable only and is responsible only for the amount of negligence attributable to that party, except as provided in subsection (3). The remaining parties are jointly and severally liable for the total less the amount attributable to the claimant.

(3) A party may be jointly liable for all damages caused by the negligence of another if both acted in concert in contributing to the claimant's damages or if one party acted as an agent of the other.

(4) On motion of any party against whom a claim is asserted for negligence resulting in death or injury to person or property, any other person whose negligence may have contributed as a proximate cause to the injury complained of may be joined as an additional party to the action. For purposes of determining the percentage of liability attributable to each party whose action contributed to the injury complained of, the trier of fact shall consider the negligence of the claimant, injured person, defendants, and third-party defendants. The liability of nonparties, including persons released from liability by the claimant and persons immune from liability to the claimant, must also be considered by the trier of fact, as provided in subsection (6). The trier of fact shall apportion the percentage of negligence of all persons listed in this subsection. Contribution must be proportional to the liability of the parties against whom

recovery is allowed. Nothing contained in this section makes any party indispensable pursuant to Rule 19, Montana Rules of Civil Procedure.

(5) If for any reason all or part of the contribution from a party liable for contribution cannot be obtained, each of the other parties shall contribute a proportional part of the unpaid portion of the noncontributing party's share and may obtain judgment in a pending or subsequent action for contribution from the noncontributing party. A party found to be 50% or less negligent for the injury complained of is liable for contribution under this section only up to the percentage of negligence attributed to that party.

(6) (a) In an action based on negligence, a defendant may assert as a defense that the damages of the claimant were caused in full or in part by a nonparty, which may be referred to as a nonparty defense.

(b) In determining the percentage of liability attributable to persons who are parties to the action, the trier of fact shall consider the negligence of nonparties, including persons released from liability by the claimant and persons immune from liability to the claimant, if a nonparty defense is properly asserted in accordance with this subsection (6). A finding of negligence of a nonparty is not a presumptive or conclusive finding as to that nonparty for purposes of a prior or subsequent action involving that nonparty.

(c) The burden of proof as to a nonparty's liability is on the defendant or defendants who affirmatively plead the nonparty defense, but this subsection (6)does not relieve the claimant of the burden of proving that negligence on the part of the defendant or defendants contributed as a proximate cause to the injury of the claimant or alter other proof requirements.

(d) A nonparty defense must be affirmatively pleaded as a part of the answer. A defendant who gains actual knowledge of a nonparty defense after the filing of that defendant's answer may plead the defense with reasonable promptness, as determined by the trial court, in a manner that is consistent with:

(i) giving the defendant a reasonable opportunity to discover the existence of a nonparty defense;

(ii) giving the claimant a reasonable opportunity to defend against a nonparty defense; and

(iii) giving the claimant a reasonable opportunity, if appropriate, to add the nonparty as an additional defendant to the action before the expiration of the period of limitation applicable to the claim. However, this subsection (iii) does not extend the period of limitation or revive the action if the period of limitation has expired.

(e) If a defendant asserts a nonparty defense, the defendant shall notify each nonparty who the defendant alleges caused the claimant's injuries, in whole or in part. Notification must be made by mailing the defendant's answer to each nonparty at the nonparty's last-known address by certified mail, return receipt requested"; and made minor changes in style. Amendment effective on occurrence of contingency.

Preamble: The preamble attached to Ch. 293, L. 1997, provided: "WHEREAS, the Montana Supreme Court, in Plumb v. District Court, 927 P.2d 1011, 53 St. Rep. 1187 (1996), recently declared unconstitutional portions of Montana's comparative negligence statute because it failed to provide an opportunity for a nonparty to defend oneself, and it required the plaintiff to act in a dual capacity by requiring that the plaintiff represent nonparties; and

WHEREAS, the Montana Supreme Court also recognized in Plumb that parties who settle represent the single exception for fair apportionment of liability under third-party practice rules; and

WHEREAS, the Montana Supreme Court has recognized that the Legislature may alter tort causes of action to promote legitimate state interests; and

WHEREAS, the Legislature believes that the policy of the state is that claimants, defendants, and other potentially liable persons should be held responsible to the extent of individual fault; and

WHEREAS, the Legislature has retained joint and several liability, but modified it because of that policy; and

WHEREAS, the current system of modified joint and several liability must permit a consideration of the fault attributable to parties who settle or are released for the modified system to be operative; and

WHEREAS, the Legislature believes that a claimant who enters into a settlement or covenant not to sue does so because the claimant has made a considered judgment that the agreement is in the claimant's best interests; and

WHEREAS, the Legislature intends that the liability of persons who settle or are released and who may share in the responsibility for a tort cause of action be considered by the trier of fact and apportioned a percentage of damages according to their negligence; and

WHEREAS, the Legislature believes that the percent credit rule, rather than the dollar credit rule, more accurately reflects the basis for comparative negligence, which apportions liability according to the percentage of individual negligence.

THEREFORE, the Legislature finds it appropriate to pass legislation addressing the concerns raised by the Montana Supreme Court and to accomplish the Legislature's objectives of allocating liability on the basis of individual negligence, encouraging fair settlements that accurately reflect potential liability, and permitting the allocation of a percentage of liability to persons who settle or are released and are found to be partially or wholly responsible."

The preamble attached to Ch. 429, L. 1997, provided: "WHEREAS, efforts of the Legislature to amend the comparative negligence statute, which is premised on a modified joint and several liability scheme, have repeatedly been struck down by the Montana Supreme Court; and

WHEREAS, the Montana Supreme Court rulings prohibiting the consideration of fault attributable to nonparties impair the effectiveness of the current modified joint and several liability system in Montana; and

WHEREAS, the Legislature intends that the policy of the state should be a system of comparative fault in which persons are held responsible only to the extent to which they cause or contribute to the harm; and

WHEREAS, the current system of joint and several liability, which apportions all liability only among parties to the action, fails to apportion liability among all tortfeasors according to their equitable share of fault; and

WHEREAS, the Legislature recognizes that public policy favors fair settlements that accurately reflect the liability of settled or released parties; and

WHEREAS, the Legislature is concerned with the present inequitable results of solvent defendants having to pay for the liability of insolvent, immune, or settled parties; and

WHEREAS, the present system of joint and several liability for all tort actions does not reflect the state's policy of liability in proportion to fault; and

WHEREAS, the Legislature recognizes that joint and several liability should be retained for certain situations; and

WHEREAS, at least ten other states have abrogated the doctrine of joint and several liability, except for specific situations; and

WHEREAS, the Legislature has the power to alter tort causes of action to promote legitimate state interests.

THEREFORE, the Legislature declares that the doctrine of joint and several liability is abolished, except for specific causes of action, and is replaced with a comparative fault system utilizing the principles of several liability."

Applicability: Section 4, Ch. 293, L. 1997, provided "[This act] [27-1-702, 27-1-703, and 27-1-704] applies to causes of action that arise on or after [the effective date of this act]." Effective April 18, 1997.

Nonseverability: Section 5, Ch. 293, L. 1997, was a nonseverability clause.

Severability: Section 9, Ch. 429, L. 1997, was a severability clause.

1995 Amendment: Chapter 330 in (4), in second sentence after "third-party defendants", deleted "persons released from liability by the claimant, persons immune from liability to the claimant, and any other persons who have a defense against the claimant", inserted third sentence requiring consideration of liability of nonparties, and deleted former fourth sentence that read: "However, in attributing negligence among persons, the trier of fact may not consider or determine any amount of negligence on the part of any injured person's employer or coemployee to the extent that such employer or coemployee has tort immunity under the Workers' Compensation Act or the Occupational Disease Act of this state, of any other state, or of the federal government"; inserted (6) establishing nonparty defense; and made minor changes in style. Amendment effective April 5, 1995.

Preamble: The preamble attached to Ch. 330, L. 1995, provided: "WHEREAS, on August 29, 1994, the Montana Supreme Court, in Newville v. State of Montana Department of Family Services, [267 Mont. 237,] 883 P.2d 793, 51 St. Rptr. 758 (1994), struck down as unconstitutional part of section 27-1-703, MCA, limiting the common-law doctrine of joint and several liability; and

WHEREAS, the basis of the holding was that the statute lacked certain procedural safeguards; and

WHEREAS, the Legislature wishes to provide for procedural safeguards considered necessary by the Montana Supreme Court; and

WHEREAS, on January 18, 1995, the Montana Supreme Court, in Wetch v. Unique Concrete Co., [269 Mont. 315,] [888] P.2d [425], 52 St. Rptr. 5 (1995), interpreted section 27-1-703, MCA, to

preclude the trier of fact from hearing about or considering the negligence of the plaintiff's employer in a case in which that negligence should have absolved or substantially limited the liability of a contractor doing work on the employer's office building; and

WHEREAS, the Legislature wishes to provide that negligence on the part of the claimant's employer or coemployee may be considered and determined as part of a nonparty defense, as provided in this bill."

Severability: Section 2, Ch. 330, L. 1995, was a severability clause.

Applicability: Section 3, Ch. 330, L. 1995, provided: "[This act] applies to all claims for relief not reduced to final judgment on [the effective date of this act]." Effective April 5, 1995.

1987 Amendment: Substituted entire section (see 1987 Session Law for text) for former (1) through (3) that read: "(1) Whenever the negligence of any party in any action is an issue, each party against whom recovery may be allowed is jointly and severally liable for the amount that may be awarded to the claimant but has the right of contribution from any other person whose negligence may have contributed as a proximate cause to the injury complained of.

(2) On motion of any party against whom a claim is asserted for negligence resulting in death or injury to person or property, any other person whose negligence may have contributed as a proximate cause to the injury complained of may be joined as an additional party to the action. Whenever more than one person is found to have contributed as a proximate cause to the injury complained of, the trier of fact shall apportion the degree of fault among such persons. Contribution shall be proportional to the negligence of the parties against whom recovery is allowed. Nothing contained in this section shall make any party indispensable pursuant to Rule 19, M.R.Civ.P.

(3) If for any reason all or part of the contribution from a party liable for contribution cannot be obtained, each of the other parties against whom recovery is allowed is liable to contribute a proportional part of the unpaid portion of the noncontributing party's share and may obtain judgment in a pending or subsequent action for contribution from the noncontributing party."

Severability: Section 3, Ch. 505, L. 1987, was a severability section.

1981 Amendment: In (1), substituted "Whenever the negligence of any party in any action is an issue, each party against whom recovery may be allowed is jointly and severally liable for the amount that may be awarded to the claimant but has the right of contribution from any other person whose negligence may have contributed as a proximate cause to the injury complained of" for "Whenever the comparative negligence of the parties in any action is an issue and recovery is allowed against more than one party, each such party is jointly and severally liable for the amount awarded to the claimant but has the right of contribution from any other party against whom recovery is allowed. Contribution shall be proportional to the negligence of the parties against whom recovery is allowed"; and inserted "(2) On motion of any party against whom a claim is asserted for negligence resulting in death or injury to person or property, any other person whose negligence may have contributed as a proximate cause to the injury complained of may be joined as an additional party to the action. Whenever more than one person is found to have contributed as a proximate cause to the injury complained of, the trier of fact shall apportion the degree of fault among such persons. Contribution shall be proportional to the negligence of the parties against whom recovery is allowed. Nothing contained in this section shall make any party indispensable pursuant to Rule 19, M.R.Civ.P."

Case Notes

No Error in Failure to Apportion Percentage of Contributory Negligence to Defendants When Plaintiff Found Fifty-One Percent Negligent: Eight of 12 jurors agreed that defendants were negligent in contributing to the death of Payne's son, and of the eight, six agreed that the son was more than 51% negligent. Given the son's negligence, the jury asked whether it needed to apportion negligence percentages for the defendants and was instructed that no further determination of negligence was required. Payne appealed on grounds that failure to apportion less than 50% of the negligence to defendants violated this section. The Supreme Court disagreed. Under 27-1-702, a plaintiff cannot recover if plaintiff's negligence exceeds the combined negligence of the defendants, so the trial court was within its discretion in instructing the jury not to proceed with apportioning negligence to the defendants. Payne v. Knutson, 2004 MT 271, 323 M 165, 99 P3d 200 (2004).

Rule of Law Regarding Admissibility of Evidence of Subsequent Accident With Nonparty — Defendant's Burden to Show That Damages Divisible and Apportionment Proper: Following Truman's injury in an automobile accident, she was involved in a second automobile accident and in an accident involving an ultralight aircraft. The District Court held that evidence of Truman's injuries in the second automobile accident and the aircraft accident would be admissible in a trial related to the first automobile accident to disprove causation. After

accepting supervisory control, the Supreme Court relied on an analogous situation in Azure v. Billings, 182 M 234, 596 P2d 460 (1979), holding that once a plaintiff presents a prima facie case that the defendant's conduct contributed as a cause of injury, the burden shifts to the defendant to prove that the injury is divisible. A defendant is permitted to submit relevant evidence of subsequent accidents to negate allegations that the defendant is the cause or sole cause of the injury, but the defendant may not attempt to apportion fault to the conduct of a nonparty because assignment of liability to a nonparty without affording that party the opportunity to defend against liability risks an unreliable and disproportionate assignment of liability and places the burden of defending the nonparty on the plaintiff. In this case, plaintiff must prove that defendant's conduct contributed as a substantial factor to the damages, but need not prove the extent to which defendant is responsible. If defendant proves by a reasonable medical probability that the injury is divisible and that defendant is responsible for only a portion of the damages, the jury may reduce defendant's obligation by the portion of damages for which it is proved that defendant is not responsible. However, if the injury is indivisible and evidence does not permit an apportionment, then defendant is liable for the entire damage. Truman v. District Court, 2003 MT 91, 315 M 165, 68 P3d 654 (2003).

Supervisory Control Proper to Determine Whether Admission of Evidence of Subsequent Accidents With Nonparties Admissible to Disprove Liability for Damages: Following Truman's injury in an automobile accident, she was involved in a second automobile accident and in an accident involving an ultralight aircraft. The District Court held that evidence of Truman's injuries in the second automobile accident and the aircraft accident would be admissible in a trial related to the first automobile accident to disprove causation. Truman requested that the Supreme Court exercise supervisory control because the District Court made a mistake of law that would place Truman at a significant disadvantage in litigating the case. If the District Court's conclusion, that evidence of subsequent accidents with nonparties was admissible, proved incorrect, that conclusion would impact all aspects of the trial, render the trial results unreliable, and substantially increase the cost to Truman in both time and finances. Therefore, the Supreme Court acceded to the request and exercised supervisory control to determine whether the District Court was proceeding based upon a mistake of law. Truman v. District Court, 2003 MT 91, 315 M 165, 68 P3d 654 (2003), following Plumb v. District Court, 279 M 363, 927 P2d 1011 (1996).

Separate and Distinct Claims Against Multiple Defendants — Settlement Proceeds of One Defendant Not Offset Against Settlement Against Another Defendant: Plaintiffs entered a settlement and release agreement with one defendant, apportioning the settlement proceeds to plaintiffs' claim for emotional distress, and releasing that defendant. Damages were awarded on plaintiffs' claim against another defendant, Schonrock, for violating the Montana Unfair Trade Practices and Consumer Protection Act of 1973. Schonrock claimed to be entitled to an offset of the emotional distress settlement against the verdict based on violation of the Act. The District Court denied the offset, and the Supreme Court affirmed. Under Schuff v. A.T. Klemens & Son, 2000 MT 357, 303 M 274, 16 P3d 1002 (2000), a dollar-for-dollar pro tanto offset reduction applies only if two or more concurrent or joint tortfeasors cause a single invisible harm. Here, the award of damages by the jury and the settlement proceeds were the result of separate and distinct injuries, so an offset of the settlement against the damages was not appropriate. Plath v. Schonrock, 2003 MT 21, 314 M 101, 64 P3d 984 (2003). See also Jim's Excavating Serv., Inc. v. HKM Associates, 265 M 494, 878 P2d 248 (1994).

Failure to Provide Discovery Not Grounds for Offsetting Settlement Against Judgment: It would not be appropriate to refuse to offset against a judgment the amount of a settlement against joint tortfeasors on the basis of equity grounded in a default judgment against defendant for its willful failure to provide information sought to be discovered. The District Court properly refused the offset. Schuff v. A.T. Klemens & Son, 2000 MT 357, 303 M 274, 16 P3d 1002, 57 St. Rep. 1499 (2000).

No Constitutional Right to Attorney Fees or to Reduction of Collateral Source or Settlement Offset by Plaintiff's Attorney Fees: The right to full legal redress contained in Art. II, sec. 16, Mont. Const., is limited to the recovery of those damages provided by the general tort law, and pursuant to the American Rule on attorney fees, attorney fees are not damages recoverable pursuant to the general tort law because it pertains to survival and wrongful death actions. Montana Supreme Court cases that include the costs of recovery in the concept of full compensation and that relate to equitable principles unique to the law of legal subrogation are inapplicable to the constitutional issue of whether full legal redress under the constitution requires payment of attorney fees. Montana's common law has followed the American Rule that attorney fees are not an element of damages unless expressly provided by statute or contract.

Attorney fees are the subject of a contract between a party and the party's attorney. They are what the party chooses to do with part of the recovered damages, based on a prior agreement. Therefore, the right to full legal redress does not create a right to attorney fees, and the defendant's right to have collateral source and settlement payments offset against the judgment was not subject to a right of the plaintiff to have the offset amount reduced by the plaintiff's attorney fees. Schuff v. A.T. Klemens & Son, 2000 MT 357, 303 M 274, 16 P3d 1002, 57 St. Rep. 1499 (2000).

Offsetting Judgment by Amount of Settlement or Collateral Source Payment Not Denial of Full Compensation for Loss: An offset against a judgment of an amount received through settlement or from a collateral source does not deny full compensation for a loss. It simply ensures a single recovery for a single injury. Schuff v. A.T. Klemens & Son, 2000 MT 357, 303 M 274, 16 P3d 1002, 57 St. Rep. 1499 (2000).

No Apportionment Mechanism Regarding Negligence of Nonparties Under 1995 Statute: The 1995 amendments to this section did not cure the due process problem created by the absence of a statutory mechanism by which the negligence of nonparties, including third-party defendants released from liability, can be fairly apportioned by a jury. Here, the District Court properly refused to permit the jury to apportion negligence to third-party defendants who were released from liability by plaintiff and who were impecunious and judgment-proof. Cusenbary v. Mortensen, 1999 MT 221, 296 M 25, 987 P2d 351, 56 St. Rep. 864 (1999), following Plumb v. District Court, 279 M 363, 927 P2d 1011, 53 St. Rep. 1187 (1996), and distinguishing Whiting v. St., 248 M 207, 810 P2d 1177, 48 St. Rep. 396 (1991). (See 1997 amendment.)

Settlement by One Tortfeasor as Precluding Claims for Contribution and Indemnity Against Settling Tortfeasor Regardless of Underlying Tort Claim: In accordance with common-law principles and the public policy favoring settlements, a settlement by one tortfeasor precludes claims for both contribution and indemnity against the settling tortfeasor, regardless of the nature of the underlying tort claim. This is so even though this section states that the trier of fact is to determine the degree of negligence among each of the joint tortfeasors. Actual recovery is allowed only against those tortfeasors who have not settled with the claimant. Durden v. Hydro Flame Corp., 1999 MT 186, 295 M 318, 983 P2d 943, 56 St. Rep. 721 (1999), following State ex rel. Deere & Co. v. District Court, 224 M 384, 730 P2d 396, 43 St. Rep. 2270 (1986).

Constitutionality of Statute Regarding Multiple Defendants Proper Issue for Supervisory Control: Although all three circumstances for the exercise of supervisory control in State ex rel. Racicot v. District Court, 244 M 521, 798 P2d 1004 (1990), were not present, the Supreme Court nevertheless concluded that the constitutionality of subsection (6) of this section was an appropriate issue to decide by supervisory control after finding that any remedy available to plaintiffs by appeal was inadequate and that denial of a speedy remedy by supervisory control would be a denial of justice. (See 1997 amendment.) Plumb v. District Court, 279 M 363, 927 P2d 1011, 53 St. Rep. 1187 (1996), following State ex rel. Deere & Co. v. District Court, 224 M 384, 730 P2d 396 (1986), and followed in Preston v. District Court, 282 M 200, 936 P2d 814, 54 St. Rep. 312 (1997).

Nonparty Defense Not Rationally Related to Liability Apportionment — Due Process Violated: Substantive due process analysis requires deciding whether the legislation in question is related to a legitimate government concern and requires that the means chosen by the Legislature to accomplish its objective are reasonably related to the result sought to be attained. Although the state has a legitimate interest in enacting a scheme of liability that apportions liability for damages based on the degree of a party's fault for another person's injuries, the nonparty defense provided for by the 1995 amendments to this section, which allows apportionment of liability to parties who are not named in the lawsuit and who do not have an opportunity to appear and defend themselves, is not rationally related to that legitimate government objective and is violative of the constitutional right to due process. Remaining portions of the statute are severable and remain in effect. (See 1997 amendment.) Plumb v. District Court, 279 M 363, 927 P2d 1011, 53 St. Rep. 1187 (1996), followed in Reynolds v. U.S.A., 280 M 191, 929 P2d 844, 53 St. Rep. 1360 (1996), State ex rel. Maffei v. Second Judicial Court, 282 M 65, 935 P2d 266, 54 St. Rep. 244 (1997), Anderson v. Werner Enterprises, Inc., 1998 MT 333, 292 M 284, 972 P2d 806, 55 St. Rep. 1350 (1998), and Cusenbary v. Mortensen, 1999 MT 221, 296 M 25, 987 P2d 351, 56 St. Rep. 864 (1999).

Plaintiff Cannot Object to Admission of Evidence for Which Plaintiff Opened Door: Hando suffered physical damages while involved in painting activities at work. She subsequently settled with her employer and sued PPG, the manufacturer of the paint. Hando alleged that the District Court erred in allowing PPG to introduce evidence indicating that any damages that she suffered were the result of her employer's negligence when the statute states that the negligence

of an employer may not be considered when the employer has tort immunity under the Workers' Compensation Act. The Supreme Court held that Hando had opened the door to the evidence by testifying on direct examination about the procedures used by her employer and therefore had participated and acquiesced in the introduction of evidence concerning negligence on the part of her employer. Hando v. PPG Indus., Inc., 272 M 146, 900 P2d 281, 52 St. Rep. 670 (1995), following Pedersen v. Nordahl, 261 M 284, 862 P2d 411 (1993).

Evidence of Employer's Negligence Properly Excluded: Wetch injured herself walking out the back door of her place of employment and falling into a hole excavated by Unique while repairing the steps. Wetch's employer was covered by workers' compensation, and she received benefits under that coverage. Wetch subsequently sued Unique for her injuries. The trial court granted Wetch's motion to exclude any evidence of her employer's assumption of the duty to keep the back door locked. Unique would have used the evidence to argue that the employer's failure to keep the door locked was an intervening cause negating any liability on the company's part. The Supreme Court held that although it had struck down other portions of this section as unconstitutional, no challenge to the remaining portion of the law was before it and the remaining law was clear on its face that no evidence of the employer's liability could be considered. (See 1995 amendment.) Wetch v. Unique Concrete Co., 269 M 315, 888 P2d 425, 52 St. Rep. 5 (1995), rejecting the holding in Weaselboy v. Ingersoll-Rand, 10 Mont. Fed. 41 (1991).

Mandated Allocation of Negligence to Nonparties — Substantive Due Process Violation: Guardians of a foster child injured by a foster father pending adoption appealed a jury verdict that attributed negligence under the state's comparative negligence statute to the Department of Family Services (now Department of Public Health and Human Services), to the foster mother, and to a professional counselor, although the mother and counselor were nonparties as the result of a settlement prior to trial. The Supreme Court ruled that mandating the jury to allocate a percentage of negligence to nonparties arbitrarily and unreasonably affected the guardians' claim without providing procedural safeguards. (See 1995 amendment.) Newville v. St., 267 M 237, 883 P2d 793, 51 St. Rep. 758 (1994), applied retroactively in Brockie v. Omo Constr., Inc., 268 M 519, 887 P2d 167, 51 St. Rep. 1322 (1994). The 1995 amendments to this section did not cure the due process problem created by the absence of a statutory mechanism by which the negligence of nonparties, including third-party defendants released from liability, can be fairly apportioned by a jury. Here, the District Court properly refused to permit the jury to apportion negligence to third-party defendants who were released from liability by plaintiff and who were impecunious and judgment-proof. Cusenbary v. Mortensen, 1999 MT 221, 296 M 25, 987 P2d 351, 56 St. Rep. 864 (1999), distinguishing Whiting v. St., 248 M 207, 810 P2d 1177, 48 St. Rep. 396 (1991). (See 1997 amendment.)

Intentional and Negligent Injuries by Joint Tortfeasor — Comparative Negligence Unaddressed When Plaintiff Fully Compensated: Boyken sued Steele for intentional injuries and Lee's Northside Bar for negligent injuries that Boyken received in a bar fight. Boyken settled with the bar for $5,000 before trial, and the jury determined Boyken's injuries in the amount of $2,500 but that Boyken was 75% responsible for those injuries. The District Court granted judgment, notwithstanding the verdict, based upon Boyken's argument that comparative negligence should not be applied when injuries also resulted from an intentional tort and awarded Boyken $2,500. The Supreme Court refused to address the issue of whether comparative negligence should be applied to an intentional tort and held that Boyken was fully compensated for his injuries and that when a joint tortfeasor settles with a claimant, the remaining joint tortfeasor is entitled to offset to the extent of the settlement. Boyken v. Steele, 256 M 419, 847 P2d 282, 50 St. Rep. 131 (1993).

Subject Matter Jurisdiction of District Court to Determine Liability of Coemployee: This section provides that to the extent a coemployee has immunity from liability under the Workers' Compensation Act, a trier of fact cannot consider or determine negligence by the coemployee. The existence of immunity must be determined by the District Court. No statute or rule requires pleading the inapplicability of the Workers' Compensation Act because the jurisdiction of the District Court over common-law personal injury claims is indisputable. Brown v. Ehlert, 255 M 140, 841 P2d 510, 49 St. Rep. 940 (1992), distinguishing Mitchell v. Banking Corp. of Mont., 83 M 581, 273 P 1055 (1929), and Massey v. Selensky, 212 M 68, 685 P2d 938 (1984).

Inclusion of Nonparties in Jury Form — Reversible Error: The inclusion of a settling party or other third party in a verdict form serves no relevant purpose in determining whether a defendant was negligent and whether that negligence was a contributing cause of plaintiff's damages. Therefore, the inclusion of nonparties in the verdict form constitutes reversible error. Rieger v. Coldwell, 254 M 507, 839 P2d 1257, 49 St. Rep. 768 (1992).

Statute of Limitations on Action for Contribution or Indemnity: A cause of action for contribution or indemnity is distinct from the underlying cause of action, and the time from which the statute of limitations for such a cause of action begins to run is when the underlying claim, judgment, or settlement is paid or discharged. Linder v. Missoula County, 251 M 292, 824 P2d 1004, 49 St. Rep. 26 (1992), citing Schiess v. Bates, 693 P2d 440 (Idaho 1984). See also St. Paul Fire & Marine Co. v. Thompson, 152 M 396, 451 P2d 98 (1969).

Allowing Jury to Know Effect of Its Percentage Findings: The plaintiff objected to the defendant's jury instruction and closing argument allowing the defendant to inform the jury that if it found one defendant only 1% liable and that another defendant had no ability to pay, then the defendant who was only 1% liable would be responsible for paying the entire amount due the plaintiff. The Supreme Court ruled that it was proper for the jury to be aware of the effect that its percentage findings would have if any of the defendants could not pay their portion of the judgment. DeCelles v. St., 243 M 422, 795 P2d 419, 47 St. Rep. 1281 (1990).

Jury's Requirement That One Joint Tortfeasor Pay All Damages Not Error Per Se: The lower court ruled by summary judgment that the state and several landowners were jointly liable for the damages caused when a dam under their control gave way. In apportioning damages, the jury ordered the state to pay 100% of the damages. The Supreme Court held that the failure of the jury to make any of the other tortfeasors contribute was not an error per se but was difficult to envision when the lower court had ruled that all the parties had a duty to maintain the dam. The court stated that the instructions given to the jury were inconsistent and may have confused them, and therefore the court remanded the case. Burk Ranches, Inc. v. St., 242 M 300, 790 P2d 443, 47 St. Rep. 520 (1990).

Liability of Tortfeasors Acting in Concert: Two defendants who were passengers in a car that was involved in a chase of and subsequent accident with another vehicle claimed that because they were not in control of the vehicle and did not make any encouraging statements to the driver, they could not be held liable for a tort or for injuries resulting from the accident. However, undisputed facts showed that they voluntarily joined in the pursuit for the purpose of eventually assaulting the occupants of the other vehicle and that they helped to free their own vehicle when it became stuck on a fence, thereby substantially assisting in the chase and encouraging the driver's actions. These facts showed that they acted in concert as tortfeasors, as defined in part in Restatement (Second) of Torts 876 (1979), and were subject to liability; therefore, a partial summary judgment for plaintiff on the issue of liability was proper. Sloan v. Fauque, 239 M 383, 784 P2d 895, 46 St. Rep. 1767 (1989).

Accepted Work Rule Doctrine — Contractor Nonliability: The District Court properly granted summary judgment in favor of a contractor on the issue of negligence based on the accepted work rule doctrine. The doctrine, first recognized in Ulmen v. Schwieger, 92 M 331, 12 P2d 856 (1932), is based on the rule that an independent contractor is not liable to third parties for injuries that occur after the work has been completed and turned over to and accepted by the employer. Instead, the person employing the contractor is substituted as the responsible party. The Supreme Court affirmed the doctrine by refusing to extend contractor liability to foreseeable injury caused by negligent construction. Harrington v. LaBelle's of Colo., Inc., 235 M 80, 765 P2d 732, 45 St. Rep. 2176 (1988), overruled by Pierce v. ALSC Architects, P.S., 270 M 97, 890 P2d 1254, 52 St. Rep. 93 (1995).

Preexisting Condition — Apportionment of Damages: In a preexisting condition case, plaintiff does not have the burden of proving what portion of his disability is attributable to the defendant. Priest v. Taylor, 227 M 370, 740 P2d 648, 44 St. Rep. 1157 (1987).

Prejudgment Settlement by Joint Tortfeasor — Not Subject to Contribution or Indemnity: A joint tortfeasor who settles with a claimant before judgment on the claim is entered in District Court is not subject to claims for contribution or indemnity from nonsettling joint tortfeasors against whom judgment may be rendered. State ex rel. Deere & Co. v. District Court, 224 M 384, 730 P2d 396, 43 St. Rep. 2270 (1986), followed in Kuhnke v. Fisher, 227 M 62, 740 P2d 625, 44 St. Rep. 895 (1987), Sevalstad v. Glaus, 227 M 117, 737 P2d 1147, 44 St. Rep. 930 (1987), Whiting v. St., 248 M 207, 810 P2d 1177, 48 St. Rep. 396 (1991), and Durden v. Hydro Flame Corp., 1999 MT 186, 295 M 318, 983 P2d 943, 56 St. Rep. 721 (1999), and distinguished in Linder v. Missoula County, 251 M 292, 824 P2d 1004, 49 St. Rep. 26 (1992). (See 1987 amendment to 27-1-703.) In applying the *Deere* standard, the term "joint tortfeasor" was held to include the term "concurrent tortfeasor". Sprinkle v. Burlington N. RR Co., 236 M 383, 769 P2d 1261, 46 St. Rep. 445 (1989), followed in Holmberg v. Strong, 272 M 101, 899 P2d 1097, 52 St. Rep. 710 (1995).

Reduction by Dollar Amount, Not Percentage, of Claim Against Remaining Tortfeasor: A plaintiff's recovery against tortfeasors remaining after prejudgment settlement by another joint tortfeasor is to be reduced by a dollar credit in the amount of consideration paid by the settling

tortfeasor and not by a percentage amount proportioned to the degree of fault of the settling tortfeasor. State ex rel. Deere & Co. v. District Court, 224 M 384, 730 P2d 396, 43 St. Rep. 2270 (1986), followed in Whiting v. St., 248 M 207, 810 P2d 1177, 48 St. Rep. 396 (1991), and Holmberg v. Strong, 272 M 101, 899 P2d 1097, 52 St. Rep. 710 (1995). (See 1987 amendments to 27-1-703.)

Interspousal Tort Immunity No Bar to Cross-Claims of Husband's Codefendants for Indemnity and Contribution: In original proceeding for declaratory judgment on two certified questions from U.S. District Court, the Supreme Court held that since it abrogated doctrine of interspousal tort immunity, husband's codefendants and joint tortfeasors may cross-claim against him for indemnity and/or contribution under 27-1-703. The court, however, refrained from commenting as to the applicability of indemnity theories in auto accident cases. Noone v. Fink, 222 M 273, 721 P2d 1275, 43 St. Rep. 1258 (1986).

Workers' Compensation — Employer Not Liable for Contribution or Indemnity: The provisions of 39-71-411, providing for nonliability of an insured employer in workers' compensation cases, can be asserted as a complete defense to a third-party action for indemnity or contribution. Raisler v. Burlington N. RR Co., 219 M 254, 717 P2d 535, 42 St. Rep. 1997 (1985).

Splitting of Profits, Advertising, and Merging of Resources and Talents as Indicia of Partnership — Lack of Intent Not Controlling: Father and son shared equipment as needed, stored seed potatoes together in son's warehouse, advertised under the name of "Wilbur Kimm and Son", and split profits in a joint account. Son's insurer sued father's insurer for contribution for claims paid that were filed by buyers against son for crop damages caused by seeds treated by son. District Court found no partnership existed, primarily based on father's and son's testimony that they did not intend for a partnership to exist. The Supreme Court reversed and ordered judgment granting plaintiff insurer's motion for summary judgment. The Supreme Court held that splitting of profits, coupled with advertising under a joint name and the merging of resources and talents for the growing of the potatoes, preponderates against the District Court's finding of no partnership. Truck Ins. Exch. v. Indus. Indem. Co., 212 M 297, 688 P2d 1243, 41 St. Rep. 1835 (1984).

Contribution and Indemnity From Tortfeasor Not Joined: Osier was a passenger in Collins' car when it collided with a Consolidated Freightways tractor-trailer. Osier sued Consolidated in federal court. The federal court certified to the Montana Supreme Court the following question: "As a matter of substantive Montana law does a tort-feasor have a cause of action for contribution or indemnity against any joint tort-feasor not joined by the plaintiff as a party defendant?" The court stated that prior to 1977 there was no right of contribution among tortfeasors. The adoption in 1977 of 27-1-703 did not change the Montana rule with respect to the right of contribution among joint tortfeasors where comparative negligence is not an issue. Even in comparative negligence cases, the right of contribution granted by 27-1-703 applies only to defendants against whom judgments have been recovered by the plaintiff. The court declined to abolish this rule by judicial fiat. The Montana law with respect to indemnity is that when each tortfeasor is affirmatively negligent, neither is entitled to indemnity. Consol. Freightways Corp. of Delaware v. Osier, 185 M 439, 605 P2d 1076 (1979). (See 1981 amendment to 27-1-703.)

No Conflict Between Statutes — Subrogation: If an employer is not liable by way of indemnity or contribution to a third party, he may, even though himself negligent, recover from the third person through the injured employee under the subrogation rights created by law. There is no conflict between 27-1-703 and 39-71-414. Cordier v. Stetson-Ross, Inc., 184 M 502, 604 P2d 86 (1979).

No Third-Party Right to Indemnity or Contribution: A third party, sued by an injured employee, has no right to indemnity or contribution from a negligent employer if the employer and the employee are covered by the Workers' Compensation Act unless such a right were to arise out of some other legal transaction between the employer and third party. Cordier v. Stetson-Ross, Inc., 184 M 502, 604 P2d 86 (1979).

Comparative Negligence — Contribution Among Joint Tortfeasors: By a complaint filed before the effective date of the comparative negligence law, plaintiff sued the defendant airline company for injuries sustained on a city's airport runway, and the defendant airline company's complaint against the city for indemnity was dismissed. Because it was held in Dunham v. Southside Nat'l Bank of Missoula, 169 M 466, 548 P2d 1383 (1976), that the comparative negligence statute is not retroactive and because Consol. Freightways Corp. of Delaware v. Osier, 185 M 439, 605 P2d 1076 (1979), held contribution not applicable except in comparative negligence cases, there was no right of contribution between the airline and city. Rogers v. W. Airlines, 184 M 170, 602 P2d 171 (1979).

Jury Instruction to Distinguish Between Joint and Several Liability and Apportionment of Damages: If liability is joint and several, the plaintiff is entitled to only one recovery. In that

event deduction of an amount already paid by a joint tortfeasor is proper. But if apportionment of damages applies, each defendant must pay his contribution to the whole and therefore a deduction is not allowed for what another tortfeasor has paid. The jury instruction in this case failed to distinguish between these situations. Azure v. Billings, 182 M 234, 596 P2d 460 (1979), followed in Whiting v. St., 248 M 207, 810 P2d 1177, 48 St. Rep. 396 (1991), and Jim's Excavating Serv., Inc. v. HKM Associates, 265 M 494, 878 P2d 248, 51 St. Rep. 623 (1994). See also Armstrong v. Gondeiro, 2000 MT 326, 303 M 37, 15 P3d 386, 57 St. Rep. 1381 (2000).

Law Review Articles

Settlement or Release Under Montana's Multiple Defendant Statute, Neuhardt, 59 Mont. L. Rev. 113 (1998).

Montana Curtails Joint and Several Liability, Richardson, 50 Mont. L. Rev. 197 (1989).

Settlement and Liability in Montana: State Ex Rel. Deere & Co. v. District Court, Lanning, 48 Mont. L. Rev. 401 (1987).

Collateral References

Apportionment of punitive or exemplary damages as between joint tortfeasors. 20 ALR 3d 666.

27-1-704. Release — covenant not to sue.

Compiler's Comments

1999 Amendment: Chapter 51 in (2) after "27-1-703" deleted "(6)". Amendment effective March 15, 1999.

Preamble: The preamble attached to Ch. 293, L. 1997, provided: "WHEREAS, the Montana Supreme Court, in Plumb v. District Court, 927 P.2d 1011, 53 St. Rep. 1187 (1996), recently declared unconstitutional portions of Montana's comparative negligence statute because it failed to provide an opportunity for a nonparty to defend oneself, and it required the plaintiff to act in a dual capacity by requiring that the plaintiff represent nonparties; and

WHEREAS, the Montana Supreme Court also recognized in Plumb that parties who settle represent the single exception for fair apportionment of liability under third-party practice rules; and

WHEREAS, the Montana Supreme Court has recognized that the Legislature may alter tort causes of action to promote legitimate state interests; and

WHEREAS, the Legislature believes that the policy of the state is that claimants, defendants, and other potentially liable persons should be held responsible to the extent of individual fault; and

WHEREAS, the Legislature has retained joint and several liability, but modified it because of that policy; and

WHEREAS, the current system of modified joint and several liability must permit a consideration of the fault attributable to parties who settle or are released for the modified system to be operative; and

WHEREAS, the Legislature believes that a claimant who enters into a settlement or covenant not to sue does so because the claimant has made a considered judgment that the agreement is in the claimant's best interests; and

WHEREAS, the Legislature intends that the liability of persons who settle or are released and who may share in the responsibility for a tort cause of action be considered by the trier of fact and apportioned a percentage of damages according to their negligence; and

WHEREAS, the Legislature believes that the percent credit rule, rather than the dollar credit rule, more accurately reflects the basis for comparative negligence, which apportions liability according to the percentage of individual negligence.

THEREFORE, the Legislature finds it appropriate to pass legislation addressing the concerns raised by the Montana Supreme Court and to accomplish the Legislature's objectives of allocating liability on the basis of individual negligence, encouraging fair settlements that accurately reflect potential liability, and permitting the allocation of a percentage of liability to persons who settle or are released and are found to be partially or wholly responsible."

Applicability: Section 4, Ch. 293, L. 1997, provided: "[This act] [27-1-702, 27-1-703, and 27-1-704] applies to causes of action that arise on or after [the effective date of this act]." Effective April 18, 1997.

Nonseverability: Section 5, Ch. 293, L. 1997, was a severability clause.

Case Notes

Failure to Provide Discovery Not Grounds for Offsetting Settlement Against Judgment: It would not be appropriate to refuse to offset against a judgment the amount of a settlement

against joint tortfeasors on the basis of equity grounded in a default judgment against defendant for its willful failure to provide information sought to be discovered. The District Court properly refused the offset. Schuff v. A.T. Klemens & Son, 2000 MT 357, 303 M 274, 16 P3d 1002, 57 St. Rep. 1499 (2000).

No Constitutional Right to Attorney Fees or to Reduction of Collateral Source or Settlement Offset by Plaintiff's Attorney Fees: The right to full legal redress contained in Art. II, sec. 16, Mont. Const., is limited to the recovery of those damages provided by the general tort law, and pursuant to the American Rule on attorney fees, attorney fees are not damages recoverable pursuant to the general tort law because it pertains to survival and wrongful death actions. Montana Supreme Court cases that include the costs of recovery in the concept of full compensation and that relate to equitable principles unique to the law of legal subrogation are inapplicable to the constitutional issue of whether full legal redress under the constitution requires payment of attorney fees. Montana's common law has followed the American Rule that attorney fees are not an element of damages unless expressly provided by statute or contract. Attorney fees are the subject of a contract between a party and the party's attorney. They are what the party chooses to do with part of the recovered damages, based on a prior agreement. Therefore, the right to full legal redress does not create a right to attorney fees, and the defendant's right to have collateral source and settlement payments offset against the judgment was not subject to a right of the plaintiff to have the offset amount reduced by the plaintiff's attorney fees. Schuff v. A.T. Klemens & Son, 2000 MT 357, 303 M 274, 16 P3d 1002, 57 St. Rep. 1499 (2000).

Offsetting Judgment by Amount of Settlement or Collateral Source Payment Not Denial of Full Compensation for Loss: An offset against a judgment of an amount received through settlement or from a collateral source does not deny full compensation for a loss. It simply ensures a single recovery for a single injury. Schuff v. A.T. Klemens & Son, 2000 MT 357, 303 M 274, 16 P3d 1002, 57 St. Rep. 1499 (2000).

27-1-705. Several liability — purpose — pleading — determination — nonparties.

Compiler's Comments

Preamble: The preamble attached to Ch. 429, L. 1997, provided: "WHEREAS, efforts of the Legislature to amend the comparative negligence statute, which is premised on a modified joint and several liability scheme, have repeatedly been struck down by the Montana Supreme Court; and

WHEREAS, the Montana Supreme Court rulings prohibiting the consideration of fault attributable to nonparties impair the effectiveness of the current modified joint and several liability system in Montana; and

WHEREAS, the Legislature intends that the policy of the state should be a system of comparative fault in which persons are held responsible only to the extent to which they cause or contribute to the harm; and

WHEREAS, the current system of joint and several liability, which apportions all liability only among parties to the action, fails to apportion liability among all tortfeasors according to their equitable share of fault; and

WHEREAS, the Legislature recognizes that public policy favors fair settlements that accurately reflect the liability of settled or released parties; and

WHEREAS, the Legislature is concerned with the present inequitable results of solvent defendants having to pay for the liability of insolvent, immune, or settled parties; and

WHEREAS, the present system of joint and several liability for all tort actions does not reflect the state's policy of liability in proportion to fault; and

WHEREAS, the Legislature recognizes that joint and several liability should be retained for certain situations; and

WHEREAS, at least ten other states have abrogated the doctrine of joint and several liability, except for specific situations; and

WHEREAS, the Legislature has the power to alter tort causes of action to promote legitimate state interests.

THEREFORE, the Legislature declares that the doctrine of joint and several liability is abolished, except for specific causes of action, and is replaced with a comparative fault system utilizing the principles of several liability."

Severability: Section 9, Ch. 429, L. 1997, was a severability clause.

Case Notes

Joint and Several Liability for Restitution Properly Imposed: Following conviction for three counts of burglary, the District Court found Workman jointly and severally liable for the full

amount of restitution to the burglary victims and ordered Workman to pay restitution in the amount of $26,840.33. Workman was accompanied in the burglaries by four accomplices, and Workman argued that he should be held responsible only for his proportionate share as divided among all the defendants. That argument was rejected, and Workman appealed on grounds that restitution was improperly imposed. Workman relied on the 2001 version of 46-18-242, contending that the required documentation of his financial resources was inaccurate, and on the 2001 version of 46-18-244, arguing that the sentencing court failed to establish a payment schedule or set the amount of installment payments. The Supreme Court noted that both the required documentation and payment schedule provisions were deleted by the 2003 Legislature and are no longer required. Workman's argument that restitution should be apportioned among his accomplices also failed because the fate of the accomplices was immaterial to the court's authority to impose restitution. Under the 2003 versions of the restitution laws and given that Workman stipulated that he owed the full amount, the District Court properly held Workman jointly and severally liable for the pecuniary loss suffered by his victims. St. v. Workman, 2005 MT 22, 326 M 1, 107 P3d 462 (2005).

Degrees of Comparative Negligence in Automobile Accident — Summary Judgment on Comparative Negligence Improper: Issues of comparative negligence are particularly difficult to resolve as a matter of law. Normally, the issue of contributory negligence and the degree of comparative negligence, if any, is an issue for the trier of fact to resolve even if the opposing party is negligent as a matter of law. In this case, a question of material fact remained regarding the specific facts of an automobile accident, and the District Court erred in granting summary judgment to plaintiff after finding that defendant's negligence exceeded any negligence that could be found on plaintiff's part. The question of degrees of negligence was properly left to the jury. Contreras v. Fitzgerald, 2002 MT 208, 311 M 257, 54 P3d 983 (2002), distinguishing Brohman v. St., 230 M 198, 749 P2d 67 (1988).

27-1-706. Effect of a release or covenant not to sue.

Compiler's Comments

Preamble: The preamble attached to Ch. 429, L. 1997, provided: "WHEREAS, efforts of the Legislature to amend the comparative negligence statute, which is premised on a modified joint and several liability scheme, have repeatedly been struck down by the Montana Supreme Court; and

WHEREAS, the Montana Supreme Court rulings prohibiting the consideration of fault attributable to nonparties impair the effectiveness of the current modified joint and several liability system in Montana; and

WHEREAS, the Legislature intends that the policy of the state should be a system of comparative fault in which persons are held responsible only to the extent to which they cause or contribute to the harm; and

WHEREAS, the current system of joint and several liability, which apportions all liability only among parties to the action, fails to apportion liability among all tortfeasors according to their equitable share of fault; and

WHEREAS, the Legislature recognizes that public policy favors fair settlements that accurately reflect the liability of settled or released parties; and

WHEREAS, the Legislature is concerned with the present inequitable results of solvent defendants having to pay for the liability of insolvent, immune, or settled parties; and

WHEREAS, the present system of joint and several liability for all tort actions does not reflect the state's policy of liability in proportion to fault; and

WHEREAS, the Legislature recognizes that joint and several liability should be retained for certain situations; and

WHEREAS, at least ten other states have abrogated the doctrine of joint and several liability, except for specific situations; and

WHEREAS, the Legislature has the power to alter tort causes of action to promote legitimate state interests.

THEREFORE, the Legislature declares that the doctrine of joint and several liability is abolished, except for specific causes of action, and is replaced with a comparative fault system utilizing the principles of several liability."

Severability: Section 9, Ch. 429, L. 1997, was a severability clause.

27-1-709. Property owner's immunity from damage caused by use of property unlawfully taken.

Compiler's Comments

Applicability: Section 3, Ch. 400, L. 1997, provided: "[This act] applies to injuries and damages occurring after October 1, 1997."

27-1-710. Civil liability for injuries involving alcohol consumption.

Compiler's Comments

2003 Amendment: Chapter 489 inserted (4) relating to consideration of consumption of an alcoholic beverage; inserted (5) relating to an action brought by a consumer; inserted (6) relating to statutes of limitation under this section; inserted (7) limiting noneconomic damages; inserted (8) limiting punitive damages; and inserted (9) relating to admissibility of intentional criminal activity. Amendment effective April 24, 2003.

Saving Clause: Section 2, Ch. 489, L. 2003, was a saving clause.

Severability: Section 3, Ch. 489, L. 2003, was a severability clause.

Applicability: Section 5, Ch. 489, L. 2003, provided: "[This act] applies to all proceedings begun after [the effective date of this act]." Effective April 24, 2003.

1989 Amendment: In (2), at beginning, inserted exception clause citing 16-6-305.

Case Notes

Liquor Liability Insurance Coverage Broader Than Statutory Language: A liquor liability policy that did not incorporate statutory liability language was construed to provide broader coverage for all liability, whether based on the statute or not. Troutt v. Colo. W. Ins. Co., 246 F3d 1150 (9th Cir. 2001).

Denial of General Liability Coverage Based on Liquor Liability Exclusion — Failure to Raise Alternative Negligence Theory — Summary Judgment Proper: Cusenbary was injured when a bar patron drove a car through the wall of Mortensen's tavern. Mortensen was covered by USF&G Co. under a general liability policy, but the insurance included a liquor liability exclusion. When Mortensen tendered the claim to USF&G Co. for defense, the company denied coverage and refused to defend based on the exclusion, so Cusenbary's claim was tried to a jury and Mortensen was found guilty of negligence (see Cusenbary v. Mortensen, 1999 MT 221, 296 M 25, 987 P2d 351 (1999)). Mortensen then assigned all rights to coverage under the general liability policy to Cusenbary. Cusenbary then sued USF&G Co., contending that the company had a duty to indemnify Mortensen for negligent behavior in management of the bar, separate from the negligent conduct of serving alcohol to an intoxicated patron, because the separate conduct was not excluded by the liquor liability exclusion. The District Court granted summary judgment for USF&G Co., holding that the separate conduct related directly to the improper service or sale of alcohol and that Mortensen failed to set forth evidence supporting an alternative negligence theory, so as a matter of law, Mortensen's judgment was excluded by the express language of the policy. The Supreme Court affirmed, citing Sheffield Ins. Co. v. Lighthouse Properties, Inc., 234 M 395, 763 P2d 669 (1988). All claims and arguments at trial were related to Mortensen's negligence in serving alcohol, and no assertion was ever made that the proposed evidence was relevant to any other theory of negligence or to any other theory. All of the claims arose from serving alcohol and were thus excluded from coverage. Cusenbary v. USF&G Co., 2001 MT 261, 307 M 238, 37 P3d 67 (2001).

Liability of Tavern Owner for Foreseeable Injury-Producing Conduct by Visibly Intoxicated Patron: Wells was served alcohol at the Town Tavern immediately prior to driving a car through the wall of the tavern, injuring another patron. The patron sued the tavern owner, Mortensen, under the dram shop law in this section, which provides tavern owner liability for accidents arising from an event involving a visibly intoxicated patron. In defense, Mortensen contended that the injuries to the patron resulted from an intervening, superseding, new, and independent cause that was not reasonably foreseeable, thereby severing the chain of causation from Mortensen's negligent act. Wells was in a wheelchair and appeared to be unable to operate the wheelchair himself. Causation requires a determination, ordinarily by the factfinder, that a defendant's conduct helped produce the injury and that the injury would not have occurred without it. In cases involving alleged intervening causes, foreseeability is properly considered with respect to causation. An intervening cause is one in which a force came into motion at the time of the defendant's negligent act and combined with the negligent act to cause the injury to the plaintiff and is also determined by foreseeability. The consequences, including criminal conduct, of serving alcohol to a visibly intoxicated person are reasonably foreseeable precisely because of the causal relationship between serving alcohol and drunken conduct. When a person

consumes alcohol, subsequent driving resulting in an injury-producing accident is an intervening act, but it is an act that is reasonably foreseeable as a matter of law. Thus, the affirmative defense of an intervening, superseding cause did not apply. Cusenbary v. Mortensen, 1999 MT 221, 296 M 25, 987 P2d 351, 56 St. Rep. 864 (1999), following Nehring v. LaCounte, 219 M 462, 712 P2d 1329, 43 St. Rep. 93 (1986), and Jevning v. Skyline Bar, 223 M 422, 726 P2d 326, 43 St. Rep. 1845 (1986), and distinguishing USF&G v. Camp, 253 M 64, 831 P2d 586, 49 St. Rep. 372 (1992), King v. St., 259 M 393, 856 P2d 954, 50 St. Rep. 848 (1993), and Estate of Strever v. Cline, 278 M 165, 924 P2d 666, 53 St. Rep. 576 (1996). See also Palsgraf v. Long Island RR, 162 NE 99 (1928), and Deeds v. U.S., 306 F. Supp. 348 (D.C. Mont. 1969).

Responsibility to Assess Visible Intoxication Regardless of Condition of Patron: This section prohibits a tavern owner from furnishing alcohol to a visibly intoxicated person. This does not mean that the tavern owner must assess the medical condition of a patron in conjunction with the patron's level of intoxication. Rather, the tavern owner is simply responsible for assessing visible intoxication, regardless of the physical ability and condition of the patron. Cusenbary v. Mortensen, 1999 MT 221, 296 M 25, 987 P2d 351, 56 St. Rep. 864 (1999).

Liquor Liability Provision Unambiguous — No Separate Theory of Negligence: The plaintiff, injured by an automobile driver served liquor by the defendant tavern owner, sued the owner on negligence theory. The plaintiff argued that the tavern owner's liability based on negligence is distinguished from liability based on the sale or service of liquor. The court disagreed, holding that summary judgment was proper because the insurance policy provision excluding liquor liability coverage was clear and unambiguous and all claims against the tavern owner relate to the sale or service of liquor. Sheffield Ins. Co. v. Lighthouse Properties, Inc., 234 M 395, 763 P2d 669, 45 St. Rep. 1999 (1988). An amended complaint was later filed that attempted to set forth an additional theory of liability not based on the sale of alcohol. The theory was that an ordinary duty of due care was owed the bar patron based on his status as business invitee and that the bartender breached that duty by allowing patron to leave the bar in the company of an obviously intoxicated person. However, the amended complaint was still based on actions related to the sale of alcohol and was therefore barred by res judicata. The District Court did not err when it held that the insurance policy also excluded liability for acts alleged in the amended complaint. Sheffield Ins. Co. v. Lighthouse Properties, Inc., 252 M 321, 828 P2d 1369, 49 St. Rep. 274 (1992), followed in Cusenbary v. USF&G Co., 2001 MT 261, 307 M 238, 37 P3d 67 (2001).

Law Review Articles

The Liability of Purveyors of Alcoholic Beverages for Torts of Intoxicated Consumers, d. The Impact of Comparative Negligence on Dramshop Actions, Heard, 47 Mont. L. Rev. 507 (1986).

Tort Liability for Serving Alcohol: An Expanding Doctrine, Bender, 46 Mont. L. Rev. 381 (1985).

Collateral References

Social host's liability for death or injuries incurred by person to whom alcohol was served. 54 ALR 5th 313.

27-1-711. Liability of minor or person of unsound mind for own torts — exemplary damages.

Collateral References

Infants *key* 59, 64; Mental Health *key* 411 through 415.

43 C.J.S. Infants §276, et seq.

42 Am. Jur. 2d Infants §§140 through 149; 53 Am. Jur. 2d Mentally Impaired Persons §§167, 168.

Modern trends as to tort liability of child of tender years. 27 ALR 4th 15.

Age of minor operator of motor-powered craft as affecting his primary negligence. 97 ALR 2d 872.

Violation of statute or ordinance as affecting question of child's primary negligence. 174 ALR 1198.

Liability of infant for injuries inflicted at play. 173 ALR 899.

Infant's liability in tort for his own act as affected by its connection with infant's contract. 127 ALR 1441.

Punitive or exemplary damages for assault as affected by ability to entertain malicious intent. 123 ALR 1126; 16 ALR 814.

Liability of infant for torts of his employee or agent. 103 ALR 487.

Liability of insane person for tort. 89 ALR 476; 51 ALR 833.

Contract, liability of infant in tort for inducing, by misrepresenting his age. 67 ALR 1264.

Liability of incompetent's estate for torts committed by guardian, committee, or trustee in managing estate. 40 ALR 1103.

27-1-712. Liability for damages for deceit.

Case Notes

Constructive Fraud for Failure to Disclose Risk of Erosion to Field Planted in Old River Channel: The sellers of farm land and an irrigation system failed to disclose to the buyers that the field at pivot three was an old river bed that had been filled but not riprapped and that the field was subject to increased risk of erosion. The buyers spent $99,575 to fix the impairment and sued for damages. The District Court found that the sellers were liable for constructive fraud for failure to disclose, and the sellers contested the District Court findings. The Supreme Court affirmed. The District Court was capable of finding that a risk of increased erosion existed without the benefit of expert testimony. Further, the court's conclusion, that filling the old river bed and creating a greatly increased risk of erosion was a serious impairment, was not clearly erroneous. Moreover, the court did not err in holding that the buyers had no way of knowing of the increased risk, even though a conversation with the the sellers' employee who performed the backfill work would have revealed the problem. The buyers were not required to speak with the sellers' employees before purchasing, particularly given the fact that when the field at pivot three was cleared and leveled, it looked like any other field. The sellers also contended that the buyers had merely to ask their own consultant, who would have informed them of the origin and obvious condition of the field. However, the buyers' consultant did not inspect the fields until after closing of the sale and thus could not have provided the buyers with any knowledge. H-D Irrigating, Inc. v. Kimble Properties, Inc., 2000 MT 212, 301 M 34, 8 P3d 95, 57 St. Rep. 832 (2000).

Agreed Coverage Minus Agreed Premiums as Damages for Insurance Fraud: An insurance agent fraudulently misrepresented that a $150,000 whole life policy converted from term life would only require 3 years of premium payments by the insured and after that would be self-sustained by the payment of premiums out of dividends and other earnings. When the insured discovered the facts, he failed to make the third payment, the policy was canceled, and at the time of the verdict in his favor he was uninsurable. The insured's damages were properly calculated at the agreed coverage minus the 3 years of premiums that he agreed to pay. Cartwright v. Equitable Life Assurance Soc'y, 276 M 1, 914 P2d 976, 53 St. Rep. 268 (1996).

Amount by Which Fraudulent Loans Against Policy to Pay Premiums Decreased Its Coverage as Proper Damages: An insurance agent fraudulently misrepresented that after the insured paid premiums for 4 or 5 years, the policy would be self-sustained by the payment of premiums out of dividends and other earnings. Without the insured's knowledge, after the 4 or 5 years passed, the agent fraudulently had the premiums paid by loans against the policy. The insured's damages were properly calculated to be the amount by which the loans against the policy decreased the coverage amount. Cartwright v. Equitable Life Assurance Soc'y, 276 M 1, 914 P2d 976, 53 St. Rep. 268 (1996).

Contributory Negligence Not to Be Used to Reduce Damages Caused by Insurance Fraud: By statute, contributory negligence can be used to reduce damages due from a defendant because of the defendant's *negligence*. In an action by the insureds against an insurance agent and his company, the insureds' contributory negligence could not be used to reduce damages caused by defendants' *fraud*. Cartwright v. Equitable Life Assurance Soc'y, 276 M 1, 914 P2d 976, 53 St. Rep. 268 (1996).

Cost of Paying for Same Coverage as Damages for Insurance Canceled After Insured Discovered Insurance Agent Fraud and Failed to Pay Further Premiums: An insurance agent fraudulently misrepresented that after the insured paid premiums for 3 years, the policy would be self-sustained by the payment of premiums out of dividends and other earnings. Without the insured's knowledge, after the 3 years passed, the agent fraudulently had the premiums paid by loans against the policy. When the insured discovered the fraud and refused to make further payments, the policy was canceled. The insured's damages were properly calculated to be the amount that it would cost her to purchase the same amount of coverage and pay the premiums until the policy was self-sustaining. Cartwright v. Equitable Life Assurance Soc'y, 276 M 1, 914 P2d 976, 53 St. Rep. 268 (1996).

Cost of Similar Policy as Damages for Fraudulently Inducing Purchase of Policy Canceled When Fraud Was Discovered and Insured Failed to Make Further Payments: An insurance agent fraudulently misrepresented that after the insured paid premiums for 4 or 5 years, the policy would be self-sustained by the payment of premiums out of dividends. Without the insured's knowledge, after the time period passed, the agent fraudulently had the premiums paid by loans

against the policy. The policy was canceled when the insured discovered the fraud and refused to make further premium payments. The insured's damages were properly calculated as the cost of paying for a similar policy. Cartwright v. Equitable Life Assurance Soc'y, 276 M 1, 914 P2d 976, 53 St. Rep. 268 (1996).

Fraudulent Statement That Policy Would Be Self-Sustaining After Three Years — Damages as Cost of Future Premiums and of Repaying Loans Fraudulently Made Against Policy to Pay Past Premiums: An insurance agent fraudulently misrepresented that after the insured paid premiums for 3 years, the policy would be self-sustained by the payment of premiums out of dividends and other earnings. Without the insured's knowledge, after the 3 years passed, the agent fraudulently had the premiums paid by loans against the policy. The insured's damages were properly calculated as the cost of paying back the loans and of making future premium payments. Cartwright v. Equitable Life Assurance Soc'y, 276 M 1, 914 P2d 976, 53 St. Rep. 268 (1996).

Instruction on Duty to Examine Available Fraudulent Form — Fraudulent Material Inserted After Availability Ceases: In an action by the insureds against an insurance agent and his company for the agent's fraud, the lower court properly refused defendants' instruction that one who fails to take the opportunity to examine a written form before executing it cannot claim that the form was fraudulent. The instruction was taken out of context. In addition, the agent's insertion of fraudulent material on insurance applications after plaintiffs saw them made the obligation in the instruction inapplicable to plaintiffs. Cartwright v. Equitable Life Assurance Soc'y, 276 M 1, 914 P2d 976, 53 St. Rep. 268 (1996).

Insurance Agent's Ongoing Misrepresentation That Policies Would Be Self-Sustaining After Three to Five Years: Whole life insurance policies stating that premiums would be due for 20 years, 30 years, or a lifetime (depending on the policy) did not put the insureds on notice that the insurance agent's sales statements were fraudulent. The agent told the insureds that after only 3 to 5 years of premium payments (depending on the policy), the policy would be self-sustaining because premiums would be paid by dividends and other earnings. In fact, the policies stated that dividends could be used to help pay premiums. When the insurer sent the insureds premium payment notices after the 3 to 5 years ended, the insureds contacted the agent, who fraudulently stated that there was a mistake and that he would take care of it. When the insurer later sent the insureds notices stating that the insurer had advanced loans against the policies to pay the premiums, the agent again fraudulently told the insureds that there was a mistake and that he would take care of it. Eventually, each policy was either terminated or lost considerable value. For statute of limitations purposes, the insureds could not be held to have been put on notice (by the policy language) that they should have discovered, and did not discover, the fraud. In addition, the agent's statements at both points in time that there was a mistake that he would take care of tolled the statute of limitations. The insureds first actually learned of the fraud upon speaking directly to insurance company personnel, who told them that the agent had been fired, that there was no such thing as a policy that was self-sustaining after 3 to 5 years, that they should pay no premiums until their questions were resolved, and that there were problems other than the mistakes that the agent had claimed. The suit filed in 1991 was within the 2-year limitation period of 27-2-203. Cartwright v. Equitable Life Assurance Soc'y, 276 M 1, 914 P2d 976, 53 St. Rep. 268 (1996).

Failure to Keep Promise to Pay Medical Bills if Injured Person Travels to Exam — No Fraud: The District Court properly granted the church summary judgment on issues of fraud and misrepresentation in an action arising after plaintiff fell and was injured on church property. Plaintiff claimed that the church agreed in writing to pay medical bills if plaintiff would travel to Salt Lake City for a medical exam. Plaintiff did so, and the church failed to pay. The promise to pay money in the future was not a representation, the first element of a prima facie case for fraud or misrepresentation. Davis v. Church of Jesus Christ of Latter Day Saints, 258 M 286, 852 P2d 640, 50 St. Rep. 535 (1993).

Blank Security Agreement Signed by Borrower and Filled Out by Bank: Borrower signed a blank security agreement that bank then filled out and mailed to her. The record shows that she had the agreement in her possession in December 1985; thus, she had the means to discover the fraud that she alleged bank committed in setting the agreement's terms. Because she did not file a claim until December 1988, her claim was barred by the 2-year statute of limitations. Richland Nat'l Bank & Trust v. Swenson, 249 M 410, 816 P2d 1045, 48 St. Rep. 730 (1991).

No Fraud in Issuance of Paid-in-Full Receipts: Employer claimed fraud and deceit through the issuance by an independent contractor of "paid-in-full" receipts for work done while the employer and contractor were associated. Evidence by the independent contractor showed that he had done the work pro bono for persons who could not pay or had accepted insurance

payments in satisfaction for services rendered. Therefore, giving of the paid-in-full receipts did not fulfill the elements of fraud. Antonick v. Jones, 236 M 279, 769 P2d 1240, 46 St. Rep. 359 (1989).

First-Party Insurance Bad Faith Claim — When Not Supported: Where plaintiff in making a first-party insurance bad faith claim failed to specify any violation of duty by defendant insurer and made no claimant contact with defendant, no request for defense, and no request for indemnity, the directed verdict for defendant was proper. Davis v. Sheriff, 234 M 126, 762 P2d 221, 45 St. Rep. 1783 (1988).

Release Applicable to Claims for Attorney Fees and Bad Faith in Settlement: Where the plaintiff retained counsel to force the defendant insurance company to settle an automobile liability claim and later signed a release of the company when it settled the claim, the District Court did not err in granting summary judgment to the insurance company on the issue of the company's liability for the plaintiff's attorney fees and bad faith in settlement of the claim. The plaintiff's obligation to pay the attorney fees arose prior to the signing of the release, and recovery is therefore precluded by the release. Moreover, while the plaintiff claims it was not his intent to release the company from his claim for bad faith, the release applies to all claims arising out of the occurrence and the plaintiff's intent, unknown to the defendant, therefore is not controlling. Richardson v. Safeco Ins. Co., 206 M 73, 669 P2d 1073, 40 St. Rep. 1515 (1983).

No Fraud Found in Sale of Real Property — Theory of Negligent Misrepresentation Abandoned — Findings and Conclusions Not Clearly Erroneous: Where the plaintiffs agreed to purchase a bar and restaurant from the defendant seller and later brought an action for damages against the county and the county sanitarian, claiming that the sanitarian misrepresented the capacity of the sewer system and conditions of a county license, the findings and conclusions of the District Court were supported by substantial evidence and were not clearly erroneous. The District Court found that the plaintiffs failed to prove their claim of fraud and that the theory of negligent misrepresentation had been abandoned by the plaintiffs. The record contained conflicting evidence but showed that there could have been a misunderstanding between the parties, and a misunderstanding will not support a claim for fraud in the inducement. The statements made by the defendant may have been negligent, but the District Court properly concluded that by failing to argue the theory of negligent misrepresentation, the plaintiffs evidenced an intention to abandon that theory. Lacey v. Herndon, 205 M 379, 668 P2d 251, 40 St. Rep. 1375 (1983).

Constructive and Actual Fraud in Execution of Contract for Deed — Failure to Disclose Violation of Law: Where the plaintiffs sued for damages caused by the defendants' fraud in the execution of a contract for deed for the sale of a shale and concrete block plant, alleging misrepresentations by the defendant company and its agents as to the plant's status of compliance with air and water pollution laws, the court did not err in finding the defendants guilty of constructive fraud. The record shows that the defendants were put on notice of the pollution problems by both the notice of violation of county and state regulations and by complaints and threat of a lawsuit from a neighboring landowner. Because the record is void of any evidence that these impairments of the plaintiffs' property were ever disclosed to the plaintiffs, there is substantial evidence to support the finding of constructive fraud. Actual fraud is always a question of fact, and there was ample evidence upon which the court could find that the factual requisites for actual fraud had been satisfied. Although the court did not make a specific finding that the plaintiff relied upon the false representations by the defendants, the Supreme Court will engage the doctrine of "implied findings" so long as those findings are not inconsistent with express findings and assume that the court found reliance upon the defendants' misrepresentations. Poulsen v. Treasure St. Indus., Inc., 192 M 69, 626 P2d 822, 38 St. Rep. 218 (1981), followed in H-D Irrigating, Inc. v. Kimble Properties, Inc., 2000 MT 212, 301 M 34, 8 P3d 95, 57 St. Rep. 832 (2000).

Sale of Dwelling: In action against building contractor for fraud in sale of newly constructed dwelling, it was held, under facts presented, that plaintiffs had right to rely on representations made by vendor as they did and verdict in their favor was affirmed. Walker v. Hustad, 116 M 495, 154 P2d 483 (1944).

Burden of Proof: In action for deceit in which court instructed on deceit substantially in words of this section and advised jury that if any one of the therein enumerated conditions was established, its verdict should be for plaintiff and followed that instruction with one that plaintiff had burden to prove each of the material allegations of his complaint, the latter instruction was held not erroneous as indicating that the verdict must be in favor of defendant unless plaintiff had proven each and all of the alleged false statements, whereas proof of any one of them was sufficient and error was not committed in not pointing out what were the material

facts at issue, since the jury, in view of the whole charge, could hardly have been misled by the general language in the latter instruction. Russell v. Sunburst Ref. Co., 83 M 452, 272 P 998 (1928).

Property Acquired by Deceit: Under this section acquisition of another's property by deceit is illegal, and all acts done in furtherance of a purpose to so acquire it become tainted with the illegality, although if performed without the unlawful purpose in view, they might of themselves be innocent. Biering v. Ringling, 74 M 176, 240 P 829 (1925).

Suppression of Facts: Deceit or fraud may be negative as well as affirmative; it may consist of suppression of that which it is one's duty to declare as well as in the declaration of that which is false. Bump v. Geddes, 70 M 425, 226 P 512 (1924).

Employment Contract: Oral agreement to employ owner of sheep business as manager after his sale thereof was superseded by written memorandum of sale making no mention of such employment, and thus owner could not maintain action for deceit. Kelly v. Ellis, 39 M 597, 104 P 873 (1909).

Collateral References

Fraud *key* 1 through 33.

37 C.J.S. Fraud §§1, et seq., 22, 26, 60.

37 Am. Jur. 2d Fraud and Deceit §§1, 12, 193.

31 Am. Jur. POF2d Dealer's liability for defective used car, pp. 639 through 749.

31 Am. Jur. POF2d Insurer's breach of covenant of good faith and fair dealing—first-party claims, pp. 323 through 442.

11 Am. Jur. POF2d Real estate broker's fraud as to income from or earnings of property, pp. 623 through 678.

5 Am. Jur. POF2d Fraudulent cancellation of life insurance, pp. 587 through 619.

1 Am. Jur. POF2d Fraudulent alteration of odometer, pp. 677 through 709.

26 Am. Jur. POF Criminal liability for unauthorized use of credit card, pp. 497 through 532; 24 ALR 3d 986.

23 Am. Jur. POF Confidence games and swindles, pp. 1 through 52.

Who is a "consumer" entitled to protection of state deceptive trade practice and consumer protection acts. 63 ALR 5th 1.

Coverage of leases under state consumer protection statutes. 89 ALR 4th 854.

Coverage of insurance transactions under state consumer protection statutes. 77 ALR 4th 991.

Filing of false insurance claims for medical services as ground for disciplinary action against dentist, physician, or other medical practitioner. 70 ALR 4th 132.

Necessity of real-estate purchaser's election between remedy of rescission and remedy of damages for fraud. 40 ALR 4th 627.

Landlord's fraud, deceptive trade practices, and the like, in connection with mobile home owner's lease or rental of landsite. 39 ALR 4th 859.

Bank's liability to real-property purchaser for misrepresentation respecting purchaser's obtaining government guaranteed or subsidized loan. 37 ALR 4th 773.

Award of attorneys' fees in actions under State Deceptive Trade Practice and Consumer Protection Acts. 35 ALR 4th 12.

Imposition of civil penalties, under state statute, upon medical practitioner for fraud in connection with claims under Medicaid, Medicare, or similar welfare programs for providing medical services. 32 ALR 4th 671.

What constitutes fraud or forgery justifying refusal to honor, or injunction against honoring, letter of credit under U.C.C. §5-114(1)(2). 25 ALR 4th 239.

Right to unemployment compensation as affected by misrepresentation in original employment application. 23 ALR 4th 1272.

Liability of repairer for unauthorized, unnecessary, or fraudulent repairs of motor vehicle. 23 ALR 4th 274.

Misrepresentation or concealment by insured or agent avoiding liability by title insurer. 17 ALR 4th 1077.

Insured's nondisclosure of information regarding value of property as ground for avoiding liability under property insurance policy. 15 ALR 4th 1109.

Practices forbidden by State Deceptive Trade Practice and Consumer Protection Acts. 89 ALR 3d 449.

Scope and exemptions of State Deceptive Trade Practice and Consumer Protection Acts. 89 ALR 3d 399, §6 superseded by 63 ALR 5th 1, §9[c] superseded by 77 ALR 4th 991, §10 superseded by 89 ALR 4th 854.

What constitutes "fraudulent and material" alteration of negotiable instrument under U.C.C. §3-407(2)(a). 88 ALR 3d 905.

Real estate broker's liability for misrepresentations as to income from or productivity of property. 81 ALR 3d 717.

Criminal prosecutions for use of "blue box" or similar device permitting user to make long-distance telephone calls without incurring charges. 78 ALR 3d 449.

Fraud in connection with franchise or distributorship relationship. 64 ALR 3d 6.

Criminal prosecution or disciplinary action against medical practitioner for fraud in connection with claims under medicaid, medicare, or similar welfare program for providing medical services. 50 ALR 3d 549, §4 superseded by 70 ALR 4th 132.

Liability for representations and express warranties in connection with sale of used motor vehicle. 36 ALR 3d 125.

Remedies and measure of damages for wrongful cancellation of life, health, and accident insurance. 34 ALR 3d 245.

Infant's misrepresentation as to his age as estopping him from disaffirming his voidable transaction. 29 ALR 3d 1270.

Employer's misrepresentation as to prospect, or duration, of employment as actionable fraud. 24 ALR 3d 1412.

Employer's misrepresentations as to employee's or agent's future earnings as actionable fraud. 16 ALR 3d 1311.

Overvaluation in proof of loss of property insured as fraud avoiding fire insurance policy. 16 ALR 3d 774.

Concealment of or misrepresentation as to prior marital status as ground for annulment of marriage. 15 ALR 3d 759.

Infant's liability for use or depreciation of subject matter, in action to recover purchase price upon his disaffirmance of contract to purchase goods. 12 ALR 3d 1174.

Liability of vendor's real-estate broker or agent to purchaser for misrepresentations as to, or nondisclosure of, physical defects of property sold. 8 ALR 3d 550.

27-1-713. Duty to restore thing wrongfully acquired or retained.

Case Notes

Conversion — Finding of Absolute Ownership Not Required: Under the law of conversion, it is not necessary that plaintiff have an absolute ownership of or title to the property in question, but rather the plaintiff must have an interest in the property entitling plaintiff to possession at the time of the alleged conversion. King v. Zimmerman, 266 M 54, 878 P2d 895, 51 St. Rep. 659 (1994).

Conversion — Leased Premises: Lessor sued for failure of lessee to vacate, and lessee counterclaimed that lessor converted the premises to his own use and interrupted her peaceful possession. Lessee could not get punitive damages under the conversion theory because conversion is a tort applicable to personal chattels and a leasehold interest is not a personal chattel. Nor could punitive damages be granted for interruption of peaceful possession, as it was not proven. In the absence of a showing of tortious conduct, it was error to grant lessee punitive damages in a simple contract action. Lemley v. Allen, 203 M 37, 659 P2d 262, 40 St. Rep. 279 (1983).

Operation and Effect:

Restitution should be granted when to do otherwise would give offense to equity and good conscience so, where plaintiff's attorneys had knowledge that there was some question as to whether the named defendant was the proper party defendant prior to entry of default judgment, which was later set aside, defendant was entitled to restitution of money seized under the default judgment. Waggoner v. Glacier Colony of Hutterites, 131 M 525, 312 P2d 117 (1957).

Where a contract has been made to sell real estate and personal property and possession has been given to the former and delivery made of the latter but the purchaser repudiates the contract and the vendor rescinds, the purchaser is bound, without demand, to restore to the vendor the personalty received and to compensate him for the use and occupation of the land. Hicks v. Rupp, 49 M 40, 140 P 97 (1914). See Hopkins v. Walker, 244 US 486, 61 L Ed 1270, 37 S Ct 711 (1917).

Collateral References

Money Received *key* 1, et seq., 11; Replevin *key* 3 through 7, 11; Trespass *key* 1, et seq.

77 C.J.S. Replevin §§10, et seq., 19, et seq., 33, et seq.; 87 C.J.S. Trespass §1, et seq.

27-1-714. Limits on liability for emergency care rendered at scene of accident or emergency.

Compiler's Comments

1987 Amendment: In (2) substituted "the total reimbursement" for "any reimbursement" and at end inserted "or $3,000 a calendar year, whichever is greater".

1985 Amendment: In (1) near beginning, after "Montana", inserted "any volunteer firefighter or officer of any nonprofit volunteer fire company" and at end, inserted "or assistance"; and inserted "(3) If a nonprofit subscription fire company refuses to fight a fire on nonsubscriber property, such refusal does not constitute gross negligence or a willful or wanton act or omission."

Case Notes

Applicability of Statute Affirmed: The Supreme Court affirmed a finding that the Good Samaritan law applied after finding that: (1) a physician offered care gratuitously and for no compensation; (2) an emergency existed; (3) no gross negligence or willful or wanton acts were committed; and (4) plaintiff conceded that the physician was in a protected and immune class. McCain v. Batson, 233 M 288, 760 P2d 725, 45 St. Rep. 1495 (1988).

Purpose — Standard of Review: The central reason for Good Samaritan legislation in Montana is the need to encourage physicians to render emergency medical care when they otherwise might not. Therefore, the standard of review is one of gross negligence and willful or wanton acts or omissions, rather than ordinary negligence/medical malpractice. McCain v. Batson, 233 M 288, 760 P2d 725, 45 St. Rep. 1495 (1988).

Collateral References

Liability for negligence of ambulance attendants, emergency medical technicians, and the like, rendering emergency medical care outside hospital. 16 ALR 5th 605.

27-1-715. Liability of owner of vicious dog.

Case Notes

Contributory Negligence Not Defense for Dog Owners: Stroop approached Days' property and leaned over the fence to talk to Day, at which time Days' dog ran towards Stroop in a threatening manner. Day alleged that he warned Stroop about placing his hands over the fence. A little later, Stroop leaned over the fence again and was bitten by the dog. Days argued that Stroop's actions constituted contributory negligence. The Supreme Court held that so long as a plaintiff can show that the dog was not provoked and that the plaintiff was legally on the property, then this section creates strict liability on the part of the owner and contributory negligence on the plaintiff's part is not a defense. Stroop v. Day, 271 M 314, 896 P2d 439, 52 St. Rep. 461 (1995).

Provocation to Be Determined on Case-by-Case Basis: Stroop approached Days' property and leaned over the fence to talk to Day, at which time Days' dog ran towards Stroop in a threatening manner. A little later, Stroop leaned over the fence again and was bitten by the dog. The Supreme Court held that provocation of a dog had to be examined on a case-by-case basis and that in the present case, Stroop's actions did not constitute provocation since there was no testimony that his actions were threatening to the dog. Stroop v. Day, 271 M 314, 896 P2d 439, 52 St. Rep. 461 (1995).

Status as Invitee Not Changed by Warning: Stroop approached Days' property and leaned over the fence to talk to Day, at which time Days' dog ran towards Stroop in a threatening manner. Day alleged that he warned Stroop about placing his hands over the fence. A little later, Stroop leaned over the fence again and was bitten by the dog. The Supreme Court held that Day's admonishing Stroop to remove his hands did not revoke Stroop's status as an invitee. Stroop v. Day, 271 M 314, 896 P2d 439, 52 St. Rep. 461 (1995).

Collateral References

Liability of dog owner for injuries sustained by person frightened by dog. 30 ALR 4th 986.

27-1-717. Issuing a bad check, draft, converted check, electronic funds transfer, or order or stopping payment — civil liability — statute of limitations.

Compiler's Comments

2005 Amendment: Chapter 392 in (6) inserted second sentence providing that statute of limitations for liability created under section is 6 years from the date of the demand under subsection (2). Amendment effective October 1, 2005.

2003 Amendment: Chapter 510 in (1) in three places, in (2) and (3) in two places, and in (7) after references to draft inserted references to converted check and electronic funds transfer; in (2) in third sentence after "draft" inserted "converted check"; inserted (8) providing that partial

payments owed do not waive right of payee or assignee and that demand, once made, is not required to be repeated upon partial payment of amounts owed; and made minor changes in style. Amendment effective October 1, 2003.

2001 Amendment: Chapter 515 inserted (7) applying the section to all checks, drafts, and orders, including those electronically presented for payment. Amendment effective October 1, 2001.

1995 Amendment: Chapter 304 in middle of (1) inserted reference to liability for service charge, substituted "payee" for "person", and after "issued" inserted "or the payee's assignee"; inserted (2) providing for up to a $30 service charge for a check, draft, or order dishonored or if payment is stopped and authorizing waiver and providing procedures for service charge demand; in (3), before "greater", inserted "service charge plus the"; in (4) substituted "subsection (3)" for "this section"; at beginning of (4)(a) substituted "the payee or the payee's assignee" for "the person to whom the check, draft, or order was issued" and after "demand" substituted "required in subsection (2)" for "mailed to the last-known address or the address shown on the check, to the drawer for payment of the amount of the check, draft, or order"; in (4)(b) inserted "under subsection (2)"; in (5)(c) substituted "issuer" for "drawer"; inserted (6) providing that failure to receive written demand is not defense to action if evidence establishing mailing of demand is sufficient; adjusted subsection references; and made minor changes in style.

1993 Amendment: Chapter 10 in (4)(c) substituted "30-3-423" for "30-3-422"; and made minor changes in style.

1991 Amendment: In (4)(c) substituted "obligation" for "engagement" and "30-3-422" for "30-3-413".

Saving Clause: Section 232, Ch. 410, L. 1991, was a saving clause.

1985 Amendment: In (1) substituted "A person who issues a check, draft, or an order for the payment of money is liable for damages in a civil action as provided in subsection (2) to the person to whom the check, draft, or order is issued if the check, draft, or order is:

(a) dishonored for lack of funds or credit or because the issuer has no account with the drawee; or

(b) issued in partial or complete fulfillment of a valid and legally binding obligation and the issuer stops payment with the intent to fraudulently defeat a possessory lien or otherwise defraud the payee of the check." for "A person who issues a check, draft, or an order for the payment of money which is dishonored for lack of funds or credit or because he has no account with the drawee is liable to the person to whom the check, draft, or order is issued for damages in a civil action as provided in subsection (2)".

Source: Section 18-3107, Idaho Code.

Case Notes

Acceptance of Partial Payment After Demanding Full Payment — Waiver of Right to Statutory Damages — Summary Judgment Warranted for Violation of Fair Debt Collection Practices Act: Plaintiff collection agency sought to collect $148.96 for eight of defendant's bad checks, plus a $30 service charge for each check, for a total of $388.96. Defendant sent a partial payment, which plaintiff accepted, but missed two promised payments, so plaintiff filed suit for the balance due, plus statutory damages of $100 for each of the eight checks. The Supreme Court affirmed the District Court conclusion that the right of a payee on a dishonored check to pursue statutory damages is a right created solely for the payee's benefit and is subject to waiver under 1-3-204 and that by accepting a partial payment after demanding full payment, plaintiff waived the right to statutory damages under this section. In order to reinstate the right to statutory damages, plaintiff was required to make further demand for full payment and wait the requisite 10 days before filing suit. The District Court also held that by seeking statutory damages without giving the requisite demand, plaintiff had attempted to collect an amount that was not permitted by law, in violation of 15 U.S.C. 1692f(1) of the federal Fair Debt Collection Practices Act. Plaintiff contended that any mistake was a bona fide error, relieving plaintiff of liability under 15 U.S.C. 1692k(c). The Supreme Court again affirmed, accepting the majority view of Circuit Courts that the bona fide error defense is available only for clerical and factual errors and that plaintiff's mistake of law did not make its action any less intentional and was insufficient to rise to the level of a bona fide error. Summary judgment for defendant was proper. Collection Bureau Serv., Inc. v. Morrow, 2004 MT 84, 320 M 478, 87 P3d 1024 (2004). See also Baker v. G.C. Serv. Corp., 677 F2d 775 (9th Cir. 1982).

Law Review Articles

What Attorneys Should Know About the Fair Debt Collection Practices Act, or, the 2 Do's and the 200 Don'ts of Debt Collection, Burnham, 59 Mont. L. Rev. 179 (1998).

Collateral References

Application of "bad check" statute with respect to postdated checks. 52 ALR 3d 464.

Personal liability of officer or directors of corporation on corporate checks issued against insufficient funds. 47 ALR 3d 1250.

27-1-718. Civil penalty for shoplifting.

Compiler's Comments

1999 Amendment: Chapter 397 in (1) and (2) increased maximum penalty from $500 to $1,000. Amendment effective October 1, 1999.

1997 Amendments: Chapter 42 in (1), near beginning after "emancipated minor", deleted "as defined in 20-25-501"; and inserted subsection (5) defining emancipated minor. Amendment effective March 12, 1997.

Chapter 135 at beginning of (3) substituted "Judgments and claims" for "Judgments, but not claims".

Applicability: Section 4, Ch. 135, L. 1997, provided: "[This act] applies to claims for civil penalties for shoplifting based on events occurring after [the effective date of this act]." Effective October 1, 1997.

1995 Amendment: Chapter 546 at end of (2) substituted "department of corrections or the department of public health and human services" for "department of family services"; and made minor changes in style. Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1991 Amendment: Near end of (1), after "amount of", and in (2), after "equal to", inserted "the greater of $100 or".

1987 Amendment: Substituted "department of family services" for "department of social and rehabilitation services".

27-1-719. Liability of seller of product for physical harm to user or consumer.

Compiler's Comments

1997 Amendment: Chapter 429 at beginning of (5) substituted "Contributory fault is a defense" for "Except as provided in this subsection, contributory negligence is not a defense"; at end of (6) substituted "fault" for "negligence" and inserted "and 27-1-705"; and made minor changes in style. Amendment effective on occurrence of contingency.

Preamble: The preamble attached to Ch. 429, L. 1997, provided: "WHEREAS, efforts of the Legislature to amend the comparative negligence statute, which is premised on a modified joint and several liability scheme, have repeatedly been struck down by the Montana Supreme Court; and

WHEREAS, the Montana Supreme Court rulings prohibiting the consideration of fault attributable to nonparties impair the effectiveness of the current modified joint and several liability system in Montana; and

WHEREAS, the Legislature intends that the policy of the state should be a system of comparative fault in which persons are held responsible only to the extent to which they cause or contribute to the harm; and

WHEREAS, the current system of joint and several liability, which apportions all liability only among parties to the action, fails to apportion liability among all tortfeasors according to their equitable share of fault; and

WHEREAS, the Legislature recognizes that public policy favors fair settlements that accurately reflect the liability of settled or released parties; and

WHEREAS, the Legislature is concerned with the present inequitable results of solvent defendants having to pay for the liability of insolvent, immune, or settled parties; and

WHEREAS, the present system of joint and several liability for all tort actions does not reflect the state's policy of liability in proportion to fault; and

WHEREAS, the Legislature recognizes that joint and several liability should be retained for certain situations; and

WHEREAS, at least ten other states have abrogated the doctrine of joint and several liability, except for specific situations; and

WHEREAS, the Legislature has the power to alter tort causes of action to promote legitimate state interests.

THEREFORE, the Legislature declares that the doctrine of joint and several liability is abolished, except for specific causes of action, and is replaced with a comparative fault system utilizing the principles of several liability."

Severability: Section 9, Ch. 429, L. 1997, was a severability clause.

Case Notes

Negligence and Strict Liability Action for Damages by Pesticide Not Preempted by FIFRA — McAlpine Overruled: Plaintiffs brought an action for damages allegedly suffered when a pesticide was applied at the building where they worked. The District Court granted summary judgment for the pesticide manufacturer on the basis that the claims were preempted by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and McAlpine v. Rhone-Poulenc Ag Co., 285 M 224, 947 P2d 474 (1997), because all of the theories of liability were based on inclusions in or omissions from the pesticide labels. In particular, 7 U.S.C. 136v(b) provides that a state may not impose or continue in effect any requirement for labeling or packaging in addition to or different from those required under the federal law. On appeal, the Supreme Court overruled McAlpine and instead applied Medtronic, Inc. v. Lohr, 518 US 470 (1996), concluding that Congress, through FIFRA, intended only to preempt states from imposing positive law requirements in the form of regulations and laws and did not intend to extinguish damage remedies under state common law. The word "requirements" in section 136v(b) means enactments of positive law by legislative or administrative bodies, not state law damage actions. The case was reversed and remanded for further proceedings. Sleath v. West Mont Home Health Serv., Inc., 2000 MT 381, 304 M 1, 16 P3d 1042, 57 St. Rep. 1629 (2000).

Forum State — Contacts Considered in Determining State With More Specific Relationship in Personal Injury or Wrongful Death Product Liability Action: Montana residents were killed in Kansas in a car made in Michigan and sold in North Carolina. Sections 146 and 175 of Restatement (Second) of Conflict of Laws (1971) that deal with personal injury and wrongful death actions provide that the rights and liabilities of the parties are to be determined in accordance with the law of the state where the injury occurred unless, with respect to a particular issue, another state has a more specific relationship. In order to determine whether a state other than the place of injury has a more significant relationship, the following contacts are taken into account, pursuant to Restatement (Second) of Conflict of Laws 145(2) (1971), applying the principles of Restatement (Second) of Conflict of Laws 6 (1971): (1) needs of the interstate and international system; (2) policies of the interested states, including place of injury, place of conduct, and residence of the parties; (3) justified expectations; (4) basic policies underlying the particular field of law; and (5) the certainty, predictability, and uniformity of result as well as the ease in the determination and application of the law to be applied. However, the principles need not be given equal weight. In this case, the relevant policies of the interested states were of primary importance. The focus of Montana law is not only on the regulation of products sold in Montana, but also on providing the maximum protection and compensation to Montana residents, considering mainly the condition of the product and not the conduct of the manufacturer. Kansas, where the injury occurred, did not maintain a similar interest in the application of its product liability laws because the injured were Montana citizens. (See Sternhagen v. Dow Co., 282 M 168, 935 P2d 1139, 54 St. Rep. 299 (1997).) Michigan also lacked such an interest because Michigan's only contact with the dispute was the location of the manufacturer. (See Farrell v. Ford Motor Co., 501 NW 2d 567 (Mich. App. 1993). Under North Carolina's vested rights approach to conflict of laws, that state would apply the law of the jurisdiction where the injury occurred, whatever that law might be. After holding that the relevant residence of the plaintiff was the residence at the time of injury, the Supreme Court found that Montana, as the place of domicile, had a significant relationship to the issues and that because the purpose behind Montana product liability law was implicated by the facts, Montana law should apply. Phillips v. Gen. Motors Corp., 2000 MT 55, 298 M 438, 995 P2d 1002, 57 St. Rep. 259 (2000). See also Tillett v. Lippert, 275 M 1, 909 P2d 1158, 53 St. Rep. 1 (1996).

Lex Loci Delicti Commissi Abandoned — "Most Significant Relationship" Approach Adopted as Choice of Law to Determine Applicable Substantive Law in Issues of Tort: In a personal injury/product liability/wrongful death action in which there is a potential conflict of laws, the traditional choice of law rule, known as lex loci delicti commissi (law of the place where the wrong was committed), which provides that the infliction of injury is actionable under the law of the state in which it was received, was abandoned in favor of the approach in Restatement (Second) of Conflict of Laws 145(1) (1971), which seeks to apply the law of the state with the most significant relationship to the occurrence and the parties. This choice of law was adopted previously in contract disputes in Casarotto v. Lombardi, 268 M 369, 886 P2d 931, 51 St. Rep. 1350 (1994), and the Supreme Court found no reason not to apply it to tort issues in favor of the traditional rule in the present case. Phillips v. Gen. Motors Corp., 2000 MT 55, 298 M 438, 995 P2d 1002, 57 St. Rep. 259 (2000).

Purpose of Choice of Law Rule — Public Policy Subsumed: Addressing the question of whether, in a personal injury and wrongful death action, Montana recognized a public policy

exception that would require application of Montana law even when Montana's choice of law rules dictate application of the laws of another state, the Supreme Court noted that for choice of law purposes, the public policy of a state is simply the rules, as expressed in its legislative enactments and judicial decisions, that it uses to decide controversies. The purpose of choice of law rules is to resolve conflicts between competing policies. In this case, considerations of public policy were accounted for, being expressly subsumed within the "most significant relationship" approach in Restatement (Second) of Conflict of Laws 6(2)(b) and (2)(c) (1971), which mandate consideration of the relevant policies of all the interested states, so a public policy exception to the most significant relationship test would have been redundant. Phillips v. Gen. Motors Corp., 2000 MT 55, 298 M 438, 995 P2d 1002, 57 St. Rep. 259 (2000). See also Casarotto v. Lombardi, 268 M 369, 886 P2d 931, 51 St. Rep. 1350 (1994), and Rothwell v. Allstate Ins. Co., 1999 MT 50, 293 M 393, 976 P2d 512, 56 St. Rep. 203 (1999).

Settlement by One Tortfeasor as Precluding Claims for Contribution and Indemnity Against Settling Tortfeasor Regardless of Underlying Tort Claim: In accordance with common-law principles and the public policy favoring settlements, a settlement by one tortfeasor precludes claims for both contribution and indemnity against the settling tortfeasor, regardless of the nature of the underlying tort claim. This is so even though 27-1-703 states that the trier of fact is to determine the degree of negligence among each of the joint tortfeasors. Actual recovery is allowed only against those tortfeasors who have not settled with the claimant. Durden v. Hydro Flame Corp., 1999 MT 186, 295 M 318, 983 P2d 943, 56 St. Rep. 721 (1999), following State ex rel. Deere & Co. v. District Court, 224 M 384, 730 P2d 396, 43 St. Rep. 2270 (1986).

Sufficient Evidence of No Manufacturing Defect in Tractor Kingpin: Having been properly instructed in product liability law, the jury found that a kingpin, which is the device by which a trailer is attached to a tractor, did not have a manufacturing or design defect at the time of sale that rendered it a defectively designed product, for the manufacture of which liability would ascribe. On appeal, the Supreme Court affirmed, finding the following substantial evidence in support of the jury's decision: (1) two experts testified that any component subject to cyclic loading will develop fatigue cracking in service; (2) an expert testified that the kingpin was adequately radiused with a stress relief groove that allowed the kingpin to properly bottom on the attachment plate, opining that if the kingpin were designed with a larger radius, the stress relief groove would be eliminated and the kingpin would not properly bottom on the attachment plate; and (3) gouges in the kingpin indicated that it may have been abused or misused during its lifetime. The jury's findings were not inherently impossible to believe, so judgment was affirmed. Baldauf v. Arrow Tank & Eng'r Co., Inc., 1999 MT 81, 294 M 107, 979 P2d 166, 56 St. Rep. 337 (1999).

Products Liability Case Elements — Failure to Comply With Case Management Order — Reliance Upon Material Safety Date Sheets Unjustified — Summary Judgment Held Proper:

In this companion case to Schelske, id., involving identical case management orders and similar affidavits and reports from the same doctors, the District Court reviewed the Schelske affidavits and concluded that the affidavits in this case did not go further than the deficient affidavits in *Schelske*; therefore, the court struck one of the doctors' affidavits in its entirety, which in turn became the basis for summary judgment as to all products and all manufacturers. On appeal, the Supreme Court distinguished Schelske and recognized that, based on the information provided, some of the products in question could properly be considered for dismissal. However, it was error to strike the entire affidavit because plaintiff provided sufficient information in pretrial proceedings to allow the case to move forward and to enable the cosmetic manufacturers to proceed with discovery by further deposition of the experts who submitted affidavits, which could have served to eliminate those products for which insufficient information was provided. Although plaintiff may not have completely complied with the case management order as to every product listed, the four requirements of the case management order were satisfied by the information as to many of the products, so summary judgment was improper. Meyer v. Creative Nail Design, Inc., 1999 MT 74, 292 M 46, 975 P2d 1264, 56 St. Rep. 306 (1999).

Mischelle, a plaintiff in a products liability lawsuit, was required by the terms of a case management order (CMO) entered by the District Court to provide a list of products that she had come in contact with, the circumstances of the alleged exposures, an identification of each specific chemical that caused harm, and a physician's opinion of the causal connection between the exposures and the injuries. In response to the CMO, her attorney filed affidavits by several physicians and material safety data sheets (MSDS). The Supreme Court held that the issuance of the CMO was totally within the discretion of the District Court. The District Court dismissed the action on the motions of defendants based upon the plaintiff's affidavits. The case was

properly dismissed because the affidavits failed to establish the elements of a products liability case, as required by the CMO. The Supreme Court noted that in violation of the CMO, the affidavits listed only generic products and not toxic substances within those products, failed to note the specific times Mischelle came in contact with the products, and failed to provide a medical opinion that specific chemicals actually caused Mischelle's illnesses. The medical affidavits stated only that the chemicals listed on the MSDS were "associated with" certain diseases. The Supreme Court also held that Mischelle was not entitled to rely solely upon the MSDS to prove the elements of her case. The MSDS did not demonstrate that the products were defective and did not demonstrate a medical basis for the chemicals having caused Mischelle's diseases. Additionally, the Supreme Court held that although a plaintiff does not have to apportion damage among several defendants, Mischelle must still show that the defendants caused her diseases, which she failed to prove. Schelske v. Creative Nail Design, Inc., 280 M 476, 933 P2d 799, 54 St. Rep. 21 (1997).

Failure of Stucco Product — No Agency Relationship Between Contractor-Applicator and Manufacturer — No Negligence or Strict Liability Found — Leave to Amend Complaint Denied: Sunset Point Partnership (Sunset), a condominium developer, sued Wolstein, d/b/a Stuc-O-Flex Systems; Stuc-O-Flex International, Inc.; and Melton and Fischer, d/b/a Melton Fischer Construction (Melton/Fischer). Sunset's complaint alleged breach of contract, breach of warranty, indemnity, negligence, and strict liability in tort because a stucco-like product that Wolstein, as a subcontractor with Melton/Fischer, applied to the exterior of condominium buildings developed problems. The District Court granted summary judgment in favor of Stuc-O-Flex International, Inc., on each of the five counts in Sunset's complaint, holding that there was no evidence of negligence or breach of contract or warranty by Stuc-O-Flex International, Inc., and no evidence of agency between Stuc-O-Flex International, Inc., and Melton/Fischer. Sunset appealed. Citing previous decisions by it to the effect that in order for there to be ostensible agency the principal and not the agent must have taken steps to lead a third party to the belief that an agency relationship existed, the Supreme Court held that there was no evidence of actual or ostensible agency between Melton/Fischer and Stuc-O-Flex International, Inc., As to Sunset's claim of negligence, the Supreme Court answered Sunset's argument that Stuc-O-Flex International, Inc., was negligent in failing to provide adequate training, supervision, and instruction to Wolstein by pointing out that Sunset's complaint only alleged negligence against the defendants in the "manner in which they applied" Stuc-O-Flex and that there was no record evidence indicating a duty on the part of Stuc-O-Flex International, Inc., to train and supervise Wolstein. Concerning Sunset's claim for strict liability, the Supreme Court noted that Sunset had only alleged defective application of Stuc-O-Flex and had not alleged a defective product. Moreover, the Supreme Court pointed out that Sunset's own expert testified that: (1) there was nothing inherently defective about Stuc-O-Flex; (2) Stuc-O-Flex International, Inc., did not sell a "system" consisting of the material on which the product was applied and the product, but only sold the product itself; and (3) therefore only that product was guaranteed. In its review of the District Court's denial of Sunset's motion to amend its complaint to add the seller of the product as a defendant, the Supreme Court affirmed the District Court's decision, pointing out that the litigation was 2 years old by the time that Sunset made its untimely motion to amend. Sunset Point Partnership v. Stuc-O-Flex Int'l, Inc., 1998 MT 42, 287 M 388, 954 P2d 1156, 55 St. Rep. 141 (1998).

Testimony Regarding Presence of Defect Even Though Failed Part Missing — Request to Dismiss Properly Denied: In their brief in support of summary judgment, defendants requested dismissal because the failed section of an allegedly defective product was missing as a result of plaintiffs' failure to preserve the evidence, rendering defendants unable to examine and evaluate the failed section and prejudicing their ability to present a defense. However, both sides offered testimony through experts' affidavits on the presence of a defect and when it occurred, even though the failed part was missing. Thus, the District Court did not abuse its discretion in denying the motion to dismiss because of the missing evidence. Wood v. Old Trapper Taxi, 286 M 18, 952 P2d 1375, 54 St. Rep. 1263 (1997), following Brandenburger v. Toyota Motor Sales, U.S.A., Inc., 162 M 506, 513 P2d 268 (1973).

Weak Possibility of Manufacturing Defect and Product Liability — Summary Judgment Improper: The District Court granted defendants' request for summary judgment on a manufacturing defect claim when the key piece of evidence was unavailable and the expert testimony was conflicting on whether or when a defect existed, concluding that plaintiffs' evidence suggested only a weak possibility that a manufacturing defect was present when the product was shipped from the manufacturer 30 years earlier. Nevertheless, the Supreme Court, considering the evidence in a light most favorable to plaintiffs, concluded that a jury could

reasonably find that a defect existed before the product left the manufacturer and that as long as a material issue of fact was in dispute, summary judgment was improper. Wood v. Old Trapper Taxi, 286 M 18, 952 P2d 1375, 54 St. Rep. 1263 (1997).

Damage to Crops by Herbicide — Extent of Preemption by FIFRA — Claims for Breach of Express and Implied Warranty Not Preempted — Negligence and Strict Liability Preempted — Remedy for Prevention of Discovery by Summary Judgment: McAlpine applied Weedone LV6, a herbicide manufactured by Rhone-Poulenc and distributed by Ben Taylor, to crops of barley and spring wheat. After several weeks of cool morning temperatures, McAlpine noticed damage to his crops, which experts from Montana State University (now Montana State University-Bozeman) and the Montana Department of Agriculture said was caused by cool temperatures after application of the herbicide. The McAlpines brought a civil action against Rhone-Poulenc, claiming damages from negligence, breach of express and implied warranty, and strict liability. The District Court granted summary judgment for the defendants on the basis that the plaintiffs' claims were based on deficiencies in the label on Weedone LV6 and that those claims were preempted by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Citing Wis. Pub. Intervenor v. Mortier, 501 US 597 (1991), and Cipollone v. Liggett Group, Inc., 505 US 504 (1992), the Supreme Court interpreted the FIFRA preemption statement, 7 U.S.C. 136v(b), to preempt only claims based upon negligence in labeling and not to preempt the appellants' claims based upon either express or implied warranty or strict liability. Therefore, the Supreme Court held that the appellants must be given the opportunity to prove that Rhone-Poulenc and Ben Taylor breached their warranty by designing, manufacturing, and marketing a product that was inherently defective and that the same defendants are strictly liable for designing, manufacturing, and marketing an unreasonably dangerous product. In response to Rhone-Poulenc's argument that the McAlpines failed to offer any evidence to defeat summary judgment, the Supreme Court pointed out that because the District Court granted summary judgment, the McAlpines were prevented from conducting complete discovery and that until discovery was completed, it was premature for the Supreme Court to conclude that the McAlpines' evidence was insufficient. McAlpine v. Rhone-Poulenc Ag Co., 285 M 224, 947 P2d 474, 54 St. Rep. 1123 (1997), overruled in Sleath v. West Mont Home Health Serv., Inc., 2000 MT 381, 304 M 1, 16 P3d 1042, 57 St. Rep. 1629 (2000), holding that state common-law negligence and strict liability claims based on or implicating pesticide labels are not preempted by FIFRA. Following the 1997 remand, the McAlpines settled with Ben Taylor, Inc., and proceeded to trial against Rhone-Poulenc on a theory of strict products liability, claiming that Weedone LV6 was a defective product because its propensity to damage or destroy crops in conjunction with cold weather was a danger outside the expectations of the ordinary consumer. Rhone-Poulenc acknowledged that the crop damage was caused by the phenoxy herbicide, but argued that the damage was not unreasonably dangerous and that liability exists only when a product is sufficiently dangerous. The trial court instructed the jury that it must find that the herbicide was in a "defective condition unreasonably dangerous", rather than merely in a defective condition, and the jury returned a verdict for Rhone-Poulenc. The McAlpines appealed. The Supreme Court previously held in McJunkin v. Kaufman, 229 M 432, 748 P2d 910 (1987), that a product is defective if it is unreasonably dangerous, but a plaintiff is not required to show that a product is defective and also that it is unreasonably dangerous, because establishing that a product is unreasonably dangerous is merely a means of proving that it is defective. Thus, the "defective condition unreasonably dangerous" language creates a vague and imprecise dual test and should not have been submitted to the jury because it was not plain, clear, and concise. The jury should have been required to find merely that the product was in a defective condition, so the case was again remanded. Further, the decision in Sleath, id., also applied on remand, so evidence of the product label was admissible in further proceedings. McAlpine v. Rhone-Poulenc Ag Co., 2000 MT 383, 304 M 31, 16 P3d 1054, 57 St. Rep. 1644 (2000).

Absence of Evidence of Defective Vehicle Window Design — Failure to Warn Not Defect — Jury Verdict Affirmed: As Wise drove a Ford Escort through a car wash, one of the side windows imploded when water was sprayed on it, injuring Wise, who sued Ford Motor Company for damages. The District Court properly applied the standards of product tort liability, including Ford's liability for failure to warn of a danger in its product as a separate theory of product liability. Alternate causes of the breakage were not necessarily eliminated, and the jury could have found that Wise did not meet his burden of proof by way of circumstantial evidence. The jury found in favor of Ford. Evidence supported the verdict that the vehicle was not defectively designed or defective for Ford's failure to warn that the side windows could break. Because the jury had substantial evidence upon which to base its decision that the vehicle did not have an

unreasonably dangerous defective condition, judgment was affirmed. Wise v. Ford Motor Co., 284 M 336, 943 P2d 1310, 54 St. Rep. 909 (1997).

Limitation of Discovery Regarding Similar Product Models and Prior Injuries Improper: Preston alleged defective design of an N12 model pneumatic roofing nailer. The District Court limited discovery to information about the N12 nailer only and to information on the N12 from the time of manufacture to the date of Preston's injury. The Supreme Court held that the discovery limitations were arbitrary and improper. Evidence of prior injuries by similar, although not identical, products is relevant. Although evidence subsequent to the date of injury is not relevant to the alternative design issue, it is relevant to the unreasonably dangerous design issue. The fact that the same design continues to cause injuries is relevant to establishing the dangerousness of the product. Allowing the discovery restrictions to stand would have not only unfairly disadvantaged Preston but would have also defeated the purpose of the rules of procedure by requiring Preston to endure the time and expense of trial and an appeal before obtaining discoverable evidence essential to the case. That portion of the District Court's order restricting discovery was vacated, and the case was remanded. Preston v. District Court, 282 M 200, 936 P2d 814, 54 St. Rep. 312 (1997).

Adoption of Imputation of Knowledge Doctrine — Rejection of State-of-the-Art Defense: The Supreme Court has consistently adhered to the core public policy principles underlying strict products liability. The principles were clarified and adopted in the present case as the imputation of knowledge doctrine. Under that doctrine, knowledge of a product's undiscovered or undiscoverable dangers is imputed to the manufacturer, basing the focus of strict liability on the product rather than on the manufacturer's conduct. The court specifically rejected admissibility of the state-of-the-art defense, which is based on whether the manufacturer knew or, through the exercise of reasonable human foresight, should have known the dangers inherent in the product. The defense raises the issues of reasonableness and foreseeability to determine a manufacturer's liability. To recognize the state-of-the-art defense would interject negligence principles into strict products liability law, severing that law from the well-established core principle of maximum protection for consumers, with the focus on the condition of the product. Rejection of the state-of-the-art defense does not change the requirements of plaintiff's prima facie case. Sternhagen v. Dow Co., 282 M 168, 935 P2d 1139, 54 St. Rep. 299 (1997), following Brandenburger v. Toyota Motor Sales, U.S.A., Inc., 162 M 506, 513 P2d 268 (1973), and Brown v. N. Am. Mfg. Co., 176 M 98, 576 P2d 711 (1978).

Assumption of Risk — Error to Submit Defense to Jury: When use of a crane by sideloading is reasonably foreseeable to a manufacturer, it cannot be considered an unreasonable use. Decedent who was electrocuted when a crane cable touched a power line did not unreasonably use the crane unless he knew in advance that the cable would contact the power line. Because decedent did not know that, he could not have assumed the risk for his own death. Therefore, it was error for the District Court to submit the affirmative defense of assumption of risk to the jury. Lutz v. Nat'l Crane Corp., 267 M 368, 884 P2d 455, 51 St. Rep. 810 (1994).

Reasonably Foreseeable Misuse Not Defense — Error to Submit Defense to Jury: Plaintiff's husband was killed in a crane electrocution accident when the crane's cable touched electrical power lines while he was loading pipes onto a flatbed trailer. Plaintiff sued the crane manufacturer, among others. The jury award in favor of plaintiff was reduced by 20%, the percentage of responsibility allocated to plaintiff's husband. On appeal, the Supreme Court held that reasonably foreseeable misuse is reasonable misuse and is therefore not a recognizable defense under this statute. When the party asserting the unreasonable misuse defense acknowledges the foreseeability of the misuse, then, as a matter of law, it is improper for the District Court to submit that issue for determination to the trier of fact. Lutz v. Nat'l Crane Corp., 267 M 368, 884 P2d 455, 51 St. Rep. 810 (1994).

Strict Liability Claim — Negligence Not Defense: Negligence of a decedent, his fellow employees, or others is not a defense to a strict liability claim. Therefore, contributory negligence is not a defense in a strict liability action, and the District Court correctly instructed the jury. Lutz v. Nat'l Crane Corp., 267 M 368, 884 P2d 455, 51 St. Rep. 810 (1994).

Strict Liability — Not Error to Exclude Government Regulations: In a strict liability claim against a crane manufacturer, it was not error to exclude government regulations. The fact that government regulations address permissive use of insulated links on cranes is not relevant to dispositive issues in design defect cases. Analysis must focus on the feasibility and practicality of the design, as well as on the marketability. Even if the regulations had some tenuous relevance in a products liability case, it was not reversible error for the District Court to exclude them. Lutz v. Nat'l Crane Corp., 267 M 368, 884 P2d 455, 51 St. Rep. 810 (1994).

Misuse of Product Excludes Reasonably Foreseeable Use: Hart-Albin sued Leviton under a strict liability theory for manufacture of an extension cord connector that caused a fire in the Hart-Albin store. Leviton defended, alleging that the connector was misused because it was improperly assembled by a store employee, but acknowledged that it was "possible" for the connector to be misused or misassembled. The Supreme Court held that the defense of misuse of a product was not available to a party if the misuse was foreseeable and that Leviton had admitted that misassembly was foreseeable. The Supreme Court concluded that the District Court had erred in instructing the jury on the misuse defense and that because the jury had answered a special interrogatory concerning the extension cord in the negative, there was no purpose in retrying the issue of whether there was another cause of the fire. Hart-Albin Co. v. McLees, Inc., 264 M 1, 870 P2d 51, 51 St. Rep. 112 (1994).

Builders Not Liable for Negligence After Relinquishment of Control: The liability of builders is terminated once work is finished and control and ownership is transferred to the subsequent owners. Papp v. Rocky Mtn. Oil & Minerals, Inc., 236 M 330, 769 P2d 1249, 46 St. Rep. 400 (1989). However, see Wiesner v. BBD Partnership, 256 M 158, 845 P2d 120, 50 St. Rep. 17 (1993).

Oil Separator Facility Not "Product" Within Meaning of Liability Statute: Plaintiff sought compensation under a strict product liability theory for the death of her husband who was overcome by hydrogen sulfide gas while working in an oil separator facility. She claimed the facility and its components were defective and unreasonably dangerous. The District Court summarily dismissed the claim on the grounds that the facility was not a "product" within the meaning of Restatement (Second) of Torts 402A. The Supreme Court affirmed after finding that: (1) defendants were not in the business of selling separator facilities as required by section 402A; (2) the alleged product did not reach the stream of commerce nor was the decedent a "consumer" as defined by the policy considerations in Brandenburger v. Toyota Motor Sales, U.S.A., Inc., 162 M 506, 513 P2d 268 (1973); and (3) the separator facility, a building, was not a product. Papp v. Rocky Mtn. Oil & Minerals, Inc., 236 M 330, 769 P2d 1249, 46 St. Rep. 400 (1989).

Speed Bump Not "Product" for Purposes of Strict Liability: A speed bump is not a "product" for purposes of determining strict product liability under Restatement (Second) of Torts 402A. Harrington v. LaBelle's of Colo., Inc., 235 M 80, 765 P2d 732, 45 St. Rep. 2176 (1988), overruled in part by Pierce v. ALSC Architects, P.S., 270 M 97, 890 P2d 1254, 52 St. Rep. 93 (1995). See also Brandenburger v. Toyota Motor Sales, 162 M 506, 513 P2d 268 (1973).

Indemnification Action — Defense of Contributory Negligence Unavailable: Contributory negligence is not available in Montana as a defense in an action for indemnification. Jones v. Aero-Chem Corp., 680 F. Supp. 338, 45 St. Rep. 360 (D.C. Mont. 1987).

Products Liability — "Upstream" Indemnification From Manufacturer of Defective Component: The federal District Court, noting the Montana Supreme Court decision in Brandenburger v. Toyota Motor Sales, 162 M 506, 513 P2d 268 (1973), adopted as a general proposition the rule that allows the manufacturer/assembler of a finished product to seek indemnification from the manufacturer of a component part that was defective at the time it left the component manufacturer's hand and that was integrated as part of the finished product. Jones v. Aero-Chem Corp., 680 F. Supp. 338, 45 St. Rep. 360 (D.C. Mont. 1987).

Legal Effect of Warnings — Admissibility of Subsequent Remedial Measures: On November 19, 1977, Gauthier injured his hand when he placed it inside the discharge chute of a running snow thrower to unclog snow. He brought a strict liability action against the manufacturer alleging defective design. The federal District Court entered judgment in Gauthier's favor, and defendant appealed. The court of appeals held that: (1) under Montana law, the manufacturer was entitled to an instruction regarding the legal effect of adequate warnings; and (2) evidence regarding subsequent design changes in the snow thrower industry was inadmissible. The case was reversed and remanded. Gauthier v. AMF, Inc., 788 F2d 634 (9th Cir. 1986). On petition for rehearing and suggestion for rehearing en banc, the court of appeals held that evidence regarding subsequent remedial measures by nonparties was inadmissible as irrelevant and denied the petition. Gauthier v. AMF, Inc., 805 F2d 337 (9th Cir. 1986).

Products Liability — Applicable to Commercial Case — Duty of Care: Plaintiffs sued manufacturer of chemical potato sprout suppressant when use of the product caused erratic growing results in potato crop. District Court jury found defendant liable for damages based on theories of strict liability, negligence, and breach of warranty. Supreme Court affirmed. Supreme Court held that jury was properly charged that a manufacturer has a duty to use reasonable care to give warning of dangerous condition of a product to those he expects to use the product or those endangered by its foreseeable use. Use of accepted form of instructions for personal injury cases that was modified to fit a property damage case was not error. Streich v. Hilton-Davis, 214 M 44, 692 P2d 440, 41 St. Rep. 2310 (1984), followed in Krueger v. Gen. Motors

Corp., 240 M 266, 783 P2d 1340, 46 St. Rep. 2114 (1989), and Wood v. Old Trapper Taxi, 286 M 18, 952 P2d 1375, 54 St. Rep. 1263 (1997).

Dual Capacity Doctrine — Products Liability Suit by Employee Against Employer — Employer Not a Manufacturer or Seller of the Product: A workman injured on an oil rig sued his employer, the owner of the rig, for products liability, claiming the rig was defective. The dual capacity doctrine is invoked in workers' compensation cases when the employer may be said to owe some duty to an injured employee distinct from his duties as an employer, commonly, when an employee is injured by a piece of equipment manufactured by the employer. Whether this doctrine exists in Montana is not clear; but the question need not be answered because, even assuming that the doctrine applies in Montana, the facts do not support products liability as to the employer. The employer did not manufacture oil rigs to sell to the public and did not place in the stream of commerce the rig involved or any other rig. Montana law requires one held liable for products liability to have been a seller of the defective product. Mitchell v. Shell Oil Co., 579 F. Supp. 1326, 41 St. Rep. 278 (D.C. Mont. 1984).

Products Liability — Circumstantial Evidence — Types: Circumstantial evidence may be used to show a product defective and may consist of proof of the circumstances of the accident, similar occurrences under similar circumstances, and elimination of alternative causes. Brothers v. Gen. Motors Corp., 202 M 477, 658 P2d 1108, 40 St. Rep. 226 (1983).

Products Liability — Auto Steering Loss — No Prima Facie Case: Testimony of driver of auto and her daughter that as they were driving around a bend there was a tremor in the steering wheel and two short bumps, after which driver could not turn wheel and the auto went into a ditch, and evidence that the auto was in good condition did not raise an inference that the steering mechanism was defective in design or manufacture and did not make a prima facie strict products liability case. Brothers v. Gen. Motors Corp., 202 M 477, 658 P2d 1108, 40 St. Rep. 226 (1983).

Products Liability — Elements: In a products liability action, the plaintiff must show three things: (1) the plaintiff was injured by the product; (2) the injury occurred because the product was defective and unreasonably dangerous; and (3) the defect existed when it left the hands of the particular defendant. Brothers v. Gen. Motors Corp., 202 M 477, 658 P2d 1108, 40 St. Rep. 226 (1983), followed in Schelske v. Creative Nail Design, Inc., 280 M 476, 933 P2d 799, 54 St. Rep. 21 (1997).

Res Ipsa Loquitur — Products Liability — Auto Accident — Not Applicable to Manufacturer and Seller: Res ipsa loquitur is generally applied to human conduct, not to defective products. The control that manufacturer and seller of used auto exercised over it with respect to the time it was involved in accident was so remote that any causal connection between their duty toward purchaser, who was driving it when it went out of control and crashed, and purchaser's injuries was broken. In addition, other reasonable causes of the accident were not eliminated and the allegations of purchaser and her passenger were purely speculative. Therefore, no reasonable inference that manufacturer and seller were negligent could be made and res ipsa loquitur did not apply. Brothers v. Gen. Motors Corp., 202 M 477, 658 P2d 1108, 40 St. Rep. 226 (1983).

Products Liability — Plaintiff's Evidence — Best Types: The nature and quality of evidence used in products liability cases to show the defect and the nexus between the defect and the accident naturally vary. The most convincing evidence is an expert's pinpointing the defect and giving his opinion on the precise cause of the accident after a thorough inspection. If an accident sufficiently destroys the product or the crucial parts thereof, an expert's opinion on the probabilities that a defect caused the accident would be helpful. If no such opinion is possible, as in the present case, the user's testimony on what happened is another method of proving that the product was defective. If the user is unable to testify, as where the accident killed or incapacitated him, no other witness was present at the time of the accident, and the product was destroyed, the fact of the accident and the probabilities are all that remain for the party seeking recovery. At this point the plaintiff can attempt to negate the user as the cause and further negate other causes not attributable to the defendant. These kinds of proof introduced alone or cumulatively are evidence which help establish the presence of a defect as the cause of the damage. Brothers v. Gen. Motors Corp., 202 M 477, 658 P2d 1108, 40 St. Rep. 226 (1983).

Products Liability — When Only Damage Done Is to Defective Product Itself: Six years after she had purchased a mobile home, appellant filed an action against the seller for damages for breach of warranty and for property damages based on strict liability in tort, alleging that the mobile home had been defective and unfit for use from the time of sale. The trial judge dismissed the strict liability claim, and the jury found for the defendants on all other counts. The Supreme Court reversed the dismissal and remanded to the trial court, holding that a claim of strict

liability in tort can be maintained when the only injury suffered is to the defective product itself. Thompson v. Nebr. Mobile Homes Corp., 198 M 461, 647 P2d 334, 39 St. Rep. 1094 (1982).

Products Liability — Statute of Limitations — Discovery Rule Not Applicable: Plaintiff was injured in May 1975, when his holstered Ruger revolver discharged into his leg as he crawled under some brush. He filed this products liability action in September 1979. Ruger moved for summary judgment based upon the running of the Statute of Limitations. Plaintiff urges adoption of a discovery rule respecting accrual of the cause of action. Discovery rules have been limited to latent injuries resulting primarily from either drug products or medical malpractice. Montana statutes permit a discovery rule in actions for fraud or mistake and in actions for malpractice. The Statute of Limitations for tort actions, however, does not authorize application of a discovery rule. Adoption of such a rule would destroy the very policies which justify the Statute of Limitations. To allow a plaintiff who fails to inquire into the cause of injury to avoid the time bar under the guise of "discovery" would hopelessly demolish the protection afforded defendants by the Statute. Much v. Sturm, Ruger & Co., Inc., 502 F. Supp. 743, 37 St. Rep. 2116 (D.C. Mont. 1980).

Effect of "As Is" Clause in Used Car Sales Agreement: When defendant failed to inspect a car for defects before sale to plaintiff and the defect that was the proximate cause of plaintiff's accident and subsequent injuries would have been discovered in a reasonable safety inspection, defendant should not be allowed to hide behind the cloak of a simple "as is" disclaimer. Public policy requires a used car dealer to inspect the cars he sells and to make sure they are in safe, working condition. Kopischke v. First Cont. Corp., 187 M 471, 610 P2d 668 (1980).

Products Liability — Indemnity — Third-Party Actions: Plaintiff was injured when a pickup truck in which he was riding rolled over. Plaintiff sued General Motors and also the manufacturer of the pants he was wearing. Plaintiff alleged the pants were defective and increased the severity of his injuries by melting onto his skin. The pants manufacturer filed a third-party complaint against Burlington Industries who had manufactured the pants material and supplied it to Corbin, Ltd., the maker of the pants. Burlington moved for dismissal of the third-party complaint, saying that indemnity for tort liability cannot be sought in a third-party action when the primary complaint sounds in strict products liability, indemnity being antithetical to and inapplicable in strict liability actions. Corbin argued that such indemnity is permissible through a process of weighing the comparative fault of two potentially liable parties, despite the fact the action was in strict liability, not in negligence. The U.S. District Court agreed with the Burlington arguments, observing that Corbin offered little supporting authority while Burlington cited ample authority. The court also noted that Montana has adopted section 402A of the Restatement of Torts, including the conclusion that the doctrine of strict liability was evolved to place liability on the party primarily responsible for the injury occurring, that is, the manufacturer of the defective product, a position based on public policy arguments. The question in Montana is the condition of the product in the hands of the injured party, not the ultimate fault of any given defendant arising from such defendant's conduct. Kelly v. Gen. Motors Corp., 487 F. Supp. 1041 (D.C. Mont. 1980), distinguished in Jones v. Aero-Chem Corp., 680 F. Supp. 338, 45 St. Rep. 360 (D.C. Mont. 1987).

Law Review Articles

The Defense of Assumption of Risk Under Montana's Product Liability Law, Lukes, 58 Mont. L. Rev. 249 (1997).

Developments in Montana Products Liability Law, 1977-1987, Bronson, 48 Mont. L. Rev. 297 (1987).

Torts, II. Strict Liability in Tort, Dzivi, 44 Mont. L. Rev. 342 (1983).

Limitations on Manufacturer Liability in Second Collision Actions, Reichert, 43 Mont. L. Rev. 109 (1982).

Torts, II. Products Liability, Reichert, 42 Mont. L. Rev. 433 (1981).

Comparative Principles and Products Liability in Montana, Carestia, 41 Mont. L. Rev. 269 (1980).

Montana Supreme Court Survey, Part I. Torts—II. Experts in Products Liability, Clemens, 41 Mont. L. Rev. 125 (1980).

Products Liability in Montana: At Last a Word on Defense, Morrison, 40 Mont. L. Rev. 327 (1979).

Montana Supreme Court Survey, Part I: Private Law. Torts—II. Strict Liability, III. Products Liability, Beck & Spooner, 40 Mont. L. Rev. 64 (1979).

A Framework for Analysis of Products Liability in Montana, Tobias & Rossbach, 38 Mont. L. Rev. 221 (1977).

Liability of the Manufacturer to the Ultimate Consumer, Bender, 31 Mont. L. Rev. 51 (1969).

Montana's "Long Arm" Statute Construed: Product Liability, Cromley, 28 Mont. L. Rev. 260 (1967).

Liability of the Manufacturer to the Ultimate Consumer Under Modern Merchandising Practices, Steensland, 9 Mont. L. Rev. 101 (1948).

Sales: Retail Dealer's Liability for Injury Arising From Consumption of Adulterated Canned Food, Besancon, 2 Mont. L. Rev. 133 (1941).

Is There a Doctor in the House? Using Failure-to-Warn Liability to Enhance the Safety of Online Prescribing, Chuang, 75 N.Y.U. L. Rev. 1452 (2000).

Collateral References

Products Liability *key* 1, et seq.

72 C.J.S. Supplement Products Liability, §1, et seq.; 86 C.J.S. Torts §18.1.

1 Am. Jur. 2d Actions §41; 63 Am. Jur. 2d Products Liability §§1 through 3, 517, et seq.; 74 Am. Jur. 2d Torts §§12, 13.

For specific product, see "Products Liability" in ALR index.

Liability of successor corporation for injury or damage caused by product issued by predecessor, based on successor's express or implied agreement to assume liability or where transfer was fraudulent, in bad faith, or without adequate consideration. 112 ALR 5th 113.

Liability of successor corporation for injury or damage caused by product issued by predecessor, based on merger or consolidation of transferor and transferee. 109 ALR 5th 301.

Liability of successor corporation for injury or damage caused by product issued by predecessor, based on successor's independent duty to warn third party of danger or defect. 92 ALR 5th 227.

Bystander recovery under state law for emotional distress from witnessing another's injury in products liability context. 90 ALR 5th 179.

Products liability: ladders. 81 ALR 5th 245.

Products liability: Admissibility of evidence of subsequent repairs or other remedial measures by third party other than defendant. 64 ALR 5th 119.

"Concert of activity," "alternate liability," "enterprise liability," or similar theory as basis for imposing liability upon one or more manufacturers of defective uniform product, in absence of identification of manufacturer of precise unit or batch causing injury. 63 ALR 5th 195.

Forum non conveniens in products liability cases. 76 ALR 4th 22.

Products liability: contributory negligence or assumption of risk as defense in negligence action based on failure to provide safety device for product causing injury. 75 ALR 4th 443.

Strict products liability: product malfunction or occurrence of accident as evidence of defect. 65 ALR 4th 346.

Liability of successor corporation for punitive damages for injury caused by predecessor's product. 55 ALR 4th 166.

Attorneys' fees in products liability suits. 53 ALR 4th 414.

Products liability: admissibility of evidence of absence of other accidents. 51 ALR 4th 1186.

Products liability: admissibility of defendant's evidence of industry custom or practice in strict liability action. 47 ALR 4th 621, §§5 through 8.

Products liability: liability of manufacturer or seller as affected by failure of subsequent party in distribution chain to remedy or warn against defect of which he knew. 45 ALR 4th 777, §§8, 11, 12[a, b], 14, 16[c], 20[c], 22[a].

Products liability: inconsistency of verdicts on separate theories of negligence, breach of warranty, or strict liability. 41 ALR 4th 9, §§3[a, b], 6.

Products liability: automobile manufacturer's liability for injuries caused by repairs made under manufacturer's warranty. 40 ALR 4th 1218.

Products liability: duty of manufacturer or seller of component part incorporated in another product to warn of dangers. 39 ALR 4th 6, §§3 through 7, 9.

Products liability: admissibility of evidence of postinjury warning measures undertaken by defendant. 38 ALR 4th 583, §§5[a], 7[b].

Strict products liability: liability for failure to warn as dependent on defendant's knowledge of danger. 33 ALR 4th 368.

Right of tortfeasor to contribution from joint tortfeasor who is spouse or otherwise in close familial relationship to injured party. 25 ALR 4th 1120, §§4[a], 8.

Pre-emption of strict liability in tort by provisions of UCC Article 2. 15 ALR 4th 791.

Allowance of punitive damages in products liability case. 13 ALR 4th 52.

Propriety of awarding punitive damages to separate plaintiffs bringing successive actions arising out of common incident or circumstances against common defendant or defendants ("one bite" or "first comer" doctrine). 11 ALR 4th 1261.

Workmen's Compensation Act as furnishing exclusive remedy for employee injured by product manufactured, sold, or distributed by employer. 9 ALR 4th 873, §§5, 6[a].

Applicability of comparative negligence doctrine to actions based on strict liability in tort. 9 ALR 4th 633.

Products liability: sufficiency of proof of injuries resulting from "second collision". 9 ALR 4th 494.

Products liability: admissibility of expert or opinion evidence that product is or is not defective, dangerous, or unreasonably dangerous. 4 ALR 4th 651, §3[a].

Construction and effect of new motor vehicle warranty limiting manufacturer's liability to repair or replacement of defective parts. 2 ALR 4th 576.

Third-party beneficiaries of warranties under UCC §2-318. 100 ALR 3d 743.

Products liability: manufacturer's or seller's obligation to supply or recommend available safety accessories in connection with industrial machinery or equipment. 99 ALR 3d 693.

When is person "engaged in the business" for purposes of doctrine of strict tort liability. 99 ALR 3d 671.

Products liability: defective vehicular gasoline tanks. 96 ALR 3d 265.

Products liability: modern cases determining whether product is defectively designed. 96 ALR 3d 22, §§3 through 9, 10[c], 11[c].

Products liability: duty of manufacturer to equip product with safety device to protect against patent or obvious danger. 95 ALR 3d 1066.

Prospective buyer's release of prospective seller from liability for injuries resulting from trial use or inspection of product for sale. 93 ALR 3d 1296.

Statute of limitations: running of statute of limitations on products liability claim against manufacturer as affected by plaintiff's lack of knowledge of defect allegedly causing personal injury or disease. 91 ALR 3d 991.

Products liability: what statute of limitations governs actions based on strict liability in tort. 91 ALR 3d 455, §5.

Products liability: admissibility, against manufacturer, of product recall letter. 84 ALR 3d 1220.

Admissibility of evidence of subsequent repairs or other remedial measures in products liability cases. 74 ALR 3d 1001, §16 superseded by 38 ALR 4th 583, §20 superseded by 64 ALR 5th 119.

Products liability: liability of successor corporation for injury or damage caused by product issued by predecessor. 66 ALR 3d 824, §4[c].

Products liability: proof, under strict tort liability doctrine, that defect was present when product left hands of defendant. 54 ALR 3d 1079, §§4 through 6.

Products liability: product as unreasonably dangerous or unsafe under doctrine of strict liability in tort. 54 ALR 3d 352, §4[b].

Products liability: strict liability in tort where injury results from allergenic (side-effect) reaction to product. 53 ALR 3d 298, §5.

Failure to warn as basis of liability under doctrine of strict liability in tort. 53 ALR 3d 239, §15.

Products liability: application of strict liability in tort doctrine to lessor of personal property. 52 ALR 3d 121.

Necessity and propriety of instructing on alternative theories of negligence or breach of warranty, where instruction on strict liability in tort is given in products liability case. 52 ALR 3d 101, §3.

Products liability: necessity and sufficiency of identification of defendant as manufacturer or seller of product alleged to have caused injury. 51 ALR 3d 1344, §§7[b], 13, 17.

Products liability: contributory negligence or assumption of risk as defense under doctrine of strict liability in tort. 46 ALR 3d 240, §§4[a], 5, 7[b, c], 8, 9[a].

Products liability: admissibility of evidence of other accidents to prove hazardous nature of product. 42 ALR 3d 780, §§3, 4[a, b].

Liability of manufacturer, seller, or distributor of motor vehicle for defect which merely enhances injury from accident otherwise caused. 42 ALR 3d 560, §8 superseded by 96 ALR 3d 265.

Products liability: alteration of product after it leaves hands of manufacturer or seller as affecting liability for product-caused harm. 41 ALR 3d 1251, §§3[b], 4.

Liability of product indorser or certifier for product-caused injury. 39 ALR 3d 181.

Judgment in action against seller or supplier of product as res judicata in action against manufacturer for injury from defective product, or vice versa. 34 ALR 3d 518, §3.

Products liability: extension of strict liability in tort to permit recovery by a third person who was neither a purchaser nor user of product. 33 ALR 3d 415, §§4, 5.

Products liability: right of manufacturer or seller to contribution or indemnity from user of product causing injury or damage to third person, and vice versa. 28 ALR 3d 943, §§3, 5 through 8.

Construction and application of state statutes or rules of court predicating in personam jurisdiction over nonresidents or foreign corporations on the commission of a tort within the state. 24 ALR 3d 532, §§9[d], 10[b], 17[b].

Discovery, in products liability case, of defendant's knowledge as to injury to or complaints by other than plaintiff, related to product. 20 ALR 3d 1430.

Retrospective operation of state statutes or rules of court conferring in personam jurisdiction over nonresidents or foreign corporations on the basis of isolated acts or transactions. 19 ALR 3d 138, §§4[a, b], 5.

Products liability: in personam jurisdiction over nonresident manufacturer or seller under "long-arm" statutes. 19 ALR 3d 13, §§5 through 8, 12, 13, 17 through 20.

Privity of contract as essential in action against remote manufacturer or distributor for defects in goods not causing injury to person or to other property. 16 ALR 3d 683.

Products liability: strict liability in tort. 13 ALR 3d 1057, §10[e] superseded by 52 ALR 3d 121, §11 superseded by 46 ALR 3d 240.

Manufacturer's duty to test or inspect as affecting his liability for product-caused injury. 6 ALR 3d 91.

Seller's duty to test or inspect as affecting his liability for product-caused injury. 6 ALR 3d 12, §§5 through 11, 13, 16 through 18.

Statute of limitations: when cause of action arises on action against manufacturer or seller of product causing injury or death. 4 ALR 3d 821, §§9, 12 through 14, 27, 39.

Products liability: manufacturer's responsibility for defective component supplied by another and incorporated in product. 3 ALR 3d 1016, §§3 through 8, 11.

Liability of manufacturer or seller of product sold in container or package for injury caused by container or packaging. 81 ALR 2d 299.

Liability of manufacturer or seller for injury caused by household and domestic machinery, appliances, furnishings, and equipment. 80 ALR 2d 202.

Right of retailer sued by consumer for breach of implied warranty of wholesomeness or fitness of food or drink, to bring in as a party defendant the wholesaler or manufacturer from whom article was procured. 24 ALR 2d 516.

"Minimum contacts" requirement of fourteenth amendment's due process clause (rule of International Shoe Co. v. Washington) for state court's assertion of jurisdiction over nonresident defendant. 62 L Ed 2d 853, §§11, 31, 32, superseded in part by 79 L Ed 2d 992.

27-1-720. Liability — defect in design of firearms or ammunition.

Compiler's Comments

Source: This section is based on model legislation drafted by the National Rifle Association. It was passed in Idaho in 1986, sec. 6-1410, Idaho Code, and in California in 1983, sec. 1714.4, Civil Code.

Law Review Articles

Developments in Montana Products Liability Law, 1977-1987, Bronson, 48 Mont. L. Rev. 297 (1987).

Collateral References

Products Liability *key* 21; Weapons *key* 18.

72 C.J.S. Supplement Products Liability §1, et seq.; 86 C.J.S. Torts §18.1.

63 Am. Jur. 2d Products Liability §517.

Products liability: firearms, ammunition, and chemical weapons. 96 ALR 5th 239.

Products liability: sufficiency of evidence to support product misuse defense in actions concerning weapons and ammunition. 59 ALR 4th 102.

Products liability: modern cases determining whether product is defectively designed. 96 ALR 3d 22, §23.

Liability of manufacturer or seller for injury caused by fire arms, explosives, and flammables. 80 ALR 2d 185.

27-1-721. Immunity of certain firearms and hunter safety or hunter education instructors.

Compiler's Comments

1999 Amendment: Chapter 499 near beginning substituted "hunter safety instructor or hunter education instructor" for "firearms safety instructor". Amendment effective July 1, 1999.

Saving Clause: Section 10, Ch. 499, L. 1999, was a saving clause.

Preamble: The preamble attached to Ch. 415, L. 1995, provided:

"WHEREAS, many qualified persons are reluctant to become firearms safety instructors because of a perception of potential exposure to liability for the conduct, acts, or omissions of students; and

WHEREAS, providing an exemption from liability will encourage more persons to undertake the teaching of firearms safety, thereby improving the quality and availability of firearms safety instruction in Montana."

Effective Date: Section 3, Ch. 415, L. 1995, provided that this section is effective on passage and approval. Approved April 13, 1995.

27-1-722. Civil damages immunity for injury caused by legal use of force.

Compiler's Comments

Effective Date: This section is effective October 1, 2001.

27-1-724. Limits on liability of livestock owner or property owner in accidents involving motor vehicles and livestock.

Compiler's Comments

Effective Date: Section 3, Ch. 28, L. 2001, provided that this section is effective on passage and approval. Approved March 1, 2001.

Applicability: Section 4, Ch. 28, L. 2001, provided: "[This act] applies to accidents involving livestock and motor vehicles on or after [the effective date of this act]." Effective March 1, 2001.

27-1-725. Purpose.

Compiler's Comments

Applicability: Section 5, Ch. 119, L. 1993, provided: "[Sections 1 through 3] [enacting 27-1-725 through 27-1-727] apply to injuries and deaths that occur on or after [the effective date of this act]." Effective March 18, 1993.

Effective Date: Section 6, Ch. 119, L. 1993, provided: "[This act] is effective on passage and approval." Approved March 18, 1993.

Case Notes

No Liability of Equine Activity Sponsor for Unavoidable Risks or Inherent Risks of Which Participant Is or Should Be Aware: Equine activity sponsors have no duty to protect participants from unavoidable risks or from the inherent risks of equine activities of which the participant is or should be aware. As long as the participant expects a risk inherent in equine activities, the equine activity sponsor is not liable for injury suffered as a result of that risk. McDermott v. Carie, LLC, 2005 MT 293, 329 M 295, 124 P3d 168 (2005).

Use of Redacted Pretort Release to Establish Statutory Liability Shield Allowed: A pretort form indicating a prospective release from liability for negligence is illegal. However, it was not improper for a trial court to allow introduction of a redacted version of an illegal exculpatory agreement to show that an equine activity sponsor was statutorily protected from liability from unavoidable risks or from the inherent risks of equine activities of which the participant was or should have been aware. In the present case, plaintiff failed to cite authority or establish error by the trial court in admitting the redacted agreement, and the Supreme Court affirmed the trial court's denial of plaintiff's motion for a new trial on grounds that the redacted agreement was improperly admitted in evidence. McDermott v. Carie, LLC, 2005 MT 293, 329 M 295, 124 P3d 168 (2005).

27-1-726. Definitions.

Compiler's Comments

Applicability: Section 5, Ch. 119, L. 1993, provided: "[Sections 1 through 3] [enacting 27-1-725 through 27-1-727] apply to injuries and deaths that occur on or after [the effective date of this act]." Effective March 18, 1993.

Effective Date: Section 6, Ch. 119, L. 1993, provided: "[This act] is effective on passage and approval." Approved March 18, 1993.

Case Notes

No Liability of Equine Activity Sponsor for Unavoidable Risks or Inherent Risks of Which Participant Is or Should Be Aware: Equine activity sponsors have no duty to protect participants from unavoidable risks or from the inherent risks of equine activities of which the participant is or should be aware. As long as the participant expects a risk inherent in equine activities, the equine activity sponsor is not liable for injury suffered as a result of that risk. McDermott v. Carie, LLC, 2005 MT 293, 329 M 295, 124 P3d 168 (2005).

27-1-727. Equine activity liability limitations.

Compiler's Comments

Applicability: Section 5, Ch. 119, L. 1993, provided: "[Sections 1 through 3] [enacting 27-1-725 through 27-1-727] apply to injuries and deaths that occur on or after [the effective date of this act]." Effective March 18, 1993.

Effective Date: Section 6, Ch. 119, L. 1993, provided: "[This act] is effective on passage and approval." Approved March 18, 1993.

Case Notes

No Liability of Equine Activity Sponsor for Unavoidable Risks or Inherent Risks of Which Participant Is or Should Be Aware: Equine activity sponsors have no duty to protect participants from unavoidable risks or from the inherent risks of equine activities of which the participant is or should be aware. As long as the participant expects a risk inherent in equine activities, the equine activity sponsor is not liable for injury suffered as a result of that risk. McDermott v. Carie, LLC, 2005 MT 293, 329 M 295, 124 P3d 168 (2005).

27-1-728. Mule and horseracing — exception.

Compiler's Comments

Effective Date: Section 6, Ch. 119, L. 1993, provided: "[This act] is effective on passage and approval." Approved March 18, 1993.

27-1-731. Individual immunity for and indemnification of ditch company employees.

Compiler's Comments

Saving Clause: Section 3, Ch. 397, L. 1987, provided: "This act does not affect rights and duties that matured, penalties that were incurred, or proceedings that were begun before the effective date of this act." Pursuant to 1-2-201, this act was effective October 1, 1987.

Collateral References

Master and Servant *key* 300, et seq.

27 Am. Jur. 2d Employment Relationship §242; 41 Am. Jur. 2d Indemnity §1, et seq..

63C Am. Jur. 2d Public Officers and Employees §§223 through 225.

Validity and construction of statute authorizing or requiring governmental unit to indemnify public officer or employee for liability arising out of performance of public duties. 71 ALR 3d 90.

27-1-732. Immunity of nonprofit corporation officers, directors, and volunteers.

Compiler's Comments

2003 Amendment: Chapter 114 in (2)(a) at end substituted "26 U.S.C. 501(c), as amended" for "of 1954"; and made minor changes in style. Amendment effective October 1, 2003.

1995 Amendment: Chapter 357 inserted (2)(c) to include the Comprehensive Health Association in the definition of a nonprofit corporation; and made minor changes in style.

Applicability — Effective Date: Section 3, Ch. 437, L. 1987, provided: "This act is effective on passage and approval and applies to claims accruing after the effective date of this act." Pursuant to sec. 3, this act was effective April 9, 1987.

Interim Study Committee Bill: Chapter 437, L. 1987, was introduced at the request of the Joint Interim Subcommittee on Liability Issues. See committee report, Legislative Council, 1986.

Collateral References

Corporations *key* 325 through 369, 488 through 498.

19 C.J.S. Corporations §§475, et seq., 544.

27-1-733. Liability of nonprofit organizations and their employees for injuries suffered in sponsored rodeo and similar events.

Compiler's Comments

Severability: Section 4, Ch. 508, L. 1987, was a severability section.

Collateral References

Corporations *key* 488 through 498.

19 C.J.S. Corporations §§475, et seq., 544.

27-1-734. Limits on liability of health care provider in emergency situations.

Compiler's Comments

1991 Amendment: Deleted former (2) that read: "(2) The limitations on liability provided in subsection (1) do not apply in the following cases:

(a) The physician, nurse, or hospital had provided prior medical diagnosis or treatment to the patient for a condition having a bearing on or relevance to the treatment of the obstetrical condition that required emergency services.

(b) Before rendering emergency obstetrical services, the physician, nurse, or hospital had a contractual obligation or agreement with the patient, another health care provider, or a third-party payer to provide obstetrical care for the patient." Amendment effective July 1, 1991.

Effective Date: Section 5, Ch. 493, L. 1989, provided that this section is effective April 11, 1989.

27-1-735. Emergency communications systems — lawful release of information.

Compiler's Comments

1999 Amendment: Chapter 242 at end of (1) substituted "and subscribers' names and physical addresses" for "provided that the subscriber information is released only in response to an emergency call involving an immediate threat to personal safety or property"; and near beginning of (2) after "telephone company" deleted "with less than 15,000 subscribers" and inserted reference to registered Montana telecommunications service providers and providers of commercial mobile services. Amendment effective April 5, 1999.

Source: This section is based on section 31-4812, Idaho Code (1990).

Preamble: The preamble attached to Ch. 452, L. 1991, provided: "WHEREAS, in order to further the purposes of Title 10, chapter 4, MCA, and to encourage the development of emergency telephone systems, the Legislature finds that telephone companies and telecommunications providers should be granted immunity when they provide emergency communications systems and related services and that they may lawfully provide to emergency communications systems information not in the public record, including but not limited to unpublished or unlisted telephone numbers, if the information is provided in good faith."

Effective Date: Section 3, Ch. 452, L. 1991, provided that this section is effective April 16, 1991.

27-1-736. Limits on liability of medical practitioner or dental hygienist who provides services without compensation.

Compiler's Comments

1999 Amendment: Chapter 406 in (1) at beginning of first sentence substituted "medical practitioner, as defined in 37-2-101, or a dental hygienist" for "dentist, dental surgeon, or oral surgeon", near middle substituted "renders, at any site, any health care within the scope of the provider's license, voluntarily and without compensation, to a patient of a clinic or to a patient referred by a clinic" for "for charitable purposes, provides care or assistance without compensation, except for reimbursement for supplies", after "damages" substituted "resulting from the rendering of the care, unless the damages were the result of" for "for acts or omissions other than damages occasioned by", and at end substituted "medical practitioner or dental hygienist" for "dentist, dental surgeon, or oral surgeon" and inserted second sentence concerning notice to patients; inserted (2) defining clinic, health care, and without compensation; inserted (3) concerning application of subsection (1); and made minor changes in style. Amendment effective April 21, 1999.

Applicability: Section 3, Ch. 406, L. 1999, provided: "[This act] applies to services rendered on or after [the effective date of this act]." Effective April 21, 1999.

Applicability: Section 3, Ch. 359, L. 1997, provided: "[This act] applies to services rendered on or after [the effective date of this act]." Effective April 22, 1997.

Effective Date: Section 4, Ch. 359, L. 1997, provided: "[This act] is effective on passage and approval." Approved April 22, 1997.

27-1-738. Health care provider's responsibility for others.

Compiler's Comments

Saving Clause: Section 3, Ch. 43, L. 2005, was a saving clause.

Effective Date: Section 4, Ch. 43, L. 2005, provided: "[This act] is effective July 1, 2005."

Applicability: Section 5, Ch. 43, L. 2005, provided: "[This act] applies to malpractice claims that arise after [the effective date of this act]." Effective July 1, 2005.

27-1-739. Liability of health care provider for reduced chance of recovery caused by malpractice.

Compiler's Comments

Effective Date: Section 2, Ch. 229, L. 2005, provided: "[This act] is effective July 1, 2005."

Applicability: Section 3, Ch. 229, L. 2005, provided: "[This act] applies to causes of action that arise on or after [the effective date of this act]." Effective July 1, 2005.

27-1-740. Ridesharing — limits on employer liability.

Compiler's Comments

Effective Date: This section is effective October 1, 1999.

27-1-741. Purpose.

Compiler's Comments

Effective Date: This section is effective October 1, 1999.

27-1-742. Definitions.

Compiler's Comments

Effective Date: This section is effective October 1, 1999.

27-1-743. Operator's responsibilities.

Compiler's Comments

Effective Date: This section is effective October 1, 1999.

27-1-744. Passenger responsibilities and prohibitions.

Compiler's Comments

Effective Date: This section is effective October 1, 1999.

27-1-745. Injury reports.

Compiler's Comments

Effective Date: This section is effective October 1, 1999.

27-1-746. Duty of health care provider performing third-party medical examination.

Compiler's Comments

Effective Date: Section 3, Ch. 246, L. 2005, provided: "[This act] is effective July 1, 2005."

Applicability: Section 4, Ch. 246, L. 2005, provided: "[This act] applies to medical examinations performed after July 1, 2005."

Part 8
Libel and Slander

Part Law Review Articles

The Rising Tide of Libel Litigation: Implications of the Gertz Negligence Rule, Smith, 44 Mont. L. Rev. 71 (1983).

Montana Supreme Court Survey, Hursh, 43 Mont. L. Rev. 279, 338 (1983).

Publication of Libel in Montana, Davis, 36 Mont. L. Rev. 120 (1975).

Privilege to Defame, Ennis, 26 Mont. L. Rev. 110 (1964).

Defamation: The Montana Law, Kimball, 20 Mont. L. Rev. 1 (1958).

Part Collateral References

Immunity of police or other law enforcement officer from liability in defamation action. 100 ALR 5th 341.

Libel and slander: statements regarding labor relations or disputes. 94 ALR 5th 149.

Liability of internet service provider for internet or e-mail defamation. 84 ALR 5th 169.

Liability for statement or publication charging plaintiff with killing of, cruelty to, or inhumane treatment of animals. 69 ALR 5th 645.

Publication of allegedly defamatory matter by plaintiff ("self-publication") as sufficient to support defamation action. 62 ALR 4th 616.

Imputation of allegedly objectionable political or social beliefs or principles as defamation. 62 ALR 4th 314.

Libel or slander: defamation by statement made in jest. 57 ALR 4th 520.

Imputation of criminal, abnormal, or otherwise offensive sexual attitude or behavior as defamation—post-New York Times cases. 57 ALR 4th 404.

Libel and slander: sufficiency of identification of allegedly defamed party. 54 ALR 4th 746.

Defamation of class or group as actionable by individual member. 52 ALR 4th 618.

Criticism or disparagement of attorney's character, competence, or conduct as defamation. 46 ALR 4th 326.

Defamation of psychiatrist, psychologist, or counselor. 38 ALR 4th 874.

Criticism or disparagement of physician's or dentist's character, competence, or conduct as defamation. 38 ALR 4th 836.

Proof of injury to reputation as prerequisite to recovery of damages in defamation action—post-Gertz cases. 36 ALR 4th 807.

State constitutional protection of allegedly defamatory statements regarding private individual. 33 ALR 4th 212.

Libel and slander: reports of pleadings as within privilege for reports of judicial proceedings. 20 ALR 4th 576.

Liability of commercial printer for defamatory statement contained in matter printed for another. 16 ALR 4th 1372.

Libel by newspaper headlines. 95 ALR 3d 660.

Liability of telegraph or telephone company for transmitting or permitting transmission of libelous or slanderous messages. 91 ALR 3d 1015.

Privileged nature of communications made in course of grievance or arbitration procedure provided for by collective bargaining agreement. 60 ALR 3d 1041.

Right of governmental entity to maintain action for defamation. 45 ALR 3d 1315.

Libel and slander: qualified privilege of reply to defamation publication. 41 ALR 3d 1082.

Mental condition: actionability of imputing to private person mental disorder or incapacity, or impairment of mental faculties. 23 ALR 3d 652.

Libel by will. 21 ALR 3d 754.

Venue of civil libel action against newspaper or periodical. 15 ALR 3d 1249.

Slut, actionability of charge of being a "slut", "bitch", or "son of a bitch". 13 ALR 3d 1286.

Overcharging, statements as to plaintiff's charging excessive or exorbitant prices or fees. 11 ALR 3d 884.

Marital matters, false news reports as to births, betrothals, marriages, divorces, or similar marital matters. 9 ALR 3d 959.

"Crook", charge of being. 1 ALR 3d 844.

Imputing credit unworthiness to nontrader. 99 ALR 2d 700.

Liability of publisher of defamatory statement for its repetition or republication by others. 96 ALR 2d 373.

Constitutional aspects of libel or slander of public officials. 95 ALR 2d 1450.

Accidental communication, or communication only to plaintiff, publication by. 92 ALR 2d 219, §6 superseded by 62 ALR 4th 616.

Falsity, necessity and sufficiency of plaintiff's allegations as to falsity in defamation action. 85 ALR 2d 460.

Privilege in respect of publications relating to proceedings to disbar or otherwise discipline attorney. 77 ALR 2d 493.

Malice, sufficiency of plaintiff's allegations in defamation action as to defendant's malice. 76 ALR 2d 696.

Literary or artistic works, criticism of. 64 ALR 2d 245.

Actionability of statement imputing incapacity, inefficiency, misconduct, fraud, dishonesty or the like to public officer or employee. 53 ALR 2d 8.

Statements respecting race, color, or nationality as actionable. 46 ALR 2d 1287.

Action for libel as remedy of workman blacklisted by labor union. 46 ALR 2d 1132.

Imputation of perjury or false swearing as actionable per se. 38 ALR 2d 161.

Retraction as affecting right of action or amount of damages for libel or slander. 13 ALR 2d 277; 13 ALR 794.

Words reflecting upon one in his character as employee as actionable per se. 6 ALR 2d 1008.

Radio communication and broadcasting. 171 ALR 765; 124 ALR 982; 104 ALR 872; 89 ALR 420; 82 ALR 1109.

Communication or exhibition to employee or business associate of defendant as publication or privilege. 166 ALR 114.

Lack of jurisdiction as destroying privilege of defamatory allegations or statements in judicial proceedings. 158 ALR 592.

Statements in the nature of comment upon judicial, legislative, or administrative proceeding, or the decision therein, as within privilege accorded to proceeding or report thereof. 155 ALR 1346.

Indebtedness of employee, privilege in respect of communication to employer regarding. 151 ALR 1104.

Doctrine of privilege or fair comment as applicable to misstatements of fact in publication (or oral communication) relating to public officer or candidate for office. 150 ALR 358; 110 ALR 412.

Privilege as regards publication of judicial opinion. 146 ALR 913.

Charging one with being a "slacker". 141 ALR 1526; 140 ALR 1533; 49 ALR 260; 11 ALR 1017.

Privilege regarding communications to police or other officer respecting commission of crime. 140 ALR 1466.

Publication of notice of cessation of relationship of principal and agent or employer and employee, or of business or professional relationships. 138 ALR 671.

Imputation of poverty. 137 ALR 913.

Privilege as to allegations in judicial proceedings contrary to facts as previously adjudicated. 136 ALR 1414.

Privilege of communications made by private person or concern to public authorities regarding one not in public employment. 136 ALR 543.

Executive officer, scope of absolute privilege of. 132 ALR 1340.

Defamation of diseased person as ground of action by members of his family, or other persons associated with him, in their own right, because of its tendency to subject them to ridicule or contempt. 132 ALR 891.

Race or nationality as to which there is social prejudice, imputation of association with persons of. 121 ALR 1151.

Garbled, inaccurate, or mistaken report of judicial proceedings as within privilege. 120 ALR 1236.

Imputation of price cutting. 118 ALR 317.

Admissibility of testimony of person who spoke or wrote the words upon which an action for slander or libel is predicated as to his intention or the sense in which the words were spoken or written. 113 ALR 670.

Law of libel or slander as applied to motion pictures. 99 ALR 878.

Privilege of communications made to employee regarding conduct of another employee or former employee. 98 ALR 1301.

Defamatory words spoken with regard to a customer's conduct as constituting actionable slander. 92 ALR 1174.

Words or publication imputing marital discord as actionable per se. 92 ALR 1128.

Qualified privilege as regards publication of matters in relation to members of private or quasi public bodies in newspapers or journals of general circulation or in those intended primarily for circulation among their members. 92 ALR 1029.

Mental or physical suffering as element of damages for libel or slander. 90 ALR 1175.

Liability of telegraph company for punitive damages for wrongful or negligent acts of employees as regards messages. 89 ALR 356.

Libelous or privileged character of publication by newspaper based on matters received from news agency or regular correspondent. 86 ALR 475.

Action by corporation for libel or slander. 86 ALR 442; 52 ALR 1199.

Communication between relatives or members of a family as publication or subject of privilege within law of libel and slander. 78 ALR 1182.

Law of libel and slander in its application to reflections on ability or skill of public performers, or persons associated with public performances as managers, trainers, etc. 72 ALR 921.

Privilege as to communications to one spouse reflecting on other spouse. 69 ALR 1023.

Statement with reference to discharge from private employment as actionable per se. 66 ALR 1499.

Imputation of mental disorder, impairment of mental faculties, or want of mental capacity, as actionable per se. 66 ALR 1257.

Church matters, privilege as to communications respecting. 63 ALR 649.

Headlines, libel by. 59 ALR 1061.

Libel or slander of stockholder or officer by publication or statement which reflects on him as well as on corporation. 58 ALR 1233.

Libel or slander by imputation of drunkenness. 58 ALR 1157.

Defamation of one in his character as political leader or "boss". 55 ALR 854.

What imputations against clergymen are actionable. 53 ALR 637.

Imputing disposition to avoid service in war. 49 ALR 260.

Liability of member of a credit association for reporting one as a delinquent debtor. 48 ALR 573.

Imputing disease as actionable per se. 45 ALR 1114.

Recall petition, libel by. 43 ALR 1268.

Common report as defense to action for libel or slander. 43 ALR 887.

Libel or slander as affected by mistake in statement or publication as to name or description of person to whom it relates. 41 ALR 485; 26 ALR 454.

Bank, libel or slander affecting. 37 ALR 1348.

Abusive words as slander or libel. 37 ALR 883.

Relative provinces of court and jury as to privileged occasion and privileged communication in law of libel and slander. 26 ALR 830.

Personal liability of servant or agent to third person for libel published by him while acting in the capacity of servant or agent. 20 ALR 116, supplemented by 99 ALR 408.

Possibility of actual malice which will defeat conditional privilege in libel or slander co-existing with belief in truth of imputation. 18 ALR 1160.

Privilege of communications in relation to member, or prospective member, of society, other than church. 15 ALR 453; 3 ALR 1654.

Privilege of statement or communication by official charged with prosecution or detection of crime. 15 ALR 249.

Charging merchant with using false weights or measures as libel or slander. 13 ALR 1019.

Communications by employer to surety company regarding employee. 11 ALR 1014.

Liability of town or municipality for libel or slander. 9 ALR 351.

Officers of corporation, communications between. 5 ALR 455.

Statement of testimony in lunacy proceedings as privileged within law of libel and slander. 2 ALR 1582.

27-1-801. Defamation — how effected.

Case Notes

Defamation Test: As outlined in Wainman v. Bowler, 176 M 91, 576 P2d 268 (1978) (citing Gang v. Hughes, 111 F. Supp. 27 (D.C. Calif. 1953)), defamatory words, to be actionable, as exposing a person to hatred, contempt, ridicule, or obloquy or which have a tendency to injure him in his occupation, must be of such a nature that the court can presume as a matter of law that they will tend to disgrace and degrade the plaintiff or cause him to be shunned and avoided. It is not sufficient, standing alone, that the language is unpleasant and annoys or irks him and subjects him to jests or banter so as to affect his feelings. An expression of opinion is generally not actionable. Frigon v. Morrison-Maierle, Inc., 233 M 113, 760 P2d 57, 45 St. Rep. 1344 (1988), followed in St. v. Kandarian, 268 M 408, 886 P2d 954, 51 St. Rep. 1381 (1994).

Defamatory Letter as Libel: There was substantial evidence to support the findings that statements in an allegedly defamatory letter sent to the Sheriff constituted libel when plaintiff's reputation was jeopardized by false accusations of felonious activity and the letter was obviously mailed with malice and ill will. Shors v. Branch, 221 M 390, 720 P2d 239, 43 St. Rep. 919 (1986).

What Constitutes "Public Figure" for Purpose of Libel Defense — Summary Judgment Properly Granted: The plaintiff, a commodities broker who had some public notoriety within the state as a result of his membership in and speeches to political organizations and as a result of articles about him appearing in national publications, brought a libel action against the defendant. The Supreme Court held that the District Court did not err in granting summary judgment for the defendant, holding the plaintiff to be a public figure as a matter of law (and therefore requiring actual malice to be proven by the plaintiff), as there was no absolute prohibition in the Montana Constitution against granting summary judgment in a libel case and because the plaintiff had a general fame or notoriety in the state and exhibited pervasive involvement in the affairs of society. Williams v. Pasma, 202 M 66, 656 P2d 212, 39 St. Rep. 2332 (1982).

Privilege for Criticism of Public Figure Available to Nonmedia Defendant: Where the plaintiff brought a libel action against the defendant, a member of a state political committee, for statements made regarding the plaintiff's alleged violation of federal securities regulations, the Supreme Court, relying on Gertz v. Robert Welch, Inc., 418 US 323 (1974), as applied by Wheeler v. Green, 286 Ore 99, 593 P2d 777 (1979), affirmed the District Court ruling that the privilege established in New York Times v. Sullivan, 376 US 254 (1964), for criticism of a public figure's conduct applied to persons like the defendant who were not connected with the news media. In Gertz, the U.S. Supreme Court expanded the privilege of fair comment, established in New York

Times, to apply to all public figures and did not limit the application of the privilege only to media defendants. Williams v. Pasma, 202 M 66, 656 P2d 212, 39 St. Rep. 2332 (1982).

Lack of Actual Malice Toward Public Figure — Summary Judgment Upheld: Where the defendant issued a press release claiming that the plaintiff had been "indicted" for violations of federal securities laws when in fact he had only been "charged" with such violations and the District Court held the plaintiff to be a public figure as a matter of law, the District Court was correct in awarding summary judgment for the defendant, holding that there was no actual malice by the defendant. The difference between the legal words "indicted" and "charged" is relatively minor in the minds of the average Montana citizen, and the defendant stated that he did not know the difference. There was simply no evidence that the defendant's statement was made with actual malice. Williams v. Pasma, 202 M 66, 656 P2d 212, 39 St. Rep. 2332 (1982).

Requisite Proof in Defamation Suit: In order to recover actual damages, a private person suing for defamation must prove that: (1) the published material was false; (2) the defendant is chargeable with fault; and (3) actual injury ensued. Further, such plaintiff may recover punitive damages if he proves malice. When the plaintiff is a public official or a public figure, he may recover only if he proves malice. Madison v. Yunker, 180 M 54, 589 P2d 126 (1978).

Public Officials and Public Figures: For purposes of determining the appropriate standard of care and damages in a defamation suit, whether the plaintiff is a public official, public figure, or private person, is a question for the jury to determine. Madison v. Yunker, 180 M 54, 589 P2d 126 (1978).

Law Review Articles

The Rising Tide of Libel Litigation: Implications of the Gertz Negligence Rule, Smith, 44 Mont. L. Rev. 71 (1983).

Defamation: The Montana Law, Kimball, 20 Mont. L. Rev. 1 (1958).

Employer Defamation: The Role of Qualified Privilege, 30 Wm. & Mary L. Rev. 469 (1989).

Collateral References

Libel and Slander *key* 1.

53 C.J.S. Libel and Slander §§1 through 5.

50 Am. Jur. 2d Libel and Slander §§6 through 8.

Defamation of church member by church or church official. 109 ALR 5th 541.

Defamation of building contractor or subcontractor other than through statement charging breach or nonperformance of contract. 106 ALR 5th 475.

Liability of internet service provider for internet or e-mail defamation. 84 ALR 5th 169.

Libel or slander: defamation by statement made in jest. 57 ALR 4th 520.

Defamation of class or group as actionable by individual member. 52 ALR 4th 618.

Libel or slander: defamation by gestures or acts. 46 ALR 4th 403.

Defamation by attack on author's or artist's character. 64 ALR 2d 257.

Defamatory nature of charges or imputations in conditional or alternative form. 59 ALR 2d 928.

Statement or publication that plaintiff has been indicted or is under indictment, as defamation. 52 ALR 2d 1178.

27-1-802. Libel defined.

Case Notes

General 843
Truth or Falsity 846
Libel Per Se 847
Libel Per Quod 849
Damages 849

GENERAL

Statements Aimed at Corporate Entity Not Considered Defamatory Against Corporate Employee — Elements of Defamation: McConkey, the general manager of an electric cooperative, asserted that press statements made by a member of a corporate board of trustees concerning corporate mismanagement constituted defamation against McConkey. The District Court concluded that allegedly libelous statements must be aimed specifically at the person claiming injury for a defamation claim to stand, and the Supreme Court agreed. Claims of defamatory libel may not be based on innuendo or inference, nor do sarcastic and hyperbolic statements meet the test for defamation, and an expression of opinion generally does not carry a defamatory meaning. Further, as set out in Hale v. Billings Police Dept., 1999 MT 213, 295 M 495, 986 P2d 413 (1999), if the stated opinion does not disclose the facts upon which it is based and as a result

creates a reasonable inference that it is based on defamatory facts, there is no protection for the statement. However, in this case, McConkey failed to suggest any undisclosed inferred facts or to produce any publications bearing a defamatory meaning against McConkey personally, so the defamation claim failed. McConkey v. Flathead Elec. Co-op, 2005 MT 334, 330 M 48, 125 P3d 1121 (2005).

Unincorporated Association Considered Person Subject to Suit: MacPheat filed a libel complaint against Schauf and the insurance company association to which Schauf belonged, claiming that Schauf wrote a libelous letter on the association letterhead to the judge who was presiding over one of MacPheat's criminal proceedings. The association moved to be removed from the action, asserting that it was simply a federally registered service mark and not a person or legal entity subject to service of process. The District Court agreed and dismissed the association from the suit. MacPheat appealed, and the Supreme Court reversed. The association made the same service mark argument in Oliver v. Farmers Ins. Group of Cos., 941 P2d 985 (Okla. 1997). In that case, the Oklahoma Supreme Court acknowledged that under traditional common law, a voluntary, unincorporated association could not be sued under its name because it did not have a legal status apart from that of its individual members, but that because of the unjustness of the rule in present day society, the rule has been modified in many jurisdictions. The Oklahoma court dismissed the service mark argument, because whatever else the association did, it clearly had a name under which a number of companies insured against risks for profit. The Montana Supreme Court found that reasoning persuasive. An unincorporated association was defined in Assoc. Press v. Mont. Senate Republican Caucus, 286 M 172, 951 P2d 65 (1997), as a voluntary group of persons, without a charter, formed by mutual consent for the purpose of promoting a common enterprise or prosecuting a common objective. The association in this case was thus considered a person within the definition in Rule 4A, M.R.Civ.P. (Title 25, ch. 20), and to conclude otherwise and sanction the association's intangible classification would unnecessarily restrict those who can be sued in Montana courts and fly in the face of Montana's constitutional open courts provision. The association name was one under which its affiliates transacted business, so MacPheat could properly serve and bring suit against the association under 25-5-104 without naming and serving process on the members individually. However, once the association was brought before the court, MacPheat still had the burden of establishing the liability of the association's members, if any, under the applicable substantive law. MacPheat v. Schauf, 2002 MT 23, 308 M 215, 41 P3d 895 (2002).

Public Airing of County's Most-Wanted Fugitive List — Material Facts as to Falsity of Statements Precluding Summary Judgment: Hale brought defamation and negligence claims against the Billings Police Department for publishing Hale's photograph and personal information and broadcasting the information on a cable television most-wanted fugitive program and for failing to pull the information from the program after Hale's arrest. The District Court summarily dismissed Hale's claims on grounds that the information was truthful or, if not truthful, then constitutionally protected and therefore not defamatory. Hale was depicted on the program as a potentially armed and dangerous fugitive. However, Hale's warrant for domestic abuse was chosen randomly from 3,000 to 5,000 outstanding warrants on file, and his whereabouts was known at all times by the police, suggesting that under the plain meaning of the terms, Hale was not accused of using a weapon and thus could not be considered "armed and dangerous", and was not a "most-wanted" suspect or a "fugitive" from justice. Clarifying Roots v. Mont. Human Rights Network, 275 M 408, 913 P2d 638, 53 St. Rep. 205 (1996), the Supreme Court held that it was improper for the District Court to create an artificial dichotomy by distinguishing statements of opinion from statements of fact, thereby granting unqualified immunity to the former. Citing Restatement (Second) of Torts 617 (1965), the court held that if an opinion is not based on disclosed facts and, as a result, creates the reasonable inference that the opinion is based on undisclosed defamatory facts, that opinion is not afforded constitutional protection. Without that protection, genuine issues of fact regarding the falsity of the statements made during the broadcast remained, making summary judgment improper. Further, the issue remained as to what constituted timely notification of Hale's arrest to the media by the police to avoid breach of their duty not to infringe on Hale's rights. Summary judgment was reversed, and the case was remanded. Hale v. Billings Police Dept., 1999 MT 213, 295 M 495, 986 P2d 413, 56 St. Rep. 830 (1999), following Milkovich v. Lorain Journal Co., 497 US 1, 111 L Ed 2d 1, 100 S Ct 2695 (1990).

Plaintiff as Limited Public Figure — Summary Judgment Held Improper: The Montana Human Rights Network (MHRN) published a booklet in which it identified Roots as a "Ku Klux Klan organizer". When Roots sued for libel, the MHRN moved for summary judgment on the basis of Roots' status as a public figure. The District Court granted the motion. The Supreme

Court held that the motion for summary judgment was incorrectly granted because the MHRN had the burden of proving that there was no question of material fact as to Roots' status as a Ku Klux Klan organizer. The evidence introduced by the MHRN and affidavits introduced by Roots showed only that Roots may have had some sympathy for the Klan, but left genuine issues of fact as to whether he'd been a Klan organizer and as to whether Roots was a public figure for limited purposes. Roots v. Mont. Human Rights Network, 275 M 408, 913 P2d 638, 53 St. Rep. 205 (1996).

Defamation Test: As outlined in Wainman v. Bowler, 176 M 91, 576 P2d 268 (1978) (citing Gang v. Hughes, 111 F. Supp. 27 (D.C. Calif. 1953)), defamatory words, to be actionable, as exposing a person to hatred, contempt, ridicule, or obloquy or which have a tendency to injure him in his occupation, must be of such a nature that the court can presume as a matter of law that they will tend to disgrace and degrade the plaintiff or cause him to be shunned and avoided. It is not sufficient, standing alone, that the language is unpleasant and annoys or irks him and subjects him to jests or banter so as to affect his feelings. An expression of opinion is generally not actionable. Frigon v. Morrison-Maierle, Inc., 233 M 113, 760 P2d 57, 45 St. Rep. 1344 (1988), followed in St. v. Kandarian, 268 M 408, 886 P2d 954, 51 St. Rep. 1381 (1994).

Communications Made in Proper Discharge of Official Duties: In libel action, when all statements made by defendants were communications made in the proper discharge of their official duties, plaintiffs did not sustain their burden of proof that genuine issues of material fact existed to be tried. Defendants were entitled to summary judgment as a matter of law. Denny Driscoll Boys Home v. St., 227 M 177, 737 P2d 1150, 44 St. Rep. 991 (1987), followed in Wolf v. Williamson, 269 M 397, 889 P2d 1177, 52 St. Rep. 51 (1995).

Defamatory Letter as Libel: There was substantial evidence to support the findings that statements in an allegedly defamatory letter sent to the Sheriff constituted libel when plaintiff's reputation was jeopardized by false accusations of felonious activity and the letter was obviously mailed with malice and ill will. Shors v. Branch, 221 M 390, 720 P2d 239, 43 St. Rep. 919 (1986).

What Constitutes "Public Figure" for Purpose of Libel Defense — Summary Judgment Properly Granted: The plaintiff, a commodities broker who had some public notoriety within the state as a result of his membership in and speeches to political organizations and as a result of articles about him appearing in national publications, brought a libel action against the defendant. The Supreme Court held that the District Court did not err in granting summary judgment for the defendant, holding the plaintiff to be a public figure as a matter of law (and therefore requiring actual malice to be proven by the plaintiff), as there was no absolute prohibition in the Montana Constitution against granting summary judgment in a libel case and because the plaintiff had a general fame or notoriety in the state and exhibited pervasive involvement in the affairs of society. Williams v. Pasma, 202 M 66, 656 P2d 212, 39 St. Rep. 2332 (1982).

Privilege for Criticism of Public Figure Available to Nonmedia Defendant: Where the plaintiff brought a libel action against the defendant, a member of a state political committee, for statements made regarding the plaintiff's alleged violation of federal securities regulations, the Supreme Court, relying on Gertz v. Robert Welch, Inc., 418 US 323 (1974), as applied by Wheeler v. Green, 286 Ore 99, 593 P2d 777 (1979), affirmed the District Court ruling that the privilege established in New York Times v. Sullivan, 376 US 254 (1964), for criticism of a public figure's conduct applied to persons like the defendant who were not connected with the news media. In Gertz, the U.S. Supreme Court expanded the privilege of fair comment, established in New York Times, to apply to all public figures and did not limit the application of the privilege only to media defendants. Williams v. Pasma, 202 M 66, 656 P2d 212, 39 St. Rep. 2332 (1982).

Lack of Actual Malice Toward Public Figure — Summary Judgment Upheld: Where the defendant issued a press release claiming that the plaintiff had been "indicted" for violations of federal securities laws when in fact he had only been "charged" with such violations and the District Court held the plaintiff to be a public figure as a matter of law, the District Court was correct in awarding summary judgment for the defendant, holding that there was no actual malice by the defendant. The difference between the legal words "indicted" and "charged" is relatively minor in the minds of the average Montana citizen, and the defendant stated that he did not know the difference. There was simply no evidence that the defendant's statement was made with actual malice. Williams v. Pasma, 202 M 66, 656 P2d 212, 39 St. Rep. 2332 (1982).

Letter Removing Chairman of English Department Privileged Publication: Small brought suit alleging that he had been libeled when he was removed as chairman of the English Department at Eastern Montana College (now Montana State University-Billings). The basis of the libel charge was the letter informing him that he was being removed and detailing the reasons for the removal. The court found that McRae had the authority to remove Small and that

the letter was a privileged publication because it was made in the proper discharge of an official duty. Since the letter was within the proper discharge of an official duty, it enjoyed an absolute privilege and could therefore not be the subject of libel action. Small v. McRae, 200 M 497, 651 P2d 982, 39 St. Rep. 1896 (1982).

Libeled by Complaint — Action Accrued at Filing: Because of a civil complaint filed against them, defendants, by counterclaim and third-party complaint, sued original plaintiffs in libel. The Supreme Court determined that upon filing of the original complaint, alleged to have been libelous, the libel action accrued for purposes of determining the start of the running of the Statute of Limitations because such libel is direct and immediate and is not of a continuing nature. Engine Rebuilders, Inc. v. Seven Seas Import-Export & Merc., Inc., 189 M 236, 615 P2d 871, 37 St. Rep. 1406 (1980).

Abuse of Liberty: Since the statutory definition of libel was on the books at the time of the adoption of the Montana Constitution and since libel is referred to in other constitutional provisions, "abuse of that liberty" within the meaning of Art. II, sec. 7, Mont. Const., includes a publication that fits the statutory definition of libel. Madison v. Yunker, 180 M 54, 589 P2d 126 (1978).

Failure to State Cause of Action: The District Court properly granted judgment on the pleadings to defendant when the pleadings failed to state a cause of action for libel, either libel per se or libel per quod by special damages. Wainman v. Bowler, 176 M 91, 576 P2d 268 (1978).

Group Libel Rule: The District Court did not err in granting defendants' motions for summary judgment in a libel action because the allegedly defamatory statements could not reasonably be interpreted as applying specifically to plaintiffs. The common-law group libel rule precluded their recovering in a defamation action. Granger v. Time, Inc., 174 M 42, 568 P2d 535 (1977).

Multipublication Rule: Montana follows the multipublication rule rather than the single publication rule in determining the situs and time of the tort in libel cases; under the multipublication rule the cause of action arose upon the arrival and sale of the allegedly libelous magazines in Montana rather than upon the first publication or printing in another state. Lewis v. Reader's Digest Ass'n, Inc., 162 M 401, 512 P2d 702 (1973).

Business Advertising: Private corporation may maintain action for libel respecting its business. Professional & Business Men's Life Ins. Co. v. Bankers Life Co., 163 F. Supp. 274 (D.C. Mont. 1958).

Publication of Libel: Complaint by private corporation for libel was sufficient where it charged that the publication was made of and concerning it. Professional & Business Men's Life Ins. Co. v. Bankers Life Co., 163 F. Supp. 274 (D.C. Mont. 1958).

Words Construed According to Usual Meaning: Alleged libelous words must be construed according to their usual, popular, and natural meaning and common acceptation, in the sense in which persons of ordinary intelligence would understand them, the presumption being that those who saw them, so understood them. Porak v. Sweitzer's, Inc., 87 M 331, 287 P 633 (1930).

"Inducement" and "Colloquium": "Inducement" in a declaration for libel under common-law pleading is the narration of the extrinsic circumstances which, coupled with the published language, affects its construction and renders it actionable, when, standing alone, the language would appear either not to affect plaintiff or not to affect him injuriously; "colloquium" is the allegation that the published language was concerning plaintiff or him and his affairs or him and the facts alleged as inducement. Nolan v. Standard Publishing Co., 67 M 212, 216 P 571 (1923).

Malice: Under the definition of libel, no mention is made of malice, and the presence or absence of malice becomes material only as a circumstance affording a basis for increasing or diminishing the amount of recovery and in cases involving the question of privileged communication. Cooper v. Romney, 49 M 119, 141 P 289 (1914); Paxton v. Woodward, 31 M 195, 78 P 215 (1904). See also Manley v. Harer, 82 M 30, 264 P 937 (1928).

Libel of Unlawful Business Not Possible: Where an alleged libel is in respect to an unlawful business carried on by a person, such as that pursued by a professional wrestler, he cannot maintain an action for injury to his business. Brown v. Independent Publishing Co., 48 M 374, 138 P 258 (1914).

TRUTH OR FALSITY

Investigative Responsibility of Newspaper Before Publishing: A newspaper has a duty to investigate before publishing when it has facts that indicate material is highly suspect. The Supreme Court remanded this case upon finding that a jury instruction defining "reckless disregard of the truth" as being equivalent to having serious doubts about the truth tended to

shield a newspaper from its investigative responsibility. Sible v. Lee Enterprises, Inc., 224 M 163, 729 P2d 1271, 43 St. Rep. 2101 (1986).

Defenses of Belief in the Truth and Fair Comment Correctly Pleaded — Common-Law Defenses Merged in U.S. Supreme Court Ruling: Where the plaintiff brought an action against the defendant for libelously alleging violation of securities regulations by the plaintiff and the defendant based his defense on a belief in the truth and fair comment upon acts of a public figure, the District Court did not err in ruling that the defenses were correctly pleaded, although not specifically pleaded. The defenses of belief in the truth and fair comment were common-law privileges incorporated into the decision of the U.S. Supreme Court in New York Times v. Sullivan, 376 US 254 (1964), regarding acts by public figures. As the defendant maintained throughout the action that the plaintiff was a public figure, this was all the defense the defendant was required to plead. Williams v. Pasma, 202 M 66, 656 P2d 212, 39 St. Rep. 2332 (1982).

Adequacy of Pleadings in Libel Suit — Damages: The Supreme Court reversed the District Court dismissal of a libel action and rejected defendant's argument that in Montana specific damages must be pleaded and proven to support a claim for libel per quod and that actual malice must be specifically pleaded to satisfy the requirements of the first amendment of the United States Constitution. The plaintiff's pleadings were found to satisfy the standards set forth in New York Times Co. v. Sullivan, 376 US 254 (1964), adopted by Montana in Madison v. Yunker, 180 M 54, 589 P2d 126 (1978), as well as the requirements of Rule 9(b), M.R.Civ.P. Gallagher v. Johnson, 188 M 117, 611 P2d 613 (1980).

Statements Neither False Nor Defamatory: The following statements, under the facts and circumstances presented, were held neither false nor defamatory: that the published article will be a "scoop"; "Gather round you boy scouts and girl scouts and learn a few wrinkles in civil affairs"; that plaintiff's offer to compromise his claim against the city was "a hot one tossed on the table" and that the claim was of "dubious legality"; "few men can serve and sue the city at the same time. Just how the city can legally pay a claim for which it is not obligated is quite difficult of solution. Even with the aid of the higher branches of the law . . .." Griffin v. Opinion Publishing Co., 114 M 502, 138 P2d 580 (1943).

The Truth — Complete Defense: Truth of alleged defamatory statement of fact is complete defense to action for libel. To constitute publication of newspaper article libelous under this section, it must be false, unprivileged, and defamatory; hence where the evidence established it to have been true, privileged, and not defamatory, there was no libel. Griffin v. Opinion Publishing Co., 114 M 502, 138 P2d 580 (1943), followed in Citizens First Nat'l Bank of Wolf Point v. Moe Motor Co., 248 M 495, 813 P2d 400, 48 St. Rep. 528 (1991).

Falsity of Publication: In action for libel, plaintiff must be nonsuited unless he introduces affirmative evidence of falsity of publication. So far as presumptions are concerned, the evidence is at equipoise at the very outset of the case. Cooper v. Romney, 49 M 119, 141 P 289 (1914).

Belief That Statement True — Not Justification: Fact that reporter believed statements which were libelous per se were fair and true or that defendant publisher, accepting them as true, published the story as a fair and true one did not constitute any excuse or justification in an action for libel. Kelly v. Independent Publishing Co., 45 M 127, 122 P 735 (1912).

LIBEL PER SE

Letter to Third Party Libelous Per Se: The defendant claimed to have a personal service contract with the plaintiff. When the plaintiff refused to honor the alleged service contract, the defendant sent a letter to the lessee of a gravel pit owned by the defendant and ordered the lessee to refuse to honor a contract the lessee had with the plaintiff to sell gravel to the plaintiff. In the letter, the defendant stated that the plaintiff had conducted dishonest business activities and had defaulted on contracts. The court held that in light of the letter as a whole and the business context in which it was addressed, the letter constituted libel per se. Tindall v. Konitz Contracting, Inc., 240 M 345, 783 P2d 1376, 46 St. Rep. 2182 (1989).

Newspaper Ad — Libel Per Se: Newspaper ad to buyers of life insurance warning them about representations by certain agents and requesting that they report proposals offered to Insurance Commissioner for his opinion was libelous per se. Professional & Business Men's Life Ins. Co. v. Bankers Life Co., 163 F. Supp. 274 (D.C. Mont. 1958).

Special Damages Not Pleaded — Must Be Libel Per Se: In libel action against newspaper in which no special damages were pleaded, plaintiff, to be entitled to damages, was required to plead and prove that the published language complained of, unaided by any innuendo, was actionable per se; having failed to do so, objection to the introduction of testimony and

defendant's motion for a directed verdict in its favor should have been sustained. Griffin v. Opinion Publishing Co., 114 M 502, 138 P2d 580 (1943).

Opprobrious Statements: It is immaterial whether publication complained of contains opprobrious statements; if language damages person about whose affairs published, it is libelous per se. (Holding in Lemmer v. The "Tribune", 50 M 559, 148 P 338 (1915), to the contrary overruled.) Miller Ins. Agency v. Home Fire & Marine Ins. Co. of Calif., 100 M 551, 51 P2d 628 (1935).

Not Libelous Without Further Statements: While assertion of suspicion, belief, or opinion is as effectively a libel as a positive charge, statement in printed article that an effort had been made to secure mailing list of newspaper "in an unethical and underhand manner" and that the surrounding circumstances seemed to warrant the conclusion that the "advertising man" (meaning plaintiff) of another paper was behind the effort was held not libelous per se, in absence of further statements, as to conduct of persons who made the attempt or extent of plaintiff's responsibility for the effort. Woolston v. Mont. Free Press, 90 M 299, 2 P2d 1020 (1931).

Words Susceptible of But One Meaning:

Words used in newspaper article must be susceptible of but one meaning to constitute libel per se; the libelous matter may not be segregated from other parts and construed alone, but the entire statement must be viewed by court as a stranger might look at it, without aid of special knowledge possessed by parties concerned. Woolston v. Mont. Free Press, 90 M 299, 2 P2d 1020 (1931).

To be characterized as libelous per se, the words used must be susceptible of but one meaning. Manley v. Harer, 73 M 253, 235 P 757 (1928). See also Burr v. Winnett Times Publishing Co., 80 M 70, 258 P 242 (1927).

In determining whether language complained of is libelous per se, it must be considered in its relation to the entire article in which it appears; and to warrant the conclusion that it is of such character, the words must be susceptible of but one meaning, namely, that from its publication pecuniary loss to plaintiff necessarily must or presumable did follow as its proximate consequence. Brown v. Independent Publishing Co., 48 M 374, 138 P 258 (1914).

Malicious Publication Not Libel Per Se: Complaint by one employed in clerical capacity against member of merchants' association which periodically published reports of delinquent debtors merely alleging that plaintiff's name was therein published as owing defendant a stated amount and that the publication was malicious and made for purpose of injuring her reputation, etc., did not state a cause of action, the publication not having been libelous per se. Porak v. Sweitzer's, Inc., 87 M 331, 287 P 633 (1930).

Charge of Dishonesty or Corruption: Words which in themselves injuriously affect one in his profession, business, or employment, which impute dishonesty or corruption to an individual or which charge him with unfaithfulness to his employer, are actionable per se. Manley v. Harer, 73 M 253, 235 P 757 (1928).

Innuendo Not Libel Per Se: Language that is not libelous per se cannot be made so by innuendo. Manley v. Harer, 73 M 253, 235 P 757 (1928).

Words of Doubtful Significance — Not Libel Per Se: Words that upon their face and without the aid of intrinsic proof are injurious to the person concerning whom they are uttered are defamatory per se; but if the words are of doubtful significance or derive their libelous character from extraneous facts, they are not defamatory per se, and the pleader must allege the meaning intended or set forth such facts by proper averment. Manley v. Harer, 73 M 253, 235 P 757 (1928).

False Charge of Public Official — Libel Per Se: Newspaper article falsely charging County Commissioner with conducting county business behind closed doors and secretly passing large bond issue at highest legal rate of interest, in violation of statutory provisions, was libelous per se, whether thus charging a misdemeanor or not, since such charges were sufficient to deprive an official of public confidence. Burr v. Winnett Times Publishing Co., 80 M 70, 258 P 242 (1927).

"White-Livered Shyster" — Libel: A newspaper article headed "The White-Livered Shyster" which in its body imputed grossly criminal conduct to an attorney, charging him with "creating sham issues", "preaching violation of the law and defiance of the Constitution he has sworn to defend", "inciting anarchy", etc., was libelous per se. Nolan v. Standard Publishing Co., 67 M 212, 216 P 571 (1923).

Libelous Per Se if False: Publication charging that County Commissioners in letting a public printing contract did so without advertising for bids and out of favoritism, with the evident desire "to deflect all possible graft" a certain way, and containing a suggestion that the named amount of money was to be "cut up" among the Commissioners, if false and unprivileged, was libelous per se. Cooper v. Romney, 49 M 119, 141 P 289 (1914).

What Constitutes Libel Per Se: To state a cause of action for general damages, the language complained of must be libelous per se, and to be libelous per se, the language must be such as, without the aid of innuendo, imputes to the aggrieved party the commission of a crime or necessarily exposes him to hatred, contempt, ridicule, or obloquy. Cooper v. Romney, 49 M 119, 141 P 289 (1914); Brown v. Independent Publishing Co., 48 M 374, 138 P 258 (1914).

Language Construed in Context: In determining whether publication is libelous per se, language complained of must be construed in its relation to entire article in which it appears, for its ordinary meaning may be limited or changed by the circumstances, or by qualifications expressly annexed to its use. Cooper v. Romney, 49 M 119, 141 P 289 (1914); Paxton v. Woodward, 31 M 195, 78 P 215 (1904).

LIBEL PER QUOD

Adequacy of Pleadings in Libel Suit — Damages: The Supreme Court reversed the District Court dismissal of a libel action and rejected defendant's argument that in Montana specific damages must be pleaded and proven to support a claim for libel per quod and that actual malice must be specifically pleaded to satisfy the requirements of the first amendment of the United States Constitution. The plaintiff's pleadings were found to satisfy the standards set forth in New York Times Co. v. Sullivan, 376 US 254 (1964), adopted by Montana in Madison v. Yunker, 180 M 54, 589 P2d 126 (1978), as well as the requirements of Rule 9(b), M.R.Civ.P. Gallagher v. Johnson, 188 M 117, 611 P2d 613 (1980).

Must Allege Special Damages: To give rise to action for libel the words published must have been actionable per se or actionable per quod, and in absence of allegation or proof of special damages, libel per quod is eliminated from the case; to be actionable per se, their injurious character must have been a fact of such common notoriety as to be established by the general consent of men so that courts take judicial notice of it; where language is clear and unambiguous, it is duty of trial court to determine whether it is actionable per se or per quod. Griffin v. Opinion Publishing Co., 114 M 502, 138 P2d 580 (1943).

Libelous Per Quod if at All: Newspaper article concerning County Commissioner and referring to "the interesting way he has of prying open the lid of the county strong box" was libelous per quod, if libelous at all, and reference likening him to "Kaiser Bill" was simply sarcasm and not libelous. Burr v. Winnett Times Publishing Co., 80 M 70, 258 P 242 (1927).

DAMAGES

Damages Caused by Defamatory Letter: Testimony as to mental anguish, worry, and the loss of worktime caused by an allegedly defamatory letter supported an award of actual damages in a libel case. Shors v. Branch, 221 M 390, 720 P2d 239, 43 St. Rep. 919 (1986).

No Special Damages Alleged — Libel Per Se:

Where complaint alleges no special damages, the action is brought on the theory of libel per se and not per quod. Steffes v. Crawford, 143 M 43, 386 P2d 842 (1963).

Unless publication was libelous per se, complaint must allege special damages. Porak v. Sweitzer's, Inc., 87 M 331, 287 P 633 (1930).

Complaint that does not plead special damages does not state a cause of action for libel against newspaper unless article published was libelous per se. Nolan v. Standard Publishing Co., 67 M 212, 216 P 571 (1923).

General Damages Recoverable — Libel Per Se:

Words are defamatory per se if upon their face and without the aid of extrinsic proof they are injurious to the person concerning whom they are published, and in such a case general damages are recoverable. Magelo v. Roundup Coal Min. Co., 109 M 293, 96 P2d 932 (1939).

Words defamatory per se carry the presumption of falsity and damage, and therefore where publication is libelous per se plaintiff may recover general damages without allegation or proof of special damages; where words are not actionable per se, there can be no recovery of general damages without pleading of special damages. Manley v. Harer, 73 M 253, 235 P 757 (1928).

General and Special Damages Distinguished: General damages in the law of libel are those which the law presumes actually, proximately, and necessarily result from the publication of the defamatory matter, while special damages are the natural but not the necessary result thereof and do not follow by implication of law upon proof of the defamatory words. Manley v. Harer, 73 M 253, 235 P 757 (1928).

Law Review Articles

The Rising Tide of Libel Litigation: Implications of the Gertz Negligence Rule, Smith, 44 Mont. L. Rev. 71 (1983).

Publication of Libel in Montana, Davis, 36 Mont. L. Rev. 120 (1975).

Collateral References

Libel and Slander *key* 6 through 18.
53 C.J.S. Libel and Slander §3.
50 Am. Jur. 2d Libel and Slander §§6 through 8.
Defamation: who is "libel-proof". 50 ALR 4th 1257.

27-1-803. Slander defined.

Case Notes

"Gang Banger" Not Considered Slanderous Term: Anderson alleged that the Troy Police Chief made false and defamatory statements on four occasions by referring to Anderson as a "gang banger". The District Court summarily dismissed the claim, and Anderson appealed. To determine whether false defamatory words about a person are slanderous, the challenged statement is to be construed by attributing the usual, popular, and commonly accepted meaning to the words and by discerning how an uninvolved person of ordinary intelligence and without special knowledge would understand the statement. The language must be susceptible to one meaning, and that meaning must be opprobrious. Further, for defamatory words to be actionable for a tendency to injure a person in a person's occupation, the words must expose the person to hatred, contempt, ridicule, or obloquy and be of a nature that the court may presume as a matter of law that the words will tend to disgrace and degrade or cause the person to be shunned and avoided. It is not sufficient, standing alone, that the language is unpleasant, annoying, or irksome and subjects the person to jests or banter. The term "gang banger" appears to denote either a bona fide member of a street gang or a wannabe, which adds up to nothing more than innuendo, and the idiom has taken on a modern signification that fails to qualify as slander. Thus, the District Court was affirmed as a matter of law. Anderson v. Troy, 2003 MT 128, 316 M 39, 68 P3d 805 (2003).

Immunity of Statements Made in Complaint: Defendant's argument pertaining to the bad faith filing of fictitious and slanderous claims printed in plaintiff's complaint was without merit. Statements made in a judicial proceeding are absolutely immune, and a cause of action for defamation cannot be predicated on the statements. Mont. Bank of Circle v. Ralph Meyers & Son, Inc., 236 M 236, 769 P2d 1208, 46 St. Rep. 324 (1989).

Defamation Test: As outlined in Wainman v. Bowler, 176 M 91, 576 P2d 268 (1978) (citing Gang v. Hughes, 111 F. Supp. 27 (D.C. Calif. 1953)), defamatory words, to be actionable, as exposing a person to hatred, contempt, ridicule, or obloquy or which have a tendency to injure him in his occupation, must be of such a nature that the court can presume as a matter of law that they will tend to disgrace and degrade the plaintiff or cause him to be shunned and avoided. It is not sufficient, standing alone, that the language is unpleasant and annoys or irks him and subjects him to jests or banter so as to affect his feelings. An expression of opinion is generally not actionable. Frigon v. Morrison-Maierle, Inc., 233 M 113, 760 P2d 57, 45 St. Rep. 1344 (1988).

Falsity of Statements: Prior action against corporate director which had been terminated by accord and satisfaction was not proof of the falsity of allegedly slanderous statements made in letters charging the director with breach of fiduciary duty. Simkins v. Jaffe, 165 M 266, 527 P2d 1195 (1974).

Slander Per Se:

Home owners' statements that builder cheated them, stole from them, and charged them for labor and material not furnished directly charged him with larceny without aid of innuendo and, as such, were slanderous per se; the words carried a presumption of falsity, and damages were recoverable without allegation or proof of special damages. McCusker v. Roberts, 152 M 513, 452 P2d 408 (1969).

Mercantile employee's statement to legal stenographer, in hearing of others, that "Your credit is no good; you don't pay your bills; you owe too many bills in town" was held not slanderous per se, such words in no manner reflecting upon subject's skill or ability as a stenographer since credit was not vital in her occupation as in the business of a merchant or trader. Liebel v. Montgomery Ward & Co., 103 M 370, 62 P2d 667 (1936).

To constitute slander per se, the objectionable statement of or concerning plaintiff must be susceptible of but one meaning; hence, a publication which requires innuendo to demonstrate wherein it is slanderous cannot be slanderous per se. Liebel v. Montgomery Ward & Co., 103 M 370, 62 P2d 667 (1936); Tucker v. Wallace, 90 M 359, 3 P2d 404 (1931).

Words Charging Commission of Crime:

For falsely charging a person with crime to constitute slander per se, it is not necessary that charge be made with the technical accuracy of an information or indictment; statement is slanderous per se if it can have only one meaning to the bystander, namely, that person spoken

about was charged with commission of a crime. Keller v. Safeway Stores, Inc., 111 M 28, 108 P2d 605 (1940).

Statement by retail store employee, in presence of plaintiff's mother, that "She [plaintiff] cashed a check . . . and ordered a sack of flour sent to an address where there was no house and received change for the check. The check was no good and if you [the mother] don't have her [plaintiff] come down and see me, we will have the sheriff after her." was held not slanderous per se in Keller v. Safeway Stores, Inc., 15 F. Supp. 716 (D.C. Mont. 1936). The same statement was later held to be slanderous per se by the state Supreme Court in Keller v. Safeway Stores, Inc., 111 M 28, 108 P2d 605 (1940).

Complaint — Sufficiency:

In suit for slander, complaint that did not allege words slanderous per se or any special damage was held subject to general demurrer. Keller v. Safeway Stores, Inc., 15 F. Supp. 716 (D.C. Mont. 1936).

In lessee's action for slander against lessor, complaint charging that lessor's agent, through whom negotiations had been carried on, had stated to another that he doubted that plaintiff could go through with the lease and that, if he was going to fall down, it would be better for plaintiff to give it up in the spring rather than wait until fall, thus causing less loss for both, was held insufficient to allege slander per se for failure to aver that hearer was in a position to injure plaintiff's business and failure to set forth place where statement was made. Tucker v. Wallace, 90 M 359, 3 P2d 404 (1931).

In absence of allegation of special damages, complaint in action for slander is properly demurrable unless the publication is slanderous per se. Tucker v. Wallace, 90 M 359, 3 P2d 404 (1931).

While at least one person who heard a defamatory statement must have known that plaintiff was meant, for damages to be recoverable, plaintiff is not required to so allege in the complaint but may prove such fact under the general allegation authorized by section 93-3812, R.C.M. 1947 (since repealed). Kosonen v. Waara, 87 M 24, 285 P 668 (1930).

Complaint charging that defendant, in the presence of other women, said of plaintiff, a married woman: "You are a wide whore" was held sufficient, such words being actionable per se; complaint was not rendered insufficient by failure to allege that plaintiff was present, no other reasonable inference being possible than that she was present. Kosonen v. Waara, 87 M 24, 285 P 668 (1930).

Where words in complaint in action for slander did not of themselves import a want of chastity and no allegation was contained therein disclosing that they were used in a defamatory sense, a plea of justification in the answer, which also denied use of words, would not remedy the defect. Daniel v. Moncure, 58 M 193, 190 P 983 (1920).

Special Damages: Attempt to show special damages in form of discharge from employment and inability to obtain new employment because of slander failed where it was not shown that defendants intended that words spoken should be repeated and the persons present were plaintiff's sister-in-law and an intimate friend, presumably disinclined to do anything to injure plaintiff. Liebel v. Montgomery Ward & Co., 103 M 370, 62 P2d 667 (1936).

Injury to Business: In a case of slander alleged to have injured plaintiff in his business, it is important to show where the statement was made and that the person to whom it was made was in a position to injure plaintiff's business. Tucker v. Wallace, 90 M 359, 3 P2d 404 (1931).

Publication:

As distinguished from libel, which may be published to all the world, the spoken word in slander reaches only those to whom it is directed; hence, liability for slander attaches only to the initial publication, and the offender is not liable for its repetition unless he requests or intends that it be repeated. Tucker v. Wallace, 90 M 359, 3 P2d 404 (1931).

Unless at least one person who heard defamatory statement knew that plaintiff was meant, there was no publication and hence no slander. Kosonen v. Waara, 87 M 24, 285 P 668 (1930).

Collateral References

Libel and Slander *key* 6 through 18.

53 C.J.S. Libel and Slander §4.

50 Am. Jur. 2d Libel and Slander §§6 through 8.

27-1-804. What communications are privileged.

Case Notes

Determination of Whether Publication of "Most-Wanted" List Considered Privileged — Abuse of Conditional Privilege as Jury Question: Hale brought defamation and negligence claims against the Billings Police Department for publishing Hale's photograph and personal

information and broadcasting the information on a cable television most-wanted fugitive program. The District Court summarily dismissed Hale's claims on grounds that the communication between the police and the media was privileged, either as a proper discharge of an official duty or as part of a judicial proceeding pursuant to this section. However, the court neglected to determine as a matter of law whether the privilege was an absolute or conditional privilege. Absent a mandate by law that the police provide information regarding arrest warrants to crime prevention programs, the privilege was, at best, conditional. Thus, it was a matter for the jury to determine whether the discharge of the official duty exercised by the police in providing criminal information was proper to the extent that the police did not abuse the privilege. Further, under Sacco v. High Country Independent Press, Inc., 271 M 209, 896 P2d 411, 52 St. Rep. 407 (1995), statements made by the police as to the facts of the case or the evidence expected to be given are not yet part of the judicial proceeding and are not privileged. Summary judgment was improper. Hale v. Billings Police Dept., 1999 MT 213, 295 M 495, 986 P2d 413, 56 St. Rep. 830 (1999), distinguishing Cox v. Lee Enterprises, Inc., 222 M 527, 723 P2d 238, 43 St. Rep. 1476 (1986).

Immunity of Statements Made in Complaint: Defendant's argument pertaining to the bad faith filing of fictitious and slanderous claims printed in plaintiff's complaint was without merit. Statements made in a judicial proceeding are absolutely immune, and a cause of action for defamation cannot be predicated on the statements. Mont. Bank of Circle v. Ralph Meyers & Son, Inc., 236 M 236, 769 P2d 1208, 46 St. Rep. 324 (1989).

Qualified Privilege of Statements of Church Leaders Incident to Disfellowship — Free Exercise of Religion: Disfellowshipped former church members brought an action against church leaders alleging defamation under state law and contending that the Supreme Court need not delve into the religious affairs of the church. The court disagreed, noting that the statements in question were made within the congregation and were based on ecclesiastical doctrine. The statements were found to be privileged under this section, and incidental communication to nonchurch members attending the service did not eliminate the privilege. Having established a qualified privilege on the part of the church leaders, the burden was on the former members to show the privilege was abused by excessive publication, by use of the occasion for an improper purpose, or by lack of belief or grounds for belief in the truth of what was said. Finding no evidence of malice, the court would be violating the church leaders' right to free exercise of religion if it were to find the leaders' statements actionable under state defamation law. Rasmussen v. Bennett, 228 M 106, 741 P2d 755, 44 St. Rep. 1378 (1987).

Communications Made in Proper Discharge of Official Duties: In libel action, when all statements made by defendants were communications made in the proper discharge of their official duties, plaintiffs did not sustain their burden of proof that genuine issues of material fact existed to be tried. Defendants were entitled to summary judgment as a matter of law. Denny Driscoll Boys Home v. St., 227 M 177, 737 P2d 1150, 44 St. Rep. 991 (1987), followed in Wolf v. Williamson, 269 M 397, 889 P2d 1177, 52 St. Rep. 51 (1995).

Preliminary Pleadings — Privileged as Part of Judicial Proceedings: An alleged defamation arose from a newspaper account of a complaint filed in U.S. District Court. On a question certified to state court, the Montana Supreme Court decided that the phrase "judicial proceeding", as used in subsection (4) of this section, included the filing of a complaint. A qualified privilege was extended to reports taken from preliminary pleadings filed in court but not judicially acted upon. Cox v. Lee Enterprises, Inc., 222 M 527, 723 P2d 238, 43 St. Rep. 1476 (1986), followed, with respect to Commission on Practice investigation, in Lence v. Hagadone Inv., 258 M 433, 853 P2d 1230, 50 St. Rep. 601 (1993).

Unsolicited Complaint by Private Citizen — Not Official Duty: This section does not extend to an unsolicited complaint by a private citizen who reports the destruction of his personal property, since the duty to communicate knowledge of crimes to law enforcement officials is a civic rather than official duty. Shors v. Branch, 221 M 390, 720 P2d 239, 43 St. Rep. 919 (1986), followed in Niles v. Big Sky Eyewear, 236 M 455, 771 P2d 114, 46 St. Rep. 504 (1989), and Sacco v. High Country Independent Press, Inc., 271 M 209, 896 P2d 411, 52 St. Rep. 407 (1995).

Psychiatric Report on Criminal Defendant as Privileged Communication: Report of doctor appointed by the lower court (on motion of defendant's counsel) to conduct an examination of defendant pursuant to 46-14-202 was a privileged communication under this section, and lower court properly dismissed action alleging that the report was false, fraudulent, defamatory, and caused mental anguish. Burgess v. Silverglat, 217 M 186, 703 P2d 854, 42 St. Rep. 1123 (1985).

Letter Removing Chairman of English Department Privileged Publication: Small brought suit alleging that he had been libeled when he was removed as chairman of the English Department at Eastern Montana College (now Montana State University-Billings). The basis of

the libel charge was the letter informing him that he was being removed and detailing the reasons for the removal. The court found that McRae had the authority to remove Small and that the letter was a privileged publication because it was made in the proper discharge of an official duty. Since the letter was within the proper discharge of an official duty, it enjoyed an absolute privilege and could therefore not be the subject of libel action. Small v. McRae, 200 M 497, 651 P2d 982, 39 St. Rep. 1896 (1982).

Intradepartmental Communications Privileged: Statements made in discharging department employee, both in recommendations of supervisors and in notice of discharge, are afforded the absolute privilege of subsection (1) of this section and provide no cause of action for slander. Nye v. Dept. of Livestock, 196 M 222, 639 P2d 498, 39 St. Rep. 49 (1982).

When Defamatory Statement Privileged — Public Officials: The defendant read a letter to the Great Falls City Commission indicating he had received a telephone call alleging misuse of funds by three police officers, naming them. He suggested an investigation be undertaken. The Supreme Court held that the publication was privileged because the defamatory statements were made under circumstances meeting the requirements for such a privilege in 27-1-804(2). Section 27-1-804(2) was held, specifically, to confer an absolute privilege. However, to be privileged under that subsection, the statement must be made to the proper authorities responsible for the interest being expressed (here, City Commission, City Manager, or Police Chief). Skinner v. Pistoria, 194 M 257, 633 P2d 672, 38 St. Rep. 1501 (1981).

Publication of Lis Pendens — Absolutely Privileged: Where plaintiff sought specific performance against a corporation to perform a written option to lease land and filed a lis pendens, it was error for the court not to grant plaintiff summary judgment on defendant's cross-complaint requesting damages for slander of title because the filing of a lis pendens is absolutely privileged, without reference to the merits of the underlying action. Hauptman v. Edwards, Inc., 170 M 310, 553 P2d 975 (1976). See also Austin v. Cash, 274 M 54, 906 P2d 669, 52 St. Rep. 1119 (1995).

Discharge of Official Duty: A communication from a mental health center director to the center's program director seeking resignation of drug abuse consultant on grounds of personal unfitness, though possibly defamatory, was made by a public official in the discharge of his official duties and was, therefore, subject to an absolute privilege under this section. Storch v. Bd. of Directors, 169 M 176, 545 P2d 644 (1976).

Absence of Malice: Intradepartment communication of state agency recommending the discharge of probationary state employee is an absolute privilege, with the only requirement being that the communication be one rendered while engaged in an "official duty", and it is not necessary to show the absence of malice. Storch v. Bd. of Directors, 169 M 176, 545 P2d 644 (1976).

Public Official Proceeding — Privileged: Publication of public official proceeding or of anything said therein is privileged if it is a fair and true report made without malice. Griffin v. Opinion Publishing Co., 114 M 502, 138 P2d 580 (1943).

When a Court or Jury Question: Whether an alleged libelous publication was privileged, either absolutely or conditionally, by reason of its character or the occasion upon which it was made, is a question of law for the trial court's decision whenever the evidence is undisputed, it being only when the evidence is conflicting that the question is to be submitted to jury. Griffin v. Opinion Publishing Co., 114 M 502, 138 P2d 580 (1943).

Employer's Statement to Industrial Accident Board — Malice: Letter sent to Industrial Accident Board (now the Division of Workers' Compensation) by manager of coal mining company with alleged intent to prejudice an employee's claim and to impliedly charge him with malingering and having made other fraudulent claims against the employer, not relevant or material to the issue then before the Board, was not privileged and if false and malicious was actionable. Magelo v. Roundup Coal Min. Co., 109 M 293, 96 P2d 932 (1939).

Striking Opinion of Justice From Records: On motion of counsel for appellant filed in their own behalf and that of their client to strike from files of court a special opinion of a Justice concurring in affirmance of judgment appealed from, on ground that statements therein were scandalous, scurrilous, and defamatory, the court ordered that such opinion be expunged from court records and not published in reports of its decisions. Nadeau v. Texas Co., 104 M 558, 69 P2d 586 (1937).

Charge of Public Officer — Privileged: Publication of taxpayers' petition charging public officer or employee with violation of his obligations to financial detriment of county and asking for his removal is privileged unless made with malice, even though the statements contained therein are false. Manley v. Harer, 82 M 30, 264 P 937 (1928).

Malice — Not Privileged: Communication addressed by taxpayers to Board of County Commissioners asking for removal of road supervisor and containing a libelous statement was not privileged under (3) of this section, where made with malice. Manley v. Harer, 73 M 253, 235 P 757 (1925).

Statement Made in Presence of Stranger: By making slanderous statement in presence of a stranger, defendant removed the bar of privilege otherwise attending communications made by him to his agents, which might have protected him, in absence of actual malice. Fowlie v. Cruse, 52 M 222, 157 P 958 (1916).

Effect of Malice:

In order to found liability for libel upon a communication prima facie privileged, actual and not implied malice must be shown. Such was the rule at common law, and such must necessarily be the rule under the statute. Cooper v. Romney, 49 M 119, 141 P 289 (1914).

Complaint alleging that libelous publication was false and malicious alleges in substance that it was false and unprivileged, since, in case of malice, privilege conferred by (3) and (4) of this section does not exist. Cooper v. Romney, 49 M 119, 141 P 289 (1914).

When Both Falsity and Malice Must Be Shown: Where the communication appears to have been privileged, the plaintiff must show not only actual malice but falsity in the publication. Cooper v. Romney, 49 M 119, 141 P 289 (1914).

Newspaper Story Based on Gossip — Not Privileged: Publication of story of mother's inhuman treatment of children gathered by reporter from gossip heard in Sheriff's office, prior to institution of any proceeding in court, was not privileged. Kelly v. Independent Publishing Co., 45 M 127, 122 P 735 (1912).

Collateral References

Libel and Slander *key* 34, 51.

53 C.J.S. Libel and Slander §4, et seq.

50 Am. Jur. 2d Libel and Slander §§273 through 279, 282.

Who are "clergy" or like within privilege attaching to communications to clergy members or spiritual advisers. 101 ALR 5th 619.

Subject matter and waiver of privilege covering communications to clergy member or spiritual adviser. 93 ALR 5th 327.

Insured-insurer communications as privileged. 55 ALR 4th 336.

Nature and extent of privilege accorded public statements, relating to subject of legislative business or concern, made by member of state or local legislature or council outside of formal proceedings. 41 ALR 4th 1116.

Privilege accorded state or local governmental administrative records relating to private individual member of public. 40 ALR 4th 318.

Privileged nature of statements or utterances by members of governing body of public institution of higher learning in course of official proceedings. 33 ALR 4th 632.

Loss of employer's qualified privilege to publish employee's work record or qualification. 24 ALR 4th 144.

Attorneys' statements, to parties other than alleged defamed party or its agents, in course of extrajudicial investigation or preparation relating to pending or anticipated civil litigation as privileged. 23 ALR 4th 932.

Testimony before or communications to private professional society's judicial commission, ethics committee, or the like, as privileged. 9 ALR 4th 807.

Hiring and discharge, public officer's privilege as to statements made in connection with. 26 ALR 3d 492.

Pretrial deposition and discovery procedures, application of privilege attending statements made in course of judicial proceedings to. 23 ALR 3d 1172.

Privilege in connection with proceedings to disbar or discipline attorney. 77 ALR 2d 493.

Privilege of statements made in lunacy or other judicial proceeding by physician, surgeon, or nurse concerning patient. 73 ALR 2d 333.

Acts, gestures, pantomime or the like as constituting privileged communication. 71 ALR 2d 812.

Liability of insurance company for libel or slander by its agent or employee as affected by doctrine of privilege. 55 ALR 2d 846.

Testimony of witness at nonjudicial proceeding as basis of civil action for slander. 54 ALR 2d 1309.

Proceedings, presentments, investigations, and reports of grand jury as privileged. 48 ALR 2d 716.

Privilege as a defense to an action for libel or slander based on statements respecting race, color, or nationality. 46 ALR 2d 1305.

Findings, reports, or the like, of persons acting in judicial capacity as privileged. 42 ALR 2d 825.

Statements or utterances by member of governing body of political subdivision, in course of official proceedings, as privileged. 40 ALR 2d 941.

Construction and effect of statute removing or modifying, in personal injury actions, patient's privilege against disclosure by physician. 25 ALR 2d 1429.

27-1-811. When owner of radio station not liable for material broadcast.

Collateral References

Libel and Slander *key* 34; Telecommunications *key* 432.

53 C.J.S. Libel and Slander §87; 86 C.J.S. Telegraphs, Telephones, Radio, and Television §296.

Criticism or disparagement of character, competence, or conduct of candidate for office as defamation. 37 ALR 4th 1088.

Defamation by radio or television. 50 ALR 3d 1311.

Libel or slander in television transmission. 15 ALR 2d 794.

27-1-812. Right of owner to require prior submission of text to be broadcast.

Collateral References

Telecommunications *key* 432.

86 C.J.S. Telegraphs, Telephones, Radio, and Television §296.

27-1-813. Liability of person broadcasting — liability of owner for broadcast prepared by station.

Collateral References

50 Am. Jur. 2d Libel and Slander §§10, 11, 257.

27-1-818. Media management to be given opportunity to publish correction prior to action for libel or slander.

Case Notes

Constitutionality of Retraction Provision: Sections 27-1-814 through 27-1-817 (now repealed), barring a libel action unless the defendant is given an opportunity to correct the libelous matter, were unconstitutional as being in contravention of Art. II, sec. 16, Mont. Const., which mandates state courts to be open to every person and to afford a remedy for every injury to character, and Art. II, sec. 7, which provides that a person is responsible for abusing the freedom of the press. Madison v. Yunker, 180 M 54, 589 P2d 126 (1978).

Collateral References

50 Am. Jur. 2d Libel and Slander §342.

40 Am. Jur. POF2d Sufficiency of retraction of defamatory statement, pp. 649 through 702.

27-1-819. What constitutes a reasonable time for correction.

Collateral References

50 Am. Jur. 2d Libel and Slander §342.

27-1-820. Content of correction.

Collateral References

50 Am. Jur. 2d Libel and Slander §346.

Part 11
Liability of Mental Health Professionals

Part Collateral References

Statute of limitations applicable to third person's actions against psychiatrist, psychologist, or other mental health practitioner, based on failure to warn persons against whom patient expressed threats. 41 ALR 4th 1078.

Liability of one treating mentally afflicted patient for failure to warn or protect third persons threatened by patient. 83 ALR 3d 1201.

27-1-1101. Definition.

Compiler's Comments

2001 Amendment: Chapter 310 inserted (6) relating to an advanced practice registered nurse with a clinical specialty in psychiatric mental health nursing; and made minor changes in style. Amendment effective October 1, 2001.

27-1-1102. Duty to warn of violent behavior.

Collateral References

Physicians and Surgeons *key* 7.
70 C.J.S. Physicians and Surgeons §110, et seq.
61 Am. Jur. 2d Physicians, Surgeons, and Other Healers §228.

27-1-1103. Immunity from liability.

Collateral References

Physicians and Surgeons *key* 7.
70 C.J.S. Physicians and Surgeons §110, et seq.
61 Am. Jur. 2d Physicians, Surgeons, and Other Healers §228.

Part 15
Montana Anti-Intimidation Act

27-1-1501. Short title.

Compiler's Comments

Effective Date — Applicability: Section 6, I.M. No. 123, provided: "If approved by the electorate, this act is effective January 1, 1997, and applies to nonconsensual common-law liens filed before or after January 1, 1997."

27-1-1502. Findings — purpose.

Compiler's Comments

Effective Date — Applicability: Section 6, I.M. No. 123, provided: "If approved by the electorate, this act is effective January 1, 1997, and applies to nonconsensual common-law liens filed before or after January 1, 1997."

27-1-1503. Civil action.

Compiler's Comments

Effective Date — Applicability: Section 6, I.M. No. 123, provided: "If approved by the electorate, this act is effective January 1, 1997, and applies to nonconsensual common-law liens filed before or after January 1, 1997."

27-1-1505. Liens.

Compiler's Comments

Effective Date — Applicability: Section 6, I.M. No. 123, provided: "If approved by the electorate, this act is effective January 1, 1997, and applies to nonconsensual common-law liens filed before or after January 1, 1997."

CHAPTER 2
STATUTES OF LIMITATIONS

Chapter Case Notes

Statute of Limitations Applicable to FELA Actions — Statute Tolled by Employer Misrepresentations: A 3-year statute of limitations applies to actions brought under the Federal Employers' Liability Act (FELA), 45 U.S.C. 51 through 60. However, plaintiff is entitled to have the cause tried on the merits, even if the suit was not filed within the statutory limit, if misrepresentations made by the employer justifiably misled plaintiff into not filing a timely action. A FELA defendant may be estopped from raising the statute of limitations for equitable reasons even if the misrepresentations upon which the employee relied were unintentional. In this case, Bevacqua was examined by independent physicians, acting as agents for the railroad, who misrepresented Bevacqua's injuries. Because those misrepresentations misled Bevacqua into not filing suit within 3 years, he was entitled to have his cause tried on the merits. Bevacqua v. Union Pac. RR Co., 1998 MT 120, 289 M 36, 960 P2d 273, 55 St. Rep. 469 (1998), citing

numerous federal cases giving a liberal construction to FELA in favor of injured railroad workers.

Tolling of Statute of Limitations by Second Action Filed Before Dismissal of First Action — Refiled First Action Allowed if Second Action Still Pending: If a first action tolls a statute of limitations and a second (allowable) action is filed before a different forum before the first action is dismissed, the second action continues to toll the statute of limitations. If the first action is then refiled while the second action is pending, it is filed while the statute is tolled and is not barred by the statute of limitations. Webb v. T.D., 275 M 243, 912 P2d 202, 53 St. Rep. 117 (1996).

Tolling of Statute of Repose by Chiropractic Legal Panel Proceeding Filed Before Dismissal of Court Action — Filing of Second Court Action After Panel Decision Not Barred: A medical malpractice complaint filed in District Court on April 16, 1992, tolled the statute of repose pursuant to 27-2-205. On August 2, 1993, an application was timely filed with the Montana Chiropractic Legal Panel. Voluntary dismissal of the District Court complaint without prejudice on August 3, 1993, did not nullify the complaint's tolling of the statute of limitations because under 27-12-701, the filing of the Panel application also tolled the statute. The Montana Chiropractic Legal Panel Act continued to toll the statute while the application under it was pending, and because the second District Court complaint was timely filed under the Act within 30 days after the Panel's decision, the second complaint was not barred by the statute of repose. Webb v. T.D., 275 M 243, 912 P2d 202, 53 St. Rep. 117 (1996).

When Statute of Limitations or of Repose Tolled: A statute of limitations or a statute of repose is tolled by the commencement of an action, and an action is commenced when a complaint is filed. Webb v. T.D., 275 M 243, 912 P2d 202, 53 St. Rep. 117 (1996).

Architectural Malpractice — Applicability of Continuing Relationship Doctrine: An architect was hired to design and oversee the building of a hospital. Shortly after completion in 1975, problems developed with the heating, air conditioning, and ventilating systems. The hospital contacted the architect about remedies for the problems, seeking and continuing to rely on his advice until 1979, when the parties' relationship ended. The hospital filed suit in 1981, which the architect contended was beyond the statute of limitations that normally would begin running upon substantial completion of the facility in 1975. Distinguishing Schneider v. Leaphart, 228 M 483, 743 P2d 613 (1987), the Supreme Court applied the continuing relationship doctrine because no specific statute of limitations governed the tort of architectural malpractice and because "accrual" was not statutorily defined at the time of the acts giving rise to the action. The continuing relationship doctrine may be used when, during the course of an ongoing, developing, and dependent relationship between a professional and a client, the professional commits a tortious act that injures the client. The doctrine suspends the accrual of the cause of action in order to give the professional an opportunity to remedy, avoid, or establish that there was no error or attempt to mitigate damages. The cause of action does not accrue until either the professional relationship ends or, if a general professional relationship continues between the parties, the professional ceases to treat or advise the client for the particular act causing the injury. Therefore, the statute of limitations in this case was suspended until the professional relationship ended in 1979 and the hospital's complaint in 1981 was filed well within the general 3-year tort statute of limitations. N. Mont. Hosp. v. Knight, 248 M 310, 811 P2d 1276, 48 St. Rep. 444 (1991).

Requirements of "Equitable Tolling" — Doctrine Not Recognized: Plaintiff relied on out-of-state decisions to present the proposition that, in instances when an injured person has several legal remedies and reasonably and in good faith pursues one, the statute of limitations will not be available as a defense where equitable principles justify tolling of the statute. Requirements of the doctrine, known as "equitable tolling", were outlined in Collier v. Pasadena, 191 Cal. Rep. 681 (Cal. App. 1983): (1) timely notice to the defendant (within the applicable statute of limitations) in filing the first claim; (2) lack of prejudice to defendant in gathering evidence to defend against the second claim; and (3) good faith and reasonable conduct by plaintiff in filing the second claim. The Supreme Court determined that in the present case the notice requirement was not met; therefore, the court did not address arguments with regard to the remaining two elements or recognize the doctrine of equitable tolling in Montana. Erickson v. Croft, 233 M 146, 760 P2d 706, 45 St. Rep. 1379 (1988), but see Harrison v. Chance, 244 M 215, 797 P2d 200, 47 St. Rep. 1539 (1990), in which the Supreme Court expressed an apparent willingness to apply the doctrine when the requirements set out in Erickson appeared to be met. See also Sorenson v. Massey-Ferguson, Inc., 279 M 527, 927 P2d 1030, 53 St. Rep. 1269 (1996), in which the Supreme Court applied the criteria and determined that plaintiff's self-help pursuit of his rights under a warranted purchase of a combine was not a legal remedy available for

purposes of equitable tolling because plaintiff was required to pursue the warranty rights within the context of time limitations imposed for filing legal claims.

No Judicial Discretion to Alter Statute of Limitations: Plaintiffs' complaint was dismissed because it was not timely filed, missing the statute of limitations by 1 day. Plaintiffs moved for relief under Rule 60(b), M.R.Civ.P., because of mistake, inadvertence, surprise, or excusable neglect. The statute of limitations does not discriminate between a just and unjust claim. The statute represents legislative and public policy controlling the rights of potential litigants. A trial court does not have judicial discretion to alter, change, or lessen statutory limits for commencement of actions. Schaffer v. Champion Home Builders Co., 229 M 533, 747 P2d 872, 44 St. Rep. 2196 (1987).

Applicable Statute of Limitations Governed by Basis of Claim: Rule 54(c), M.R.Civ.P. (Title 25, ch. 20), provides that a party must be granted any relief to which he is entitled even though he may not have demanded the relief in his pleadings. Thus, under Rule 8, M.R.Civ.P. (Title 25, ch. 20), it is not necessary to set out the legal theory under which the claim is based. However, the Statute of Limitations applicable must necessarily be in conformity with the basis of the action. Castillo v. Franks, 213 M 232, 690 P2d 425, 41 St. Rep. 2071 (1984).

Laches: The Supreme Court held in Castillo v. Kunnemann, 197 M 190, 642 P2d 1019 (1982), that Kunnemann, the original owner of a 160-acre parcel of land, had reserved certain water and ditch rights when he conveyed the land to Franks, and that Franks, therefore, had not conveyed any of these water rights to the Castillos and the Cotants when they each purchased subdivided portions of the original parcel from Franks. Following the Supreme Court's decision, the Cotants and Castillos sued Franks for breach of contract, fraud, and in the case of the Cotants, for breach of warranty. Franks asserted that these actions were barred by laches. On appeal of this second case, the Supreme Court rejected Franks' argument for the following reasons: (1) plaintiffs had acted reasonably promptly in suing Kunnemann for the rights that Franks contended had been conveyed to them; (2) plaintiffs filed this action 3 ½ months after the Supreme Court rejected their claim against Kunnemann; and (3) plaintiffs' demands are not stale. They have not been lax in enforcing their rights, and they have not acquiesced in the loss of denial of their rights. Castillo v. Franks, 213 M 232, 690 P2d 425, 41 St. Rep. 2071 (1984).

Raising for First Time on Appeal Disallowed: Statute of Limitations defense was an affirmative defense and could not be raised in Supreme Court when it was not raised in District Court. Taylor v. Dept. of Fish, Wildlife, & Parks, 205 M 85, 666 P2d 1228, 40 St. Rep. 1112 (1983).

Products Liability — Statute of Limitations — Fraudulent Concealment Test Adopted: Plaintiff was injured in May 1975, when his holstered Ruger revolver discharged into his leg as he crawled under some brush. He filed this products liability action in September 1979. Ruger moved for summary judgment based upon the Statute of Limitations. The statutory period for tort action in Montana is 3 years. The Statute begins to run from the time the right of action accrues and not from the time when the plaintiff who was ignorant before comes to knowledge of his rights. Plaintiff contended the Statute tolled due to Ruger's fraudulent concealment of the defective nature of the revolver. The Supreme Court has never considered fraudulent concealment in a products liability case but has considered it in malpractice actions, which could apply here. To toll the Statute, the fraud must be of such a character as to prevent inquiry, elude investigation, or to mislead the party who claims the cause of action. There first must be injury and then concealment. It is the cause of action which must be fraudulently concealed by failing to disclose the fact of injury. Application of this test to this case establishes no fraudulent concealment. There must be some affirmative act of the defendant calculated to obscure the existence of the cause action. Much v. Sturm, Ruger & Co., Inc., 502 F. Supp. 743, 37 St. Rep. 2116 (D.C. Mont. 1980).

Object of Statute of Limitations: A true Statute of Limitations establishes a time period within which suit must be brought. Its object is to suppress stale and fraudulent claims after the facts concerning them have become obscure from lapse of time, defective memory, or death or removal of witnesses. Nelson v. Twin Bridges High School, 181 M 318, 593 P2d 722 (1979).

Chapter Law Review Articles

Does It Have to be This Hard? Rule 41(e) in Montana, Ford, 60 Mont. L. Rev. 285 (1999).

Statutes of Limitation in Montana, Mont. L. Rev. Special Issue (1977).

Wrongful Death and the Statute of Limitations, Broeder, 34 Mont. L. Rev. 170 (1973).

Part 1
General Provisions

27-2-101. Definition of action.

Case Notes

Action Not Commenced by Petition for Mediation: An action includes a special proceeding of a civil nature. However, mediation under the Workers' Compensation Act is a nonbinding and informal meeting that is not considered a special proceeding, so a petition for mediation does not commence an action as defined in this section. Preston v. Transp. Ins. Co., 2004 MT 339, 324 M 225, 102 P3d 527 (2004).

Tolling of Statute of Limitations During Statutorily Required Workers' Compensation Mediation: After waiting more than 9 months after a mediator issued a report, Preston petitioned the Workers' Compensation Court for a hearing regarding the reopening of a formerly settled claim. At the hearing, the court determined that a mutual mistake of fact existed concerning the severity of Preston's mental illness that arose as the result of an industrial accident. However, the court also concluded that reopening the claim based on the mutual mistake of fact was time-barred under the 2-year statute of limitations in 27-2-203. On appeal, the Supreme Court disagreed. The statute of limitations did not begin to run until Preston became aware of the mistake of fact, which occurred during the 62-day statutorily mandated mediation. Given that mediation was mandatory and that Preston had to wait until satisfying the dispute resolution requirements to petition the Workers' Compensation Court, the statute of limitations tolled during mediation and Preston had an additional 62 days to file the petition. The case was remanded for further proceedings. Preston v. Transp. Ins. Co., 2004 MT 339, 324 M 225, 102 P3d 527 (2004).

Child Support Enforcement Remedies Held Separate Remedies to Be Exercised Within Ten-Year Statute of Limitations — Due Process Requirements Applicable to Separate Remedies — Connell Distinguished: Emery was divorced from Keep in 1987, and Emery was ordered to pay child support. In exchange for Keep's receipt of payments under the Aid to Families With Dependent Children (now FAIM financial assistance) program, Keep assigned the Child Support Enforcement Division (CSED) of the Department of Public Health and Human Services her right to receive child support and her right to enforcement of support. In 1991, CSED served Emery with a Notice of Intent (NOI) to collect the child support payments by referral of his debt to the Internal Revenue Service (IRS) for collection by interception of any federal tax refund owed to Emery. In response to the NOI, Emery timely requested an administrative hearing before CSED, which was granted, but the hearing was indefinitely continued, and no interception was made by the IRS. In 1992, CSED sent a second NOI to Emery, but Emery made no response. In 1992, no interception was made by the IRS. Also in 1992, Emery and Keep executed a stipulated change of their children's custody. In that stipulation, Keep waived her ability to collect child support arrearages, and the District Court approved the stipulation in an order. In 1995, CSED sent a third NOI to Emery notifying him of CSED's intent to collect child support payments by interception of Emery's federal tax refund. In response to the 1995 NOI, Emery requested a hearing before the CSED. Within 8 months from service of the 1995 NOI upon Emery, the Administrative Law Judge (ALJ) held that CSED's assigned right to child support was not affected by the waiver because CSED was not a party to the stipulation. The District Court approved the decision of the ALJ. On a motion for alteration or amendment of the District Court's order, the District Court, relying upon In re Connell v. St., 280 M 491, 930 P2d 88 (1997), held that the delay between Emery's 1991 request for administrative review and the 1996 hearing before the ALJ violated Emery's right to due process of law and his right to the administration of justice without delay. The Supreme Court reviewed its decision in Connell and pointed out that in that case, 44 months elapsed before the ALJ made a decision in response to Connell's request for administrative review of a CSED NOI and that the 44-month lapse denied Connell his constitutional rights to due process and administration of justice without delay. In contrast, the Supreme Court held that the NOI served upon Emery in 1995 in the case before it was a separate proceeding from the NOI served upon him in 1991 and was not, as interpreted by the District Court, a continuation of the 1991 proceeding because the 1991 proceeding was discontinued once the IRS failed to make an interception of the federal tax refund owed to Emery. Further, the Supreme Court pointed out that the various administrative remedies, such as state debt offsets, license suspension, warrants for distraint, and state income withholding, are all separate remedies for the CSED to pursue, and election of one remedy does not preclude pursuit of another remedy after, or at the same time as, the remedy chosen by the CSED until the debt assigned to the CSED is fully paid. Any of the remedies, the Supreme Court held, were

subject to the 10-year statute of limitations provided in 27-2-201. The Supreme Court therefore held that because the lapse of time in the case before it was between different proceedings and not within one proceeding and the lapse of time within the 1995 proceeding was reasonable, Emery's right of due process and right to administration of justice without delay were not violated. The Supreme Court also held that because Emery had no right under Montana law to a hearing when no action was being taken by the CSED against him, the failure of the CSED to grant a hearing did not implicate Emery's rights of due process and administration of justice. In response to Emery's argument that the CSED did not act soon enough in initiating its collection action, the Supreme Court held that Art. II, sec. 16, Mont. Const., imposes no requirement that the CSED act "speedily and without delay" within the 10-year statute of limitations provided in 27-2-201, noting that imposition of such a requirement would effectively eliminate that 10-year limitation period. For these reasons, the Supreme Court reversed the decision made by the District Court that Emery's constitutional rights were violated by the decision of the CSED. Emery v. St., 286 M 376, 950 P2d 764, 54 St. Rep. 1454 (1997).

Writ of Review: A proceeding in District Court for Writ of Review to set aside a judgment of a Justice's Court is an "action" and the Statute of Limitations expressed by 27-2-215 (renumbered 27-2-231) applies thereto. Shaffroth v. Lamere, 104 M 175, 65 P2d 610 (1937), overruled in Jones v. District Court, 2001 MT 276, 307 M 305, 37 P3d 682 (2001), to the extent that Shaffroth holds that the general 5-year statute of limitations in 27-2-231 applies to all writs of review authorized in 27-25-102 because pursuant to Rule 5, M.R.App.P. (Title 25, ch. 21), a petition for a writ of certiorari to review contempt proceedings must be filed with the Clerk of the District Court within 30 days of the date on which the District Court enters the contempt finding, unless the state is a party, in which case the petition must be filed within 60 days of the date on which the District Court enters the contempt finding.

Mandate: An application for a Writ of Mandate to compel the reinstatement of a discharged policeman is a special proceeding of a civil nature. State ex rel. Bennetts v. Duncan, 47 M 447, 133 P 109 (1932).

Surety's Right to Contribution: The right of a surety who has paid a judgment against his principal, himself, and other sureties to enforce contribution from a cosurety exists so long as the judgment is alive; and such a proceeding is not an ordinary action within the meaning of this section. NW. Nat'l Bank v. Great Falls Opera House Co., 23 M 1, 57 P 440 (1899).

Collateral References

Action *key* 20.
1A C.J.S. Actions §1.
1 Am. Jur. 2d Actions §1.

27-2-102. When action commenced.

Compiler's Comments

1987 Amendment: Inserted (1)(a) and (2) through (4) (see 1987 Session Law for text).

Case Notes

Statute of Limitations on Claim for Disability Insurance Cost of Living Adjustments: Rodgers purchased a disability policy from defendant in 1983. On the application, Rodgers checked a box requesting cost of living adjustments (COLA), but the request was turned down by defendant because a policy with COLA benefits required a higher premium. Defendant received a document purportedly signed by Rodgers, requesting that the COLA rider be deleted. Defendant then issued a policy without the benefits, and Rodgers began paying premiums on the policy without COLA benefits. Rodgers raised no issue or complaint regarding the lack of COLA payments until 2002, when he sued defendant for COLA payments. The District Court summarily dismissed the claim, and on appeal, the Supreme Court affirmed. Rodgers had been receiving monthly disability payments, without COLA benefits, since 1989, and because the payments did not increase, it should have been clear to Rodgers that he was not receiving COLA increases. By the time that Rodgers' claim was filed in 2002, the statute of limitations for the claim had expired, and summary judgment for defendant was proper. Rodgers v. MONY Life Ins. Co., 2005 MT 290, 329 M 289, 124 P3d 137 (2005).

Applicable Immunity Is Immunity When Injury Is Manifested and Not Immunity When Injury Occurred — Sovereign Immunity Held Bar to Liability and Not Lack of Duty: Plaintiffs suffered injury from inhaling dust-borne vermiculite, a known carcinogen, while working in a vermiculite mine in Libby, Montana, beginning in the late 1950s or early 1960s, but their injuries were not manifested until 1998 when plaintiffs were diagnosed as suffering from various forms of cancer induced by the dust present in the mine. The Supreme Court, noting that the question of what

version of sovereign immunity applies was an issue of first impression, examined case law from other jurisdictions and determined that it must construe the "suit for injury" language of Art. II, sec. 18, Mont. Const. That language, the Supreme Court held, incorporates the concept of accrual of any injury. The court further held that in determining when an injury accrues, Montana follows the "discovery rule", meaning that a legally recognized injury does not accrue until the injury is discovered. Because under this section no cause of action accrues until the injury is discovered, the court reasoned that the version of sovereign immunity that should be applied is the version in effect at the time that the miners' injuries accrued in 1998. By 1998, the defense of sovereign immunity had long been abolished by the constitutional language effective July 1, 1973. The Supreme Court also stated, in response to the dissenting opinion and citing Jacques v. Mont. Nat'l Guard, 199 M 493, 649 P2d 1319 (1982), and Brown v. Ehlert, 255 M 140, 841 P2d 510 (1992), that sovereign immunity, a type of affirmative defense, is a matter of avoidance of a legal duty, not the absence of the duty itself. Orr v. St., 2004 MT 354, 324 M 391, 106 P3d 100 (2004).

Tolling of Statute of Limitations During Statutorily Required Workers' Compensation Mediation: After waiting more than 9 months after a mediator issued a report, Preston petitioned the Workers' Compensation Court for a hearing regarding the reopening of a formerly settled claim. At the hearing, the court determined that a mutual mistake of fact existed concerning the severity of Preston's mental illness that arose as the result of an industrial accident. However, the court also concluded that reopening the claim based on the mutual mistake of fact was time-barred under the 2-year statute of limitations in 27-2-203. On appeal, the Supreme Court disagreed. The statute of limitations did not begin to run until Preston became aware of the mistake of fact, which occurred during the 62-day statutorily mandated mediation. Given that mediation was mandatory and that Preston had to wait until satisfying the dispute resolution requirements to petition the Workers' Compensation Court, the statute of limitations tolled during mediation and Preston had an additional 62 days to file the petition. The case was remanded for further proceedings. Preston v. Transp. Ins. Co., 2004 MT 339, 324 M 225, 102 P3d 527 (2004).

Statute of Limitations Calculated as Ending One Day Prior to Start Day in Next Calendar Year: Plaintiff was injured on December 24, 1999, and plaintiff filed a complaint on December 26, 2002, contending that because December 25, 2002, was a holiday, the 3-year statute of limitations in 27-2-204 extended to December 26, 2002, so the complaint was timely filed. The District Court held that the complaint was time-barred and granted defendant summary judgment on the pleadings. On appeal, the Supreme Court affirmed. Generally, a statute of limitations begins to run when a claim or cause of action accrues. Plaintiff's cause of action accrued on December 24, 1999, the date of injury. Under Rule 6(a), M.R.Civ.P. (Title 25, ch. 20), the day of the event is not included in computing any period of time, so the statute of limitations was counted from December 25, 1999. A year is defined as a calendar year, which is a 365-day period starting on a given day and ending on the date 1 day prior to the start day in the next calendar year. Thus, plaintiff's cause of action began on December 25, 1999, and ended on December 24, 2002, which was neither a weekend day nor a legal holiday. The statute of limitations was properly calculated, and summary judgment was proper because plaintiff's complaint was not timely filed. Bosch v. Town Pump, Inc., 2004 MT 330, 324 M 138, 102 P3d 32 (2004).

Legal Malpractice Claim Timely Filed — Summary Judgment Inappropriate When Date of Discovery and Accrual Disputed: The Watkins estate filed a legal malpractice claim against an attorney who set up the trust. The District Court found that the 3-year statute of limitations had run on filing the suit and granted summary judgment for the attorney. On appeal, the Supreme Court reversed. After concluding that the statute of limitations does not begin to run until both the discovery rule and the accrual rule have been satisfied, the court examined the applicability of both rules. The claim was filed in 1997, but the estate did not discover the attorney's negligence until 1995, which was excusable because: (1) the trustee relied on the fiduciary relationship and trusted that the attorney's assertion that the trust was revocable was correct, even though it was irrevocable; (2) of the complexity of the estate plan, which was difficult even for experts to understand and was beyond the understanding of a layperson; and (3) the attorney may have fraudulently concealed the malpractice. Further, because the trustee continued to treat the trust as revocable in reliance on the attorney's advice, the estate did not sustain any actual damages until the irrevocable nature of the trust was discovered and trust beneficiaries brought suit to remove the trustee in 1996, well within the statute of limitations. The attorney's contention that res judicata and estoppel barred the present suit because the beneficiaries also maintained a separate suit for damages also failed because neither the parties nor the issues

were the same. Summary judgment was thus improper, and the case was remanded. Estate of Watkins v. Hedman, Hileman & Lacosta, 2004 MT 143, 321 M 419, 91 P3d 1264 (2004), following Uhler v. Doak, 268 M 191, 885 P2d 1297 (1994). See also Watkins Trust v. Lacosta, 2004 MT 144, 321 M 432, 92 P3d 620 (2004).

Legal Malpractice — Nexus Between Fraudulent Concealment and Discovery Rule: In the context of legal malpractice, a nexus exists between a defendant's fraudulent concealment and the question of whether a plaintiff should have discovered the defendant's negligent act. Estate of Watkins v. Hedman, Hileman & Lacosta, 2004 MT 143, 321 M 419, 91 P3d 1264 (2004). See also Watkins Trust v. Lacosta, 2004 MT 144, 321 M 432, 92 P3d 620 (2004).

Statute of Limitations in Legal Malpractice Action to Run Upon Satisfaction of Both Discovery Rule and Accrual Rule: The law in Montana for legal malpractice actions is that the statute of limitations does not begin to run until both the discovery rule and the accrual rule have been satisfied—in other words, until the negligent act was or should have been discovered, and all elements of the legal malpractice claim, including damages, have occurred. Estate of Watkins v. Hedman, Hileman & Lacosta, 2004 MT 143, 321 M 419, 91 P3d 1264 (2004). See also Watkins Trust v. Lacosta, 2004 MT 144, 321 M 432, 92 P3d 620 (2004).

No Error in Denial of Amended Complaint When Underlying Claim Moot: Plaintiff sought to file an amended complaint based on allegations of defendants' fraud in treating plaintiff's pet dog at defendants' animal clinic. The District Court denied the amended complaint, and plaintiff appealed, but the Supreme Court affirmed. The 2-year statute of limitations on the fraud claim had run, rendering the fraud claim futile, so denial of the amended complaint was not an abuse of discretion. Hawkins v. Harney, 2003 MT 58, 314 M 384, 66 P3d 305 (2003).

Legal Malpractice Action Not Brought Within Statutory Time Limit — Summary Dismissal Proper — Damage Rule Inapplicable: Plaintiff filed a legal malpractice action against defendant on December 17, 1999, 3 years and 8 days after the date that plaintiff's damages occurred. The District Court dismissed the claim as untimely under 27-2-206. On appeal, plaintiff contended that under the damage rule set out in Schneider v. Leaphart, 228 M 483, 743 P2d 613 (1987), and Uhler v. Doak, 268 M 191, 885 P2d 1297 (1994), the statute of limitations should have been tolled until notice of damages was actually received on December 23, 1996, which would have allowed filing until December 23, 1999. The Supreme Court disagreed. The damage rule is not the accepted standard in Montana. Under the statute of limitations for legal malpractice actions in 27-2-206, the time for filing is not tolled by a plaintiff's failure to discover damages, but runs from the date that plaintiff discovered or should through reasonable diligence have discovered the act or omission causing the damages. The claim or cause of action accrued on December 9, 1996, and the complaint filed on December 17, 1999, was beyond the statute of limitations, so summary dismissal for defendant was proper. Spolar v. Datsopoulos, 2003 MT 54, 314 M 364, 66 P3d 284 (2003).

Statute of Limitations Tolled Until Discovery of Self-Concealing Injury — Exposure to Farm Chemicals and Injection: While assisting her former husband with farm duties in 1989, Elizabeth Nelson was exposed to farm chemicals and pesticides and was accidentally injected with bovine ecthyma vaccine. She lost consciousness briefly following the injection but recovered and continued assisting with sheep inoculations the rest of the day. From 1989 through 1998, Elizabeth received extensive medical evaluations and treatments for numerous physical ailments that either surfaced or worsened subsequent to the exposure to chemicals and the vaccine, but doctors were unable to pinpoint the cause and effect relationship between the ailments and the exposure until 1996. Elizabeth filed a complaint in 1998, but her former husband moved for summary judgment because Elizabeth allegedly knew of her injuries for more than 3 years before the action was filed. The District Court agreed that the claim was barred by the 3-year statute of limitations in 27-2-204. Elizabeth appealed. In Hando v. PPG Indus., Inc., 236 M 493, 771 P2d 956 (1989), the Supreme Court held that the onset of the statute of limitations is determined by applying the discovery rule and establishing when the injured person knew, or in the exercise of due diligence should have known, of the facts constituting the cause of action. However, the District Court distinguished Hando because Elizabeth's injuries following the injection were obvious and immediate, unlike the self-concealing injuries in Hando that developed over time. The Supreme Court disagreed. Although Elizabeth suspected the cause of the injuries and diligently sought medical treatment and diagnosis, there was no genuine issue of material fact that the actual causal connection was not discovered until 1996, well within the 3-year period prior to the filing of the claim. Thus, the complaint was timely filed as a matter of law, and summary judgment was improper, so the case was reversed for trial on the merits. Nelson v. Nelson, 2002 MT 151, 310 M 329, 50 P3d 139 (2002).

Statute of Limitations Does Not Begin to Run Until Concealed Facts Are or Should Be Discovered: The Logans argued that the Stroms' suit against them should have been dismissed on the basis that the 3-year statute of limitations had run. The Stroms had purchased the Logans' house and, upon having the roof fixed, discovered that the fire damage to the house had not been substantially repaired as the Logans' had indicated. The Supreme Court agreed with the lower court that the Stroms were not obligated to cut holes in the walls and ceilings to find any structural damage and therefore the statute of limitations did not begin to run until the Stroms discovered the damage upon having the roof repaired. Strom v. Logan, 2001 MT 30, 304 M 176, 18 P3d 1024 (2001).

No Extension of Statute of Repose Under Equity Principles: The omission that gave rise to Joyce's claim for legal malpractice was attorney Garnaas's failure to serve a summons within the 3-year time limit. Joyce claimed a second cause of action in Garnaas's failure to notify Joyce about the status of the case even after the underlying action was lost, arguing that the concealment of a claim is a separate tort that resets the start date for the statutes of limitations and repose. However, there was no separate claim in this case, in addition to the alleged malpractice, because that claim was subsumed within the initial malpractice. Joyce argued on appeal that the statute of repose should be extended in this case because: (1) an attorney who intentionally misleads a client regarding the true status of a case is not entitled to claim the benefit of the statute of repose because the attorney would be allowed to take advantage of his wrong, in violation of 1-3-208; or (2) equitable estoppel should bar Garnaas from taking advantage of his wrong while asserting a strict legal right, in violation of this section. In this case, however, principles of equity did not extend the otherwise absolute statute of repose. This section does not apply to legal malpractice actions. Further, Joyce's allegations of continuing fraudulent concealment failed because claims for damages against Garnaas for not informing Joyce of the legal malpractice related back to the date that the summons was not served. Thus, Joyce could not claim any actual damages separate from Garnaas's original omission, which was barred by the statute of repose. Joyce v. Garnaas, 1999 MT 170, 295 M 198, 983 P2d 369, 56 St. Rep. 661 (1999).

Negligence Claims Against Accountant Self-Concealing — Summary Judgment Improper: This section may toll the statute of limitations in a negligence case when the facts constituting the negligence claim are self-concealing, thereby preventing their discovery by plaintiff. Although Brevig's injury accrued on the date of his father's death, Brevig could not have known that he should have received the entire ranch upon his father's death until he learned that his accountant had withheld accurate information regarding the existence of an invalid trust agreement. Had the accountant disclosed the questionable validity of the trust prior to Brevig's father's death, Brevig would have had the opportunity to remedy the faulty trust. Nondisclosure of information is by its nature self-concealing. Because the facts constituting Brevig's negligence claims were self-concealing, the point at which Brevig discovered or should have discovered the negligence was a question for the jury. The statute of limitations would be tolled if Brevig could establish that the accountant withheld information or failed to disclose material facts. Summary judgment for the accountant was improperly granted, and the case was reversed for further proceedings. McCormick v. Brevig, 1999 MT 86, 294 M 144, 980 P2d 603, 56 St. Rep. 355 (1999), following Blackburn v. Blue Mtn. Women's Clinic, 286 M 60, 951 P2d 1 (1997).

Latent Disease Case Comprising Exposure to Harmful Substance Over Extended Period — Continuing Tort Theory Contrary to Public Policy: Gomez contended that the exposure to chemical fumes that allegedly injured him occurred each day that he worked and was thus in the nature of a continuing tort. Because the date of last exposure to the fumes occurred on Gomez's last day of employment, he contended that the 3-year statute of limitations did not begin to run until that date. Citing Handa v. PPG Indus., Inc., 236 M 493, 771 P2d 956, 46 St. Rep. 532 (1989), the Supreme Court noted that, in latent disease or injury cases, the point at which the statute of limitations begins to run is ascertained by applying the discovery rule and determining when the injured person knew, or in the exercise of due diligence should have known, of the facts constituting the cause of action. The court declined to apply the continuing tort theory to delay the statute of limitations until the last injurious exposure because doing so could delay running of the limitations period indefinitely and is contrary to the general policy underlying statutes of limitations. Gomez was aware of his injuries, of the cause of those injuries, and of the fact that he had a cause of action by 1992 or earlier, but he did not take action on the claims until 1996, essentially sleeping on his rights. Thus, the District Court did not err in concluding that Gomez's complaint was not timely filed or in granting summary judgment to the state on grounds that Gomez's causes of action were barred by the statute of limitations. Gomez v. St., 1999 MT 67, 293

M 531, 975 P2d 1258, 56 St. Rep. 272 (1999), distinguishing Shors v. Branch, 221 M 390, 720 P2d 239, 43 St. Rep. 919 (1986), and Graveley Ranch v. Scherping, 240 M 20, 782 P2d 371 (1989).

Consulting Physician Diagnosis and Notice to Counsel Binding on Plaintiff — Late Claim Properly Dismissed: In 1992, after consulting with several medical doctors, Kaeding hired Baiz as his attorney to pursue a claim for damages from asbestosis against his employer, W.R. Grace & Co. (Grace). Baiz employed Whitehouse as a consulting physician, and Whitehouse, after reviewing several x-rays, sent Baiz a letter stating that the appearance of the x-rays was consistent with asbestosis. In 1996, Kaeding filed suit against Grace, alleging Grace caused his medical condition. After dismissal of the suit by the District Court for failure to commence the action within the statute of limitations, the Supreme Court, distinguishing Hando v. PPG Indus., Inc., 236 M 493, 771 P2d 956 (1989), in which a diagnosis confirming the plaintiff's suspicions as to her medical condition was not received for some time, held that Kaeding had at least a preliminary diagnosis of asbestosis as early as 1983, when Grace sent Kaeding the results of a breathing test. Although Kaeding argued that he was unaware of the contents of the letter sent to Baiz by Dr. Whitehouse, the Supreme Court concluded that because the employment of an attorney creates an agency relationship between the attorney and the attorney's client, Kaeding knew or should have known no later than the time of Dr. Whitehouse's letter to Baiz that he, Kaeding, had contracted asbestosis. Because suit was not brought within the time required by the statute of limitations after the letter from Dr. Whitehouse, the District Court had properly dismissed the claim. Kaeding v. W.R. Grace & Co., 1998 MT 160, 289 M 343, 961 P2d 1256, 55 St. Rep. 640 (1998).

Ability to Demonstrate Later Accrual of Action as Precluding Motion to Dismiss Based on Failure to State Claim — Human Rights Violation Claim: Powell was dismissed from his job with the Salvation Army on February 18, 1994, for the stated reason that he had been drinking on the job that day. Powell asserted that he learned months later that the dismissal was actually based on his past history of alcoholism, and he subsequently filed a grievance charge with the Human Rights Commission, alleging unlawful discrimination. The District Court granted a motion by the Salvation Army to dismiss for failure to state a claim for which relief could be granted for lack of jurisdiction based on Powell's failure to file a timely claim with the Commission. Under this section, the period of limitation applicable to any given cause of action begins to run when the claim or cause of action accrues, unless otherwise provided by statute. Pursuant to 49-2-501, a cause of action accrues under Title 49, ch. 2, commonly known as the Montana Human Rights Act, when the alleged unlawful discriminatory practice occurred or was discovered. Applying the principles in Hash v. U.S. W. Communication Serv., 268 M 326, 886 P2d 442 (1994), the Supreme Court found that Powell may well be able to demonstrate that his cause of action did not accrue until sometime after his termination and that he had thus complied with the applicable 300-day limitation period. The allegations in Powell's complaint were sufficient to withstand the Salvation Army's motion to dismiss, and the District Court erred in concluding otherwise. The case was remanded for further proceedings. Powell v. Salvation Army, 287 M 99, 951 P2d 1352, 54 St. Rep. 1518 (1997), following Willson v. Taylor, 194 M 123, 634 P2d 1180 (1981).

No Affirmative Act by Health Provider Required to Toll Statute of Limitations: After becoming pregnant in 1989, Blackburn learned that the father was HIV positive. Blackburn tested negative for HIV but claims that she was informed by a nurse at the Butte-Silver Bow County Health Department (BSBHD) that, despite her HIV negative status, she would likely die within a few years and that her baby had a 50% chance of being born HIV positive. Based on this information, Blackburn made an appointment at the Blue Mountain Clinic in Missoula. Blackburn stated that she provided the clinic with written proof of her HIV negative status and informed the clinic counselor that she was seeking an abortion only because she feared that her baby would be born HIV positive. After obtaining the abortion, Blackburn consulted with an attorney in 1995 and learned, allegedly for the first time, that it was impossible for an HIV negative mother to give birth to an HIV positive baby. Blackburn filed an action, claiming that despite providing proof of her HIV negative status and her statement concerning her reason for seeking the abortion, neither the counselor, nurse, nor doctor at the clinic explained to her that an HIV negative mother could not deliver an HIV positive baby. Both the BSBHD and the Blue Mountain Clinic filed a motion to dismiss, claiming that Blackburn's claims were barred by the 5-year statute of limitations. When the District Court dismissed the action, Blackburn appealed. On appeal, the Supreme Court upheld the dismissal of the action against BSBHD and its doctor, but held that the District Court had erred in dismissing Blackburn's negligence claims against the Blue Mountain Clinic and its counselor. In its decision, the court overruled any suggestion in Major, Monroe, and Wisher that an affirmative act by the health care provider is required to

trigger the tolling provisions of 27-2-205 or that 27-2-205 could be applied to toll the statute of limitations in a medical malpractice case. Blackburn v. Blue Mtn. Women's Clinic, 286 M 60, 951 P2d 1, 54 St. Rep. 1303 (1997).

Taxpayer Action Precluded by Statute of Limitations — Running of Statute Not Tolled by Fiduciary Relationship With Department of Revenue — Knowledge of Accrual of Cause of Action Immaterial: Taxpayers brought a civil action against the Department of Revenue and others, seeking a declaratory judgment relief and refund of property taxes assessed in 1989 through 1992, based upon their rights as adjudicated in Dept. of Revenue v. Sheehy, 262 M 104, 862 P2d 1181 (1993). In that case, the Supreme Court found the stratified sales assessment ratio valuation adjustment in 15-7-111 to be unconstitutional. As a consequence of payment of the taxes and the Supreme Court's opinion in Sheehy, the taxpayers alleged that they were entitled to a court-ordered reduction in certain real property appraisals as well as a partial refund of their 1989 through 1992 real property taxes. The Department moved to dismiss the suit on the grounds that each claim was barred by the statute of limitations and that the taxpayers failed to state a claim for which relief could be granted. The District Court dismissed the suit. The Supreme Court noted that the applicable statute of limitations in 15-1-406 requires that suit be commenced within 90 days of imposition of the tax and that it did not matter whether the 1991 version of the statute or the 1995 version of the statute applied to the taxpayers' case because they both contained a similar statute of limitations. The Supreme Court responded to the taxpayers' argument, that the running of the statute of limitations was tolled because the Department acted as a fiduciary in holding the taxpayers' claimed reimbursement, by distinguishing the cases from other jurisdictions cited by the taxpayers upon which the taxpayers based their argument. The Supreme Court also noted that under some statutes, such as 15-8-115, the Department is actually a taxpayer's adversary. The Supreme Court also pointed out that contrary to the taxpayers' assertions, whether the taxpayers had knowledge of the accrual of their cause of action is immaterial because under this section, the statute of limitations begins to run when a cause of action accrues and lack of knowledge of the time of accrual of the cause of action does not postpone the running of the period of limitation. Samson v. St., 285 M 310, 948 P2d 232, 54 St. Rep. 1165 (1997).

General Rule for Beginning and Tolling of Limitation Period: The statute of limitations for an action based on fraud begins to run when the fraud occurs, unless the facts that form the basis for the alleged fraud are, by their nature, concealed. After the facts forming the basis for the alleged fraud are discovered, the limitation period is tolled if the defendant takes affirmative action to prevent the plaintiff from discovering the injury. Cartwright v. Equitable Life Assurance Soc'y, 276 M 1, 914 P2d 976, 53 St. Rep. 268 (1996).

Insurance Agent's Ongoing Misrepresentation That Policies Would Be Self-Sustaining After Three to Five Years: Whole life insurance policies stating that premiums would be due for 20 years, 30 years, or a lifetime (depending on the policy) did not put the insureds on notice that the insurance agent's sales statements were fraudulent. The agent told the insureds that after only 3 to 5 years of premium payments (depending on the policy), the policy would be self-sustaining because premiums would be paid by dividends and other earnings. In fact, the policies stated that dividends could be used to help pay premiums. When the insurer sent the insureds premium payment notices after the 3 to 5 years ended, the insureds contacted the agent, who fraudulently stated that there was a mistake and that he would take care of it. When the insurer later sent the insureds notices stating that the insurer had advanced loans against the policies to pay the premiums, the agent again fraudulently told the insureds that there was a mistake and that he would take care of it. Eventually, each policy was either terminated or lost considerable value. For statute of limitations purposes, the insureds could not be held to have been put on notice (by the policy language) that they should have discovered, and did not discover, the fraud. In addition, the agent's statements at both points in time that there was a mistake that he would take care of tolled the statute of limitations. The insureds first actually learned of the fraud upon speaking directly to insurance company personnel, who told them that the agent had been fired, that there was no such thing as a policy that was self-sustaining after 3 to 5 years, that they should pay no premiums until their questions were resolved, and that there were problems other than the mistakes that the agent had claimed. The suit filed in 1991 was within the 2-year limitation period of 27-2-203. Cartwright v. Equitable Life Assurance Soc'y, 276 M 1, 914 P2d 976, 53 St. Rep. 268 (1996).

When Statute of Limitations or of Repose Tolled: A statute of limitations or a statute of repose is tolled by the commencement of an action, and an action is commenced when a complaint is filed. Webb v. T.D., 275 M 243, 912 P2d 202, 53 St. Rep. 117 (1996).

Statute of Limitations — Cannot Begin to Run at Start of Attorney-Client Relationship: Uhler retained Doak to advise and represent him in a dispute with his business associates. On May 16, 1989, Doak advised Uhler to not sue to enforce a stock buy out provision and bonus provision in his agreement with his associates. Uhler was unwilling to accept this advice and continued to meet with Doak to discuss the situation and to provide Doak with more information concerning the situation. On June 16, 1989, Uhler signed a resignation letter and on June 22, 1989, Uhler executed an agreement that waived the stock buy out and bonus provisions. On June 1, 1992, Uhler filed suit against Doak for malpractice. The lower court granted Doak summary judgment on the basis that Doak had advised Uhler to waive his stock buy out and bonus rights on May 16, 1989, and never changed that advice; therefore, the statute of limitations commenced to run at that time. The Supreme Court held that the statute of limitations does not commence to run until the cause of action accrues and that in the present case, Uhler suffered no damages until he signed the resignation letter on June 16, 1989. Uhler v. Doak, 268 M 191, 885 P2d 1297, 51 St. Rep. 1315 (1994), partially reversing Boles v. Simonton, 242 M 394, 791 P2d 755 (1990).

Plan, Prior to Wrongful Discharge Act's Effective Date, to Terminate Employee — Not Breach of Implied Covenant of Good Faith and Fair Dealing Exempting Employee From Act: An employee could not successfully argue that because, prior to the Wrongful Discharge From Employment Act's effective date, the employer had a plan to terminate him, the implied covenant of good faith and fair dealing existing prior to the Act's effective date applied and the Act's remedies limitation did not apply to him. The covenant is not breached until termination of employment, which in this case occurred after the Act's effective date. Sullivan v. Sisters of Charity of Providence of Mont., 268 M 71, 885 P2d 488, 51 St. Rep. 1193 (1994).

Statute of Limitations in Invasion of Privacy Action — Summary Judgment Proper: In 1988, Hentchel told Rucinsky that he had tape recorded her telephone conversations. She asked to hear them, and he agreed to play them, but neither party pursued the issue further. In 1992, Hentchel's wife found the tapes and notified Rucinsky, who brought a claim for invasion of privacy. The District Court granted Hentchel's summary judgment motion on grounds that the 3-year statute of limitations for an action on a liability not founded on an instrument in writing, as set out in 27-2-204, had run. Under this section, a cause of action accrues when all of its elements exist or have occurred, the right to maintain an action is complete, and a court is authorized to accept jurisdiction. Rucinsky claimed that because a reasonable person would not have taken Hentchel seriously when he originally confessed that the taping had occurred, the statute of limitations was tolled until the tapes were discovered. The Supreme Court affirmed summary judgment. That Rucinsky chose not to believe the confession did not negate the existence of the elements of her cause of action in 1988. She had the right to the cause of action when she was put on notice that the tapes existed, and the cause of action began regardless of whether she was convinced of the success of the action. Rucinsky v. Hentchel, 266 M 502, 881 P2d 616, 51 St. Rep. 887 (1994).

Statutory Limitation for Fraudulent Concealment: In 1988, Hentchel told Rucinsky that he had tape recorded her telephone conversations. Rucinsky claimed that the recordings were the only reliable evidence for her invasion of privacy claim and that because of Hentchel's fraudulent concealment of the tapes prior to their discovery in 1992, there was insufficient evidence to support a right to maintain an action and the statute of limitations was therefore tolled until the tapes were discovered in Hentchel's locked drawer. However, when Hentchel initially confessed to the phone tapping, Rucinsky declared that she would like to hear them sometime and Hentchel responded that he would play them for her. Rucinsky's argument that Hentchel fraudulently concealed the tapes failed because he told her that he had them and agreed to her request to hear them. Hentchel did not conceal the tapes; he maintained their control. Rucinsky v. Hentchel, 266 M 502, 881 P2d 616, 51 St. Rep. 887 (1994).

When Action Accrues — Knowledge of Facts: Action brought by landowner against chemical company for CERCLA costs and compensatory damages for injury to property was barred by the statute of limitations. Action accrued when the landowner had knowledge of the facts essential to the cause of action well before seizure of the land by the EPA. Mont. Pole & Treating Plant v. Laucks & Co,. 993 F2d 676 (1993).

Failure of Personal Representative to Fully Disclose Specifics of Estate — Fraud Claim Timely Filed: As personal representative of his mother's estate, Kimm refused to communicate any monetary information to his sisters, who were also heirs, stating only that the assets of the estate would be shared equally among them all. In September 1988, Kimm filed an inventory and appraisal, indicating that most of the assets were held by him in joint tenancy and stating that he was entitled to the bulk of the estate. In April 1990, the sisters filed a claim of actual fraud and undue influence, which Kimm contended was untimely because the facts constituting the claim

were discovered or through due diligence should have been discovered prior to April 1988. The District Court held the claim to be timely filed, accepting the sisters' assertion that they did not discover the facts until the inventory and appraisal was filed and that Kimm did not comply with the duty of full disclosure, instead taking affirmative steps to conceal the information necessary to bring the suit. Flikkema v. Kimm, 255 M 34, 839 P2d 1293, 49 St. Rep. 880 (1992).

Statute of Limitations on Action for Contribution or Indemnity: A cause of action for contribution or indemnity is distinct from the underlying cause of action, and the time from which the statute of limitations for such a cause of action begins to run is when the underlying claim, judgment, or settlement is paid or discharged. Linder v. Missoula County, 251 M 292, 824 P2d 1004, 49 St. Rep. 26 (1992), citing Schiess v. Bates, 693 P2d 440 (Idaho 1984). See also St. Paul Fire & Marine Co. v. Thompson, 152 M 396, 451 P2d 98 (1969).

When Wrongful Death Action Accrues: No claim exists until all elements of a cause of action occur pursuant to this section, and death is an element of a wrongful death claim under 27-1-513. Therefore, a wrongful death action in Montana accrues at the time of decedent's death. Carroll v. W.R. Grace & Co., 252 M 485, 830 P2d 1253, 49 St. Rep. 24 (1992).

When Actionable Cause for Termination Arises: On June 16, 1987, Martin was told her position was to be terminated as of July 17, 1987. After receiving notice, Martin discovered the position had not been eliminated but was to be filled by the company's new president's personal secretary from his former job. Martin filed suit alleging wrongful discharge, breach of the implied covenant of good faith and fair dealing, and negligence. On July 1, 1987, the Wrongful Discharge From Employment Act became effective. The District Court held that the Act precluded Martin's claims for breach of the implied covenant and negligence because the claim had not fully accrued until the date of termination. On appeal, Martin conceded that the claim for negligence was properly dismissed in light of Heltborg v. Modern Mach., 244 M 24, 795 P2d 954 (1990), but disputed dismissal of the breach of covenant claim, contending that a cause of action begins at the time of breach, which in this case occurred upon receipt of the notice of termination, and that all decisions made leading to the discharge occurred prior to notification. The Supreme Court, citing Del. St. College v. Ricks, 449 US 250, 66 L Ed 2d 431, 101 S Ct 498 (1980), and Chardon v. Fernandez, 454 US 6, 70 L Ed 2d 6, 102 S Ct 28 (1981), agreed with Martin that the cause of action accrued upon notice of termination and held that it was the decision to terminate and the act thereupon that caused the end result. It was at that point that legal redress could first be sought. Martin v. Special Resource Management, Inc., 246 M 181, 803 P2d 1086, 47 St. Rep. 2319 (1990), followed in Walch v. Univ. of Mont., 260 M 496, 861 P2d 179, 50 St. Rep. 1186 (1993), distinguishing Allison v. Jumping Horse Ranch, Inc., 255 M 410, 843 P2d 753 (1992).

Statute of Limitations Not Tolled by Lack of Knowledge of Legal Rights: The defendant, Freed, and a party named Egeland were limited partners in a real estate development project. The limited partners had received SID bonds from the city of Cut Bank. Egeland used the bonds to secure his personal trading account with D.A. Davidson. In December 1983, Freed informed D.A. Davidson that Egeland had no authority to make personal use of the bonds. D.A. Davidson responded that it held an interest in the bonds superior to Freed's interest. On January 16, 1985, Freed filed suit against Egeland, and judgment was entered on July 9, 1987, giving all of the limited partnership's interest in the bonds to Freed. On January 22, 1985, Egeland filed a mandamus petition to force the city of Cut Bank to pay interest on the SID bonds. The city answered and petitioned to interplead Freed and D.A. Davidson as parties claiming an interest in the bonds. On March 3, 1987, the District Court issued an order interpleading Freed and D.A. Davidson. On March 16, 1987, Freed filed his responsive pleading, alleged an interest in the bonds superior to any other person, and accused D.A. Davidson of bad faith. The District Court, using December 21, 1983, as the triggering date, applied a 3-year statute of limitations to Freed's bad faith claim and granted D.A. Davidson's motion for summary judgment. The Supreme Court agreed that the statute of limitations had run and pointed out that Freed could have filed a claim when D.A. Davidson refused to surrender the bonds to him. State ex rel. Egeland v. City Council of Cut Bank, 245 M 484, 803 P2d 609, 47 St. Rep. 2212 (1990).

Breach of Contract — Legal Wrong Independent of Actual Damage: The plaintiff alleged that the defendant bank breached the implied covenant of good faith and fair dealing. The Supreme Court held that the action was barred by the running of the statute of limitations because the statute commences to run on a breach of contract claim at the time the breach occurs and not at the time, if any, when the plaintiff suffers an injury. Kitchen Krafters, Inc. v. Eastside Bank of Mont., 242 M 155, 789 P2d 567, 47 St. Rep. 602 (1990).

Cause of Action — Accruing Upon Injury, Not Breach of Duty: The plaintiff alleged that the defendant bank had breached its fiduciary duty to disclose when it failed to inform the plaintiff of

the way certain escrow payments had been applied. The bank argued that the date the statute of limitations had commenced running was the date of the alleged breach of the duty to disclose. The Supreme Court held that the statute did not commence to run when the bank breached its fiduciary duty, but when the bank failed to release the trust indenture and the plaintiff suffered an injury. Kitchen Krafters, Inc. v. Eastside Bank of Mont., 242 M 155, 789 P2d 567, 47 St. Rep. 602 (1990).

Effect of Administrative Actions: In a case relating to wage claims assigned to the Department of Labor and Industry, the Supreme Court held that the District Court's the finding that the Statute of Limitations was not tolled by the administrative actions of the Department was incorrect. Intermountain Deaconess Home v. St., 191 M 309, 623 P2d 1384, 38 St. Rep. 272 (1981), following Pope v. Keefer, 180 M 454, 591 P2d 206, 36 St. Rep. 366 (1979).

Proof of Date of Complaint: Where from the filing mark on the original complaint in an action brought under the Federal Employers' Liability Act it appeared that the action was commenced within the 2-year period prescribed, it was sufficient as against the objection that the amended pleading did not affirmatively allege that it was commenced within that time. Gillespie v. Great N. Ry., 63 M 598, 208 P 1059 (1922).

Amendment of Complaint:

Where an amended complaint in an action brought under the federal liability act did not state a new cause of action, the contention that the action was barred by the 2-year limitation prescribed therein is without merit, the amendment relating back to the date of the commencement of the action, unaffected by the intervening lapse of time. Gillespie v. Great N. Ry., 63 M 598, 208 P 1059 (1922).

An amendment, properly allowed, relates back to the date of the original pleading or process. Clark v. Oreg. Short Line R.R., 38 M 177, 99 P 298 (1909). See McAuley v. Cas. Co. of Am., 39 M 185, 102 P 586 (1909).

Demurrable Complaint: An action is "commenced", within the meaning of this section, and the operation of the Statute of Limitations is thereby arrested by filing a complaint to which a general demurrer (demurrer abolished, Rule 7(c), M.R.Civ.P., and 25-31-503 (25-31-503 now repealed)) is afterward sustained, provided the pleading is sufficiently substantial to allow of its being properly amended so as to fully state the same cause of action attempted to be stated in the first instance. Am. Sur. Co. v. Kartowitz, 54 M 92, 166 P 685 (1917); Clark v. Oreg. Short Line R.R., 38 M 177, 99 P 298 (1909). See McAuley v. Cas. Co. of Am., 39 M 185, 102 P 586 (1909).

Collateral References

Limitation of Actions *key* 117 through 119.

54 C.J.S. Limitations of Actions §260, et seq.

1 Am. Jur. 2d Actions §67; 61A Am. Jur. 2d Pleading §§111, 119, 180.

Filing of pleadings as amounting to bringing of suit within limited time required by mechanics' lien statute. 75 ALR 695.

27-2-103. Actions by state subject to limitations.

Case Notes

Tax Collections: This section limits the time for commencing a personal action to collect a tax to 2 years and is not in conflict with Art. V, sec. 39, 1889 Mont. Const. Bd. of County Comm'rs v. Story, 26 M 517, 69 P 56 (1902).

Collateral References

Limitation of Actions *key* 11(1); States *key* 201.

54 C.J.S. Limitations of Actions §25; 81A C.J.S. States §316.

51 Am. Jur. 2d Limitation of Actions §§399, 416.

Mandamus as subject to Statute of Limitations. 155 ALR 1144.

State Statute of Limitations as affecting action or proceeding by federal government or its officials. 61 ALR 412.

Consent by state to suit against it as affecting right to set up defense of Statute of Limitations. 42 ALR 1493, supplemented by 50 ALR 1408.

27-2-104. Application of this state's statutes of limitations — actions against nonresidents.

Compiler's Comments

1991 Amendment: Near middle of first sentence, after "an action", substituted "is governed by part 5 of this chapter" for remainder of sentence and former (1) and (2) that read: "cannot be brought thereon in a court of the state against him or his personal representative after the

expiration of the time limited by the laws of his residence for bringing a like action except by a resident of the state and in one of the following cases:

(1) where the cause of action originally accrued in favor of a resident of the state;

(2) where, before the expiration of the time so limited, the person in whose favor it originally accrued was or became a resident of the state or the cause of action was assigned to and thereafter continuously owned by a resident of the state"; and made minor changes in style.

Severability: Section 9, Ch. 293, L. 1991, was a severability clause.

Case Notes

Resident Defendant: In an action on an open account by a resident of another state against defendant then and for some years prior thereto a resident of Montana, plaintiff's contention that the bar of the statute applicable was that prescribed by this section and that thereunder the question whether the action was barred depended upon the statute of the foreign state solely was wrong, this section meaning no more than that a debtor, situated as defendant was, shall have in addition to all other Statutes of Limitation of Montana the further one provided for herein if available and he desires to assert it. Bahn v. Estate of Fritz, 92 M 84, 10 P2d 1061 (1932).

Collateral References

Limitation of Actions *key* 86 through 88.

54 C.J.S. Limitations of Actions §31.

51 Am. Jur. 2d Limitation of Actions §154.

Tolling of statute of limitations during absence from state as affected by fact that party claiming benefit of limitations remained subject to service during absence or nonresidence. 55 ALR 3d 1158.

Nonresidence of judgment debtor as suspending or tolling running of period of limitation as to judgment. 27 ALR 2d 846.

Provision of Statute of Limitations excluding period of absence of debtor or defendant from state as applicable to action on liability or cause of action accruing out of state. 148 ALR 732.

Nonresidence or absence of defendant from state as suspending or tolling Statute of Limitations, where relief is sought, or could have been sought, by action or proceeding in rem or quasi in rem. 119 ALR 331.

Provision suspending limitations while defendant is a nonresident or without the state as affected by nonresidence of party asserting cause of action. 83 ALR 271.

Provision in Statute of Limitations as to absence from state as applied to a nonresident individual who has an office or place of business in the state. 61 ALR 391.

Absence from state as suspending bar of Statute of Limitations as against judgment. 21 ALR 1039, superseded in part by 166 ALR 768.

Part 2
Time Limits on Specific Kinds of Actions

Part Case Notes

Architectural Malpractice — Applicability of Continuing Relationship Doctrine: An architect was hired to design and oversee the building of a hospital. Shortly after completion in 1975, problems developed with the heating, air conditioning, and ventilating systems. The hospital contacted the architect about remedies for the problems, seeking and continuing to rely on his advice until 1979, when the parties' relationship ended. The hospital filed suit in 1981, which the architect contended was beyond the statute of limitations that normally would begin running upon substantial completion of the facility in 1975. Distinguishing Schneider v. Leaphart, 228 M 483, 743 P2d 613 (1987), the Supreme Court applied the continuing relationship doctrine because no specific statute of limitations governed the tort of architectural malpractice and because "accrual" was not statutorily defined at the time of the acts giving rise to the action. The continuing relationship doctrine may be used when, during the course of an ongoing, developing, and dependent relationship between a professional and a client, the professional commits a tortious act that injures the client. The doctrine suspends the accrual of the cause of action in order to give the professional an opportunity to remedy, avoid, or establish that there was no error or attempt to mitigate damages. The cause of action does not accrue until either the professional relationship ends or, if a general professional relationship continues between the parties, the professional ceases to treat or advise the client for the particular act causing the injury. Therefore, the statute of limitations in this case was suspended until the professional relationship ended in 1979 and the hospital's complaint in 1981 was filed well within the general 3-year tort statute of limitations. N. Mont. Hosp. v. Knight, 248 M 310, 811 P2d 1276, 48 St. Rep. 444 (1991).

Requirements of "Equitable Tolling" — Doctrine Not Recognized: Plaintiff relied on out-of-state decisions to present the proposition that, in instances when an injured person has several legal remedies and reasonably and in good faith pursues one, the statute of limitations will not be available as a defense where equitable principles justify tolling of the statute. Requirements of the doctrine, known as "equitable tolling", were outlined in Collier v. Pasadena, 191 Cal. Rep. 681 (Cal. App. 1983): (1) timely notice to the defendant (within the applicable statute of limitations) in filing the first claim; (2) lack of prejudice to defendant in gathering evidence to defend against the second claim; and (3) good faith and reasonable conduct by plaintiff in filing the second claim. The Supreme Court determined that in the present case the notice requirement was not met; therefore, the court did not address arguments with regard to the remaining two elements or recognize the doctrine of equitable tolling in Montana. Erickson v. Croft, 233 M 146, 760 P2d 706, 45 St. Rep. 1379 (1988), but see Harrison v. Chance, 244 M 215, 797 P2d 200, 47 St. Rep. 1539 (1990), in which the Supreme Court expressed an apparent willingness to apply the doctrine when the requirements set out in Erickson appeared to be met.

Relation Back of Amendment to Substitute True Name: When a complaint sets forth a cause of action against a defendant designated by a fictitious name under 25-5-103 and his true name is thereafter discovered and substituted by amendment, the fictitiously named defendant is considered a party to the action from its commencement, so that the Statute of Limitations stops running as to the fictitiously named defendant on the date the original complaint is filed. Sooy v. Petrolane Steel Gas, Inc., 218 M 418, 708 P2d 1014, 42 St. Rep. 1702 (1985).

Applicable Statute of Limitations Governed by Basis of Claim: Rule 54(c), M.R.Civ.P. (Title 25, ch. 20), provides that a party must be granted any relief to which he is entitled even though he may not have demanded the relief in his pleadings. Thus, under Rule 8, M.R.Civ.P. (Title 25, ch. 20), it is not necessary to set out the legal theory under which the claim is based. However, the Statute of Limitations applicable must necessarily be in conformity with the basis of the action. Castillo v. Franks, 213 M 232, 690 P2d 425, 41 St. Rep. 2071 (1984).

27-2-201. Actions upon judgments.

Compiler's Comments

2001 Amendment: Chapter 515 in (2) at end of first sentence substituted "10 years" for "6 years". Amendment effective October 1, 2001.

1999 Amendment: Chapter 101 in (2) increased period from 5 years to 6 years. Amendment effective October 1, 1999.

1995 Amendments — Composite Section: Chapter 60 in (3), at end, inserted "or within 10 years from entry of a lump-sum judgment or order for support arrears, whichever is later".

Chapter 125 in (1), in exception clause, inserted reference to subsection (5); and inserted (5) establishing statute of limitation for action to enforce order of restitution.

Chapter 264 in (1) inserted reference to subsection (4); inserted (4) concerning period for commencement of action to collect past-due child support that accrued in another state or country or by tribal court order; and made minor changes in style. Amendment effective March 28, 1995.

In the exception clause at the beginning of (1), the codifier changed "and" to "through" because Ch. 125 and Ch. 264 each added a subsection reference to the existing reference.

Severability: Section 18, Ch. 60, L. 1995, was a severability clause.

Section 42, Ch. 125, L. 1995, was a severability clause.

1993 Amendment: Chapter 631 at beginning of (1) inserted exception clause; inserted (3) prescribing a 10-year period after termination of the support obligation for commencement of an action for collection of past-due support; and made minor changes in style.

Preamble: The preamble attached to Ch. 631, L. 1993, provided: "WHEREAS, it is necessary to draft a composite bill containing unrelated sections in order to present the proposed program improvements in a single, comprehensive bill that promotes the needs of legislative energy, efficiency, and economy by limiting the number of possible bills and by reducing the need for hearings and readings on those bills.

THEREFORE, the Legislature finds it appropriate to enact the following legislation."

Severability: Section 29, Ch. 631, L. 1993, was a severability clause.

Case Notes

Monthly Maintenance Payments Treated as Separate Installments — All Elements of Maintenance Claim Not in Existence on Date of Judgment — Statute of Limitations Inapplicable: A dissolution decree on October 23, 1987, granted the wife monthly spousal maintenance payments of $3,500 a month for 10 years. The ex-husband made the first several payments, but paid no maintenance after August 1, 1988. In 2001, the ex-wife filed an action to renew the

judgment. The ex-husband contended that the judgment was barred by the 10-year statute of limitations in this section. The District Court reasoned that because all elements of the ex-wife's maintenance claim existed on October 23, 1987, the statute of limitations applied, and summary judgment was granted to the ex-husband. On appeal, the Supreme Court reversed, holding that when a judgment award requires monthly payments rather than a lump sum, each payment is to be treated as a separate installment for purposes of applying the statute of limitations. The court likened delinquent monthly maintenance payments to monthly child support arrearages that are due within the statute of limitations. Thus, the claim did not accrue until all elements of the claim or cause existed or occurred, so any claim for the ex-husband's nonpayment of maintenance could not have accrued until each individual payment was due. The ex-wife's claim for delinquent monthly maintenance payments was not time-barred. Fulton v. Fulton, 2004 MT 240, 322 M 516, 97 P3d 573 (2004), distinguishing Cummings v. Lockwood, 327 P2d 1012 (Ariz. 1958). See also In re Marriage of Hooper & Crittendon, 247 M 322, 806 P2d 541 (1991).

Statute of Limitations to Run From Time Payment Due: After 11 years passed from the time that a dissolution decree was entered, the wife moved to obtain her share of the husband's retirement benefits as ordered in the decree. Although the wife moved to enforce the decree about 1 year after the husband retired, the husband contended that the enforcement motion was untimely because under this section, an action to enforce a judgment or decree must be brought within 10 years. The Supreme Court cited In re Marriage of Brown, 263 M 184, 867 P2d 381 (1994), for the holding that the statute of limitations does not begin to run until the payment is due, which in this case was the date that the husband retired. In re Marriage of Weber, 2004 MT 206, 322 M 324, 95 P3d 694 (2004).

Limitation of Action — Workers' Compensation Third Party and Bad Faith Claims: A third-party claimant may not bring an action pursuant to Title 33, ch. 18, commonly known as the Unfair Trade Practices Act, until the underlying claim has been settled or a judgment entered in favor of the claimant on the underlying claim. The statute of limitations on such a claim is 1 year from the date of settlement or entry of judgment on the underlying claim, even though the Act does not define what constitutes an underlying claim. A common-law bad faith claim accrues when: (1) all of the elements of the claim or cause exist or have occurred; (2) the right to maintain an action on the claim or cause is complete; or (3) a court or other agency is authorized to accept jurisdiction of the action. The statute of limitations for a common-law bad faith claim is 3 years and begins to run when the claim or action accrues. The accrual date of a bad faith claim arising out of a separate and independent disputed issue is established by determining whether that particular issue has been ultimately resolved, regardless of the existence or absence of a resolution of other issues within the workers' compensation case. Therefore, for statute of limitations purposes, statutory and common-law bad faith claims against an insurer that are predicated on actions taken in adjusting a workers' compensation claim accrue when the Workers' Compensation Court enters a judgment ordering the insurer to pay for a previously denied benefit but leaves unresolved the ultimate determinations of the extent and duration of the worker's disability. O'Connor v. Nat'l Union Fire Ins. Co., 2004 MT 65, 320 M 301, 87 P3d 454 (2004), following Grenz v. Orion Group, Inc., 243 M 486, 795 P2d 444 (1990), Poteat v. St. Paul Mercury Ins. Co., 277 M 117, 918 P2d 677 (1996), and Brewington v. Employers Fire Ins. Co., 1999 MT 312, 297 M 243, 992 P2d 237 (1999), and distinguishing Fode v. Farmers Ins. Exch., 221 M 282, 719 P2d 414 (1986).

Error in Denial of Motion to Set Aside Past-Due Child Support Judgment for Fraud — Payments Improperly Applied to Barred Debt: In 1998, a mother sought $33,350 in past-due child support owed over a 20-year period. The District Court found that the statute of limitations in this section limited recovery to arrearages incurred only in the 10 years prior to filing the complaint. At trial, the father provided documentation that some support had been paid, but the mother denied ever receiving any payments. After trial, the father attempted to introduce evidence of additional payments, but the evidence was disallowed. The District Court then calculated the amount of child support owed since 1988, but applied payments made since 1988 to the obligations incurred prior to 1988, irrespective of the statute of limitations. The father then moved to set aside the judgment because the mother committed fraud by denying the receipt of certain payments, but that motion was denied without reaching the issue of fraud. On appeal, the Supreme Court held that the District Court erred in denying the motion. Although a District Court should apply any payment of child support to the earliest arrearage, an award may be applied only to arrearages due within 10 years of a suit for enforcement. It is incongruous for a court to bar a plaintiff from bringing an action to enforce a certain debt, but then apply payments toward that barred debt. Thus, the District Court erred in applying payments made since 1988 to the obligations incurred prior to 1988, and in turn erred in failing to address the

merits of the father's motion alleging fraud. The case was remanded for further consideration. Roberts v. Nickey, 2002 MT 37, 308 M 335, 43 P3d 263 (2002). See also In re Adoption of C.J.H., W.L.H., & T.A.H., 246 M 52, 803 P2d 214 (1990), and In re Marriage of Hooper & Crittendon, 247 M 322, 806 P2d 541 (1991).

License Suspension for Nonpayment of Child Support Available Remedy Despite Child's Emancipation: A father was years in arrears in paying child support at the time that a license suspension hearing was held but nevertheless maintained that when the child was emancipated, the child support debt transformed into an ordinary civil debt that was not enforceable by a license suspension action. In general, child support that is due under a dissolution decree but that remains unpaid becomes a judgment debt similar to any other money judgment. As such, the collection of back child support is subject to the 10-year statute of limitations in this section, but other than that limit, a custodial parent to whom back child support is owed has recourse to any collection remedies provided by law, including the license suspension remedies, regardless of whether the child for whom support is owed has achieved emancipation. Although losing his licenses was a drastic remedy, the father's persistent failure to honor his child support obligations left the District Court with no alternative, and the Supreme Court affirmed the suspension of the father's driver's, hunting and fishing, and electrician's licenses on appeal. In re Marriage of Hopper, 1999 MT 310, 297 M 225, 991 P2d 960, 56 St. Rep. 1247 (1999), following Willoughby v. Loomis, 264 M 44, 869 P2d 271, 51 St. Rep. 138 (1994), and distinguishing In re Marriage of Mikesell, 276 M 403, 916 P2d 740, 53 St. Rep. 418 (1996).

Judgment Lien Extinguished by Operation of Law: In a case filed in order to have a series of conveyances declared fraudulent, the District Court erred by failing to determine that the judgment lien was extinguished by operation of law, terminating any rights of the plaintiff to the subject property. A judgment may be enforced for a period of 10 years from docketing; a writ of execution may be issued to enforce a judgment for a period of 6 years, which may be extended by the court for up to an additional 4 years; a judgment lien continues for 6 years following docketing of the judgment and then expires by operation of law; a judgment may be extended past its 10-year duration only by filing a separate action to obtain a new judgment on the existing judgment. Jones v. Arnold, 272 M 317, 900 P2d 917, 52 St. Rep. 779 (1995).

Agency Applied Wrong Ten-Year Statute of Limitations: The state support enforcement officials argued that they could pursue Day for past-due child support based upon subsection (3) of this section. The Supreme Court held that the part of the statute relied on by the state applied only to delinquent support accruing after October 1, 1993, and that the state should have relied on the 10-year statute of limitations provided for in subsection (1) of this section. In re Support Obligation of Day v. St., 272 M 170, 900 P2d 296, 52 St. Rep. 680 (1995).

Stipulation Acknowledging Child Support Arrearages — Tolling of Statute of Limitations: Jody and Stephen were divorced in 1979, and Stephen was ordered to pay child support. Jody brought a URESA action in 1982 to collect arrearages, and the parties stipulated to the amount of those arrearages. The District Court entered an order providing that the stipulation was enforceable by contempt. In 1992, Jody moved to enforce the 1982 stipulation and order. Stephen claimed that collection of certain arrearages was barred by the statute of limitations. Citing Marriage of Hooper & Crittendon, 247 M 322, 806 P2d 541 (1991), the Supreme Court held that the 10-year statute of limitations in this section applied to each required payment as if it were a separate judgment, and therefore any payment accruing prior to 10 years before the 1992 motion for enforcement was barred. However, citing Dodd v. Simon, 113 M 536, 129 P2d 224 (1942), the Supreme Court also held that the statute of limitations was tolled by the 1982 stipulation acknowledging the unsatisfied judgments existing prior to the stipulation. Therefore, none of the arrearages were barred. In re Marriage of Brown, 263 M 184, 867 P2d 381, 51 St. Rep. 7 (1994).

Writs of Execution Quashed When Based on Judgment Extended by Ex Parte Motion Past Ten-Year Statute of Limitations: In 1982, Welch obtained a judgment against Huber for $6,612.34. In 1988, Lorn moved the court for an order extending the judgment. The judgment was extended until 1994. Over 10 years later, Lorn attempted to collect the judgment by obtaining writs of execution. Welch moved to quash the writs and for an order finding the order extending the judgments void for want of service upon Welch, which the District Court granted. The Supreme Court affirmed, noting that the order extending the judgment presumed to make the original judgment valid for 12 years, contrary to this section. The judgment could be extended beyond the 10-year statute of limitations only by the filing of an action, with notice to Welch. The Supreme Court said that the motions allowed by 25-13-102 (now repealed) are permissible as long as the extension granted does not exceed the 10-year statute of limitations. Welch v. Huber, 262 M 114, 862 P2d 1180, 50 St. Rep. 1469 (1993), followed in Jones v. Arnold,

272 M 317, 900 P2d 917, 52 St. Rep. 779 (1995), and Jones v. Arnold, 1998 MT 214, 290 M 444, 963 P2d 1269, 55 St. Rep. 901 (1998).

Statute of Limitations to Run From Date Each Support Payment Due: In a case of first impression, the Supreme Court adopted the rule that each monthly support obligation constitutes a judgment and that the 10-year statute of limitations for judgments begins to run the month the payment becomes due. In re Marriage of Crittendon, 247 M 322, 806 P2d 541, 48 St. Rep. 218 (1991), followed in In re Marriage of Petranek, 255 M 458, 843 P2d 784, 49 St. Rep. 1107 (1992), Willoughby v. Loomis, 264 M 44, 869 P2d 271, 51 St. Rep. 138 (1994), and Emery v. St., 286 M 376, 950 P2d 764, 54 St. Rep. 1454 (1997).

Partial Bar by Statute: Fact that plaintiff had been awarded full judgment for services rendered without regard to limitation period under this section did not require that entire verdict be set aside but only that the judgment be reduced by value of services rendered prior to 5-year period, since the claim was divisible. Cartwright v. Joyce, 155 M 478, 473 P2d 515 (1970).

Probate Claims: Statutes of Limitations have no application to creditors' claims in probate that have been approved by the personal representative and allowed by the court. Montgomery v. First Nat'l Bank, 114 M 395, 136 P2d 760 (1943).

Appeal Pending on Judgment:

Under our statute there is no exception that extends the time for bringing an action on a judgment so as to permit exclusion of the time when appeals are pending or when a supersedeas bond is in effect. If the Legislature so intended, it would have so provided in 27-2-406. St. v. Hart Refineries, 109 M 140, 92 P2d 766, 123 ALR 555 (1939).

An action to renew a money judgment entered in plaintiff's favor more than 10 years prior to commencement was barred by the Statute of Limitations, notwithstanding appeals to the state and United States Supreme Courts and the filing of a supersedeas bond on both appeals; the fact that an appeal is pending in the principal proceeding does not delay an action to renew the judgment obtained therein because they are different causes not involving the same facts; a supersedeas bond merely prohibits issuance of execution on the judgment pending appeal. St. v. Hart Refineries, 109 M 140, 92 P2d 766, 123 ALR 555 (1939).

Execution of Cumulative Remedy:

The right to bring suit on the judgment is not dependent upon the right to levy execution. In fact, execution must be issued within 6 years after the entry of the judgment under 25-13-101, except by leave of court under 25-13-102 (now repealed), whereas action for revival or renewal may be brought as a matter of right within 10 years. St. v. Hart Refineries, 109 M 140, 92 P2d 766, 123 ALR 555 (1939).

A judgment is a cause of action on which suit may be brought within 10 years of its rendition, the remedy by execution being cumulative merely and not impairing the common-law right of action upon the judgment as a debt of record. Lindsay Great Falls Co. v. McKinney Motor Co., 79 M 136, 255 P 25 (1927).

Quiet Title Actions: This section has no application to a water right suit in which plaintiff's right as established in a former decree was sought to be protected, injunctive relief asked in such a suit being in the nature of an action to quiet title to realty, in which the running of time strengthens rather than destroys a title determined by decree. Missoula Light & Water Co. v. Hughes, 106 M 355, 77 P2d 1041 (1938).

Lien of Judgment: This section gives a right of action on a judgment within 10 years, whereas the lien of a judgment is expressly limited to 6 years by 25-13-101. Swift & Co. v. Weston, 88 M 40, 289 P 1035 (1930).

Montana Judgments: A similar statute applied to judgments rendered by the courts of this state. Lindsay Great Falls Co. v. McKinney Motor Co., 79 M 136, 255 P 25 (1927); Haupt v. Burton, 21 M 572, 55 P 110 (1898).

Collateral References

Judgment *key* 910(1) through (5); Limitation of Actions *key* 21, 39(6).

50 C.J.S. Judgments §854; 53 C.J.S. Limitations of Actions §§46, 67.

47 Am. Jur. 2d Judgments §895.

Laches or acquiescence as defense, so as to bar recovery of arrearages of permanent alimony or child support. 5 ALR 4th 1015.

Statute of limitations as defense to action or proceeding for alimony or support of child allowed by court order or decree. 70 ALR 2d 1250, §§5, 6 superseded by 5 ALR 4th 1015.

Period within which new action may be commenced after nonsuit or judgment not on merits. 54 ALR 2d 1229; 83 ALR 478.

Suspension, or removal of bar, of Statute of Limitations as against judgment. 45 ALR 2d 967; 166 ALR 768; 21 ALR 1038.

Absence of judgment debtor from state as suspending or tolling running of period of limitations as to judgment. 27 ALR 2d 839.

Effect of the death of a judgment debtor as tolling the Statute of Limitations. 2 ALR 1706.

27-2-202. Actions based on contract or other obligation.

Case Notes

Three-Year Statute of Limitations Applicable to Breach of Bailment Obligation: Pursuant to a breach of a bailment agreement related to the transfer of 10 horses and tack, plaintiff filed a claim for the value of the property, asserting that under subsection (2) of this section, 5 years were allowed to bring the claim as a breach of contract. The District Court concluded that the voluntary bailment agreement was not a contract, but rather an obligation, which was governed by the 3-year statute of limitations in subsection (3) of this section, and because the claim was not brought within 3 years, summary judgment for defendants was appropriate. On appeal, the Supreme Court affirmed. Regardless of the fact that plaintiff characterized the claim as a breach of contract, there was no evidence of an expressed agreement for sale of the property, so defendants were obligated but not contractually required to account for the property. Plaintiff's election to sue on a contract theory did not operate to grant 2 additional years for plaintiff to assert her rights. The District Court's conclusion that plaintiff's action was not timely was correct. Demarest v. Broadhurst, 2004 MT 147, 321 M 470, 92 P3d 1168 (2004).

Statute of Limitations Applicable to Workers' Compensation Subrogation Right Created by Statute — Subrogation Agreement Not Created by Correspondence Between Attorneys for Claimant and Insurer: Roadarmel suffered an industrial injury and filed a workers' compensation claim against his employer, and the claim was defended by Royal Insurance Company (Royal). Roadarmel received a judgment and then filed a third-party action against two companies that had supplied the chemicals that injured him. Roadarmel's attorney, White, properly notified Royal that the third-party action was being commenced. Pursuant to 39-71-414, Roadarmel requested that Royal pay a portion of the costs, and Royal agreed to participate in the costs rather than waive its subrogation rights, tendering a check for $5,000 toward the costs. Roadarmel was successful in the third-party action, and White advised Royal that the third parties would appeal. The appeal was upheld, and White notified Royal of that fact, attaching copies of the settlement check and jury verdict forms, a breakdown of the actual costs of the third-party action, and a request that Royal determine its subrogation interest in a portion of the third-party proceeds. Royal independently computed the amount that it contended that it was owed and advised Roadarmel in letters that an action would be filed to determine Royal's subrogation interests. White did not respond to the letters, and 3 1/2 years passed before Royal filed a petition to determine its subrogation rights. Royal later learned through discovery that White had disbursed the third-party proceeds on the same day that Royal had been requested to determine its subrogation interest, allegedly instructing Roadarmel to hold the funds pending a subrogation determination. Royal then also filed a separate count against White for an alleged breach of the duty of trust owed Royal as a third-party beneficiary of the trust imposed on the third-party proceeds. The Workers' Compensation Court determined that a subrogation agreement had been formed in the exchange of letters between White and Royal's counsel, that the statute of limitations on the contract had not expired, and that Roadarmel and White were jointly and severally liable for $63,864.79 for breaching the subrogation contract and failing to honor Royal's first lien of the third-party judgment. Roadarmel and White appealed, contending that Royal's subrogation action was based on a statutory liability that was time-barred by the 2-year statute of limitations in 27-2-211 and that the 3-year statute of limitations in 72-34-511, which governs actions based on an alleged breach of trust, also barred Royal's action against White. Royal argued that the correspondence between the parties formed an enforceable contract that was subject to the longer statute of limitations in this section. The Supreme Court agreed with Roadarmel and White. The correspondence only confirmed in writing that which was required by and took place entirely in the context of the mandatory statutory procedures and did not create an enforceable contract. Although the court recognized the rights of equitable subrogation at common law, those rights were conceptually distinguished from an insurer's first lien against third-party proceeds recovered by an injured employee, which constitutes a statutory liability amounting to an unqualified right of reimbursement not found at common law. As set out in St. Paul Fire & Marine Ins. Co. v. Glassing, 269 M 76, 887 P2d 218 (1994), the concept of subrogation merely gives the insurer the right to prosecute the cause of action that the insurer possessed, so the insurer's claim by subrogation, being purely derivative, is subject to the same statute of limitations as though the cause of action were sued upon by the insured. The statutory right to reimbursement or recoupment is distinguishable from the

insurer's right of subrogation proper. Thus, Royal's claim against Roadarmel, being based on a liability created by statute, was time-barred under 27-2-211(1)(c). Further, Royal's breach of trust claim against White was time-barred by 72-34-511. Because Royal's statutory lien was extinguished as a matter of law 2 years after Royal received notice that the third-party action was settled, by the time that the statute of limitations on White's actions began to run, even if that time was determined to be the date on which he disbursed the third-party funds, he could no longer be characterized as a trustee, constructive or otherwise, of the third-party proceeds. The case was reversed and remanded for summary judgment in favor of Roadarmel and White. Royal Ins. Co. v. Roadarmel, 2000 MT 259, 301 M 508, 11 P3d 105, 57 St. Rep. 1080 (2000).

Action Based in Tort or Contract — Choice of Injured Party as to Theory Under Which to Proceed: Andersen's home was destroyed in an arson fire. It could not be determined who started the fire, so The Travelers Indemnity Co. (Travelers) paid Andersen's claim. Four years later, Andersen was charged with conspiracy to commit arson, and Travelers filed to recover the claim money. Andersen moved for summary dismissal on grounds that the complaint alleged fraud, the statute of limitations for which had already run under 27-2-203. Although the complaint alleged fraud, it also alleged a breach of contract. When an action may be based in either tort or contract, the injured party may elect the theory under which to proceed, and the statute of limitations governing that theory will control. The general rule applied to situations falling within the twilight zone of contract and tort law is that doubt must be resolved in favor of an action based on contract. Travelers' complaint sufficiently alleged a cause of action based on breach of written contract to allow application of the 8-year statute of limitations in this section and thus was timely filed. Travelers Indem. Co. v. Andersen, 1999 MT 201, 295 M 438, 983 P2d 999, 56 St. Rep. 782 (1999), following Weible v. Ronan St. Bank, 238 M 235, 776 P2d 837, 46 St. Rep. 1231 (1989).

Statute of Frauds and Statute of Limitations Not Applicable to Constructive Trust: The husband argued that the statute of frauds and the statute of limitations for agreements not in writing barred his wife's claim to marital property. However, in this case, a constructive trust should have been created for the property. Constructive trusts arise by operation of law, so 70-20-101 did not bar the wife's claim because under 70-20-102, 70-20-101 may not be construed to prevent creation of a trust. Further, because the wife was not attempting to directly enforce a verbal agreement, the requirement in this section that an action based on a contract, account, or promise not founded on an instrument in writing be brought within 5 years also did not apply. In re Marriage of Moss, 1999 MT 62, 293 M 500, 977 P2d 322, 56 St. Rep. 257 (1999).

Right to Assert Counterclaims Arising Out of Same Transaction as Foreclosure Action: Ranch Recovery Limited Liability Company (Ranch Recovery) was the assignee of the vendor's interest in real property that was subjected to a mortgage foreclosure brought by First Security Bank of Missoula (First Security). Upon the vendee's default, the District Court awarded summary judgment to First Security. Ranch Recovery moved for reconsideration and for permission to amend its counterclaim based on newly discovered evidence. The District Court denied Ranch Recovery's motion for leave to amend its answer. First Security alleged that leave to amend was properly denied because the counterclaims were barred by the applicable statute of limitations. The Supreme Court held that because Ranch Recovery's claims were counterclaims arising out of the same written contract from which First Security asserted its right to foreclose and to priority, Ranch Recovery was entitled to assert those claims notwithstanding any applicable limitation periods. First Sec. Bank of Missoula v. Ranch Recovery Ltd. Liab. Co., 1999 MT 43, 293 M 363, 976 P2d 956, 56 St. Rep. 188 (1999).

Applicability of Statute of Limitations to Breach of Restrictive Covenants: A home owners' association brought suit against McMillan to enforce compliance with the restrictive covenant limiting home construction to a 1-year period following commencement of construction. McMillan pleaded the affirmative defense of statute of limitations. Under this section, an action on any obligation founded on an instrument in writing must be commenced within 8 years. The District Court applied Graveley Ranch v. Scherping, 240 M 20, 782 P2d 371 (1989), in holding that the defense was inapplicable because each day of noncompliance constituted a new violation of the covenant, starting the statute of limitations running anew. The Supreme Court distinguished Graveley Ranch because it applied to a continuing nuisance rather than a restrictive covenant. Also, because a restrictive covenant provides a definite and readily determinable timeframe for performance, the holding in Scherpenseel v. Bitney, 263 M 68, 865 P2d 1145 (1993), that the statute of limitations does not run until an actual demand for performance is made did not apply. The statute of limitations began to run after the 1-year period following commencement of construction. Because the action was not brought until 10 years after that date, the claim was time-barred under this section. Country Estates Homeowners Ass'n, Inc. v. McMillan, 276 M 100, 915 P2d 806, 53 St. Rep. 297 (1996).

Guarantor's Obligation Not Barred by Statute of Limitations as to Obligation of Principal: A creditor's claim against a guarantor is not exonerated by the running of the statute of limitations as against the principal. Mercury Marine v. Monty's Enterprises, Inc., 270 M 413, 892 P2d 568, 52 St. Rep. 255 (1995). See also Dupree v. Jordan, 252 P 67 (Okla. 1927), Bloom v. Bender, 313 P2d 568 (Calif. 1957), and Restatement of Security 130 (1941), Comment a on subsection (1) and illustration 2.

Statute of Limitations Applicable to Claims Involving Employment Relationship With No Written Contract: Because the employment relationship is contractual in nature, the applicable statute of limitations for claims involving employment relationships with no written contract is 5 years. Thus, for purposes of receiving unpaid wages, an employee may bring a claim any time within 5 years of the date the claim accrues. Craver v. Waste Management Partners of Bozeman, 265 M 37, 874 P2d 1, 51 St. Rep. 268 (1994), applied, as to claims for payment of wages that are due on the last day of employment, but not wages that become due after the last day of employment, in Delaware v. K-Decorators, Inc., 1999 MT 13, 293 M 97, 973 P2d 818, 56 St. Rep. 52 (1999).

Conflicting Statutes of Limitations Resolved in Favor of Longest Statute: Kearney, a news manager working for a television station under an oral contract, sued KXLF for overtime compensation. The District Court applied a 5-year statute of limitations pursuant to subsection (2) of this section. KXLF argued that the applicable statute of limitations was the 2-year limit contained in 27-2-211. Citing Ritland v. Rowe, 260 M 453, 861 P2d 175 (1993), and Thiel v. Taurus Drilling Ltd. 1980-II, 218 M 201, 710 P2d 33 (1985), the Supreme Court held that conflict between the statutes applicable in this case should be resolved in favor of the statute containing the longer limitation. Kearney v. KXLF Communications, Inc., 263 M 407, 869 P2d 772, 51 St. Rep. 119 (1994). See also Travelers Indem. Co. v. Andersen, 1999 MT 201, 295 M 438, 983 P2d 999, 56 St. Rep. 782 (1999).

Laches Inapplicable to Bar Suit to Enforce Divorce Settlement Payments Fifteen Months in Arrears: A divorce settlement agreement that wife sought to enforce was a contract. It was subject to an 8-year statute of limitations. Wife filed the suit 15 months after husband stopped making payments under the agreement. Husband failed to show the extraordinary circumstances requiring application of laches that is required to dismiss a suit filed within the limitations period. In re Marriage of Hahn, 263 M 315, 868 P2d 599, 51 St. Rep. 73 (1994).

Statute of Limitations Not to Begin to Run on Covenant Running With the Land Until Demand for Performance Made: The landowners did not request that the developer build a covenanted road until 16 years after they purchased the property. The Supreme Court determined that a covenant to dedicate is an affirmative, written covenant running with the land. It is meant to benefit a purchaser's property. The Supreme Court held that public policy demands that real estate developers be strictly held to their covenants and that the statute of limitations does not begin to run on an affirmative covenant until a demand for performance has been made. Scherpenseel v. Bitney, 263 M 68, 865 P2d 1145, 50 St. Rep. 1709 (1993), distinguished in Country Estates Homeowners Ass'n, Inc. v. McMillan, 276 M 100, 915 P2d 806, 53 St. Rep. 297 (1996).

Credit Card Account Not Written Contract Subject to Eight-Year Statute of Limitations: Colorado National Bank sued the Storys for an unpaid Visa card account. At the trial, the bank introduced the Storys' signed application form and the monthly invoices as evidence that a signed contract existed between the parties. The Storys argued that their debt was only an account stated and was therefore subject to a 5-year statute of limitations, which had run. The Supreme Court held that the application form did not contain any contract terms and that the monthly statements were only statements of account and therefore there was no written contract and the applicable statute of limitations was 5 years. Colo. Nat'l Bank v. Story, 261 M 375, 862 P2d 1120, 50 St. Rep. 1366 (1993).

Statute of Limitations Applicable to Contract for Sale of Wheat: The appropriate statute of limitations applicable to a proceeding concerning an alleged contract for the sale of wheat is the 4-year period provided for in 30-2-725 that specifically applies to contracts for the sale of goods, rather than the general statute of limitations contained in this section covering actions on contracts. Mogan v. Cargill, Inc., 259 M 400, 856 P2d 973, 50 St. Rep. 851 (1993).

Limitations of Actions: The parties entered into an agreement for the sale of a motel. The agreement provided that the sellers would assign their Burlington Northern railroad lease to the buyers at closing. The parties were mutually mistaken about the area covered by the lease. The Supreme Court determined that the dispute was a breach of contract action governed by the 8-year statute of limitations of this section rather than the 2-year limitations period for fraud and mistake under 27-2-203. Maloney v. Heer, 257 M 500, 850 P2d 957, 50 St. Rep. 382 (1993).

Action Sounding in Tort and Contract: The defendant accounting firm argued that its duty to the plaintiff arose from law in that it was required to use due care in carrying out its duties and that a breach of duty constituted a tort claim barred by the statute of limitations. The Supreme Court held that the defendant's obligations were defined by the parties' contract and also that there was a legal duty to meet those obligations in a professional manner. The court stated that the plaintiff's claim was based both in tort and contract and therefore the longer statute of limitations for contracts was available to the plaintiff. Billings Clinic v. Peat Marwick Main & Co., 244 M 324, 797 P2d 899, 47 St. Rep. 1464 (1990).

Injuries Claimed Constituting Tort Theories — Tort Statute of Limitation Applies: Following the bank's seizure of collateral when plaintiff failed to repay a bank loan, plaintiff brought the present action against the bank for trespass and wrongful removal of farm machinery. The injuries claimed by plaintiff as a result of the breach of the loan contract constitute tort theories of action, and therefore the gravamen of the action lies in tort and the tort statute of limitations applies to bar the action. Weible v. Ronan St. Bank, 238 M 235, 776 P2d 837, 46 St. Rep. 1231 (1989), followed in Action Enterprises, Inc. v. McCalla, 259 M 167, 855 P2d 111, 50 St. Rep. 743 (1993).

Avoidance of Statute of Limitations by Pursuit of One Claim Over Another — Gravamen of Claim to Control Limitations Period: Plaintiff contended that he could elect between a contract theory or negligence theory when his claim had a basis in either theory. The District Court found that the gravamen of the causes of action alleged under the contract theory "sound in common law fraud and negligence" and that, despite the contract label, the theory simply rehashed the fraud and negligence claims and was barred by the statute of limitations. Affirming, the Supreme Court held that the election to pursue one cause of action over another must be more than a mere relabeling of a claim to avoid a statute of limitations. The gravamen of the claim, not the label attached, controls the limitations period to be applied to that claim. Erickson v. Croft, 233 M 146, 760 P2d 706, 45 St. Rep. 1379 (1988), distinguishing Unruh v. Buffalo Bldg. Co., 194 M 553, 633 P2d 617, 38 St. Rep. 1156 (1981).

Breach of Implied Covenant of Good Faith and Fair Dealing as Separate Tort — Three-Year Statute of Limitations: A cause of action for breach of the implied covenant of good faith and fair dealing is a separate tort action, independent of the underlying contract. Therefore, the applicable Statute of Limitations is that for a tort action, 3 years. Tynes v. Bankers Life Co., 224 M 350, 730 P2d 1115, 43 St. Rep. 2243 (1986).

Subdivision Access as Sounding in Contract: A declaration of restrictions governing subdivision tracts provided for access to a river by purchasers of the lots. In 1976, one of the subdividers constructed a gate across the access road in derogation of the declaration and in interference with easement rights of the purchasers. He later claimed the Statute of Limitations expired 2 years after the gate was constructed; however, suit was not brought until 1982. The Supreme Court held that since the failure to construct a proper access road sounded in contract, the 8-year Statute of Limitations applied. Shors v. Branch, 221 M 390, 720 P2d 239, 43 St. Rep. 919 (1986).

Lack of Contract — Breach of Warranty Sounded in Tort Rather Than Contract: Plaintiff was injured in 1979 while spraying weeds. He brought suit in 1984 against the producers, distributors, and sellers of the herbicide and spraying equipment, claiming counts in strict liability in tort, tortious misrepresentation, negligence, and contract for breach of sellers' warranty. Plaintiff had no direct written contract with any of the defendants. The District Court found that there was no contract from which to imply the warranties which plaintiff claimed were breached. The court reasoned that without a contract the breach of warranty claims sounded in tort rather than contract; therefore, the warranty claims were barred by the 3-year tort Statute of Limitations. On appeal, plaintiff contended that one of the longer contract Statutes of Limitations in 27-2-202 or 30-2-725 should apply. The Supreme Court disagreed, noting that the implied covenants of good faith and fair dealing, fitness for a particular purpose, merchantability, and workmanlike performance are imposed by law regardless of contract and that, absent a contract, breach of the implied covenants sounds in tort, not contract. The District Court judgment was affirmed. Bennett v. Dow Chem. Co., 220 M 117, 713 P2d 992, 43 St. Rep. 221 (1986).

Use of Plats to Induce Purchasers — Implied Covenant — Statute of Limitations: In order to sell lots, a subdivider prepared and recorded subdivision plat maps that designated common areas and roadways. The sales contracts did not state who would construct roads or common areas. As the issue here concerns an implied covenant arising from the use of the written documents to induce purchasers, the appropriate Statute of Limitations is 8 years, the limitation for actions based on a written contract. Majers v. Shining Mtns., 219 M 366, 711 P2d 1375, 43 St.

Rep. 16 (1986), reaffirmed in Majers v. The Shining Mtns., 230 M 373, 750 P2d 449, 45 St. Rep. 283 (1988), and followed in Country Estates Homeowners Ass'n, Inc. v. McMillan, 276 M 100, 915 P2d 806, 53 St. Rep. 297 (1996).

Eight-Year Statute of Limitations for Civil Action Under Securities Act of Montana: The U.S. District Court for the District of Montana certified a question to the Supreme Court on the applicable Statute of Limitations for a civil action brought pursuant to 30-10-307. In deciding that the 8-year limitation period rather than the 2-year period applied, the court traced the legislative history of the civil enforcement limitation period under the Securities Act of Montana. In 1967, the Legislature eliminated the relevant 2-year limitation and left a void. The court reviewed the legislative intent, underlying purposes of the Act, and characterization of the essence of the claim. Finding that each count of plaintiff's complaint could be interpreted as sounding in tort, contract, or statutory violation, the court resolved the case in favor of the longest limitation period. Thiel v. Taurus Drilling Ltd. 1980-II, 218 M 201, 710 P2d 33, 42 St. Rep. 1520 (1985), followed in Ritland v. Rowe, 260 M 453, 861 P2d 175, 50 St. Rep. 1183 (1993), and in Kearney v. KXLF Communications, Inc., 263 M 407, 869 P2d 772, 51 St. Rep. 119 (1994). See also State ex rel. Vranish v. District Court, 228 M 59, 741 P2d 412, 44 St. Rep. 1341 (1987), and Travelers Indem. Co. v. Andersen, 1999 MT 201, 295 M 438, 983 P2d 999, 56 St. Rep. 782 (1999).

Cases Falling Between Contract and Tort Law:

The Supreme Court held in Castillo v. Kunnemann, 197 M 190, 642 P2d 1019 (1982), that Kunnemann, the original owner of a 160-acre parcel of land, had reserved certain water and ditch rights when he conveyed the land to Franks, and that Franks, therefore, had not conveyed any of these water rights to the Castillos and the Cotants when they each purchased subdivided portions of the original parcel from Franks. Following the Supreme Court's decision, the Cotants and Castillos sued Franks for breach of contract, fraud, and in the case of the Cotants, for breach of warranty. Whether the claims are viewed as in tort or in contract, they are within the applicable Statute of Limitations. The facts constituting the fraud were not considered discovered until the date of the Supreme Court's decision, and the cases were filed within 2 years of that date. The cases were filed within the 8-year contract Statute of Limitations. Castillo v. Franks, 213 M 232, 690 P2d 425, 41 St. Rep. 2071 (1984).

Plaintiffs leased office space from defendant in a commercial office building. A fire gutted the building, destroying the plaintiffs' offices. Four years later, plaintiffs brought this action for property and business loss. Defendant argues the plaintiffs' claim, which seeks recovery for injury to property, is covered by the 2-year statute on tort action. The Supreme Court said that there are circumstances in which liability in tort may coexist with a liability in contract, giving the injured party the right to elect which form of action he will pursue. The plaintiffs framed the action as a claim for breach of a covenant of quiet enjoyment, implied from the terms of the lease agreement, which results in the conclusion that the 8-year Statute of Limitations is applicable to contracts. Unruh v. Buffalo Bldg. Co., 194 M 553, 633 P2d 617, 38 St. Rep. 1156 (1981).

Assessment of Penalty for Usurious Promissory Note up to Time of Trial Held Proper: Appellants loaned $7,000 to respondents in exchange for a demand promissory note at 11 ½% interest. In a suit for payment on the note, the District Court found that the note was usurious and calculated the forfeiture penalty based on the note's interest from the date of its making up to the time of trial. On appeal, appellants conceded that the note was usurious but claimed that the District Court had calculated the statutory penalty incorrectly. Appellants contended that since demand was made prior to the filing of the action on the note, the note matured at that time and appellants cannot be penalized for usurious interest after that date. The Supreme Court affirmed, ruling that since appellants did not cancel their rights under the note after demand, the obligation on the note continued after demand and through the trial. Therefore, assessment of the usury penalty up to the date of the trial was proper under 31-1-108. E.C.A. Envtl. Management Serv., Inc. v. Toenyes, 208 M 336, 679 P2d 213, 41 St. Rep. 388 (1984).

Eight-Year Statute of Limitations for Grantor Support Agreement: Montana law provides for the enforcement of a grantor support agreement, and the Statute of Limitations applicable to such an agreement is 8 years. Sands v. Nestegard, 198 M 421, 646 P2d 1189, 39 St. Rep. 1101 (1982).

Negligence in Performing Contractual Duty: A prime contractor contracted separately with a steel supplier to supply steel and with a subcontractor to erect the steel. Because the supplier was delayed in delivering the steel, the subcontractor suffered financial losses. The subcontractor's action against the supplier for negligence in the performance of its duties arising out of the steel supply contract with the prime contractor is governed by the 3-year Statute of Limitations applicable to negligence cases. The Statute of Limitations could not begin running

before the contract delivery date. Hawthorne v. Kober Constr. Co., 196 M 519, 640 P2d 467, 39 St. Rep. 294 (1982).

Pension Dispute Controlled by Two-Year Statute of Limitation: Appellant's action to adjust his retirement benefits based on a claim of two constitutional violations and promissory estoppel is barred by the Statute of Limitations, 27-2-207, relating to property rights and is not controlled, as appellant contends, by 27-7-202, applying to written contracts, or 27-2-203, applying to obligations other than a contract. "Only in the broadest sense could 27-2-203 or 27-2-202 be considered controlling, and since there is a more specific statute involving injury to personal property rights, of which retirement benefits are one, the Supreme Court is constrained to follow the more specific statute." Rierson v. St., 191 M 66, 622 P2d 195, 38 St. Rep. 3 (1981).

No Error Where Claim of When Action Accrued Not Before Court: In an action for compensatory and exemplary damages for wrongful conversion of plaintiff's merchandise stored in defendant's warehouse, the District Court properly granted defendant's motion for summary judgment on the basis that the action was barred by the Statute of Limitations. Plaintiff's claims for recovery accrued 4 years previously when the defendant warehouse sold plaintiff's merchandise, not, as plaintiff claimed, when plaintiff discovered upon demand that defendant sold the merchandise. In this instance the allegation of knowledge, demand, and then refusal to return the goods was not raised in the complaint, the answer, the interrogatories, or in any affidavit properly before the District Court at the time summary judgment was granted, and thus plaintiff's allegations as to when the action accrued will not be considered on appeal. Seven Seas Import-Export & Mercantile, Inc. v. Handee Foods, 190 M 508, 621 P2d 1097, 38 St. Rep. 60 (1981).

Minimum Wage Dispute: In a case relating to wage claims assigned to the Department of Labor and Industry, the Supreme Court held that the District Court was correct in holding a 5-year Statute of Limitations governs a minimum wage dispute. Intermountain Deaconess Home v. St., 191 M 309, 623 P2d 1384, 38 St. Rep. 272 (1981), following Pope v. Keefer, 180 M 454, 591 P2d 206, 36 St. Rep. 366 (1979).

Bar to Recovering Unpaid Wages: When the appellant's original complaint was filed on June 13, 1972, 27-2-202 barred him from recovering any unpaid wages due prior to June 13, 1964, because the Statute of Limitations on such an employment contract commenced at the end of each payday for services performed during the pay period. Weston v. St. Highway Comm'n, 186 M 46, 606 P2d 150 (1980).

Involuntary Payment Not Acknowledgment of Debt — Suspending Statute of Limitations: In 1965, loans made by Worden Trading Company to defendant Trenka were consolidated into two promissory notes. In addition, two other loans were made by means of promissory notes. No payments were made on the notes. In 1970, Trenka attempted to remove some items from his safe deposit box in Farmers State Bank but was prevented from doing so by Richard Hansen, president of the bank and of the Worden Trading Company. Hansen would not release the contents of the box until payment was made on the notes. Trenka's girlfriend wrote two checks to Worden Trading Company in order to obtain the contents of the box. Hansen claimed that he was substituting one form of collateral for another and that the payments were an acknowledgment of the debts. To be a valid acknowledgment of a debt and suspend the running of the Statute of Limitations, payments must be voluntary. The payments here were involuntary because neither Hansen nor Worden Trading Company had a valid security interest in the safe deposit box and the Statute of Limitations ran. Worden Trading Co. v. Trenka, 184 M 256, 602 P2d 601 (1979).

Action to Enforce Implied Covenant in Oil and Gas Lease: In a suit by lessor's grantees to collect damages from defendants/lessees for failure to comply with the common-law offset drilling rule and drill a well to protect the plaintiffs' interests, the suit was not governed by the Statute of Limitations applying to suits to prevent waste to real property. Because the suit was brought to enforce implied provisions of an agreement, it was governed by the Statute of Limitations applicable to contracts. U. V. Indus., Inc. v. Danielson, 184 M 203, 602 P2d 571 (1979).

Deed as Contract in Writing: In Montana deeds are construed as contracts in writing to which the 8-year Statute of Limitations applies. Neils v. Deist, 180 M 542, 591 P2d 652 (1979), followed in Larson v. Undem, 246 M 336, 805 P2d 1318, 47 St. Rep. 2088 (1990).

Implied Contract for Services — Statute of Limitations — Month-by-Month Accrual: The Statute of Limitations on an implied contract for services is 5 years, under 27-2-202. The Statute begins to run when an enforceable claim accrues. Section 39-2-602(2) creates the presumption that an employee is hired on a month-by-month basis. The Statute therefore begins to run on each month's wages as that month's wages become due. Pope v. Keefer, 180 M 454, 591 P2d 206 (1979).

Fraudulent Concealment: Doctrine of fraudulent concealment was not applicable to medical malpractice case in which plaintiff alleged that doctor had failed to make a full disclosure of the experimental nature of the operation to be performed, but admitted that he was informed in detail of the type of operation to be performed and that he consented to the operation and where, although doctor assured the plaintiff that he would be able to return to work within 6 months of the operation, plaintiff admitted to being totally disabled for 6 years after the operation and permanently partially disabled thereafter. Monroe v. Harper, 164 M 23, 518 P2d 788 (1974).

Decedents' Estates:

Five-year limitation period under this section did not include time between decedent's death and issuance of letters of administration to defendant. Cartwright v. Joyce, 155 M 478, 473 P2d 515 (1970).

Statutes of Limitations have no application to creditors' claims in probate that have been approved by the personal representative and allowed by the District Court. Montgomery v. First Nat'l Bank, 114 M 395, 136 P2d 760 (1943).

An action by an executor to recover from a beneficiary under a will a succession tax required by the laws of another country that plaintiff had paid was upon an obligation not founded on an instrument in writing and therefore barred by 27-2-202(3) because not commenced within 3 years from the time the tax was paid. Tietjen v. Heberlein, 54 M 486, 171 P 928 (1918).

Damage to Building From Broken Water Pipes: This section did not apply to action by owners of apartment building against realtors for water damages to building from bursting of water pipes due to alleged negligence of realtors in caring for the building. The claim was barred by Statute of Limitations relating to injury to or waste or trespass on property, 27-2-207. Quitmeyer v. Theroux, 144 M 302, 395 P2d 965 (1964). (Dissenting opinion, 144 M 302, 395 P2d 965 (1964).)

Nonparticipating Oil Royalty: Where wife agreed to property settlement granting her a percentage of royalties should oil ever be found on land, such right did not vest until oil production began and her action for royalties was not barred by the fact that it had been more than 8 years since execution of the settlement. Close v. Ruegsegger's Estate, 143 M 32, 386 P2d 739 (1963).

Defenses Not Barred: Limitation statutes apply only to actions and not to defenses; and evidence of payment by services rendered was admissible, although such services were done more than 5 years prior to filing of action. Hagerty v. Hall, 135 M 276, 340 P2d 147 (1959).

Corporate Suspension: The suspension in its domicile of a foreign corporation for nonpayment of taxes does not suspend the running of the Statute of Limitations on claims against the corporation, since, under section 93-3007, R.C.M. 1947 (since repealed), the corporation could have been served with process; hence, a mortgage executed by the corporation would be barred after 8 years. Mont. Valley Land Co. v. Bestul, 126 M 426, 253 P2d 325 (1953).

Partial Payments Tolling Statute:

Where the plaintiff in an action on a note executed in 1931 and payable within 90 days pleaded part payment in 1934 and 1938 to bar the Statute of Limitations, he has the burden of proof that the payments were made and it is not sufficient to show the endorsement on the back of the note. An endorsement of a payment on a note by the holder does not create a presumption that the payment was made at the time that the endorsement indicates. Wight v. Stevenson, 126 M 377, 252 P2d 241 (1953).

A payment of principal or interest extends time for commencement of action on note from date of last payment. Mercer v. Mercer, 120 M 132, 180 P2d 248 (1947).

Where plaintiff rented building from defendant with understanding that rent was to be applied on several notes made by defendant which plaintiff held, in absence of specific directions by defendant as to application of rent to the various notes, plaintiff could apply rent as he saw fit to interrupt running of Statute of Limitations as to all of the notes. Mercer v. Mercer, 120 M 132, 180 P2d 248 (1947).

The rendering of service, transfer of property or goods, or assumption of obligations taken as part payment of principal or interest is sufficient to toll Statute of Limitations on note. Mercer v. Mercer, 120 M 132, 180 P2d 248 (1947).

In order for payment of principal or interest due on note to toll Statute of Limitations, it must be voluntary and the indebtedness clearly identified so as to warrant inference that debtor had acknowledged existence of liability in his obligation to pay remainder of debt. Mercer v. Mercer, 120 M 132, 180 P2d 248 (1947).

Part payment on a promissory note by one of two joint makers does not suspend the running of the Statute of Limitations as against the other. Nathan v. Jenkins, 113 M 46, 123 P2d 975 (1942).

Where plaintiff relies on a payment to toll the running of the Statute of Limitations in an action on a promissory note, the mere endorsement of a payment on the instrument by the holder or his agent does not raise a presumption that such payment was made by the makers or either of them; plaintiff to make out a prima facie case must show actual payment made by or for the makers with their knowledge and consent. Such endorsement promotes the interest of the payee and in that sense is self-serving. Nathan v. Jenkins, 113 M 46, 123 P2d 975 (1942).

In an action to recover balance due on contract for the purchase of water stock and to foreclose mortgages on land securing contracts, where company constructed its water distribution system under contract with the Carey Land Act Board (now abolished), payment of an installment of the purchase price made 8 years before suit and credited first to interest on the entire unpaid balance prevented the 8-year Statute of Limitations from running against any of the installments remaining unpaid. Valier-Mont. Land & Water Co. v. Ries, 109 M 508, 97 P2d 584 (1940).

Partial payment of a past-due note by one joint obligor does not extend the time within which an action on it may be brought, as against the coobligor who neither authorized nor ratified such payment. Turner v. Powell, 85 M 241, 278 P 512 (1929).

If an endorser makes payment of interest on an overdue note, the holder's right to maintain suit on the instrument is not barred under this section if commenced within 8 years after such payment. Morgan v. Huffman, 76 M 396, 247 P 326 (1926).

Trust Charges: In an action for an accounting, assuming that there was a trust relationship, when the plaintiff beneficiary in 1925 made complaint to the defendant as to how the expenses were charged and defendant denied that its conduct was wrong and continued to make similar charges, the Statute of Limitations began to run at that time, since at that time the plaintiff knew that the trust was being violated. Potlatch Oil & Ref. Co. v. Ohio Oil Co., 199 F2d 766 (9th Cir. 1952).

Trust Obligations:

Statute of Limitations does not commence to run in favor of the trustee of a resulting trust until the trustee disavows the trust or asserts some right inconsistent with it. Campanello v. Mercer, 124 M 528, 227 P2d 312 (1951).

Where the relationship of plaintiff and defendant in the acquisition of securities was that of trustee and cestui que trust, under an express parol agreement to share in the profits, and the former repudiated the relationship in 1912 before the sale of the securities, with the knowledge of the latter, defendant's claim for an interest in the proceeds of the transaction asserted in 1921 was barred under 27-2-202(2). Cook v. MacGinniss, 72 M 280, 233 P 129 (1925).

An action to recover money received by defendant from her husband with knowledge that it belonged to plaintiff and that it had been taken from him by the husband by threats and intimidation, thus constituting her a trustee, ex maleficio, would seem to fall within the provision of 27-2-202(3). Kerrigan v. O'Meara, 71 M 1, 227 P 819 (1924).

Bond for Deed: Action to enforce "bond for deed" for certain mining rights in land was barred by this section. Clinton v. Miller, 124 M 463, 226 P2d 487 (1951).

Consideration for New Promise: Even though original debt is barred by Statute of Limitations, it is sufficient consideration for a subsequent note and new promise to pay, and such new note revives the obligation. Betor v. Chevalier, 121 M 337, 193 P2d 374 (1948).

Offset of Barred Claims: Where debt was barred by 5-year Statute of Limitations, it could not be set up as an offset in a suit on a note and mortgage not arising out of the same transaction. Francisco v. Francisco, 120 M 468, 191 P2d 317, 1 ALR 2d 625 (1947), distinguished in Hagerty v. Hall, 135 M 276, 340 P2d 147 (1959).

Account for Services: This section was applicable to an account for hotel services furnished by plaintiff to defendant during period 1930 to 1939, inclusive, since the account was not one of reciprocal demand, and the limitation operated from the date of the opening of the account. Couse v. Dietz, 117 M 539, 159 P2d 886 (1945).

Mortgages: Where a mortgagor never paid any of the principal or interest on the mortgage or any taxes on the land and the mortgagee paid the taxes to prevent delinquency but allowed the Statute of Limitations to run against his lien by not availing himself of the provisions of 71-1-210, the court will not free the lands from the cloud occasioned by the outlawed mortgage in a suit to quiet title brought by the mortgagor without his first reimbursing the mortgagee for the taxes, on the theory that the mortgagee became subrogated to the county's tax lien provided by 15-16-401. Swingley v. Riechoff, 112 M 59, 112 P2d 1075 (1941), explained in Mont. Valley Land Co. v. Bestul, 126 M 426, 253 P2d 325 (1953).

Bond Coupons: Generally, the Statute of Limitations applicable to the principal of public bonds is applicable also to the coupons, except that on the latter it begins to run from their date of

maturity and not from that of the bond, whether attached or detached, but mandamus to compel payment does not lie until demand made and refused or until the trust created between the irrigation district officers and County Treasurer on the one hand and the bondholders on the other is repudiated, which did not occur in the instant case, so neither the 2-, 5-, nor 8-year Statutes were applicable as barring the coupons. State ex rel. Central Auxiliary Corp. v. Rorabeck, 111 M 320, 108 P2d 601 (1940).

Equitable Obligations:

An action for money had and received, where payment was made by mistake, resting upon the legal fiction of a promise implied by law to return that which in equity and good conscience should be returned to him from whom it was received, falls within the limitation of 3 years provided by 27-2-202(3) and not within the 2-year limitation prescribed by 27-2-203 as "for relief on the ground of fraud or mistake", the mistake alleged being a mere incident to the cause of action and 27-2-203 having to do only with mistake of fact. McFarland v. Stillwater County, 109 M 544, 98 P2d 321 (1940).

An action against a party for money that he, in equity and good conscience, ought to refund is one upon an "obligation" and is barred unless commenced within 3 years from the time the cause of action accrues. Schaeffer v. Miller, 41 M 417, 109 P 970 (1910), distinguished in Clack v. Staunton, 100 M 26, 44 P2d 1069 (1935), and Keith v. Kottas, 119 M 98, 172 P2d 306 (1946).

Pleadings:

Where new matter in the answer consists of plea of Statute of Limitations, plaintiff need not reply thereto if matter in avoidance of the plea be found in any of plaintiff's pleadings; hence when complaint on mortgage foreclosure shows on face that the action is barred but in addition alleges payment of interest within the 8-year period, no reply is necessary to the limitation plea, nothing new having been brought in by the answer. Matteson v. Ackerson, 104 M 239, 66 P2d 797, 115 ALR 750 (1937).

By failing to plead the Statute of Limitations in a foreclosure proceeding, the defense is waived. Humbird v. Arnet, 99 M 499, 44 P2d 756 (1935); Turner v. Powell, 85 M 241, 278 P 512 (1929).

Promises Tolling Statute: As against defendant's contention in a mortgage foreclosure suit that the notes were "outlawed" under this section, the evidence was held to show that a check and letters to plaintiff promising payment, written within the 8-year period, had tolled the statute. Rock Island Plow Co. v. Cut Bank Implement Co., 101 M 117, 53 P2d 116 (1935).

Conversion of Property: One whose property has been converted may waive the tort and sue on an implied promise to pay the value of the property converted, and the Statute of Limitations applicable is 27-2-202(3). Stagg v. Stagg, 90 M 180, 300 P 539 (1931).

Partial Bar by Statute: Where plaintiff lessor brought action to recover rental, payable yearly under an oral lease of land for 2 years for the full term, but the demand as to the first year's rental was barred by 27-2-202(2), a plea of the statute directed to the whole cause of action was bad. Besse v. McHenry, 89 M 520, 300 P 199 (1931).

Tax Sale Receipts: An action for money had and entered against a county by a school district to recover money collected by the former for interest and penalties on redemption of property from tax sale proportionate to the tax due it was one upon "a contract, account, promise, not founded upon an instrument in writing", within the meaning of 27-2-202(2), fixing the period within which such an action must be brought at 5 years. School District v. Pondera County, 89 M 342, 297 P 498 (1931).

Statutory Stockholders' Liability: While the double liability of stockholders in state banks is contractual in nature, this section does not apply in an action on such liability, but, the liability being one created by law, the provision of 27-2-211(3), that an action of that nature must be brought within 3 years after it was created, applies. Brown v. Roberts, 78 M 301, 254 P 419 (1927).

Bonds of Public Officers:

The liability of a surety on the official bond of a County Treasurer is not founded on an "instrument in writing" in the sense in which that term is used in this section. Gallatin County v. USF&G Co., 50 M 55, 144 P 1085 (1914), distinguished in School District v. Pondera County, 89 M 342, 297 P 498 (1931).

This section is not applicable to an action against a City Treasurer who fails to turn over interest on public money received by him. Butte v. Goodwin, 47 M 155, 134 P 670 (1913).

Waiver of Statute:

A party may waive the benefit of the Statute of Limitations before or after the expiration of the prescribed limit, not only by either of the acts mentioned in 27-2-104 but also by express agreement based upon a consideration, though made contemporaneously with and as a part of

the principal agreement or obligation out of which the action has arisen. Parchen v. Chessman, 49 M 326, 142 P 631 (1914), distinguished in Thielbar Realties, Inc. v. Nat'l Union Fire Ins. Co., 91 M 525, 9 P2d 469 (1932).

A stipulation embodied in a promissory note to the effect that the maker expressly waives all rights and benefits conferred by the Statute of Limitations is not void as against public policy, and by it he binds himself not to plead the Statute, if not for all time, for at least a reasonable time, namely, until the expiration of an additional period of 8 years after the period prescribed by this section. Parchen v. Chessman, 49 M 326, 142 P 631 (1914), distinguished in Thielbar Realties, Inc. v. Nat'l Union Fire Ins. Co., 91 M 525, 9 P2d 469 (1932).

Public Officer's Obligations: A City Treasurer who failed to turn over interest received on public funds was guilty of a breach of his implied promise, as trustee of such funds, to do so, and not a breach of a contract in writing as embodied in his official bond; hence an action to recover such interest, brought more than 4 years after the conclusion of the Treasurer's term of office, was barred by 27-2-202. Butte v. Goodwin, 47 M 155, 134 P 670 (1913).

Instrument in Writing:

Where the transfer of personal property was evidenced by a bill of sale, to which the purchaser, upon reselling the goods, added an endorsement guaranteeing delivery but not expressly warranting title, the language of 30-11-211 may not be read into the endorsement and thereby a written contract created so as to make the statutory limitation of 8 years applicable to a suit for a breach of warranty of title to the property sold. Pincus v. Muntzer, 34 M 498, 87 P 612 (1906).

The instrument in writing mentioned in this section is one which, in itself, contains a contract to do the particular thing for the nonperformance of which the action is brought and not one which by implication may be said to be in writing. Pincus v. Muntzer, 34 M 498, 87 P 612 (1906).

Declaration of Trust: An action to enforce a liability evidenced by a declaration of trust in which a complaint was filed within 8 years after a certain payment under the declaration became due was commenced in time. Goodell v. Sanford, 31 M 163, 77 P 522 (1904).

Collateral References

Judgments *key* 910(1), (3); Limitation of Actions *key* 24(1) through (6).

54 C.J.S. Limitations of Actions §73, et seq.

51 Am. Jur. 2d Limitation of Actions §§92 through 99.

Causes of action governed by limitations period in UCC §2-725. 49 ALR 5th 1.

Application of statute of limitations to actions for breach of duty in performing services of public accountant. 7 ALR 5th 852.

Payment by one of two or more joint or joint and several debtors as suspending or tolling limitation. 74 ALR 2d 1287.

When Statute of Limitations begins to run against note payable on demand. 71 ALR 2d 284.

When Statute of Limitations begins to run on contractual obligation to pay for minor's support. 52 ALR 2d 1125.

When limitations begin to run against actions on public securities or obligations to be paid out of a special or particular fund. 50 ALR 2d 271.

When Statute of Limitations begins to run against action on bond of personal representative. 44 ALR 2d 807.

Entry or endorsement by creditor on note, bond, or other obligation as evidence of part payment which will toll the Statute of Limitations. 23 ALR 2d 1331.

Waiver or tolling of Statute of Limitations by executor or administrator. 8 ALR 2d 660.

When Statute of Limitations begins to run against action to recover upon contracts payable in installments. 82 ALR 316.

27-2-203. Actions for relief on ground of fraud or mistake.

Case Notes

General 883
Fraud 886
Mistake 887
Discovery of Fraud or Mistake — When Limitation Period Begins to Run. 888
Failure to Discover Fraud or Mistake — Statute Not Tolled 890

GENERAL

Statute of Limitations Under Repealed Uniform Fraudulent Conveyance Act Displaced by Explicit Statute of Limitations in Uniform Fraudulent Transfer Act: Plaintiff insurers argued that a creditor may not assert a claim under the Uniform Fraudulent Transfer Act (UFTA) until

after the underlying judgment is entered, citing Murphy v. Atkinson, 262 M 164, 864 P2d 273 (1993). Plaintiffs were correct to the extent that prior to the adoption of UFTA in 1991, the statute of limitations for fraudulent transfers under the now repealed Uniform Fraudulent Conveyance Act was supplied by the general rule for fraud under this section. However, after adoption of UFTA, Murphy, in conjunction with this section, was no longer the rule of law, but rather the statute of limitations in 31-2-341 applied and provided that a judgment in hand is no longer a prerequisite for establishing standing to bring a UFTA claim. Gulf Ins. Co. v. Clark, 2001 MT 45, 304 M 264, 20 P3d 780 (2001).

Limitations of Actions: The parties entered into an agreement for the sale of a motel. The agreement provided that the sellers would assign their Burlington Northern railroad lease to the buyers at closing. The parties were mutually mistaken about the area covered by the lease. The Supreme Court determined that the dispute was a breach of contract action governed by the 8-year statute of limitations of 27-2-202 rather than the 2-year limitations period for fraud and mistake under this section. Maloney v. Heer, 257 M 500, 850 P2d 957, 50 St. Rep. 382 (1993).

Applicable Statutes of Limitations Not Affected by Statute of Repose Applicable to Real Property Improvements: The plaintiffs, a condominium owners' association and its individual members, sued Big Sky of Montana Realty, Inc., the successor in interest of Big Sky of Montana, Inc., for breach of warranty, strict liability, negligence, fraud, and deceptive practices in connection with a fire in the Deer Lodge Condominiums at Big Sky. The defendants claimed that the actions were barred by the statute of limitations applicable to each individual cause of action. Plaintiffs claimed that the applicable statute of limitations in 27-2-208 allows a 10-year period following completion of real property improvements in which to bring an action. The Supreme Court held that 27-2-208 was a statute of repose and should be interpreted not to extend the statute of limitations otherwise applicable to a cause of action. The statute only provides that if the time for bringing an action was otherwise extended by law under 27-2-401 or 27-2-409, the extension could be for no longer than 10 years after completion of the improvement. The District Court therefore properly held that the action was barred by the statutes of limitations. Ass'n of Unit Owners of Deer Lodge Condominium v. Big Sky of Mont., Inc., 245 M 64, 798 P2d 1018, 47 St. Rep. 1814 (1990), followed in Carl v. Chilcote, 255 M 526, 844 P2d 79, 49 St. Rep. 1109 (1992).

Avoidance of Statute of Limitations by Pursuit of One Claim Over Another — Gravamen of Claim to Control Limitations Period: Plaintiff contended that he could elect between a contract theory or negligence theory when his claim had a basis in either theory. The District Court found that the gravamen of the causes of action alleged under the contract theory "sound in common law fraud and negligence" and that, despite the contract label, the theory simply rehashed the fraud and negligence claims and was barred by the statute of limitations. Affirming, the Supreme Court held that the election to pursue one cause of action over another must be more than a mere relabeling of a claim to avoid a statute of limitations. The gravamen of the claim, not the label attached, controls the limitations period to be applied to that claim. Erickson v. Croft, 233 M 146, 760 P2d 706, 45 St. Rep. 1379 (1988), distinguishing Unruh v. Buffalo Bldg. Co., 194 M 553, 633 P2d 617, 38 St. Rep. 1156 (1981).

Tolling of Statute — Time Spent in Armed Services: The 2-year period of limitations is tolled by the time plaintiff spent in the Marine Corps, under the federal Soldiers and Sailors Civil Relief Act of 1940, 50 U.S.C. 525. In re Estate & Guardianship of Schultz, 218 M 148, 706 P2d 135, 42 St. Rep. 1471 (1985).

Real Estate Fraud — Joinder of Parties Relating Back to Original Complaint: In an action against the defendant real estate company for fraud and negligence in the sale of real property to the plaintiffs, the complaint was properly filed in August 1979 and the owners of the company were dismissed by stipulation from the action in June 1980. When the plaintiffs made a motion in 1982 to rejoin the owners as defendants, the defendant company argued that the joinder was barred by the 2-year Statute of Limitations. On appeal, the Supreme Court found that the amendment satisfied the conditions of Rule 15(c), M.R.Civ.P., related back to the date of the filing of the action, and was therefore not barred. The owners were corporate officers, and both knew of the lawsuit and knew or should have known of their potential liability. The joinder is therefore not precluded by the Statute of Limitations. White v. Lobdell, 208 M 295, 678 P2d 637, 41 St. Rep. 346 (1984).

Motion by Trustee in Bankruptcy to Set Aside Conveyance Not Barred by State Statute of Limitations: Where the trustee in bankruptcy brought an action in a bankruptcy proceeding to set aside a fraudulent conveyance made by the debtor's wife, the bankruptcy judge held that the action filed by the trustee was not barred by the state Statute of Limitations, as federal statute (11 U.S.C. 546(a)) gives the trustee 2 years after his appointment to file such an action. Here, the

action was brought within the applicable limit. In re McIntosh, 40 St. Rep. 1488 (1983) (apparently not reported in Federal Supplement).

Pension Dispute Controlled by Two-Year Statute of Limitation: Appellant's action to adjust his retirement benefits based on a claim of two constitutional violations and promissory estoppel is barred by the Statute of Limitations, 27-2-207, relating to property rights and is not controlled, as appellant contends, by 27-7-202, applying to written contracts, or 27-2-203, applying to obligations other than a contract. "Only in the broadest sense could 27-2-203 or 27-2-202 be considered controlling, and since there is a more specific statute involving injury to personal property rights, of which retirement benefits are one, the Supreme Court is constrained to follow the more specific statute." Rierson v. St., 191 M 66, 622 P2d 195, 38 St. Rep. 3 (1981).

Products Liability — Statute of Limitations — Discovery Rule Not Applicable: Plaintiff was injured in May 1975, when his holstered Ruger revolver discharged into his leg as he crawled under some brush. He filed this products liability action in September 1979. Ruger moved for summary judgment based upon the running of the Statute of Limitations. Plaintiff urges adoption of a discovery rule respecting accrual of the cause of action. Discovery rules have been limited to latent injuries resulting primarily from either drug products or medical malpractice. Montana statutes permit a discovery rule in actions for fraud or mistake and in actions for malpractice. The Statute of Limitations for tort actions, however, does not authorize application of a discovery rule. Adoption of such a rule would destroy the very policies which justify the Statute of Limitations. To allow a plaintiff who fails to inquire into the cause of injury to avoid the time bar under the guise of "discovery" would hopelessly demolish the protection afforded defendants by the Statute. Much v. Sturm, Ruger & Co., Inc., 502 F. Supp. 743, 37 St. Rep. 2116 (D.C. Mont. 1980).

Misrepresentation Action in Real Estate Sale: The District Court properly awarded summary judgment to defendants in a misrepresentation action under the Montana real estate license law when the record indicated that no fraudulent representations were made by defendants and the Statute of Limitations had expired, notwithstanding the "discovery" exception. Anderson v. Applebury, 173 M 411, 567 P2d 951 (1977).

Rental — Effect of Payments Upon Limitation: Whether or not rent was paid, the lease contained no default clause and no evidence was presented as to termination of lease. Therefore, lease was voidable, not void, and the statute did not begin to run until there was a demand and refusal. Grinde v. Tindall, 172 M 199, 562 P2d 818 (1977).

Action Not Based on Fraud: Where daughter conveyed real property to her mother with the understanding that it was to be held in trust for her and mother then deeded property to another daughter with the understanding that it was to be held in trust for the first daughter, an action brought by the first daughter to recover the property was not based on fraud but upon a failure to comply with the promise to reconvey the property and was therefore not barred by this section. Opp v. Boggs, 121 M 131, 193 P2d 379 (1948), distinguished in Barrett v. Zenisek, 132 M 229, 315 P2d 1001 (1957).

Fraud and Mistake Explained:

This section applies only to fraud or mistake within the common acceptance of the term. Opp v. Boggs, 121 M 131, 193 P2d 379 (1948).

Section 27-2-203 applies only to actions for fraud or mistake within the common acceptation of those terms and not to an action in claim and delivery, where defendant honestly and in good faith bought an estray from one wrongfully claiming to be the owner of the animal. Bennett v. Meeker, 61 M 307, 202 P 203 (1921).

Reformation Incident to Enforcement of Contract:

In a suit on a public warehouseman's bond in which an amended complaint sought reformation of the bond to express the true intent of the parties to protect owners of beans rather than owners of grain, the reformation asked was merely auxiliary to the enforcement of the contract originally pleaded and the applicable limitation was that applying to actions on contracts rather than that applying to actions for relief on the ground of fraud or mistake. Fidelity & Deposit Co. of Md. v. St., 92 F2d 693 (9th Cir. 1937), affirming 16 F. Supp. 489 (D.C. Mont. 1936).

Where plaintiff's primary purpose in bringing action against defendant fire insurance company was the enforcement of the contract of insurance but, as ancillary thereto, sought the aid of the equity arm of the court for the reformation of the policy in one particular on the ground of mutual mistake, the applicable Statute of Limitations is that having to do with an action on the contract and not this section. Thielbar Realties, Inc. v. Nat'l Union Fire Ins. Co., 91 M 525, 9 P2d 469 (1932).

Fraud of Judgment: Under 27-2-203, where an action to set aside a sale of property as in fraud of a judgment against the seller was commenced in the year after the rendition of the judgment, it was not barred by limitations, since the right of action did not accrue until plaintiff's judgment was obtained. Finch v. Kent, 24 M 268, 61 P 653 (1900), followed in Murphy v. Atkinson, 262 M 164, 864 P2d 273, 50 St. Rep. 1495 (1993).

FRAUD

No Error in Denial of Amended Complaint When Underlying Claim Moot: Plaintiff sought to file an amended complaint based on allegations of defendants' fraud in treating plaintiff's pet dog at defendants' animal clinic. The District Court denied the amended complaint, and plaintiff appealed, but the Supreme Court affirmed. The 2-year statute of limitations on the fraud claim had run, rendering the fraud claim futile, so denial of the amended complaint was not an abuse of discretion. Hawkins v. Harney, 2003 MT 58, 314 M 384, 66 P3d 305 (2003).

Action Based in Tort or Contract — Choice of Injured Party as to Theory Under Which to Proceed: Andersen's home was destroyed in an arson fire. It could not be determined who started the fire, so The Travelers Indemnity Co. (Travelers) paid Andersen's claim. Four years later, Andersen was charged with conspiracy to commit arson, and Travelers filed to recover the claim money. Andersen moved for summary dismissal on grounds that the complaint alleged fraud, the statute of limitations for which had already run under this section. Although the complaint alleged fraud, it also alleged a breach of contract. When an action may be based in either tort or contract, the injured party may elect the theory under which to proceed, and the statute of limitations governing that theory will control. The general rule applied to situations falling within the twilight zone of contract and tort law is that doubt must be resolved in favor of an action based on contract. Travelers' complaint sufficiently alleged a cause of action based on breach of written contract to allow application of the 8-year statute of limitations in 27-2-202 and thus was timely filed. Travelers Indem. Co. v. Andersen, 1999 MT 201, 295 M 438, 983 P2d 999, 56 St. Rep. 782 (1999), following Weible v. Ronan St. Bank, 238 M 235, 776 P2d 837, 46 St. Rep. 1231 (1989).

Negligent Misrepresentation Governed by Three-Year Negligence Statute of Limitations — Tolls Until Plaintiff Suffers Damages: A real estate broker appealed a verdict finding that he was liable because of his employee's negligent misrepresentation of a boundary on land purchased by the plaintiffs. The basis for the appeal was that the applicable statute of limitations was the 2-year time limit governing actions for fraud and that the suit had not been timely filed. The Supreme Court held that negligent misrepresentation involves breach of a reasonable standard of care and therefore is couched in terms of negligence and as such is subject to the 3-year negligence statute of limitations. The Supreme Court further held that the statute did not begin to run until damages were suffered and that did not occur in the present case until the plaintiffs learned that their house had been built on another's property. Cechovic v. Hardin & Associates, Inc., 273 M 104, 902 P2d 520, 52 St. Rep. 854 (1995), partially overruling Bushnell v. Cook, 221 M 296, 718 P2d 665 (1986).

Blank Security Agreement Signed by Borrower and Filled Out by Bank: Borrower signed a blank security agreement that bank then filled out and mailed to her. The record shows that she had the agreement in her possession in December 1985; thus, she had the means to discover the fraud that she alleged bank committed in setting the agreement's terms. Because she did not file a claim until December 1988, her claim was barred by the 2-year statute of limitations. Richland Nat'l Bank & Trust v. Swenson, 249 M 410, 816 P2d 1045, 48 St. Rep. 730 (1991).

Estoppel:

Plaintiff purchaser, who forfeited all payments under a real estate contract for deed and was required to return possession to the sellers, alleged that the sellers engaged in a continuing fraudulent concealment of facts that prevented him from ascertaining the extent of their fraud regarding representations concerning the ranch property he purchased. In response to plaintiff's contention that the sellers are estopped from raising the statute of frauds as a defense because of their acts of fraudulent concealment, the Supreme Court held that plaintiff did not exercise the ordinary diligence necessary to discover the facts constituting the alleged fraud, and therefore the necessary elements of estoppel are not present in this case. Plaintiff's claim is barred by the statute of limitations. Holman v. Hansen, 237 M 198, 773 P2d 1200, 46 St. Rep. 734 (1989).

Plaintiffs' claim of fraud against a shareholder was not barred by the 2-year Statute of Limitations, defendant being estopped from arguing the affirmative defense in order to promote justice, honesty, and fair dealing, when the six elements of estoppel have been established. Keneco v. Cantrell, 174 M 130, 568 P2d 1225 (1977), distinguished in Holman v. Hansen, 237 M 198, 773 P2d 1200, 46 St. Rep. 734 (1989).

Fraud Claims Barred — No Showing That Statute Did Not Begin to Run: Plaintiff brought action for fraud, both actual and constructive, as well as undue influence, arising out of a promise by his mother to compensate plaintiff, upon sale of the family corporation's assets, for a portion of value attributable to plaintiff's stock and partnership interest conveyed to corporation for cancellation of promissory note executed by plaintiff for a loan from the corporation. The respondent mother was granted summary judgment. The Supreme Court held that plaintiff failed to establish a fraud claim because of admissions that his mother did not intend to deceive him and that he never relied on his mother's promise to compensate. His claims were also barred by the Statute of Limitations. Fleming v. Fleming Farms, Inc., 221 M 237, 717 P2d 1103, 43 St. Rep. 776 (1986).

Action Accruing at Time of Supreme Court Decision on Which Claim Is Based: The Supreme Court held in Castillo v. Kunnemann, 197 M 190, 642 P2d 1019 (1982), that Kunnemann, the original owner of a 160-acre parcel of land, had reserved certain water and ditch rights when he conveyed the land to Franks, and that Franks, therefore, had not conveyed any of these water rights to the Castillos and the Cotants when they each purchased subdivided portions of the original parcel from Franks. Following the Supreme Court's decision, the Cotants and Castillos sued Franks for breach of contract, fraud, and in the case of the Cotants, for breach of warranty. Whether the claims are viewed as in tort or in contract, they are within the applicable Statute of Limitations. The facts constituting the fraud were not considered discovered until the date of the Supreme Court's decision, and the cases were filed within 2 years of that date. The cases were filed within the 8-year contract Statute of Limitations. Castillo v. Franks, 213 M 232, 690 P2d 425, 41 St. Rep. 2071 (1984).

Knowledge of Conflict of Interest: Harmer sued Antimony for attorney fees, and Antimony counterclaimed, sounding in fraud. The court concluded that Antimony knew of Harmer's relationship with Resources (a corporation contracting with Antimony), and therefore the counterclaim is barred by the 2-year Statute of Limitations, 27-2-203. Harmer's contacts with Montana were such as to subject him to the reach of Rule 4B, M.R.Civ.P., and therefore the Statute of Limitations is not tolled by 27-2-402. Harmer v. Lawrence, 37 St. Rep. 1333 (D.C. Mont. 1980) (apparently not reported in Federal Supplement).

Cause of Action Determines Which Limitation Applies: Trial court properly granted defendant's motion for summary judgment in action for fraudulent representation or in alternative breach of contract in sale of tractor since plaintiff's having failed to state claim in complaint for breach of contract made tort statute applicable and tort action was barred by this section. Israelson v. Mtn. Tractors Co., 155 M 69, 467 P2d 149 (1970).

Quiet Title: Quiet title action based on husband's fraud of wife's community property and instituted within 2 years of discovery of facts constituting fraud was timely even though brought as counterclaim. Rozan v. Rosen, 150 M 121, 431 P2d 870 (1967).

Contract for Sale of Real Estate: Action to rescind contract for sale of real estate was barred when not brought within 2 years after discovery of fraud by all parties concerned. Rock v. Birdwell, 149 M 449, 429 P2d 634 (1967).

Negligent Misrepresentation: Action for negligent misrepresentation is action for fraud within meaning of statute and is subject to 2-year Statute of Limitations that begins to run when plaintiff acquires knowledge of facts constituting negligent misrepresentation. Falls Sand & Gravel Co. v. W. Concrete, Inc., 270 F. Supp. 495 (D.C. Mont. 1967), followed in Williams v. DeVinney, 259 M 354, 856 P2d 546, 50 St. Rep. 831 (1993).

Action Not Based on Fraud: Where daughter conveyed real property to her mother with the understanding that it was to be held in trust for her and mother then deeded property to another daughter with the understanding that it was to be held in trust for the first daughter, an action brought by the first daughter to recover the property was not based on fraud but upon a failure to comply with the promise to reconvey the property and was therefore not barred by this section. Opp v. Boggs, 121 M 131, 193 P2d 379 (1948), distinguished in Barrett v. Zenisek, 132 M 229, 315 P2d 1001 (1957).

MISTAKE

Reopening Workers' Compensation Settlement for Mutual Mistake — Statute of Limitations: Workers' compensation claimant was held to have discovered in October 1986 that back surgery was a possibility when at that time his doctor discussed with claimant the possibility of surgery and advised claimant to consider it. Furthermore, in that month, claimant's attorney for a social security disability claim notified the administrative law judge of the doctor's conclusion, and the judge's decision in claimant's favor was based in part on a possibility of surgery. Therefore, the 2-year statute of limitations for a claim based on mutual mistake (assuming that there was one)

expired in October 1988 because a full and final compromise settlement approved by the Workers' Compensation Court was made without knowledge that surgery might well be necessary. The claim was barred because claimant's petition to reopen the compromise settlement was filed in July 1990. Rath v. St. Labre Indian School, 249 M 433, 816 P2d 1061, 48 St. Rep. 758 (1991).

Statute of Limitations Applicable to Alleged Mutual Mistake in Contract Action — Time to Begin Running When Party Would Have Discovered Mistake Through Ordinary Diligence: Plaintiffs claimed the District Court applied the incorrect statute of limitations on their complaint alleging mutual mistake in a contract action. However, because mutual mistake was the essence of the action rather than enforcement of the contract, this section applied. Further, the limitations period for actions based on mutual mistake begins to run when the facts are such that the party bringing the action would have discovered the mistake through the exercise of ordinary diligence, rather than at the time of actual discovery of the mistake. D'Agostino v. Swanson, 240 M 435, 784 P2d 919, 47 St. Rep. 10 (1990), distinguishing Thielbar Realties, Inc. v. Nat'l Union Fire Ins. Co., 91 M 525, 9 P2d 469 (1932).

No Mutual Mistake in Workers' Compensation Settlement: Claimant sought to have his workers' compensation settlement reopened on grounds of mutual mistake. The Supreme Court affirmed the District Court's denial of the request after finding: (1) claimant was capable of understanding the terms of the settlement agreement; (2) although claimant may have experienced an increased level of pain, there was no evidence to indicate the parties were mutually mistaken about the condition of claimant's back at the time of settlement; (3) there was no evidence to link claimant's personality disorder to his back injury; and (4) the claim was barred by the statute of limitations. Whitcher v. Pac. Employers Ins. Co., 236 M 289, 769 P2d 1215, 46 St. Rep. 367 (1989).

Mutual Mistake — Discovery: An action to reform and enforce contract of sale of corporate assets on the ground of mutual mistake, commenced in April of 1955, was promptly brought where facts constituting the mistake were discovered in December of 1954. Favero v. Wynacht, 140 M 358, 371 P2d 858 (1962).

DISCOVERY OF FRAUD OR MISTAKE WHEN LIMITATION PERIOD BEGINS TO RUN

Tolling of Statute of Limitations During Statutorily Required Workers' Compensation Mediation: After waiting more than 9 months after a mediator issued a report, Preston petitioned the Workers' Compensation Court for a hearing regarding the reopening of a formerly settled claim. At the hearing, the court determined that a mutual mistake of fact existed concerning the severity of Preston's mental illness that arose as the result of an industrial accident. However, the court also concluded that reopening the claim based on the mutual mistake of fact was time-barred under the 2-year statute of limitations in this section. On appeal, the Supreme Court disagreed. The statute of limitations did not begin to run until Preston became aware of the mistake of fact, which occurred during the 62-day statutorily mandated mediation. Given that mediation was mandatory and that Preston had to wait until satisfying the dispute resolution requirements to petition the Workers' Compensation Court, the statute of limitations tolled during mediation and Preston had an additional 62 days to file the petition. The case was remanded for further proceedings. Preston v. Transp. Ins. Co., 2004 MT 339, 324 M 225, 102 P3d 527 (2004).

General Rule for Beginning and Tolling of Limitation Period: The statute of limitations for an action based on fraud begins to run when the fraud occurs, unless the facts that form the basis for the alleged fraud are, by their nature, concealed. After the facts forming the basis for the alleged fraud are discovered, the limitation period is tolled if the defendant takes affirmative action to prevent the plaintiff from discovering the injury. Cartwright v. Equitable Life Assurance Soc'y, 276 M 1, 914 P2d 976, 53 St. Rep. 268 (1996).

Insurance Agent's Ongoing Misrepresentation That Policies Would Be Self-Sustaining After Three to Five Years: Whole life insurance policies stating that premiums would be due for 20 years, 30 years, or a lifetime (depending on the policy) did not put the insureds on notice that the insurance agent's sales statements were fraudulent. The agent told the insureds that after only 3 to 5 years of premium payments (depending on the policy), the policy would be self-sustaining because premiums would be paid by dividends and other earnings. In fact, the policies stated that dividends could be used to help pay premiums. When the insurer sent the insureds premium payment notices after the 3 to 5 years ended, the insureds contacted the agent, who fraudulently stated that there was a mistake and that he would take care of it. When the insurer later sent the insureds notices stating that the insurer had advanced loans against the policies to pay the

premiums, the agent again fraudulently told the insureds that there was a mistake and that he would take care of it. Eventually, each policy was either terminated or lost considerable value. For statute of limitations purposes, the insureds could not be held to have been put on notice (by the policy language) that they should have discovered, and did not discover, the fraud. In addition, the agent's statements at both points in time that there was a mistake that he would take care of tolled the statute of limitations. The insureds first actually learned of the fraud upon speaking directly to insurance company personnel, who told them that the agent had been fired, that there was no such thing as a policy that was self-sustaining after 3 to 5 years, that they should pay no premiums until their questions were resolved, and that there were problems other than the mistakes that the agent had claimed. The suit filed in 1991 was within the 2-year limitation period of this section. Cartwright v. Equitable Life Assurance Soc'y, 276 M 1, 914 P2d 976, 53 St. Rep. 268 (1996).

No Affirmative Act of Concealment by Defendant That Would Toll Statute of Limitations: HKM had been hired to design a pipeline project and was subsequently sued for negligence by the general contractor for damages because of delays caused by pipe installed pursuant to HKM's specifications. The jury returned a verdict in favor of the general contractor. HKM then filed suit against the pipe manufacturer for indemnification for the amount for which HKM had been found liable. HKM alleged that the manufacturer had fraudulently misrepresented the characteristics of the pipe that HKM had purchased. The Supreme Court held that as early as April 18, 1986, HKM had been aware that the manufacturer had taken an inconsistent position as to the characteristics of the pipe and therefore there had been no affirmative act of concealment on the manufacturer's part that would toll the running of the statute of limitations. Therefore, HKM's cause of action was barred by the 2-year statute of limitations. HKM Associates v. NW. Pipe Fittings, Inc., 272 M 187, 900 P2d 302, 52 St. Rep. 692 (1995).

Statute of Limitations in Land Fraud Case to Begin Running at Earliest Time of Discovery of Fraud Facts: Defendant fraudulently induced plaintiffs to purchase property by misrepresenting the quality of the road that she intended to build as access to the property. There was substantial evidence to support the trial court's determination that the statute of limitations did not begin to run for any of the plaintiffs until the earliest time that plaintiffs could have discovered all of the facts constituting the fraud. Dew v. Dower, 258 M 114, 852 P2d 549, 50 St. Rep. 454 (1993).

Failure of Personal Representative to Fully Disclose Specifics of Estate — Fraud Claim Timely Filed: As personal representative of his mother's estate, Kimm refused to communicate any monetary information to his sisters, who were also heirs, stating only that the assets of the estate would be shared equally among them all. In September 1988, Kimm filed an inventory and appraisal, indicating that most of the assets were held by him in joint tenancy and stating that he was entitled to the bulk of the estate. In April 1990, the sisters filed a claim of actual fraud and undue influence, which Kimm contended was untimely because the facts constituting the claim were discovered or through due diligence should have been discovered prior to April 1988. The District Court held the claim to be timely filed, accepting the sisters' assertion that they did not discover the facts until the inventory and appraisal was filed and that Kimm did not comply with the duty of full disclosure, instead taking affirmative steps to conceal the information necessary to bring the suit. Flikkema v. Kimm, 255 M 34, 839 P2d 1293, 49 St. Rep. 880 (1992).

Statute of Limitations Applicable to Alleged Mutual Mistake in Contract Action — Time to Begin Running When Party Would Have Discovered Mistake Through Ordinary Diligence: Plaintiffs claimed the District Court applied the incorrect statute of limitations on their complaint alleging mutual mistake in a contract action. However, because mutual mistake was the essence of the action rather than enforcement of the contract, this section applied. Further, the limitations period for actions based on mutual mistake begins to run when the facts are such that the party bringing the action would have discovered the mistake through the exercise of ordinary diligence, rather than at the time of actual discovery of the mistake. D'Agostino v. Swanson, 240 M 435, 784 P2d 919, 47 St. Rep. 10 (1990), followed in Naftco Leasing Ltd. Partnership 301 v. Finalco, Inc., 254 M 89, 835 P2d 729, 49 St. Rep. 644 (1992), and distinguishing Thielbar Realties, Inc. v. Nat'l Union Fire Ins. Co., 91 M 525, 9 P2d 469 (1932).

No Confidential Relationship Tolling Statute: Plaintiffs argued the existence of a confidential relationship between them and their lender excused their failure to discover alleged fraud by their lender and therefore tolled the statute of limitations. The court held there was no failure to discover the facts alleged to constitute fraud because the loan instruments were signed each year by plaintiffs, who should have known the terms contained therein. Therefore, any confidential relationship exception does not apply. Shiplet v. First Sec. Bank of Livingston, Inc., 234 M 166, 762 P2d 242, 45 St. Rep. 1816 (1988).

Statute of Limitations — Confidential Relationship Tolls: Plaintiff's husband and defendant were brothers and partners in a ranching operation, although each owned the land individually. Plaintiff's husband died and defendant was named executor. A corporation was formed to operate the ranch on May 1, 1973. Both parties transferred all assets to the corporation. Defendant's family got 364 more shares than plaintiff, and defendant was named president of the corporation. Restrictions were placed on the valuation and transfer of stock. On May 29, 1975, plaintiff consulted her own attorney and for the first time fully realized her position. All corporate votes became deadlocked. On April 29, 1977, plaintiff filed suit to dissolve the corporation, alleging fraud and oppressive conduct by defendant and mistake at the formation. Defendant contended the suit was barred by the Statute of Limitations, claiming that any fraud or mistake occurred in 1973. The court found that defendant occupied a position of trust and confidence in relation to plaintiff. He was executor of her husband's estate and partner to her husband at the date of death; that status imposed on defendant the duties of a trustee. The confidential relationship did not cease until May 29, 1975, when plaintiff first discovered her inferior position. This action was filed within the 2-year period from that date. Skierka v. Skierka Bros., Inc., 192 M 505, 629 P2d 214, 38 St. Rep. 754 (1981).

Noncompliance With Annexation Procedure — Property Not Subject to Municipal Tax: The city of Forsyth failed to substantially comply with the statutory annexation procedure, which supplanted common-law methods. Therefore, the disputed property taxed by the municipality was outside its jurisdiction and the plaintiffs' action for refund of taxes was remanded for consideration in conformity with such holding and the holding that under 27-2-203, the Statute of Limitations did not begin to run until plaintiff discovered that the city map was in error. Gregory v. Forsyth, 187 M 132, 609 P2d 248 (1980).

Plaintiff Not Charged With Knowledge — Publicity: Where plaintiff developed cataracts following use of defendant's drug, evidence that wide publicity had been given to causal relationship between drug and cataracts did not establish that plaintiff was charged with knowledge of such relationship so as to constitute discovery under 27-2-203. Hornung v. Richardson-Merrill, Inc., 317 F. Supp. 183 (D.C. Mont. 1970).

Transfers by Deceased During Last Illness: An action by administrator of estate of deceased against surviving partners to recover assets that had been transferred by deceased during his last illness was timely filed on July 25, 1960, where fraud was not discovered until December 1, 1958. Marshall v. Minlschmidt, 148 M 263, 419 P2d 486 (1966).

FAILURE TO DISCOVER FRAUD OR MISTAKE
STATUTE NOT TOLLED

Action Accruing Upon Discovery — Showing Required of Plaintiff:

Plaintiff purchaser, who forfeited all payments under a real estate contract for deed and was required to return possession to the sellers, alleged that the sellers engaged in a continuing fraudulent concealment of facts that prevented him from ascertaining the extent of their fraud regarding representations concerning the ranch property he purchased. The Supreme Court held that in the context of nonmalpractice negligence actions, invoking fraudulent concealment requires a showing of affirmative conduct by the defendant seller to obscure the existence of the cause of action. It is a question of law whether there has been a discovery of facts sufficient to start the running of the statute of limitations. Plaintiff did not exercise the ordinary diligence necessary to discover the facts constituting the alleged fraud, and therefore his claim is barred by the statute of limitations. Holman v. Hansen, 237 M 198, 773 P2d 1200, 46 St. Rep. 734 (1989).

Under 27-2-203, the limitation begins to run from the time the right of action accrues but the cause of action does not accrue until discovery of the alleged fraud, and where plaintiff relies upon the exception, he must prove the facts entitling him to its benefit. Frisbee v. Coburn, 101 M 58, 52 P2d 882 (1935); Ray v. Divers, 81 M 552, 264 P 673 (1928).

Where at the time an action for fraud is commenced the 2-year limitation prescribed by this section has expired but plaintiff proceeds under the proviso that the cause of action does not accrue until the discovery by him of the facts constituting the fraud, he must show that he used due diligence to detect it, when discovery was made, what it was, how it was made, and why it was not made sooner; he will be presumed to have known whatever with reasonable diligence he might have ascertained. Lasby v. Burgess, 88 M 49, 289 P 1028 (1930).

In order to make applicable the provision of 27-2-203, that in an action for fraud the cause of action does not accrue until discovery by plaintiff of the facts constituting the fraud, plaintiff must show, in the absence of a relation of trust or confidence between the parties which imposed upon defendant the duty of making a full disclosure of the facts, some active affirmative concealment of the fraud by defendant, something said or done to continue the deception or to

prevent inquiry or discovery, else the running of the statute, which limits the time within which the action may be brought to 2 years, is not postponed. Kerrigan v. O'Meara, 71 M 1, 227 P 819 (1924), followed in Jacobson v. W. Mont. Prod. Credit Ass'n, 643 F. Supp. 391, 43 St. Rep. 1598 (D.C. Mont. 1986).

One who relies on the exception to the provision of this section, to the effect that while an action for fraud must be commenced within 2 years, the cause of action does not accrue until discovery of the facts constituting the fraud, must show the time and the circumstances of the discovery to enable the District Court to determine whether by ordinary diligence it might not have been made before, his simple statement that it was not made until the limitation had run being insufficient. Kerrigan v. O'Meara, 71 M 1, 227 P 819 (1924), followed in Jacobson v. W. Mont. Prod. Credit Ass'n, 643 F. Supp. 391, 43 St. Rep. 1598 (D.C. Mont. 1986).

Estoppel:

Plaintiff purchaser, who forfeited all payments under a real estate contract for deed and was required to return possession to the sellers, alleged that the sellers engaged in a continuing fraudulent concealment of facts that prevented him from ascertaining the extent of their fraud regarding representations concerning the ranch property he purchased. In response to plaintiff's contention that the sellers are estopped from raising the statute of frauds as a defense because of their acts of fraudulent concealment, the Supreme Court held that plaintiff did not exercise the ordinary diligence necessary to discover the facts constituting the alleged fraud, and therefore the necessary elements of estoppel are not present in this case. Plaintiff's claim is barred by the statute of limitations. Holman v. Hansen, 237 M 198, 773 P2d 1200, 46 St. Rep. 734 (1989).

Plaintiffs' claim of fraud against a shareholder was not barred by the 2-year Statute of Limitations, defendant being estopped from arguing the affirmative defense in order to promote justice, honesty, and fair dealing, when the six elements of estoppel have been established. Keneco v. Cantrell, 174 M 130, 568 P2d 1225 (1977), distinguished in Holman v. Hansen, 237 M 198, 773 P2d 1200, 46 St. Rep. 734 (1989).

Action Accruing on Discovery — Buyer on Inquiry Notice Considered to Have "Discovered" Fraud: In 1975, defendant owners (Halls) entered into a listing agreement with defendant realtors (Eastern) for the sale of Halls' 4,000-acre cattle ranch. The ranch included several parcels of cropland. Halls gave Eastern acreage figures for each parcel of cropland, which Eastern then used in preparing a brochure on the ranch. The figures were not correct, either in the total farming acreage or in the amount stated for each parcel. Mobley bought the property. He had received a copy of the brochure prior to the sale. Halls had told Mobley that the crop acreage figures were approximate. Mobley requested official maps of the property. He did not receive complete maps because no such maps existed. However, Halls did leave maps at the ranch which showed that the estimate for alfalfa acreage was not correct. In March 1976, the parties entered into a contract for deed for the ranch. Mobley began planting grain in April of 1976. His drill acreage measurements did not correspond with the acreage shown on the brochure, but Halls assured him that the acreage specified was correct. In the fall of 1976, Mobley summer fallowed with a borrowed drill whose acreage measurement also differed from the brochure figures. In June of 1977, Mobley asked the Agricultural Soil Conservation Service (now Natural Resource Conservation Service) to take acreage measurements. Their initial survey, indicating that there was less cropland than Mobley had been told, was completed in late June. An aerial survey confirming the findings was completed in November 1977. In October 1979, Mobley sued Halls and Eastern for actual damages and for punitive damages based on fraud. Defendants claimed that the action was barred by the 2-year Statute of Limitations and moved to dismiss the action. Mobley claimed that the fraud had not been discovered until the aerial survey had been completed. The District Court dismissed the case, and the Supreme Court affirmed, ruling that adequate information had come to Mobley's attention to put him on inquiry notice and that therefore the situation had been discovered within the meaning of this section more than 2 years prior to suit. Mobley v. Hall, 202 M 227, 657 P2d 604, 40 St. Rep. 49 (1983).

Showing Required of Party for Operation of Exception: The plaintiff, son of a deceased rancher, received 24 ½% of the surface rights to his father's ranch in accordance with the terms of an estate plan established for the benefit of the plaintiff and his brothers, the defendants. Upon leaving the ranch, plaintiff executed one quitclaim deed to his mineral interest in 1977 and one quitclaim deed to his surface interest in 1968 in exchange for a promise that the defendants would hold him harmless on a promissory note. The District Court did not err (in a subsequent challenge by the plaintiff to the validity of the quitclaim deeds) in declaring both deeds to be valid and denying the plaintiff any interest in the ranch. The plaintiff's claim for relief from the 1968 quitclaim deed is barred by the operation of this section. As stated in Israelson v. Mtn. Tractors Co., 155 M 69, 467 P2d 149 (1970), the claim arises upon the occurrence of the fraud and

not upon its discovery, with the one exception being where the fraud is committed under such circumstances that the plaintiff would be presumed not to have knowledge of them. In such a case, however, he must show some affirmative act or representation designed to prevent his discovery of the facts. He must also show diligence. In this case, the District Court found no such facts, and the Supreme Court will not substitute its factual judgments for those of the trial court. Turley v. Turley, 199 M 265, 649 P2d 434, 39 St. Rep. 1336 (1982).

Rescission of Land Contract Barred: Under the evidence in an action for the rescission of a land contract, brought about 4 ½ years after the contract was made, based on alleged false representations by the vendor as to acreage, the number of acres which were tillable, and that no part of the land was covered by the waters of a river which formed the boundary of a portion of the land, plaintiffs were estopped by their laches and the cause of action was barred by 27-2-203. Lasby v. Burgess, 88 M 49, 289 P 1028 (1930).

Law Review Articles

Civil RICO: Pleading Fraud for Treble Damages, Dzivi, 45 Mont. L. Rev. 87 (1984).

Collateral References

Limitation of Actions *key* 37.
54 C.J.S. Limitations of Actions §230, et seq.
37 Am. Jur. 2d Fraud and Deceit §§400 through 415.

27-2-204. Tort actions — general and personal injury.

Compiler's Comments

1993 Amendment: Chapter 560 near beginning of (1) inserted reference to 27-2-217.

1993 Statement of Intent: The statement of intent attached to Ch. 560, L. 1993, provided: "It is the intent of the legislature that the phrase "ceremony, rite, or ritual" be interpreted in a manner that does not include a ceremony, rite, or ritual performed in a formal, commonly recognized religious ceremony."

Severability: Section 6, Ch. 560, L. 1993, was a severability clause.

Retroactive Applicability: Section 7, Ch. 560, L. 1993, provided: "[Sections 3 and 4] [27-2-217 and 27-2-204] apply to all causes of action commenced on or after October 1, 1993, regardless of when the cause of action arose. To this extent, [sections 3 and 4] [27-7-217 and 27-2-204] apply retroactively, within the meaning of 1-2-109."

1989 Amendment: In (1), at beginning, inserted exception clause.

Severability: Section 4, Ch. 158, L. 1989, was a severability clause.

Retroactive Applicability: Section 5, Ch. 158, L. 1989, provided: "[This act] applies to all causes of action commenced on or after October 1, 1989, regardless of when the cause of action arose. To this extent, [this act] applies retroactively, within the meaning of 1-2-109."

Case Notes

General . . . 892
Personal Injury . . . 897
Wrongful Death . . . 898
Libel, Slander, Assault, Battery, False Imprisonment, and Seduction . . . 898
Accrual of Cause of Action . . . 898
Discovery — When Limitation Period Begins to Run . . . 900
Tolling of Statute . . . 902
Amendment of Complaint . . . 904

GENERAL

Jury Finding That Accident Did Not Result in Injury Supported by Substantial Evidence: Ele alleged that he was injured in a low-impact motor vehicle accident for which Ehnes admitted liability. The jury, however, found that Ele was not injured as a result of the accident, and Ele appealed, requesting that the zero damage award be set aside, in part based on a medical bill from the emergency room where Ele went after the accident and on the fact that Ehnes failed to refute the attending physician's testimony that Ele was injured and sustained damages. The Supreme Court declined to disturb the jury decision. The emergency room bill was not direct evidence that the visit was caused by the accident, but merely showed that Ele went to the emergency room. Also, notwithstanding that the physician found evidence of injury, the doctor's testimony showed that he was not aware of Ele's preexisting medical condition. Further, testimony at trial from several of Ele's coworkers showed that Ele had engaged in numerous activities following the accident that Ele later testified he was unable to do because of pain. It is the trier of fact that weighs the credibility of witnesses, and there was sufficient credible

evidence for the jury to conclude that Ele had prior back problems and could do more than he claimed, that the doctor's opinion relied on an inaccurate medical history supplied by Ele, and that the accident was so minor that Ele suffered no injury necessitating an emergency room visit. Ele v. Ehnes, 2003 MT 131, 316 M 69, 68 P3d 835 (2003), following Magart v. Schank, 2000 MT 279, 302 M 151, 13 P3d 390 (2000), and distinguishing Thompson v. Bozeman, 284 M 440, 945 P2d 48 (1997), and Renville v. Taylor, 2000 MT 217, 301 M 99, 7 P3d 400 (2000).

Consulting Physician Diagnosis and Notice to Counsel Binding on Plaintiff — Late Claim Properly Dismissed: In 1992, after consulting with several medical doctors, Kaeding hired Baiz as his attorney to pursue a claim for damages from asbestosis against his employer, W.R. Grace & Co. (Grace). Baiz employed Whitehouse as a consulting physician, and Whitehouse, after reviewing several x-rays, sent Baiz a letter stating that the appearance of the x-rays was consistent with asbestosis. In 1996, Kaeding filed suit against Grace, alleging Grace caused his medical condition. After dismissal of the suit by the District Court for failure to commence the action within the statute of limitations, the Supreme Court, distinguishing Hando v. PPG Indus., Inc., 236 M 493, 771 P2d 956 (1989), in which a diagnosis confirming the plaintiff's suspicions as to her medical condition was not received for some time, held that Kaeding had at least a preliminary diagnosis of asbestosis as early as 1983, when Grace sent Kaeding the results of a breathing test. Although Kaeding argued that he was unaware of the contents of the letter sent to Baiz by Dr. Whitehouse, the Supreme Court concluded that because the employment of an attorney creates an agency relationship between the attorney and the attorney's client, Kaeding knew or should have known no later than the time of Dr. Whitehouse's letter to Baiz that he, Kaeding, had contracted asbestosis. Because suit was not brought within the time required by the statute of limitations after the letter from Dr. Whitehouse, the District Court had properly dismissed the claim. Kaeding v. W.R. Grace & Co., 1998 MT 160, 289 M 343, 961 P2d 1256, 55 St. Rep. 640 (1998).

Tort Claim Against Political Subdivision — No Requirement for Filing of Administrative Claim — Statute Clear and Unambiguous: Lincoln County Deputy Sheriff Stratemeyer filed a tort action against Lincoln County for failing to properly train, debrief, and counsel him to cure his posttraumatic stress disorder incurred from observing a suicide victim. The Supreme Court held that there is no requirement under 2-9-301(3) similar to the requirement under 2-9-301(1) that a tort claim against a political subdivision first be presented for administrative settlement. To the extent that such a requirement was implied in Rouse v. Anaconda-Deer Lodge County, 250 M 1, 817 P2d 690 (1991), the Supreme Court expressly overruled that case. The Supreme Court also held that 2-9-301(3) is clear and unambiguous in its lack of requirement of an administrative claim and that Stratemeyer therefore filed his tort action within the 3-year statute of limitations contained in this section. Stratemeyer v. Lincoln County, 276 M 67, 915 P2d 175, 53 St. Rep. 245 (1996).

Tolling Provision Inclusive of Negligence Claims Against Nonperpetrator — "Based On" Defined: Defendant argued that the plain language of 27-2-216 refers only to intentional conduct and that the statute does not toll the general 3-year statute of limitations for negligence actions. Defendant further argued that 27-2-216 includes only claims against perpetrators of intentional sexual abuse and that because defendant was not the perpetrator, a negligence claim could not be maintained. The meaning of the term "based on" is determinative of whether 27-2-216 includes negligence claims. The plain statutory meaning is that an action is based on intentional conduct if intentional sexual abuse is the starting point or foundation of the claim. Harmonizing 27-2-216 with this section, the Supreme Court held that 27-2-216 is not limited to intentional tort actions against perpetrators of childhood sexual abuse. The District Court properly concluded that 27-2-216 includes negligence claims based on intentional conduct by a nonperpetrator. Further, the court distinguished Deeds v. U.S., 306 F. Supp. 348 (D.C. Mont. 1969), and Azure v. U.S. Health & Human Serv., 758 F. Supp. 1382 (D.C. Mont. 1991), in holding that the proposition that when harm is intentionally caused by a third person and is not within the scope of risk created by the defendant's conduct, the third person's intentional act precludes imposition of liability against the defendant applies only to cases on intervening, superseding causes. Werre v. David, 275 M 376, 913 P2d 625, 53 St. Rep. 187 (1996), following State ex rel. Snidow v. St. Bd. of Equalization, 93 M 19, 17 P2d 68 (1933).

Negligent Misrepresentation Governed by Three-Year Negligence Statute of Limitations — Tolls Until Plaintiff Suffers Damages: A real estate broker appealed a verdict finding that he was liable because of his employee's negligent misrepresentation of a boundary on land purchased by the plaintiffs. The basis for the appeal was that the applicable statute of limitations was the 2-year time limit governing actions for fraud and that the suit had not been timely filed. The Supreme Court held that negligent misrepresentation involves breach of a

reasonable standard of care and therefore is couched in terms of negligence and as such is subject to the 3-year negligence statute of limitations. The Supreme Court further held that the statute did not begin to run until damages were suffered and that did not occur in the present case until the plaintiffs learned that their house had been built on another's property. Cechovic v. Hardin & Associates, Inc., 273 M 104, 902 P2d 520, 52 St. Rep. 854 (1995), partially overruling Bushnell v. Cook, 221 M 296, 718 P2d 665 (1986).

Complaint Filed Prior to Amendment — Statutes of Limitations Met: Prior to amendment of 49-2-509 in 1987, the decision in Drinkwalter v. Shipton Supply Co., Inc., 225 M 380, 732 P2d 1335 (1987), allowed an individual alleging sexual harassment to file directly in District Court without first filing a complaint with the Human Rights Commission, in effect granting a victim of an alleged tort two legal remedies. The amendment effectively overruled *Drinkwalter* by mandating that Title 49, ch. 2, commonly known as the Human Rights Act, was the sole and exclusive remedy for a sexual harassment cause of action. In this case, because the final alleged tort occurred on March 17, 1987, prior to the amendment, Harrison reasonably and in good faith pursued one of the two potential remedies, believing that the amended version of 49-2-509 either was inapplicable to her claims or, if applicable, would not apply because the alleged torts occurred prior to the effective date of the 1987 amendment. Harrison filed the complaint in District Court on September 28, 1987, well within the 3-year tort statute of limitations in this section and also within the 180-day statute of limitations applicable to human rights cases that was triggered on the effective date of the amendment—April 16, 1987. Absent any evidence of prejudice by the delayed filing, equitable tolling, as discussed in Erickson v. Croft, 233 M 146, 760 P2d 706 (1988), was properly invoked and Harrison was entitled to a judgment as a matter of law. Chance v. Harrison, 272 M 52, 899 P2d 537, 52 St. Rep. 603 (1995), distinguishing Hash v. U.S. W., 268 M 326, 886 P2d 442 (1994).

Statute of Limitations Applicable to Subrogee in Insurance Claim: St. Paul Fire & Marine Insurance Company (St. Paul), as subrogee, sought to recover from Glassing a payment made to its insured Lynn for underinsured motorist coverage, interest, and costs. Montana has no statutory authority extending the statute of limitations for subrogation claims in such cases. Because an insurer's claim is derived from that of the insured, St. Paul's claim was subject to the same defenses, including the statute of limitations, as though the action were sued upon by the insured and St. Paul had no claim for its damages independent of Lynn's claim. An insurer's right to subrogation attaches upon paying an insured's loss; thus, the 3-year statute of limitations in this section applied to St. Paul's claim in the same manner that the original action brought by Lynn and, when raised after the 3-year limit, was time-barred. St. Paul Fire & Marine Ins. Co. v. Glassing, 269 M 76, 887 P2d 218, 51 St. Rep. 1437 (1994), followed in Nimmick v. St. Farm Mut. Auto. Ins. Co., 270 M 315, 891 P2d 1154, 52 St. Rep. 208 (1995). See also Skauge v. Mtn. St. Tel. & Tel., 172 M 521, 565 P2d 628 (1977), and Beedie v. Shelly, 187 M 556, 610 P2d 713 (1980).

Applicability of Tort Statute of Limitations to Independent Cause of Action for Failure to Maintain Workers' Compensation Insurance: Under 39-71-601, a statutory time limit is established for filing a claim with the Department; however, no limit is established within which a claim must be filed in District Court. As established in Boehm v. Alanon Club, 222 M 373, 722 P2d 1160 (1986), an independent cause of action authorized by 39-71-508 is ordinarily considered a negligence action, but strict liability may apply in certain situations. Therefore, the applicable statute of limitations for such actions is the tort statute of limitations of 3 years provided in this section. Barthule v. Karman, 268 M 477, 886 P2d 971, 51 St. Rep. 1423 (1994).

Negligent Damage to Property — Two Statutes of Limitations Applicable, One of Which Has Run Out: L&R Spraying sprayed Semenza's land and Fitzgerald's land, which Semenza custom farmed. Semenza sued L&R for negligent spraying that allegedly damaged crops on both owners' farms. After the 2-year statute of limitations for injury to property ran out, Fitzgerald sought to be added as a party. The 3-year negligent tort statute of limitations also applied, and when two statutes of limitations apply, the court should use the longer one. Therefore, Fitzgerald's claim was not barred because it was made within 3 years. Semenza v. Bowman, 268 M 118, 885 P2d 451, 51 St. Rep. 1209 (1994).

Statute of Limitations in Invasion of Privacy Action — Summary Judgment Proper: In 1988, Hentchel told Rucinsky that he had tape recorded her telephone conversations. She asked to hear them, and he agreed to play them, but neither party pursued the issue further. In 1992, Hentchel's wife found the tapes and notified Rucinsky, who brought a claim for invasion of privacy. The District Court granted Hentchel's summary judgment motion on grounds that the 3-year statute of limitations for an action on a liability not founded on an instrument in writing, as set out in this section, had run. Under 27-2-102, a cause of action accrues when all of its

elements exist or have occurred, the right to maintain an action is complete, and a court is authorized to accept jurisdiction. Rucinsky claimed that because a reasonable person would not have taken Hentchel seriously when he originally confessed that the taping had occurred, the statute of limitations was tolled until the tapes were discovered. The Supreme Court affirmed summary judgment. That Rucinsky chose not to believe the confession did not negate the existence of the elements of her cause of action in 1988. She had the right to the cause of action when she was put on notice that the tapes existed, and the cause of action began regardless of whether she was convinced of the success of the action. Rucinsky v. Hentchel, 266 M 502, 881 P2d 616, 51 St. Rep. 887 (1994).

Statute of Limitations Applicable to Negligent Damage to Cattle and Ranching Operations: Plaintiffs alleged that as a result of commingling of their cattle with those of defendants, plaintiff's cattle became infected through defendant's negligence, resulting in damage to plaintiff's cattle and ranching operation. Defendants affirmatively asserted, and the trial court agreed, that plaintiffs' claim was barred by the 2-year statute of limitations in 27-2-207 for complaints based on damage to property. Plaintiffs claimed applicability of the 3-year statute of limitations in this section for complaints based on negligence. Following the holding in Thiel v. Taurus Drilling Ltd., 218 M 201, 710 P2d 33 (1985), the Supreme Court applied the general rule that when there is a substantial question regarding which of two statutes of limitations should apply, any doubt should be resolved in favor of the statute containing the longer limitation in order to afford a plaintiff party-litigant maximum free access to the court system. Ritland v. Rowe, 260 M 453, 861 P2d 175, 50 St. Rep. 1183 (1993), distinguishing Heckaman v. N. Pac. RR Co., 93 M 363, 20 P2d 258 (1933), Quitmeyer v. Theroux, 144 M 302, 395 P2d 965 (1964), Lahman v. Rocky Mtn. Phosphate Co., 161 M 28, 504 P2d 271 (1972), Engine Rebuilders, Inc. v. Seven Seas Import-Export Merc., Inc., 189 M 236, 615 P2d 871 (1980), Rierson v. St., 191 M 66, 622 P2d 195 (1981), Weston v. Cole, 233 M 61, 758 P2d 289 (1988), Carbon County School District v. Spivey, 247 M 33, 805 P2d 61 (1991), and Knight v. Missoula, 252 M 232, 827 P2d 1270 (1992).

Statute of Limitations on Tort Claim Against Decedent's Estate: Campbell brought a claim against Allen's estate in connection with injuries allegedly sustained while a prisoner in the state prison, alleging that the injuries occurred as a result of negligent supervision by Allen, who was a prison guard at the time of injury. The ordinary statute of limitations on Campbell's tort claim would be 3 years under this section; however, because no action was commenced during that time, the claim would be barred. Section 27-2-401 would normally extend the limit to 5 years because Campbell was imprisoned. However, 72-3-801 requires that a claim against a decedent's estate must be filed within 4 months from the date of the first publication of notice to creditors, which constitutes a special statute of limitations as to decedents, and there is no extension provided by law even for persons who are incarcerated or are otherwise under a statutory disability. Therefore, the District Court properly held that Campbell's claim was time-barred under 72-3-801 even if the general tort claim statute of limitations under Title 27, ch. 2, part 2, had not run. In re Estate of Allen, 255 M 469, 843 P2d 781, 49 St. Rep. 1071 (1992).

Case Decided Without Determining Whether Action for Malicious Prosecution Governed by Two- or Three-Year Statute of Limitations: The plaintiff filed suit against county employees for malicious prosecution. The lower court ruled that the claim was barred by a 2-year statute of limitations. The Supreme Court reversed, holding that the action did not accrue until the defendant had been acquitted in a separate criminal trial. The Supreme Court declined to rule on whether an action for malicious prosecution is governed by a 2- or 3-year statute of limitations because the plaintiff's suit was timely under either period. Rouse v. Anaconda-Deer Lodge County, 250 M 1, 817 P2d 690, 48 St. Rep. 834 (1991).

Applicable Statutes of Limitations Not Affected by Statute of Repose Applicable to Real Property Improvements: The plaintiffs, a condominium owners' association and its individual members, sued Big Sky of Montana Realty, Inc., the successor in interest of Big Sky of Montana, Inc., for breach of warranty, strict liability, negligence, fraud, and deceptive practices in connection with a fire in the Deer Lodge Condominiums at Big Sky. The defendants claimed that the actions were barred by the statute of limitations applicable to each individual cause of action. Plaintiffs claimed that the applicable statute of limitations in 27-2-208 allows a 10-year period following completion of real property improvements in which to bring an action. The Supreme Court held that 27-2-208 was a statute of repose and should be interpreted not to extend the statute of limitations otherwise applicable to a cause of action. The statute only provides that if the time for bringing an action was otherwise extended by law under 27-2-401 or 27-2-409, the extension could be for no longer than 10 years after completion of the improvement. The District Court therefore properly held that the action was barred by the statutes of limitations. Ass'n of

Unit Owners of Deer Lodge Condominium v. Big Sky of Mont., Inc., 245 M 64, 798 P2d 1018, 47 St. Rep. 1814 (1990), followed in Carl v. Chilcote, 255 M 526, 844 P2d 79, 49 St. Rep. 1109 (1992).

Avoidance of Statute of Limitations by Pursuit of One Claim Over Another — Gravamen of Claim to Control Limitations Period: Plaintiff contended that he could elect between a contract theory or negligence theory when his claim had a basis in either theory. The District Court found that the gravamen of the causes of action alleged under the contract theory "sound in common law fraud and negligence" and that, despite the contract label, the theory simply rehashed the fraud and negligence claims and was barred by the statute of limitations. Affirming, the Supreme Court held that the election to pursue one cause of action over another must be more than a mere relabeling of a claim to avoid a statute of limitations. The gravamen of the claim, not the label attached, controls the limitations period to be applied to that claim. Erickson v. Croft, 233 M 146, 760 P2d 706, 45 St. Rep. 1379 (1988), distinguishing Unruh v. Buffalo Bldg. Co., 194 M 553, 633 P2d 617, 38 St. Rep. 1156 (1981).

Fraudulent Concealment of Wrongful Nature of Sexual Abuse — Discovery Doctrine Not Applicable: Plaintiff who was sexually abused as a child contended the discovery doctrine applied because her abuser fraudulently concealed the wrongful nature of the relationship. Plaintiff was not incompetent, did not psychologically repress the attacks, and was aware that child molestation was a wrongful act. Reliance upon a fraudulent representation must be reasonable, and the state of facts was sufficient to cause a reasonable person to inquire. E. & D.W. v. D.C.H., 231 M 481, 754 P2d 817, 45 St. Rep. 778 (1988). (See 1989 enactment of 27-2-216.)

No Extension of Discovery Doctrine to Instances of Sexual Molestation: A child was sexually molested for several years and suffered psychological problems since late adolescence; however, she never associated the psychological problems with the molestation until she underwent counseling 19 years later. She filed suit 22 years after the last incident of abuse, but the claim was barred by the statute of limitations. The Supreme Court refused to extend the discovery doctrine to these instances of sexual abuse because plaintiff was clearly aware of the wrongful conduct and the injury had manifested itself. Failure to understand the causal relationship between the wrongful act and the injury was not sufficient to resuscitate the claim. E. & D.W. v. D.C.H., 231 M 481, 754 P2d 817, 45 St. Rep. 778 (1988). Principle also applied to a claim of medical malpractice in Major v. N. Valley Hosp., 233 M 25, 759 P2d 153, 45 St. Rep. 1263 (1988). (See 1989 enactment of 27-2-216.)

Complaint Mailed Early But Filed Late Barred: Plaintiffs mailed their complaint from Anaconda to Deer Lodge on February 23. The statute of limitations expired on February 28, but the complaint was not filed with the Clerk of Court until March 1. Plaintiffs contended that timely mailing substantially met the statutory deadline. Under Rule 5(e), M.R.Civ.P., filing is not complete until a complaint is placed in the custody of the Clerk of Court. The burden of vigilance was on plaintiffs to monitor timely delivery and filing, and the complaint was properly dismissed. Schaffer v. Champion Home Builders Co., 229 M 533, 747 P2d 872, 44 St. Rep. 2196 (1987).

Period of Repose When Multiple Disabilities: Appellant was a minor and was seriously mentally ill at time of alleged tortious conduct against her. She continues to be seriously mentally ill. The District Court construed 27-2-401(1) as providing for a maximum repose of the statute of limitations (27-2-204) of 5 years, and it found 27-2-401(4), which purports to provide repose until all disabilities are removed, to be inconsistent and ineffective. The Supreme Court held that the 5-year period of repose applies only to plaintiffs with a single disability under subsection (1) and that subsection (4) is effective and provides a different period for plaintiffs suffering from multiple disabilities. Murphy v. St., 229 M 342, 748 P2d 907, 44 St. Rep. 2030 (1987). On remand, the state was granted partial summary judgment on the grounds that sovereign immunity barred recovery for any state actions before July 1, 1973. Murphy v. St., 248 M 82, 809 P2d 16, 48 St. Rep. 335 (1991).

Breach of Implied Covenant of Good Faith and Fair Dealing as Separate Tort — Three-Year Statute of Limitations: A cause of action for breach of the implied covenant of good faith and fair dealing is a separate tort action, independent of the underlying contract. Therefore, the applicable Statute of Limitations is that for a tort action, 3 years. Tynes v. Bankers Life Co., 224 M 350, 730 P2d 1115, 43 St. Rep. 2243 (1986).

Violation of Unfair Claims Settlement Practices — Three-Year Statute of Limitations: A claim for violation of the unfair claims settlement practices statute arises out of a statutory scheme but consists of a separate cause of action in tort. Therefore, the 3-year Statute of Limitations applies. Tynes v. Bankers Life Co., 224 M 350, 730 P2d 1115, 43 St. Rep. 2243 (1986).

Blacklisting as Tort: Blacklisting prohibited under 39-2-803 is to be classified as a tort, and therefore the general tort Statute of Limitations under this section governs. Malquist v. Foley, 220 M 176, 714 P2d 995, 43 St. Rep. 270 (1986).

Statute of Limitations Defense — Raised Only by Answer: A codefendant, Rancher's Agra Services, Inc. (Rancher's), requested the Supreme Court to order the District Court to enter summary judgment by reason of the running of the Statute of Limitations in Rancher's favor. Rule 8(c), M.R.Civ.P. (Title 25, ch. 20), provides that a defense of the running of the Statute of Limitations is an affirmative defense and can only be raised by answer. Rancher's never filed an answer or provided the Supreme Court with any reason for failing to do so. The request was denied. Bennett v. Dow Chem. Co., 220 M 117, 713 P2d 992, 43 St. Rep. 221 (1986).

Statute of Limitations — Applicability to Subrogation: A subrogation claim by insurance company is derived from the claim of the insured and is subject to the same defenses, including the Statute of Limitations, as though the action were sued upon by the insured. Beedie v. Shelley, 187 M 556, 610 P2d 713 (1980).

Action Filed in Another State — Saving Statute Inapplicable: An action was filed in Utah but dismissed because it was barred by the Statute of Limitations. The action was then filed in Montana. If the original action had been filed in Montana, it would have been within Montana's Statute of Limitations but it was barred at the time it was filed in Montana. Montana's saving statute does not apply to an action which was originally filed in another state. Allen v. Greyhound Lines, Inc., 476 F. Supp. 244 (D.C. Mont. 1979).

Medical Malpractice:

Section 27-2-204 applies to a medical malpractice action when the malpractice occurred before the enactment of 27-2-205. Penrod v. Hoskinson, 170 M 277, 552 P2d 325 (1976).

Where sponge had been left in patient's body in operation performed 10 years previously, patient's cause of action for malpractice did not accrue until patient learned that such foreign object was in his body. Johnson v. St. Patrick's Hosp., 148 M 125, 417 P2d 469 (1966), distinguished in Monroe v. Harper, 164 M 23, 518 P2d 788 (1974).

Computation of Time: Under the rule prescribed by 1-1-306, relative to the computation of time, an action for libel published on February 21, 1907, which was commenced on February 23, 1909, was not barred by this section, where February 21 fell on Sunday and February 22 was also a holiday. Kelly v. Independent Publishing Co., 45 M 127, 122 P 735 (1912).

PERSONAL INJURY

Limitation of Action — Workers' Compensation Third Party and Bad Faith Claims: A third-party claimant may not bring an action pursuant to Title 33, ch. 18, commonly known as the Unfair Trade Practices Act, until the underlying claim has been settled or a judgment entered in favor of the claimant on the underlying claim. The statute of limitations on such a claim is 1 year from the date of settlement or entry of judgment on the underlying claim, even though the Act does not define what constitutes an underlying claim. A common-law bad faith claim accrues when: (1) all of the elements of the claim or cause exist or have occurred; (2) the right to maintain an action on the claim or cause is complete; or (3) a court or other agency is authorized to accept jurisdiction of the action. The statute of limitations for a common-law bad faith claim is 3 years and begins to run when the claim or action accrues. The accrual date of a bad faith claim arising out of a separate and independent disputed issue is established by determining whether that particular issue has been ultimately resolved, regardless of the existence or absence of a resolution of other issues within the workers' compensation case. Therefore, for statute of limitations purposes, statutory and common-law bad faith claims against an insurer that are predicated on actions taken in adjusting a workers' compensation claim accrue when the Workers' Compensation Court enters a judgment ordering the insurer to pay for a previously denied benefit but leaves unresolved the ultimate determinations of the extent and duration of the worker's disability. O'Connor v. Nat'l Union Fire Ins. Co., 2004 MT 65, 320 M 301, 87 P3d 454 (2004), following Grenz v. Orion Group, Inc., 243 M 486, 795 P2d 444 (1990), Poteat v. St. Paul Mercury Ins. Co., 277 M 117, 918 P2d 677 (1996), and Brewington v. Employers Fire Ins. Co., 1999 MT 312, 297 M 243, 992 P2d 237 (1999), and distinguishing Fode v. Farmers Ins. Exch., 221 M 282, 719 P2d 414 (1986).

Statute of Limitations Applicable to FELA Actions — Statute Tolled by Employer Misrepresentations: A 3-year statute of limitations applies to actions brought under the Federal Employers' Liability Act (FELA), 45 U.S.C. 51 through 60. However, plaintiff is entitled to have the cause tried on the merits, even if the suit was not filed within the statutory limit, if misrepresentations made by the employer justifiably misled plaintiff into not filing a timely action. A FELA defendant may be estopped from raising the statute of limitations for equitable

reasons even if the misrepresentations upon which the employee relied were unintentional. In this case, Bevacqua was examined by independent physicians, acting as agents for the railroad, who misrepresented Bevacqua's injuries. Because those misrepresentations misled Bevacqua into not filing suit within 3 years, he was entitled to have his cause tried on the merits. Bevacqua v. Union Pac. RR Co., 1998 MT 120, 289 M 36, 960 P2d 273, 55 St. Rep. 469 (1998), citing numerous federal cases giving a liberal construction to FELA in favor of injured railroad workers.

Loss of Consortium — Statute of Limitations: A loss of consortium claim is subject to the 3-year statute of limitations for tort actions provided in 27-2-204. Priest v. Taylor, 227 M 370, 740 P2d 648, 44 St. Rep. 1157 (1987).

Lack of Contract — Breach of Warranty Sounded in Tort Rather Than Contract: Plaintiff was injured in 1979 while spraying weeds. He brought suit in 1984 against the producers, distributors, and sellers of the herbicide and spraying equipment, claiming counts in strict liability in tort, tortious misrepresentation, negligence, and contract for breach of sellers' warranty. Plaintiff had no direct written contract with any of the defendants. The District Court found that there was no contract from which to imply the warranties which plaintiff claimed were breached. The court reasoned that without a contract the breach of warranty claims sounded in tort rather than contract; therefore, the warranty claims were barred by the 3-year tort Statute of Limitations. On appeal, plaintiff contended that one of the longer contract Statutes of Limitations in 27-2-202 or 30-2-725 should apply. The Supreme Court disagreed, noting that the implied covenants of good faith and fair dealing, fitness for a particular purpose, merchantability, and workmanlike performance are imposed by law regardless of contract and that, absent a contract, breach of the implied covenants sounds in tort, not contract. The District Court judgment was affirmed. Bennett v. Dow Chem. Co., 220 M 117, 713 P2d 992, 43 St. Rep. 221 (1986), followed in Jacobson v. W. Mont. Prod. Credit Ass'n, 643 F. Supp. 391, 43 St. Rep. 1598 (D.C. Mont. 1986), in a civil RICO action.

WRONGFUL DEATH

Wrongful Death: This section, rather than 27-2-207, applies to an action for wrongful death. Bryant v. Hall, 157 M 28, 482 P2d 147 (1971), overruling Smith v. Wiprud, 154 M 325, 463 P2d 317 (1969).

LIBEL, SLANDER, ASSAULT, BATTERY, FALSE IMPRISONMENT, AND SEDUCTION

Action Against Police Officer for Assault Governed by Two-Year Statute of Limitations: The plaintiff argued that he had 3 years to bring suit for assault against a police officer. The Supreme Court held that 27-2-209, relied upon by the plaintiff, refers to Sheriffs and constables. The statute does not refer to peace officers; therefore, the applicable limitation period was the 2-year period for intentional torts provided under this section. Rouse v. Anaconda-Deer Lodge County, 250 M 1, 817 P2d 696, 48 St. Rep. 834 (1991).

Two-Year Statute of Limitations Applicable to Claim of Assault and Battery: Although a strict reading of this section may present some conflict between subsections (1) and (3), the legislative intent was to establish a general 3-year statute of limitations for tort actions with a shorter 2-year period for certain particular tort actions, such as assault and battery. The District Court properly applied the 2-year statute of limitations in subsection (3) of this section when the complaint alleged "assault and battery". Weston v. Cole, 233 M 61, 758 P2d 289, 45 St. Rep. 1292 (1988).

No Renewal of Action: An untimely cause of action for intentional assault instituted in federal court was not "renewed" by 27-2-407 in order to prevent the running of the Statute of Limitations against a subsequent action in state court for negligent conduct based on the same fact situation. Cassidy v. Finley, 173 M 475, 568 P2d 142 (1977).

Seduction: In action for seduction induced by promise of marriage, the cause of action arose and the Statute of Limitations began to run upon completion of the first act of intercourse, contrary to plaintiff's contention that since the illicit relationship continued, with repeated promises of marriage, the Statute did not commence to run until the last act of intercourse some 3 years later. Taylor v. Rann, 106 M 588, 80 P2d 376 (1938).

ACCRUAL OF CAUSE OF ACTION

State Law Tort Claims Not Protected or Prohibited by FELA — Dismissal for Failure to State Claim Improper: Reidelbach worked for the railroad for about 20 years but was forced to stop working because of job-related disabling cumulative spinal injuries. Reidelbach reached an agreement with the railroad's claim representatives under which he would forego pursuing a

claim under the Federal Employers' Liability Act (FELA) and the railroad would propose a fair settlement for the injuries. After 2 years, no settlement was offered, and ultimately the parties exchanged counteroffers, but no agreement on an amount was reached. Reidelbach then filed a timely FELA claim and also brought several state claims, alleging that the railroad had engaged in unfair, dilatory, and fraudulent claims practices. The District Court concluded that all the postinjury state claims were preempted by FELA and dismissed them pursuant to Rule 12(b), M.R.Civ.P. (Title 25, ch. 20), so Reidelbach appealed. Following an extensive analysis of federal law related to preemption in its various forms, the Supreme Court held that Reidelbach's state claims were neither expressly nor impliedly preempted by FELA and did not conflict with or stand as an obstacle to the accomplishment and execution of FELA. Therefore, the District Court erred in dismissing Reidelbach's state claims on grounds of FELA preemption, and the case was reversed and remanded for trial in state court. Reidelbach v. Burlington N. & Santa Fe Ry. Co., 2002 MT 289, 312 M 498, 60 P3d 418 (2002).

Claim for Common-Law Tort of Bad Faith by Third Party Not Preempted by Statute — General Statute of Limitations Applicable: The District Court dismissed Brewington's complaint against two insurance companies based on the conclusion that the complaint failed to state a claim for which relief could be granted because the claim was barred by the statute of limitations in 33-18-242 regarding third-party claimants. Brewington contended that the claim was based on the common-law tort of bad faith, not on 33-18-242. The Supreme Court construed the plain language of the statute in determining that by its terms, 33-18-242 does not prohibit a third-party claimant from bringing an action for bad faith. Both Vigue v. Evans Prod. Co., 187 M 1, 608 P2d 488 (1980), and Hayes v. Aetna Fire Underwriters, 187 M 148, 609 P2d 257 (1980), establish a common-law cause of action for bad faith that was not affected by the passage of 33-18-242. When the common law is not in conflict with a statute, the common law applies. Thus, the District Court's conclusion that 33-18-242 prohibited Brewington from pleading the common-law tort of bad faith was reversible error. Further, because the claim was brought for bad faith and not pursuant to 33-18-242, the 3-year statute of limitations in this section, not the 1-year statute of limitations in 33-18-242, applied. Brewington v. Employers Fire Ins. Co., 1999 MT 312, 297 M 243, 992 P2d 237, 56 St. Rep. 1257 (1999), distinguishing Grenz v. Orion Group, Inc., 243 M 486, 795 P2d 444, 47 St. Rep. 1346 (1990).

Statute of Limitations Barring Professional Negligence Claim Against Accountant Who Entered Business With Client: Brevig's company executed a cattle share agreement with Brevig's accountant wherein the accountant purchased cattle and bulls, paid taxes on the livestock, and agreed to supply labor for the operation of the herd. In turn, the company agreed to manage the herd, cover certain expenses, market the stock, and maintain herd records. The partnership split calves born to the herd, 60% to the company and 40% to the accountant. The arrangement was profitable for both parties and produced appropriate returns on the accountant's investment. Brevig later argued that it was unethical for the accountant to go into business with the partnership because the partnership was one of the accountant's clients. The 3-year statute of limitations in this section barred Brevig's negligence claim with respect to the cattle share agreement because the claim of professional negligence was not filed within 3 years from the time that the agreement was executed. McCormick v. Brevig, 1999 MT 86, 294 M 144, 980 P2d 603, 56 St. Rep. 355 (1999).

Statute of Limitations in Invasion of Privacy Action — Summary Judgment Proper: In 1988, Hentchel told Rucinsky that he had tape recorded her telephone conversations. She asked to hear them, and he agreed to play them, but neither party pursued the issue further. In 1992, Hentchel's wife found the tapes and notified Rucinsky, who brought a claim for invasion of privacy. The District Court granted Hentchel's summary judgment motion on grounds that the 3-year statute of limitations for an action on a liability not founded on an instrument in writing, as set out in this section, had run. Under 27-2-102, a cause of action accrues when all of its elements exist or have occurred, the right to maintain an action is complete, and a court is authorized to accept jurisdiction. Rucinsky claimed that because a reasonable person would not have taken Hentchel seriously when he originally confessed that the taping had occurred, the statute of limitations was tolled until the tapes were discovered. The Supreme Court affirmed summary judgment. That Rucinsky chose not to believe the confession did not negate the existence of the elements of her cause of action in 1988. She had the right to the cause of action when she was put on notice that the tapes existed, and the cause of action began regardless of whether she was convinced of the success of the action. Rucinsky v. Hentchel, 266 M 502, 881 P2d 616, 51 St. Rep. 887 (1994).

Cause of Action — Accruing Upon Injury, Not Breach of Duty: The plaintiff alleged that the defendant bank had breached its fiduciary duty to disclose when it failed to inform the plaintiff of

the way certain escrow payments had been applied. The bank argued that the date the statute of limitations had commenced running was the date of the alleged breach of the duty to disclose. The Supreme Court held that the statute did not commence to run when the bank breached its fiduciary duty, but when the bank failed to release the trust indenture and the plaintiff suffered an injury. Kitchen Krafters, Inc. v. Eastside Bank of Mont., 242 M 155, 789 P2d 567, 47 St. Rep. 602 (1990).

Amendment to Add Corporation as Plaintiff Against Lender Denied After Corporate Transfer of Interest to Lender: Shareholders' complaint, filed January 6, 1986, included counts of breach of loan agreements, fraud and negligent misrepresentation, negligence, tortious interference with business, and alleged vicarious liability against their lender, Norwest, Inc. (Norwest). On August 11, 1987, shareholders moved to amend their complaint to add their corporation, Nordak Industries, USA, Inc. (Nordak), of which they were sole shareholders and directors, as party plaintiff. The District Court denied amendment after finding that Nordak's claims against Norwest were barred because Nordak expressly and voluntarily transferred and assigned to Norwest all its assets, including legal claims, on August 25, 1983. The District Court also correctly found that any claim Nordak had against Norwest was barred by the statute of limitations because the cause of action against Norwest accrued at the time of the transfer, more than 3 years before the proposed amendment. The denial of leave to amend was clearly an appropriate exception to Rule 15(c), M.R.Civ.P. (Title 25, ch. 20). Walstad v. Norwest Bank of Great Falls, 240 M 322, 783 P2d 1325, 46 St. Rep. 2160 (1989), distinguishing Tynes v. Bankers Life Co., 224 M 350, 730 P2d 1115 (1986).

DISCOVERY — WHEN LIMITATION PERIOD BEGINS TO RUN

Statute of Limitations Tolled Until Discovery of Self-Concealing Injury — Exposure to Farm Chemicals and Injection: While assisting her former husband with farm duties in 1989, Elizabeth Nelson was exposed to farm chemicals and pesticides and was accidentally injected with bovine ecthyma vaccine. She lost consciousness briefly following the injection but recovered and continued assisting with sheep inoculations the rest of the day. From 1989 through 1998, Elizabeth received extensive medical evaluations and treatments for numerous physical ailments that either surfaced or worsened subsequent to the exposure to chemicals and the vaccine, but doctors were unable to pinpoint the cause and effect relationship between the ailments and the exposure until 1996. Elizabeth filed a complaint in 1998, but her former husband moved for summary judgment because Elizabeth allegedly knew of her injuries for more than 3 years before the action was filed. The District Court agreed that the claim was barred by the 3-year statute of limitations in this section. Elizabeth appealed. In Hando v. PPG Indus., Inc., 236 M 493, 771 P2d 956 (1989), the Supreme Court held that the onset of the statute of limitations is determined by applying the discovery rule and establishing when the injured person knew, or in the exercise of due diligence should have known, of the facts constituting the cause of action. However, the District Court distinguished Hando because Elizabeth's injuries following the injection were obvious and immediate, unlike the self-concealing injuries in Hando that developed over time. The Supreme Court disagreed. Although Elizabeth suspected the cause of the injuries and diligently sought medical treatment and diagnosis, there was no genuine issue of material fact that the actual causal connection was not discovered until 1996, well within the 3-year period prior to the filing of the claim. Thus, the complaint was timely filed as a matter of law, and summary judgment was improper, so the case was reversed for trial on the merits. Nelson v. Nelson, 2002 MT 151, 310 M 329, 50 P3d 139 (2002).

Consulting Physician Diagnosis and Notice to Counsel Binding on Plaintiff — Late Claim Properly Dismissed: In 1992, after consulting with several medical doctors, Kaeding hired Baiz as his attorney to pursue a claim for damages from asbestosis against his employer, W.R. Grace & Co. (Grace). Baiz employed Whitehouse as a consulting physician, and Whitehouse, after reviewing several x-rays, sent Baiz a letter stating that the appearance of the x-rays was consistent with asbestosis. In 1996, Kaeding filed suit against Grace, alleging Grace caused his medical condition. After dismissal of the suit by the District Court for failure to commence the action within the statute of limitations, the Supreme Court, distinguishing Hando v. PPG Indus., Inc., 236 M 493, 771 P2d 956 (1989), in which a diagnosis confirming the plaintiff's suspicions as to her medical condition was not received for some time, held that Kaeding had at least a preliminary diagnosis of asbestosis as early as 1983, when Grace sent Kaeding the results of a breathing test. Although Kaeding argued that he was unaware of the contents of the letter sent to Baiz by Dr. Whitehouse, the Supreme Court concluded that because the employment of an attorney creates an agency relationship between the attorney and the attorney's client,

Kaeding knew or should have known no later than the time of Dr. Whitehouse's letter to Baiz that he, Kaeding, had contracted asbestosis. Because suit was not brought within the time required by the statute of limitations after the letter from Dr. Whitehouse, the District Court had properly dismissed the claim. Kaeding v. W.R. Grace & Co., 1998 MT 160, 289 M 343, 961 P2d 1256, 55 St. Rep. 640 (1998).

Diligence in Attempt to Discover Injury — Limitation Tolled: The statute of limitations was tolled where claimant's failure to learn the cause of ongoing physical, emotional, and mental ailments until more than 3 years after exposure to paint vapors was not due to a lack of diligence on her part. Because she suspected the cause of injury and continuously sought medical confirmation of her suspicion, the statute of limitations did not begin to run until a medical opinion was actually rendered. Hando v. PPG Indus., Inc., 236 M 493, 771 P2d 956, 46 St. Rep. 532 (1989), distinguishing E. & D.W. v. D.C.H., 231 M 481, 754 P2d 817, 45 St. Rep. 778 (1988). Hando was distinguished in Kaeding v. W.R. Grace & Co., 1998 MT 160, 289 M 343, 961 P2d 1256, 55 St. Rep. 640 (1998). See also Gomez v. St., 1999 MT 67, 293 M 531, 975 P2d 1258, 56 St. Rep. 272 (1999), in which the Supreme Court declined to apply the continuing tort theory to delay the statute of limitations until the last injurious exposure because doing so could delay running of the limitations period indefinitely and is contrary to the general policy underlying statutes of limitations.

Fraudulent Concealment of Circumstances of Employee's Discharge — Tolling of Statute of Limitations: Nearly 8 years after the plaintiff was discharged from his employment, his guardian ad litem filed a complaint against his former employer alleging wrongful discharge. In response to the employers' motion for summary judgment based on the contention the claim was barred by the statute of limitations, the plaintiff claimed, in part, that the 3-year statute of limitations was tolled because the plaintiff did not learn until discovery several years after the discharge that the employer fraudulently concealed the facts surrounding the plaintiff's discharge. The Supreme Court held that the plaintiff's fraudulent concealment claim does not toll the statute of limitations because the discovery doctrine does not apply. Bestwina v. Village Bank, 235 M 329, 767 P2d 338, 46 St. Rep. 27 (1989).

Nonmalpractice Negligence Action — No Evidence of Fraudulent Concealment — Cause of Action Barred: When a defendant's fraudulent concealment prevents a plaintiff from discovering a cause of action, the statute of limitations is generally tolled. In a nonmalpractice negligence action, there must be an affirmative act committed by the defendant, and the affirmative act must be calculated to obscure the existence of a cause of action. Absent evidence that defendant fraudulently concealed the fact of injury, plaintiff's cause of action was barred. Yellowstone Conference of the United Methodist Church v. D.A. Davidson, Inc., 228 M 288, 741 P2d 794, 44 St. Rep. 1528 (1987).

Statute of Limitations — Discovery of Injury — Discovery of Legal Rights: Plaintiff was injured in July 1979 while spraying weeds for the Powell County weed board. His attorney advised him in March 1984 that he might have a third-party claim against the persons and companies involved in production, distribution, and sale of the herbicides and spraying equipment. This advisement came 3 ½ years after the attorney was retained. The applicable Statute of Limitations period for actions in negligence and products liability in tort is 3 years. Plaintiff contended that the Statute of Limitations did not begin running until March 1984 when he "discovered" his legal rights. The Supreme Court expressly declined to extend the discovery doctrine to toll the Statute of Limitations until discovery of legal rights rather than discovery of injury, affirming the District Court judgment that plaintiff's tort claims were barred by the 3-year tort Statute of Limitations which began running in July 1979. Bennett v. Dow Chem. Co., 220 M 117, 713 P2d 992, 43 St. Rep. 221 (1986), followed in E. & D.W. v. D.C.H., 231 M 481, 754 P2d 817, 45 St. Rep. 778 (1988), Sternhagen v. Dow Co., 711 F. Supp. 1027, 46 St. Rep. 946 (D.C. Mont. 1989), and in Carl v. Chilcote, 255 M 526, 844 P2d 79, 49 St. Rep. 1109 (1992). See also Major v. N. Valley Hosp., 233 M 25, 759 P2d 153, 45 St. Rep. 1263 (1988). For application to civil RICO claim, see Jacobson v. W. Mont. Prod. Credit Ass'n, 643 F. Supp. 391, 43 St. Rep. 1598 (D.C. Mont. 1986).

Date of Discovery — Required Finding: During construction of an interstate highway in 1972, a right-of-way monument was placed on plaintiffs' property although no right-of-way was purchased from them. In 1973, while attempting to sell their property, plaintiffs became aware of the infringement and hired a surveyor. That survey concluded that plaintiffs were encroaching on the right-of-way. Plaintiffs discussed the problem with the Highway Department (now Department of Transportation), and they removed the monument. The Department resurveyed the area in the spring of 1975 and found no encroachment by either party. Plaintiffs filed a negligence action against the Department in October 1977. The District Court awarded

damages. On appeal, the Supreme Court remanded the case for a determination regarding the date plaintiffs discovered they had a cause of action and to determine whether the 3-year Statute of Limitations had expired at the time the cause of action was filed. Masse v. St., 204 M 146, 664 P2d 890, 40 St. Rep. 730 (1983).

Products Liability:

The period of limitations applicable in a products liability case is 3 years from the date of discovery. However, that period may be tolled by acts creating an estoppel. Thompson v. Nebr. Mobile Homes Corp., 198 M 461, 647 P2d 334, 39 St. Rep. 1094 (1982).

Where plaintiff developed cataracts following use of defendant's drug, there was question of fact as to whether publicity connecting the drug and cataracts was sufficient to put plaintiff on notice as to cause of his cataracts, thus to start the Statute running, and motion for summary judgment for defendant, based on Statute of Limitations, was denied. Hornung v. Richardson-Merrill, Inc., 317 F. Supp. 183 (D.C. Mont. 1970).

No Error Where Claim of When Action Accrued Not Before Court: In an action for compensatory and exemplary damages for wrongful conversion of plaintiff's merchandise stored in defendant's warehouse, the District Court properly granted defendant's motion for summary judgment on the basis that the action was barred by the Statute of Limitations. Plaintiff's claims for recovery accrued 4 years previously when the defendant warehouse sold plaintiff's merchandise, not, as plaintiff claimed, when plaintiff discovered upon demand that defendant sold the merchandise. In this instance the allegation of knowledge, demand, and then refusal to return the goods was not raised in the complaint, the answer, the interrogatories, or in any affidavit properly before the District Court at the time summary judgment was granted, and thus plaintiff's allegations as to when the action accrued will not be considered on appeal. Seven Seas Import-Export & Mercantile, Inc. v. Handee Foods, 190 M 508, 621 P2d 1097, 38 St. Rep. 60 (1981).

Products Liability — Statute of Limitations — Discovery Rule Not Applicable: Plaintiff was injured in May 1975, when his holstered Ruger revolver discharged into his leg as he crawled under some brush. He filed this products liability action in September 1979. Ruger moved for summary judgment based upon the running of the Statute of Limitations. Plaintiff urges adoption of a discovery rule respecting accrual of the cause of action. Discovery rules have been limited to latent injuries resulting primarily from either drug products or medical malpractice. Montana statutes permit a discovery rule in actions for fraud or mistake and in actions for malpractice. The Statute of Limitations for tort actions, however, does not authorize application of a discovery rule. Adoption of such a rule would destroy the very policies which justify the Statute of Limitations. To allow a plaintiff who fails to inquire into the cause of injury to avoid the time bar under the guise of "discovery" would hopelessly demolish the protection afforded defendants by the Statute. Much v. Sturm, Ruger & Co., Inc., 502 F. Supp. 743, 37 St. Rep. 2116 (D.C. Mont. 1980). See also E. & D.W. v. D.C.H., 231 M 481, 754 P2d 817, 45 St. Rep. 778 (1988).

Medical Malpractice:

Section 27-2-204 applies to a medical malpractice action when the malpractice occurred before the enactment of 27-2-205. Penrod v. Hoskinson, 170 M 277, 552 P2d 325 (1976).

Where sponge had been left in patient's body in operation performed 10 years previously, patient's cause of action for malpractice did not accrue until patient learned that such foreign object was in his body. Johnson v. St. Patrick's Hosp., 148 M 125, 417 P2d 469 (1966), distinguished in Monroe v. Harper, 164 M 23, 518 P2d 788 (1974).

TOLLING OF STATUTE

Statute of Limitations Calculated as Ending One Day Prior to Start Day in Next Calendar Year: Plaintiff was injured on December 24, 1999, and plaintiff filed a complaint on December 26, 2002, contending that because December 25, 2002, was a holiday, the 3-year statute of limitations in this section extended to December 26, 2002, so the complaint was timely filed. The District Court held that the complaint was time-barred and granted defendant summary judgment on the pleadings. On appeal, the Supreme Court affirmed. Generally, a statute of limitations begins to run when a claim or cause of action accrues. Plaintiff's cause of action accrued on December 24, 1999, the date of injury. Under Rule 6(a), M.R.Civ.P. (Title 25, ch. 20), the day of the event is not included in computing any period of time, so the statute of limitations was counted from December 25, 1999. A year is defined as a calendar year, which is a 365-day period starting on a given day and ending on the date 1 day prior to the start day in the next calendar year. Thus, plaintiff's cause of action began on December 25, 1999, and ended on December 24, 2002, which was neither a weekend day nor a legal holiday. The statute of limitations was properly calculated, and summary judgment was proper because plaintiff's

complaint was not timely filed. Bosch v. Town Pump, Inc., 2004 MT 330, 324 M 138, 102 P3d 32 (2004).

Limitation of Action — Workers' Compensation Third Party and Bad Faith Claims: A third-party claimant may not bring an action pursuant to Title 33, ch. 18, commonly known as the Unfair Trade Practices Act, until the underlying claim has been settled or a judgment entered in favor of the claimant on the underlying claim. The statute of limitations on such a claim is 1 year from the date of settlement or entry of judgment on the underlying claim, even though the Act does not define what constitutes an underlying claim. A common-law bad faith claim accrues when: (1) all of the elements of the claim or cause exist or have occurred; (2) the right to maintain an action on the claim or cause is complete; or (3) a court or other agency is authorized to accept jurisdiction of the action. The statute of limitations for a common-law bad faith claim is 3 years and begins to run when the claim or action accrues. The accrual date of a bad faith claim arising out of a separate and independent disputed issue is established by determining whether that particular issue has been ultimately resolved, regardless of the existence or absence of a resolution of other issues within the workers' compensation case. Therefore, for statute of limitations purposes, statutory and common-law bad faith claims against an insurer that are predicated on actions taken in adjusting a workers' compensation claim accrue when the Workers' Compensation Court enters a judgment ordering the insurer to pay for a previously denied benefit but leaves unresolved the ultimate determinations of the extent and duration of the worker's disability. O'Connor v. Nat'l Union Fire Ins. Co., 2004 MT 65, 320 M 301, 87 P3d 454 (2004), following Grenz v. Orion Group, Inc., 243 M 486, 795 P2d 444 (1990), Poteat v. St. Paul Mercury Ins. Co., 277 M 117, 918 P2d 677 (1996), and Brewington v. Employers Fire Ins. Co., 1999 MT 312, 297 M 243, 992 P2d 237 (1999), and distinguishing Fode v. Farmers Ins. Exch., 221 M 282, 719 P2d 414 (1986).

Statute of Limitations Applicable to FELA Actions — Statute Tolled by Employer Misrepresentations: A 3-year statute of limitations applies to actions brought under the Federal Employers' Liability Act (FELA), 45 U.S.C. 51 through 60. However, plaintiff is entitled to have the cause tried on the merits, even if the suit was not filed within the statutory limit, if misrepresentations made by the employer justifiably misled plaintiff into not filing a timely action. A FELA defendant may be estopped from raising the statute of limitations for equitable reasons even if the misrepresentations upon which the employee relied were unintentional. In this case, Bevacqua was examined by independent physicians, acting as agents for the railroad, who misrepresented Bevacqua's injuries. Because those misrepresentations misled Bevacqua into not filing suit within 3 years, he was entitled to have his cause tried on the merits. Bevacqua v. Union Pac. RR Co., 1998 MT 120, 289 M 36, 960 P2d 273, 55 St. Rep. 469 (1998), citing numerous federal cases giving a liberal construction to FELA in favor of injured railroad workers.

Statute of Limitations Tolled by Renewal Statute for One Year After Appeal: Hollister was dismissed from her job with the Rosebud County Attorney's Office in 1991 and filed a complaint in federal court the same year, alleging federal and state claims. In 1992, the United States District Court dismissed the complaint and Hollister appealed to the Ninth Circuit Court of Appeals. In 1994, the Ninth Circuit Court of Appeals affirmed, and in the same year, Hollister filed a complaint in Rosebud County District Court. The Rosebud County District Court dismissed, holding that the claims were barred by the 1-year statute of limitations under 39-2-911 and by the 3-year statute of limitations under this section. Citing Glass v. Basin & Bay St. Min. Co., 34 M 88, 85 P 746 (1906), the Supreme Court held that the word "terminated" in 27-2-407 includes ultimate termination after final appellate action. For this reason, the Supreme Court held that Hollister's complaint was timely filed. Hollister v. Forsythe, 270 M 91, 889 P2d 1205, 52 St. Rep. 90 (1995).

Architectural Malpractice — Applicability of Continuing Relationship Doctrine: An architect was hired to design and oversee the building of a hospital. Shortly after completion in 1975, problems developed with the heating, air conditioning, and ventilating systems. The hospital contacted the architect about remedies for the problems, seeking and continuing to rely on his advice until 1979, when the parties' relationship ended. The hospital filed suit in 1981, which the architect contended was beyond the statute of limitations that normally would begin running upon substantial completion of the facility in 1975. Distinguishing Schneider v. Leaphart, 228 M 483, 743 P2d 613 (1987), the Supreme Court applied the continuing relationship doctrine because no specific statute of limitations governed the tort of architectural malpractice and because "accrual" was not statutorily defined at the time of the acts giving rise to the action. The continuing relationship doctrine may be used when, during the course of an ongoing, developing, and dependent relationship between a professional and a client, the professional commits a

tortious act that injures the client. The doctrine suspends the accrual of the cause of action in order to give the professional an opportunity to remedy, avoid, or establish that there was no error or attempt to mitigate damages. The cause of action does not accrue until either the professional relationship ends or, if a general professional relationship continues between the parties, the professional ceases to treat or advise the client for the particular act causing the injury. Therefore, the statute of limitations in this case was suspended until the professional relationship ended in 1979 and the hospital's complaint in 1981 was filed well within the general 3-year tort statute of limitations. N. Mont. Hosp. v. Knight, 248 M 310, 811 P2d 1276, 48 St. Rep. 444 (1991).

Issue of Material Facts as to Plaintiff's Mental Illness — Tolling of Statute of Limitations: Nearly 8 years after the plaintiff was discharged from his employment, his guardian ad litem filed a complaint against his former employer alleging wrongful discharge and claiming that the 3-year statute of limitation was tolled due to the plaintiff's mental illness. Upon the employer's motion for summary judgment, the trial court dismissed the complaint as untimely filed. In response to the employer's contention that the plaintiff's pursuit of other benefit claims demonstrates an absence of mental illness, the Supreme Court held that that is an issue to be decided at trial, not on a motion for summary judgment, because it is not an issue that is susceptible to resolution based on written affidavits without the benefit of cross-examination in court. Therefore, the matter was remanded because there is a material issue of fact concerning the plaintiff's mental condition that precludes summary judgment. Bestwina v. Village Bank, 235 M 329, 767 P2d 338, 46 St. Rep. 27 (1989).

Bankruptcy Petitioner — Limitation Not Tolled: The Statute of Limitations does not toll for the bankrupt during a bankruptcy action. Under 11 U.S.C. 361, nothing prevents or stays the bankrupt from filing claims against other parties. Thus, the District Court did not err in dismissing a libel action brought after bankruptcy for an event occurring prior to bankruptcy but which was filed after the Statute of Limitations had run. A Statute of Limitations is tolled, under 11 U.S.C. 108, until 2 years after adjudication of bankruptcy for a trustee in bankruptcy, but there is no tolling provision for the debtor. Engine Rebuilders, Inc. v. Seven Seas Import-Export & Merc., Inc., 189 M 236, 615 P2d 871, 37 St. Rep. 1406 (1980).

Known Out-of-State Address — No Tolling: When persons involved in a tort, who were residents of the state at its occurrence, subsequently moved to another state and plaintiff insurance company was aware of their address, the Statute of Limitations provided by this section didn't toll due to absence from the state under 27-2-402 because Montana District Courts had jurisdiction under Rule 4B(1), M.R.Civ.P., and process could be served under the long-arm statute, Rule 4D(3), M.R.Civ.P. Beedie v. Shelley, 187 M 556, 610 P2d 713 (1980).

Absence From State: Absence of alleged tortfeasor from state did not toll Statute of Limitations where it was possible to obtain service during the entire 3-year period, under Rule 4D(2)(a) initially and under Rule 4D(3) after he left the state. State ex rel. McGhee v. District Court, 162 M 31, 508 P2d 130 (1973).

Death of Defendant Tolling Statute: Where accident, in which defendant was driving, occurred November 26, 1941, and defendant died within 3 years thereof and letters of administration for his estate issued December 13, 1944, and an action for tort against the estate was instituted December 11, 1945, within 1 year after the issuing of letters testamentary, the action was timely under 27-2-404, which provides that if a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof and the cause of action survives, an action may be commenced against his representatives after the expiration of that time and within 1 year after the issuing of letters testamentary or of administration. Kujich v. Lillie, 127 M 125, 260 P2d 383 (1953).

AMENDMENT OF COMPLAINT

Applicability of Fictitious Name Statute and Misnomer Rule to Similarly Named Defendants — Relation Back of Amended Complaint: Molina was injured on a construction site, and filed a complaint against Panco, Inc., a Washington corporation that he believed to be the general contractor, for failing to supervise the job site and to provide a safe place to work. Molina also named fictitious defendants John Does I-III in the complaint. After the complaint was served but before Panco, Inc., filed a responsive pleading, Molina learned that there were two different corporations in Washington with similar names, so he filed an amended complaint naming the true contractor, Panco Construction, Inc., and retaining the additional fictitious defendants. Panco Construction, Inc., then filed its answer and moved for summary judgment, listing as an affirmative defense that the action was barred by the statute of limitations because the amended complaint was filed 3 months and 3 days after the limitation for negligence claims in this section.

Molina asserted that the statute of limitations did not apply because under 25-5-103, a fictitiously named defendant is party to the action from its commencement so the statute of limitations stops running as to the fictitious party on the date that the original complaint is filed. Molina also contended that under Rule 15(c), M.R.Civ.P. (Title 25, ch. 20), an amended complaint relates back to the date of the original complaint when the amended complaint revolves around the same operative facts as the original complaint. Molina then moved to amend the complaint, asking that the District Court rule that the amended complaint sufficed to substitute Panco Construction, Inc., for John Doe I or, alternatively, that Molina be allowed to file a second amended complaint substituting Panco Construction, Inc., for John Doe I. Molina then moved to dismiss Panco, Inc., as a defendant. The District Court subsequently granted the motion of Panco Construction, Inc., for summary judgment without ruling on Molina's motion to amend the complaint. Molina appealed, contending that Panco Construction, Inc., was not a new party to the action, but rather a presently identified, formerly fictitiously named defendant that should be considered a party from the filing of the original complaint. Panco Construction, Inc., argued that: (1) Molina had attempted to entirely replace a mistakenly named defendant with a correctly named defendant without meeting the notice requirements of Rule 15(c), M.R.Civ.P.; (2) it was not a fictitiously named defendant under 25-5-103 because due diligence on Molina's part would have revealed the true identity of the defendant; and (3) Molina was precluded from arguing the applicability of Rule 4E(2), M.R.Civ.P., on appeal because the issue was never raised in District Court. The Supreme Court reversed based on the District Court's incorrect assumption that it orally granted Molina's motion to file an amended complaint and on its failure to rule on the motion to amend the complaint. The case was remanded for consideration of the motion to amend the complaint in conjunction with Rule 4E(2), M.R.Civ.P., and of the effect that that rule may or may not have on 25-5-103, the fictitious name statute, and Rule 15(c), M.R.Civ.P., the misnomer rule. Molina v. Panco Constr. Inc., 2002 MT 136, 310 M 185, 49 P3d 570 (2002). On remand, the District Court concluded that Molina was not ignorant of defendant's name because, even though Molina was misinformed by the Washington Secretary of State, he nevertheless knew defendant's true corporate name, so summary judgment was granted to defendant. On appeal, the Supreme Court disagreed and remanded again. Under a liberal interpretation of 25-5-103, Molina was allowed to substitute defendant's real name for one of the John Doe defendants in the original complaint because he had no reason to believe that the wrong name had been supplied by the Washington Secretary of State, and even though he knew that the identity of the defendant whom he sought to name from the outset was the general contractor of the job on which he was injured, he relied on the incorrect information and thus was ignorant of the contractor's true legal name at the time that the complaint was filed. Molina v. Panco Constr., Inc., 2004 MT 198, 322 M 268, 95 P3d 687 (2004).

Wrong Defendant Sued — No Substitution: Section 25-5-103 does not allow substitution of the proper defendant after discovery that the wrong defendant was named and the Statute of Limitations has run. Keller v. Stembridge Gun Rentals, 221 M 352, 719 P2d 764, 43 St. Rep. 886 (1986), citing LaForest v. Texaco, Inc., 179 M 42, 585 P2d 1318 (1978).

Relation Back of Amendment to Substitute True Name: When a complaint sets forth a cause of action against a defendant designated by a fictitious name under 25-5-103 and his true name is thereafter discovered and substituted by amendment, the fictitiously named defendant is considered a party to the action from its commencement, so that the Statute of Limitations stops running as to the fictitiously named defendant on the date the original complaint is filed. Sooy v. Petrolane Steel Gas, Inc., 218 M 418, 708 P2d 1014, 42 St. Rep. 1702 (1985).

Notice Required to Toll Statute Under Fictitiously Named Defendant: A plaintiff may utilize the fictitious name statute and may amend a complaint to substitute the true name of the defendant when discovered. If the amendment occurs after the Statute of Limitations has run, however, the real or intended defendant must have either been served or otherwise received notice of the institution of the action under the conditions for relation back provided in Rule 15(c), M.R.Civ.P. It is fundamental that the purpose of the Statute of Limitations is to provide a cutoff point for state claims. Rule 15(c) carries out this policy by requiring notice of the action within the time limitations of the Statute of Limitations before an amendment adding new parties will relate back to the date of the original pleading. Vincent v. Edwards, 184 M 92, 601 P2d 1184 (1979), overruled in Sooy v. Petrolane Steel Gas, Inc., 218 M 418, 708 P2d 1014, 42 St. Rep. 1702 (1985).

Amendment of Complaint: Three-year limitation for tort actions did not preclude amendment of complaint to correct misnomer by which defendant was referred to erroneously as Illinois corporation rather than as Delaware corporation; federal rule was applied in allowing the amendment. Wentz v. Alberto Culver Co., 294 F. Supp. 1327 (D.C. Mont. 1969).

Law Review Articles

Employment At-Will, Wrongful Discharge, and the Covenant of Good Faith and Fair Dealing in Montana, Past, Present, and Future, Hopkins & Robinson, 46 Mont. L. Rev. 1 (1985).

The Continuing Development of the Tort of Bad Faith in Montana, Graham & Luck, 45 Mont. L. Rev. 43 (1984).

Wrongful Death and the Statute of Limitations, Broeder, 34 Mont. L. Rev. 170 (1973).

Collateral References

Limitation of Actions *key* 30.

54 C.J.S. Limitations of Actions §193, et seq.

51 Am. Jur. 2d Limitation of Actions §§102 through 106.

Emotional or psychological "blocking" or repression as tolling running of statute of limitations. 11 ALR 5th 588.

Running of limitations against action for civil damages for sexual abuse of child. 9 ALR 5th 321.

Application of statute of limitations to actions for breach of duty in performing services of public accountant. 7 ALR 5th 852.

27-2-205. Actions for medical malpractice.

Compiler's Comments

1995 Amendment: Chapter 16 in last sentence of (1), in two places, substituted reference to defendant for reference to plaintiff; and made minor changes in style.

1989 Amendment: Near end of (1) substituted "the plaintiff" for "him".

1987 Amendment: In (1), in first sentence near beginning, inserted "in tort or contract", included hospital administrator and licensed medical professional corporation in list of affected health care providers, near middle, after "licensed medical professional corporation", deleted "as the employer of any such person", before "error" inserted "an act", after "omission" deleted "in such person's practice", inserted "except as provided in subsection (2)", and in second sentence, near beginning, substituted "during which there has been a failure" for "during which such person has failed"; inserted (2) relating to period of limitations when person injured is under age of 4; and made minor changes in phraseology.

Applicability — Effective Date: Section 2, Ch. 499, L. 1987, provided: "Applicability. (1) An action referred to in 27-2-205(2) for injury or death occurring prior to October 1, 1987, must be commenced within 2 years after the effective date of this act or within the time limits in 27-2-205(2), whichever expires last.

(2) This act applies retroactively, within the meaning of 1-2-109, to causes of action that arose prior to October 1, 1987." Pursuant to 1-2-201, this act was effective October 1, 1987.

Case Notes

Defense of Comparative Negligence Inapplicable to Medical Malpractice Case When Patient's Pretreatment Behavior Furnishes Need for Care That Later Becomes Subject of Malpractice Claim: Plaintiff's daughter had asthma, was allergic to horses, and had a long history of breathing difficulties, but nevertheless went horseback riding. She stopped breathing and collapsed, ultimately suffering irreversible brain damage and death. The mother sued the physicians at the hospitals where the daughter was taken for treatment, alleging that the physicians were negligent in failing to intubate the daughter immediately and that the physicians' negligence caused the daughter's injury and death. The physicians argued that the daughter had already suffered a severe brain injury because of oxygen deprivation brought on by her asthma and that it was her own negligence, not that of the physicians, that caused her death. The District Court allowed the physicians to present arguments and jury instructions on comparative negligence. In assisting a jury to decide a case involving a patient's fault as a defense in a medical malpractice case, it is necessary to first clarify the sequence of events in relation to the interwoven doctrines of contributory or comparative negligence, proximate cause, and avoidable consequences (see Bryant v. Calontone, 669 A2d 286 (N.J. Sup. Ct. App. Div. 1996). The temporal headings under which the patient's conduct is to be examined are: (1) the pretreatment period; (2) the treatment period during which the alleged malpractice occurred; and (3) the postmalpractice period. A patient's conduct before seeking medical treatment is merely a factor that a physician should consider in treating the patient. When the patient's negligent act merely precedes that of the physician and provides the occasion for medical treatment, contributory negligence is not a permissible defense and the physician's negligent act is considered an intervening act that does not bar a patient from recovering (see Durphy v. Kaiser, 698 A2d 459 (D.C. 1977). In the present case, the patient's actions were clearly

pretreatment conduct and not to be considered as evidence of fault that could offset any negligent conduct by the physicians. Thus, the Supreme Court held that the District Court abused its discretion in giving instructions on comparative negligence because in a medical malpractice action, jury instructions on a patient's comparative negligence are appropriate only when the patient's negligent conduct occurs contemporaneous with or subsequent to treatment. Further, allowing evidence of the daughter's prior acts denied the mother a fair and impartial trial, and the District Court also abused its discretion in failing to grant the mother's motion for a mistrial, constituting reversible error. Harding v. Deiss, 2000 MT 169, 300 M 312, 3 P3d 1286, 57 St. Rep. 696 (2000), followed, with regard to treatment at an accident scene by law enforcement personnel responding to allegedly negligent conduct of DUI that occurred prior to the accident, in Cutler v. Jim Gilman Excavating, Inc., 2003 MT 314, 318 M 255, 80 P3d 1203 (2003).

Statute Establishing Time Bar to Medical Malpractice Actions Not Violative of Constitutional Right to Equal Protection or Access to Court: In 1974, shortly after the premature birth of Richard Best, a doctor placed an umbilical vein catheter in the baby, who subsequently developed liver problems. In 1995, Best filed a complaint against the doctor's estate, claiming that the doctor's actions were negligent, constituting medical malpractice resulting in injuries for which Best sought a variety of damages. The estate moved for summary judgment on grounds that the complaint was time-barred by the statute of limitations in subsection (2) of this section. The District Court denied the motion, agreeing with Best that the statute of limitations violated Best's constitutional rights to equal protection of the law and access to courts. Following acceptance of the estate's writ for supervisory control, the Supreme Court reversed. The rational basis test applicable to review of the statute of limitations required only that the classification created by subsection (2) of this section bear a rational relationship to a legitimate legislative purpose. In this case, the statute passed the test because ensuring the availability and affordability of heath care services and reducing the costs of medical malpractice insurance are legitimate legislative objectives, and the classification, narrowly defined to minors injured between birth and 4 years of age, was rationally related to the legitimate legislative objectives. Further, Best presented no persuasive argument or authority supporting the contention that the statute was not rationally related to legitimate legislative objectives and therefore failed to meet the burden of establishing that the statute was unconstitutional beyond a reasonable doubt. Best was required to bring the action before October 1, 1989, and failing to do so, the estate was entitled to summary judgment because the statute of limitations applied. Estate of Dennis McCarthy, M.D. v. District Court, 1999 MT 309, 297 M 212, 994 P2d 1090, 56 St. Rep. 1241 (1999), distinguishing Carson v. Maurer, 424 A2d 825 (N.H. 1980), Schwan v. Riverside Methodist Hosp., 425 NE 2d 1337 (Ohio 1983), Sax v. Votteler, 648 SW 2d 661 (Tex. 1983), Barrio v. San Manuel Div. Hosp., Magma Copper, 692 P2d 280 (Ariz. 1984), Strahler v. St. Luke's Hosp., 706 SW 2d 7 (Mo. 1986), Lyons v. Lederle Laboratories, 440 NW 2d 769 (S.Dak. 1989), and Torres v. County of Los Angeles, 257 Cal. Rep. 211 (Cal. App. 1989).

No Affirmative Act by Health Provider Required to Toll Statute of Limitations: After becoming pregnant in 1989, Blackburn learned that the father was HIV positive. Blackburn tested negative for HIV but claims that she was informed by a nurse at the Butte-Silver Bow County Health Department (BSBHD) that, despite her HIV negative status, she would likely die within a few years and that her baby had a 50% chance of being born HIV positive. Based on this information, Blackburn made an appointment at the Blue Mountain Clinic in Missoula. Blackburn stated that she provided the clinic with written proof of her HIV negative status and informed the clinic counselor that she was seeking an abortion only because she feared that her baby would be born HIV positive. After obtaining the abortion, Blackburn consulted with an attorney in 1995 and learned, allegedly for the first time, that it was impossible for an HIV negative mother to give birth to an HIV positive baby. Blackburn filed an action, claiming that despite providing proof of her HIV negative status and her statement concerning her reason for seeking the abortion, neither the counselor, nurse, nor doctor at the clinic explained to her that an HIV negative mother could not deliver an HIV positive baby. Both the BSBHD and the Blue Mountain Clinic filed a motion to dismiss, claiming that Blackburn's claims were barred by the 5-year statute of limitations. When the District Court dismissed the action, Blackburn appealed. On appeal, the Supreme Court upheld the dismissal of the action against BSBHD and its doctor, but held that the District Court had erred in dismissing Blackburn's negligence claims against the Blue Mountain Clinic and its counselor. In its decision, the court overruled any suggestion in Major, Monroe, and Wisher that an affirmative act by the health care provider is required to trigger the tolling provisions of this section or that this section could be applied to toll the statute of limitations in a medical malpractice case. Blackburn v. Blue Mtn. Women's Clinic, 286 M 60, 951 P2d 1, 54 St. Rep. 1303 (1997).

Tolling of Statute of Repose by Chiropractic Legal Panel Proceeding Filed Before Dismissal of Court Action — Filing of Second Court Action After Panel Decision Not Barred: A medical malpractice complaint filed in District Court on April 16, 1992, tolled the statute of repose pursuant to this section. On August 2, 1993, an application was timely filed with the Montana Chiropractic Legal Panel. Voluntary dismissal of the District Court complaint without prejudice on August 3, 1993, did not nullify the complaint's tolling of the statute of limitations because under 27-12-701, the filing of the Panel application also tolled the statute. The Montana Chiropractic Legal Panel Act continued to toll the statute while the application under it was pending, and because the second District Court complaint was timely filed under the Act within 30 days after the Panel's decision, the second complaint was not barred by the statute of repose. Webb v. T.D., 275 M 243, 912 P2d 202, 53 St. Rep. 117 (1996).

When Statute of Limitations or of Repose Tolled: A statute of limitations or a statute of repose is tolled by the commencement of an action, and an action is commenced when a complaint is filed. Webb v. T.D., 275 M 243, 912 P2d 202, 53 St. Rep. 117 (1996).

Cognizance of Fact of Injury Constituting Discovery of Cause of Action: Appellant contended the statute of limitations was tolled by the acts or omissions of the defendants, who concealed the cause of her daughter's death. She claimed she was stymied in her attempts to gain access to medical records, first by the doctor's failure to finalize the records and then by the hospital's refusal to allow her access to the records. However, appellant was cognizant of the fact of the injury complained of on the day her daughter died and therefore discovered her cause of action on the date of death, thus beginning the clock on the statute of limitations. Major v. N. Valley Hosp., 231 M 481, 759 P2d 153, 45 St. Rep. 1263 (1988), distinguished in Wisher v. Higgs, 257 M 132, 849 P2d 152, 50 St. Rep. 191 (1993). Major was overruled insofar as it suggests that an affirmative act by a health care provider is required to trigger the tolling provisions of this section and Major and Wisher were overruled to the extent that they suggest that this section applies to toll the statute of limitations in medical malpractice cases in Blackburn v. Blue Mtn. Women's Clinic, 286 M 60, 951 P2d 1, 54 St. Rep. 1303 (1997).

Discovery Rule: Plaintiff urges adoption of a discovery rule respecting the accrual of a products liability cause of action. Discovery rules have been limited to latent injuries resulting primarily from either drug products or medical malpractice. Montana statutes permit a discovery rule in actions for fraud or mistake and in actions for malpractice. The Statute of Limitations for tort actions, however, does not authorize application of a discovery rule. Much v. Sturm, Ruger & Co., Inc., 502 F. Supp. 743, 37 St. Rep. 2116 (D.C. Mont. 1980).

Applicability: This statute has prospective application only; it could not be applied where the alleged negligence giving rise to the action occurred prior to its effective date, even though the action was brought after that date. Penrod v. Hoskinson, 170 M 277, 552 P2d 325 (1976).

Fraudulent Concealment: Doctrine of fraudulent concealment was not applicable to medical malpractice case in which plaintiff alleged that doctor had failed to make a full disclosure of the experimental nature of the operation to be performed, but admitted that he was informed in detail of the type of operation to be performed and that he consented to the operation and where, although doctor assured plaintiff that he would be able to return to work within 6 months of the operation, plaintiff admitted to being totally disabled for 6 years after the operation and partially disabled thereafter. Monroe v. Harper, 164 M 23, 518 P2d 788 (1974), followed in Wisher v. Higgs, 257 M 132, 849 P2d 152, 50 St. Rep. 191 (1993). Monroe was overruled insofar as it suggests that an affirmative act by a health care provider is required to trigger the tolling provisions of this section and Monroe and Wisher were overruled to the extent that they suggest that this section applies to toll the statute of limitations in medical malpractice cases in Blackburn v. Blue Mtn. Women's Clinic, 286 M 60, 951 P2d 1, 54 St. Rep. 1303 (1997).

Law Review Articles

A Child's View of Recovery Under the National Childhood Vaccine Act or "He Who Hesitates is Lost", Pertnoy, 59 Mont. L. Rev. 275 (1998).

Accrual of the Cause of Action for Medical Malpractice: Penrod v. Hoskinson, Reynolds, 38 Mont. L. Rev. 399 (1977).

Collateral References

Limitation of Actions *key* 95.

54 C.J.S. Limitations of Actions §§214 through 216.

61 Am. Jur. 2d Physicians, Surgeons, etc. §§286 through 294.

Medical malpractice in connection with diagnosis, care, or treatment of diabetes. 43 ALR 5th 87.

Medical malpractice: who are "health care providers," or the like, whose actions fall within statutes specifically governing actions and damages for medical malpractice. 12 ALR 5th 1.

What nonpatient claims against doctors, hospitals, or similar health care providers are not subject to statutes specifically governing actions and damages for medical malpractice. 88 ALR 4th 358.

27-2-206. Actions for legal malpractice.

Case Notes

No Showing of Damages or That Client Would Have Prevailed on Lost Appeal of Marital Dissolution Case — Failure of Legal Malpractice Claim: Richards brought a malpractice claim against an attorney who negligently failed to appeal Richards' marriage dissolution proceeding prior to the deadline for appeal. The District Court dismissed the claim, ruling that the court, rather than a jury, should decide the consequences of the attorney's failure to file the appeal and that the lost appeal would not have succeeded. Richards appealed, but the Supreme Court affirmed. Even though the attorney admitted malpractice by allowing the claim to expire, the attorney contended that no damages occurred. When a malpractice claim changes to the question of whether an attorney perfected an appeal, the analysis shifts from one of fact to one of law, which is properly considered by the court rather than a jury. The question of the probable outcome of a lost appeal also presents a question of law for the trial court to decide based on the special expertise required to analyze the relevant law and rules of appellate procedure, and the review is limited to the transcript and record of the underlying action and arguments presented by counsel. Here, there was substantial credible evidence regarding primary parenting time, valuation of the marital estate, and child support payments showing that Richards' lost appeal would not have resulted in a successful or favorable outcome. Further, one element of a legal malpractice claim requires a showing that the attorney's conduct proximately caused damages suffered by the claimant. Because Richards failed to show that the lost appeal would have been successful, he also failed to show that the attorney's breach caused any damages, so the malpractice claim failed. Richards v. Knuchel, 2005 MT 133, 327 M 249, 115 P3d 189 (2005).

Legal Malpractice Statute of Limitations Claim Related to Discovery — Tests: Attorney Younkin represented the town of Clyde Park in defending a claim objecting to the town's water rights claims filed in 1982. Based on the attorney's recommendation, the town settled the claim in 1996, but the claimant continued to complain that water was not being received. The file was provided to the town's attorney in June 1998. In 2004, the town filed a malpractice claim against Younkin, asserting that by agreeing to settle, the town had unknowingly waived its right to a larger water rights claim and that if Younkin had properly advised the town of its rights, priorities, and abandonment claims, the town would have prevailed in any litigation. The District Court granted summary judgment to Younkin, holding that the town had actual or constructive knowledge of the facts underlying the malpractice action when the town attorney received the file in June 1998 and that the statute of limitations on the malpractice claim expired 3 years later. The town appealed, but the Supreme Court affirmed. When a statute of limitations issue involving a legal malpractice claim relates to actual discovery, the test is actual knowledge of the facts essential to the claim rather than discovery of legal theories. When the issue involves the time at which plaintiff, through use of reasonable diligence should have discovered the facts, the test is whether plaintiff had information of circumstances sufficient to put a reasonable person on inquiry or had the opportunity to obtain knowledge from sources open to investigation. In this case, the town attorney's claim that he did not have the legal expertise to know what to look for did not toll the statute of limitations because the issue did not turn on the attorney's expertise in various legal matters. For purposes of the statute of limitations, it only mattered that the town had all the necessary information in 1998 when the town attorney received the file that put the town on notice of a possible malpractice claim. Clyde Park v. Younkin, 2004 MT 274, 323 M 197, 99 P3d 196 (2004). See also Johnson v. Barrett, 1999 MT 176, 295 M 254, 983 P2d 925 (1999).

Attorney's Duty of Care Owed to Estate Beneficiary — Standing of Estate to Bring Legal Malpractice Action: A personal representative brought a legal malpractice damage suit on behalf of the estate against an attorney who drafted a trust document and will. Before granting summary judgment to the attorney, the District Court raised the issue of whether the estate and personal representative had standing to bring the suit, based on a questionable fiduciary relationship between the plaintiffs and the attorney. On appeal, the Supreme Court concluded that as a representative of the decedent, the estate stood in the shoes of the decedent and was thus considered to be in privity with the attorney, so the estate had standing to bring a malpractice claim. Further, the question of whether the trust and the personal representative

had standing was a question of fact to be determined at trial, so summary judgment was precluded and the case remanded for further proceedings. Watkins Trust v. Lacosta, 2004 MT 144, 321 M 432, 92 P3d 620 (2004).

Legal Malpractice Claim by Estate Not Barred by Res Judicata, Equitable Estoppel, or Judicial Estoppel: A personal representative brought a legal malpractice damage suit on behalf of the estate against an attorney who drafted a trust document and will. The trust beneficiaries brought a separate suit against the trustee. The District Court granted summary judgment for the attorney on grounds of res judicata, equitable estoppel, and judicial estoppel. On appeal, the Supreme Court reversed. Res judicata and collateral estoppel did not apply because the subject matter and parties in the beneficiaries' suit were different. Equitable estoppel did not apply because the defendants did not present any evidence to establish that they relied on an act by the personal representative or changed their position for the worse because of that act. Judicial estoppel did not apply because the judicial admission in this case referred only to plaintiffs' legal theory and not to an unequivocal statement of fact and because of the absence of any evidence that defendants were misled by a judicial admission. Thus, summary judgment was inappropriate. Watkins Trust v. Lacosta, 2004 MT 144, 321 M 432, 92 P3d 620 (2004).

Legal Malpractice Claim Timely Filed — Summary Judgment Inappropriate When Date of Discovery and Accrual Disputed: The Watkins estate filed a legal malpractice claim against an attorney who set up the trust. The District Court found that the 3-year statute of limitations had run on filing the suit and granted summary judgment for the attorney. On appeal, the Supreme Court reversed. After concluding that the statute of limitations does not begin to run until both the discovery rule and the accrual rule have been satisfied, the court examined the applicability of both rules. The claim was filed in 1997, but the estate did not discover the attorney's negligence until 1995, which was excusable because: (1) the trustee relied on the fiduciary relationship and trusted that the attorney's assertion that the trust was revocable was correct, even though it was irrevocable; (2) of the complexity of the estate plan, which was difficult even for experts to understand and was beyond the understanding of a layperson; and (3) the attorney may have fraudulently concealed the malpractice. Further, because the trustee continued to treat the trust as revocable in reliance on the attorney's advice, the estate did not sustain any actual damages until the irrevocable nature of the trust was discovered and trust beneficiaries brought suit to remove the trustee in 1996, well within the statute of limitations. The attorney's contention that res judicata and estoppel barred the present suit because the beneficiaries also maintained a separate suit for damages also failed because neither the parties nor the issues were the same. Summary judgment was thus improper, and the case was remanded. Estate of Watkins v. Hedman, Hileman & Lacosta, 2004 MT 143, 321 M 419, 91 P3d 1264 (2004), following Uhler v. Doak, 268 M 191, 885 P2d 1297 (1994). See also Watkins Trust v. Lacosta, 2004 MT 144, 321 M 432, 92 P3d 620 (2004).

Legal Malpractice — Nexus Between Fraudulent Concealment and Discovery Rule: In the context of legal malpractice, a nexus exists between a defendant's fraudulent concealment and the question of whether a plaintiff should have discovered the defendant's negligent act. Estate of Watkins v. Hedman, Hileman & Lacosta, 2004 MT 143, 321 M 419, 91 P3d 1264 (2004). See also Watkins Trust v. Lacosta, 2004 MT 144, 321 M 432, 92 P3d 620 (2004).

Statute of Limitations in Legal Malpractice Action to Run Upon Satisfaction of Both Discovery Rule and Accrual Rule: The law in Montana for legal malpractice actions is that the statute of limitations does not begin to run until both the discovery rule and the accrual rule have been satisfied—in other words, until the negligent act was or should have been discovered, and all elements of the legal malpractice claim, including damages, have occurred. Estate of Watkins v. Hedman, Hileman & Lacosta, 2004 MT 143, 321 M 419, 91 P3d 1264 (2004). See also Watkins Trust v. Lacosta, 2004 MT 144, 321 M 432, 92 P3d 620 (2004).

When Statute of Limitations Begins to Run on Legal Malpractice Claim Stemming From Criminal Representation: In a case of first impression, the Supreme Court considered whether the statute of limitations for a legal malpractice claim should be tolled while a criminal defendant pursues a claim for postconviction relief or whether the defendant should pursue a legal malpractice claim simultaneously with the claim for postconviction relief. After considering both approaches, the court adopted the two-track approach in Gebhardt v. O'Rouke, 510 NW 2d 900 (Mich. 1994), because it incorporates a strict reading of the statute of limitations and at the same time addresses problems posed by multiple litigations. Thus, pursuant to Gebhardt, a criminal defendant must file a malpractice claim within 3 years of discovering the act, error, or omission. With the claim preserved, the defendant can then seek a stay in the civil suit until the criminal case is resolved, and the trial court handling the civil suit would have discretion regarding the duration of the stay, keeping in mind the nature of the claim asserted for

postconviction relief. After adopting this new rule, the Supreme Court declined to retroactively apply the rule in the present case on equitable grounds, but did put parties convicted in criminal proceedings on notice of the new rule henceforth. Ereth v. Cascade County, 2003 MT 328, 318 M 355, 81 P3d 463 (2003).

Legal Malpractice Action Not Brought Within Statutory Time Limit — Summary Dismissal Proper — Damage Rule Inapplicable: Plaintiff filed a legal malpractice action against defendant on December 17, 1999, 3 years and 8 days after the date that plaintiff's damages occurred. The District Court dismissed the claim as untimely under this section. On appeal, plaintiff contended that under the damage rule set out in Schneider v. Leaphart, 228 M 483, 743 P2d 613 (1987), and Uhler v. Doak, 268 M 191, 885 P2d 1297 (1994), the statute of limitations should have been tolled until notice of damages was actually received on December 23, 1996, which would have allowed filing until December 23, 1999. The Supreme Court disagreed. The damage rule is not the accepted standard in Montana. Under the statute of limitations for legal malpractice actions in this section, the time for filing is not tolled by a plaintiff's failure to discover damages, but runs from the date that plaintiff discovered or should through reasonable diligence have discovered the act or omission causing the damages. The claim or cause of action accrued on December 9, 1996, and the complaint filed on December 17, 1999, was beyond the statute of limitations, so summary dismissal for defendant was proper. Spolar v. Datsopoulos, 2003 MT 54, 314 M 364, 66 P3d 284 (2003).

Legal Malpractice Claim Barred by Statute of Limitations — Continuing Tort Theory Inapplicable: The plain language of this section requires that a legal malpractice action be commenced within 3 years after plaintiff discovers or should have discovered the allegedly negligent act, error, or omission at issue, but does not permit an overlay of a continuing damage or injury theory that would toll the statute of limitations. Here, the legal malpractice claim accrued no later than December 9, 1993, but the action was filed on December 19, 1996, and thus was barred by the 3-year statute of limitations. Plaintiff's claim of fraudulent concealment under Monroe v. Harper, 164 M 23, 518 P2d 788 (1974), was not addressed on appeal because the theory had not been raised in District Court. Johnson v. Barrett, 1999 MT 176, 295 M 254, 983 P2d 925, 56 St. Rep. 689 (1999).

No Extension of Statute of Repose Under Equity Principles: The omission that gave rise to Joyce's claim for legal malpractice was attorney Garnaas's failure to serve a summons within the 3-year time limit. Joyce claimed a second cause of action in Garnaas's failure to notify Joyce about the status of the case even after the underlying action was lost, arguing that the concealment of a claim is a separate tort that resets the start date for the statutes of limitations and repose. However, there was no separate claim in this case, in addition to the alleged malpractice, because that claim was subsumed within the initial malpractice. Joyce argued on appeal that the statute of repose should be extended in this case because: (1) an attorney who intentionally misleads a client regarding the true status of a case is not entitled to claim the benefit of the statute of repose because the attorney would be allowed to take advantage of his wrong, in violation of 1-3-208; or (2) equitable estoppel should bar Garnaas from taking advantage of his wrong while asserting a strict legal right, in violation of 27-2-102. In this case, however, principles of equity did not extend the otherwise absolute statute of repose. Section 27-2-102 does not apply to legal malpractice actions. Further, Joyce's allegations of continuing fraudulent concealment failed because claims for damages against Garnaas for not informing Joyce of the legal malpractice related back to the date that the summons was not served. Thus, Joyce could not claim any actual damages separate from Garnaas's original omission, which was barred by the statute of repose. Joyce v. Garnaas, 1999 MT 170, 295 M 198, 983 P2d 369, 56 St. Rep. 661 (1999).

Statute of Repose Absolute — No Tolling by Fraudulent Concealment: The 3-year statute of limitations, within which an action for professional negligence against an attorney must be brought, contains a built-in tolling mechanism for a defendant's fraudulent concealment of a plaintiff's injury and does not begin to run until the plaintiff discovers, or with reasonable diligence should have discovered, the error, act, or omission. Not to provide some tolling in those circumstances would inequitably allow the defendant to use the statute, intended as a device for fairness, to perpetrate a fraud. On the other hand, the 10-year statute of repose in this section is the absolute time limit beyond which liability no longer exists. Not even fraudulent concealment can toll the statute of repose. Joyce v. Garnaas, 1999 MT 170, 295 M 198, 983 P2d 369, 56 St. Rep. 661 (1999), following Blackburn v. Blue Mtn. Women's Clinic, 286 M 60, 951 P2d 1 (1997). See also First United Methodist Church of Hyattsville v. U.S. Gypsum Co., 882 F2d 862 (4th Cir. 1989).

Attorney's Failure to Protect Money of Client Who Warned Him of Possible Theft by Escrow Agent: Mills, the seller under a contract for deed, hired an attorney to find out why the escrow agent for the parties to the contract was missing payments to Mills and making other payments late. The attorney also represented Mills in the buyer's resale of the house. Mills told the attorney that she thought the escrow agent was a thief and to make sure that no money went through the agent on the resale. There were indications that the attorney did not take Mills seriously. After the resale, Mills received no money and the escrow agent was convicted of crimes arising from the handling of various escrow accounts. It was improper to grant the attorney summary judgment in Mills' malpractice action because there were fact issues on the elements of the attorney's duty and breach, among which was Mills' assertion that it was foreseeable by the attorney that the escrow agent would embezzle Mills' money and that she would not have lost her money if the attorney had not failed to act to protect her interests. Mills v. Mather, 270 M 188, 890 P2d 1277, 52 St. Rep. 139 (1995). See also Lopez v. Great Falls Pre-Release Serv., Inc., 1999 MT 199, 295 M 416, 986 P2d 1081, 56 St. Rep. 771 (1999).

Elements of Malpractice Action: To establish a cause of action for attorney malpractice, there must be a showing that the attorney owed the client a duty of care, that the attorney breached that duty by failure to use reasonable care and skill, and that the breach was the proximate cause of injury to the client, resulting in damages. Mills v. Mather, 270 M 188, 890 P2d 1277, 52 St. Rep. 139 (1995). See also Lopez v. Great Falls Pre-Release Serv., Inc., 1999 MT 199, 295 M 416, 986 P2d 1081, 56 St. Rep. 771 (1999).

Statute of Limitations — Cannot Begin to Run at Start of Attorney-Client Relationship: Uhler retained Doak to advise and represent him in a dispute with his business associates. On May 16, 1989, Doak advised Uhler to not sue to enforce a stock buy out provision and bonus provision in his agreement with his associates. Uhler was unwilling to accept this advice and continued to meet with Doak to discuss the situation and to provide Doak with more information concerning the situation. On June 16, 1989, Uhler signed a resignation letter and on June 22, 1989, Uhler executed an agreement that waived the stock buy out and bonus provisions. On June 1, 1992, Uhler filed suit against Doak for malpractice. The lower court granted Doak summary judgment on the basis that Doak had advised Uhler to waive his stock buy out and bonus rights on May 16, 1989, and never changed that advice; therefore, the statute of limitations commenced to run at that time. The Supreme Court held that the statute of limitations does not commence to run until the cause of action accrues and that in the present case, Uhler suffered no damages until he signed the resignation letter on June 16, 1989. Uhler v. Doak, 268 M 191, 885 P2d 1297, 51 St. Rep. 1315 (1994), partially reversing Boles v. Simonton, 242 M 394, 791 P2d 755 (1990).

Disqualification in Malpractice Action of Judge Who Represented Plaintiff in Underlying Matter: A judge who had represented plaintiff on the underlying guardianship accounting matter prior to the time that the attorney being sued for malpractice began to represent plaintiff as to the accounting should have disqualified himself from presiding over the malpractice action. A judge may preside over a matter involving a former client if the action over which the judge presides involves a matter different from the one as to which the judge represented the client. In this case, the malpractice action is technically a separate action from the underlying accounting proceeding; however, the malpractice action arose from the legal representation in the accounting proceeding. Default judgment for plaintiff for failure of attorney to plead or in any manner appear was reversed and remanded for a ruling, before another judge, on attorney's motion for relief from judgment for excusable neglect. Shultz v. Hooks, 263 M 234, 867 P2d 1110, 51 St. Rep. 34 (1994).

Suit Filed by Unauthorized Foreign Corporation Tolls Statute of Limitations: A foreign corporation with an expired certificate of authority to do business in Montana filed suit for legal malpractice. The suit was dismissed due to the lapsed certificate. When the corporation refiled the lawsuit, defendants argued that the action was barred by the statute of limitations. Section 35-1-1004 merely suspends rather than bars further legal proceedings until a certificate is obtained. The Supreme Court held that the corporation could file a lawsuit even though its certificate was expired and the filing had tolled the statute of limitations. Watson & Associates, Inc. v. Green, MacDonald, & Kirscher, 253 M 291, 833 P2d 199, 49 St. Rep. 550 (1992).

Contract Not Containing Saving Clause: The buyers and seller of a gas station jointly retained the defendant to draft the real estate purchase agreement for them. The contract provided that upon a default in the payments, the seller could declare the total balance due. The buyers failed to make several payments, and the seller accelerated the contract and ultimately took back the property. The buyers sued the attorney for negligence in failing to include a saving clause in the contract that would have allowed them to bring the contract current by making up the missed payments. The Supreme Court held that the action was barred by the statute of

limitations because the time commenced to run when the buyers read the contract. The court ruled that the buyers were held to understand the terms of the document that they read and signed. Boles v. Simonton, 242 M 394, 791 P2d 755, 47 St. Rep. 793 (1990), partially reversed in Uhler v. Doak, 268 M 191, 885 P2d 1297, 51 St. Rep. 1315 (1994).

No "Continuous Representation" Doctrine in Legal Malpractice Cases: Although adopted statutorily in some states, the doctrine of "continuous representation" in legal malpractice actions, whereby the 3-year statute of limitations must be tolled until such time as an attorney ceases to represent the plaintiff, is absent from this section and is not recognized in Montana as a matter of law. Schneider v. Leaphart, 228 M 483, 743 P2d 613, 44 St. Rep. 1699 (1987).

No "Damage Rule" in Legal Malpractice Statute of Limitations Cases: The rule that the statute of limitations in a legal malpractice action does not run until plaintiff discovers his actual and determinable damages, otherwise known as the "damage rule", is neither recognized in Montana nor required by this section. Schneider v. Leaphart, 228 M 483, 743 P2d 613, 44 St. Rep. 1699 (1987), followed in Young v. Datsopoulos, 249 M 466, 817 P2d 225, 48 St. Rep. 786 (1991), and in Rouane v. Lynaugh, 259 M 171, 855 P2d 114, 50 St. Rep. 745 (1993).

Tolling of Statute — Test to Be Discovery of Facts: Plaintiff brought a legal malpractice action against defendant arising out of defendant's handling of a dissolution of marriage in 1978. The malpractice claim was filed in January 1982. The District Court granted summary judgment to defendant based on the Statute of Limitations. The Supreme Court, relying on California precedent, stated that it is the knowledge of facts rather than the discovery of legal theory that is the test for tolling the Statute of Limitations. It was incumbent on plaintiff to commence his malpractice action within 3 years after he discovered or should have discovered defendant's alleged negligent acts, errors, or omissions. Because the claim was based on three separate acts, it was necessary to determine the date of discovery for each act. The court noted that 27-2-206 does not suspend accrual until the "attorney-client" relationship has terminated. The case was remanded to determine the dates of discovery. Burgett v. Flaherty, 204 M 169, 663 P2d 332, 40 St. Rep. 748 (1983), followed in Estate of Halko v. Dawson, 231 M 283, 751 P2d 1064, 45 St. Rep. 611 (1988), McMillan v. Landoe, Brown, Planalp, Kommers & Johnstone, P.C., 233 M 483, 760 P2d 758, 45 St. Rep. 1662 (1988), in Rouane v. Lynaugh, 259 M 171, 855 P2d 114, 50 St. Rep. 745 (1993), and Loney v. Dye, 281 M 240, 934 P2d 169, 54 St. Rep. 153 (1997). See also Peschel v. Jones, 232 M 516, 760 P2d 51, 45 St. Rep. 1244 (1988), Erickson v. Croft, 233 M 146, 760 P2d 706, 45 St. Rep. 1379 (1988), and Young v. Datsopoulos, 249 M 466, 817 P2d 225, 48 St. Rep. 786 (1991).

Law Review Articles

Legal Malpractice: A Calculus for Reform, Huszagh & Molloy, 37 Mont. L. Rev. 279 (1976).

Collateral References

Limitation of Actions *key* 95.

54 C.J.S. Limitations of Actions §§2, 12, 213.

7 Am. Jur. 2d Attorneys at Law §§212 through 253.

Attorney malpractice—tolling or other exceptions to running of statute of limitations. 87 ALR 5th 473.

27-2-207. Injuries involving property.

Case Notes

Amended Complaint After Running of Statute of Limitations for Amended Complaint's Claim: L&R Spraying sprayed Semenza's land and Fitzgerald's land, which Semenza custom farmed. Semenza sued L&R for negligent spraying that allegedly damaged crops on both owners' farms. After the 2-year statute of limitations for injury to property ran out, Fitzgerald sought to be added as a party. Since Fitzgerald's claim arose out of conduct set forth in Semenza's original pleading, the amended complaint adding Fitzgerald as a party with the same cause of action related back to the date of Semenza's original pleading and thus was not barred by the statute of limitations. In addition, the 3-year negligent tort statute of limitations also applied, and when two statutes of limitations apply, the court should use the longer one. Semenza v. Bowman, 268 M 118, 885 P2d 451, 51 St. Rep. 1209 (1994).

Negligent Damage to Property — Two Statutes of Limitations Applicable, One of Which Has Run Out: L&R Spraying sprayed Semenza's land and Fitzgerald's land, which Semenza custom farmed. Semenza sued L&R for negligent spraying that allegedly damaged crops on both owners' farms. After the 2-year statute of limitations for injury to property ran out, Fitzgerald sought to be added as a party. The 3-year negligent tort statute of limitations also applied, and when two statutes of limitations apply, the court should use the longer one. Therefore, Fitzgerald's claim

was not barred because it was made within 3 years. Semenza v. Bowman, 268 M 118, 885 P2d 451, 51 St. Rep. 1209 (1994).

Statute of Limitations Applicable to Negligent Damage to Cattle and Ranching Operations: Plaintiffs alleged that as a result of commingling of their cattle with those of defendants, plaintiff's cattle became infected through defendant's negligence, resulting in damage to plaintiff's cattle and ranching operation. Defendants affirmatively asserted, and the trial court agreed, that plaintiffs' claim was barred by the 2-year statute of limitations in this section for complaints based on damage to property. Plaintiffs claimed applicability of the 3-year statute of limitations in 27-2-204 for complaints based on negligence. Following the holding in Thiel v. Taurus Drilling Ltd., 218 M 201, 710 P2d 33 (1985), the Supreme Court applied the general rule that when there is a substantial question regarding which of two statutes of limitations should apply, any doubt should be resolved in favor of the statute containing the longer limitation in order to afford a plaintiff party-litigant maximum free access to the court system. Ritland v. Rowe, 260 M 453, 861 P2d 175, 50 St. Rep. 1183 (1993), distinguishing Heckaman v. N. Pac. RR Co., 93 M 363, 20 P2d 258 (1933), Quitmeyer v. Theroux, 144 M 302, 395 P2d 965 (1964), Lahman v. Rocky Mtn. Phosphate Co., 161 M 28, 504 P2d 271 (1972), Engine Rebuilders, Inc. v. Seven Seas Import-Export Merc., Inc., 189 M 236, 615 P2d 871 (1980), Rierson v. St., 191 M 66, 622 P2d 195 (1981), Weston v. Cole, 233 M 61, 758 P2d 289 (1988), Carbon County School District v. Spivey, 247 M 33, 805 P2d 61 (1991), and Knight v. Missoula, 252 M 232, 827 P2d 1270 (1992).

When Action Accrues — Knowledge of Facts: Action brought by landowner against chemical company for CERCLA costs and compensatory damages for injury to property was barred by the statute of limitations. Action accrued when the landowner had knowledge of the facts essential to the cause of action well before seizure of the land by the EPA. Mont. Pole & Treating Plant v. Laucks & Co,. 993 F2d 676 (1993).

Claim of Illegal Creation of Road Barred by Statute of Limitations: A dirt road was cut through a park at the end of Knight's road in 1957. In 1958, the city of Missoula annexed a portion of land through which the road passed. When construction was completed and thereafter, Knight and other area residents were aware of and continued to complain about the creation of the road and the problems arising from it until 1984, when they filed a complaint that the road was illegally created by a land developer without approval of any authority. Knight alleged that the continued use of the road and failure of the city to close the road were actions committed under color of state law that violated constitutional rights to enjoy property and guarantees of substantive due process, actionable under 42 U.S.C. 1983. The Supreme Court held that the cause of action against the roadbuilder accrued when the road was created and that any claim against the governmental entity arose when the city annexed the property. All claims were therefore barred by the statute of limitations under this section. Absent a showing that the actions of the city were egregious, arbitrary, capricious, or shocking to the conscience, relief under federal law was unavailable because state tort law remedies satisfied due process requirements. Knight v. Missoula, 252 M 232, 827 P2d 1270, 49 St. Rep. 230 (1992).

Applicable Statutes of Limitations Not Affected by Statute of Repose Applicable to Real Property Improvements: The plaintiffs, a condominium owners' association and its individual members, sued Big Sky of Montana Realty, Inc., the successor in interest of Big Sky of Montana, Inc., for breach of warranty, strict liability, negligence, fraud, and deceptive practices in connection with a fire in the Deer Lodge Condominiums at Big Sky. The defendants claimed that the actions were barred by the statute of limitations applicable to each individual cause of action. Plaintiffs claimed that the applicable statute of limitations in 27-2-208 allows a 10-year period following completion of real property improvements in which to bring an action. The Supreme Court held that 27-2-208 was a statute of repose and should be interpreted not to extend the statute of limitations otherwise applicable to a cause of action. The statute only provides that if the time for bringing an action was otherwise extended by law under 27-2-401 or 27-2-409, the extension could be for no longer than 10 years after completion of the improvement. The District Court therefore properly held that the action was barred by the statutes of limitations. Ass'n of Unit Owners of Deer Lodge Condominium v. Big Sky of Mont., Inc., 245 M 64, 798 P2d 1018, 47 St. Rep. 1814 (1990), followed in Carl v. Chilcote, 255 M 526, 844 P2d 79, 49 St. Rep. 1109 (1992).

Action Sounding in Tort and Contract: The defendant accounting firm argued that its duty to the plaintiff arose from law in that it was required to use due care in carrying out its duties and that a breach of duty constituted a tort claim barred by the statute of limitations. The Supreme Court held that the defendant's obligations were defined by the parties' contract and also that there was a legal duty to meet those obligations in a professional manner. The court stated that the plaintiff's claim was based both in tort and contract and therefore the longer statute of

limitations for contracts was available to the plaintiff. Billings Clinic v. Peat Marwick Main & Co., 244 M 324, 797 P2d 899, 47 St. Rep. 1464 (1990).

Injuries Claimed Constituting Tort Theories — Tort Statute of Limitation Applies: Following the bank's seizure of collateral when plaintiff failed to repay a bank loan, plaintiff brought the present action against the bank for trespass and wrongful removal of farm machinery. The injuries claimed by plaintiff as a result of the breach of the loan contract constitute tort theories of action, and therefore the gravamen of the action lies in tort and the tort statute of limitations applies to bar the action. Weible v. Ronan St. Bank, 238 M 235, 776 P2d 837, 46 St. Rep. 1231 (1989), followed in Action Enterprises, Inc. v. McCalla, 259 M 167, 855 P2d 111, 50 St. Rep. 743 (1993).

Conversion: Conversion is a tort bearing a 2-year statute of limitations. Claim for unauthorized personal expenditures incurred prior to that time is barred. Northwest Plating Co. v. Hoffman, 234 M 360, 763 P2d 44, 45 St. Rep. 1971 (1988), followed in Action Enterprises, Inc. v. McCalla, 259 M 167, 855 P2d 111, 50 St. Rep. 743 (1993).

Raising for First Time on Appeal Disallowed: Statute of Limitations defense was an affirmative defense and could not be raised in Supreme Court when it was not raised in District Court. Taylor v. Dept. of Fish, Wildlife, & Parks, 205 M 85, 666 P2d 1228, 40 St. Rep. 1112 (1983). For application to cases of personal injury, see Bennett v. Dow Chem. Co., 220 M 117, 713 P2d 992, 43 St. Rep. 221 (1986).

Nuisance:

If a nuisance is abatable, it cannot be considered a permanent nuisance. Therefore the nuisance is of a temporary and continuous character and gives rise to a separate cause of action each time it causes damage. The applicable Statute of Limitations is 2 years. Haugen v. Warner, 204 M 508, 665 P2d 1132, 40 St. Rep. 1036 (1983), followed in Shors v. Branch, 221 M 390, 720 P2d 239, 43 St. Rep. 919 (1986), and distinguished in Graveley Ranch v. Scherping, 240 M 20, 782 P2d 371, 46 St. Rep. 1908 (1989). But see a later decision in Graveley Ranch v. Scherping, 247 M 310, 806 P2d 29, 48 St. Rep. 211 (1991), in which it was held that the building of a fence around the poison site constituted abatement of the nuisance sufficient to trigger the statute of limitations. *Graveley Ranch* was distinguished in Country Estates Homeowners Ass'n, Inc. v. McMillan, 276 M 100, 915 P2d 806, 53 St. Rep. 297 (1996).

When plaintiff's damages are caused by a continuous nuisance but are merely temporary and consequential, the cause of action accrues only at the time of the consequential injury and the Statute of Limitations begins to run from that time. Plaintiff is entitled to recover for the yearly injury to his crops caused by the continuing nuisance until the injury is permanent. Walton v. Bozeman, 179 M 351, 588 P2d 518 (1978), followed in Graveley Ranch v. Scherping, 240 M 20, 782 P2d 371, 46 St. Rep. 1908 (1989). But see a later decision in Graveley Ranch v. Scherping, 247 M 310, 806 P2d 29, 48 St. Rep. 211 (1991), in which it was held that the building of a fence around the poison site constituted abatement of the nuisance sufficient to trigger the statute of limitations. Graveley Ranch was distinguished in Country Estates Homeowners Ass'n, Inc. v. McMillan, 276 M 100, 915 P2d 806, 53 St. Rep. 297 (1996).

Two-year Statute of Limitations was applicable to continuous and unremitting nuisance; recovery for damage occurring as a result of continuous and unremitting nuisance more than 2 years prior to the commencement of an action was barred by this section. Lahman v. Rocky Mtn. Phosphate Co., 161 M 28, 504 P2d 271 (1972).

In action for alleged well pollution, trial court erred in not limiting recovery to 2 years before filing date of complaint since, under circumstances, pollution of groundwater by dumping of glue waste was continuing temporary nuisance and this section applied. Nelson v. C & C Plywood Corp., 154 M 414, 465 P2d 314, 39 ALR 3d 893 (1970), followed in Graveley Ranch v. Scherping, 240 M 20, 782 P2d 371, 46 St. Rep. 1908 (1989). But see a later decision in Graveley Ranch v. Scherping, 247 M 310, 806 P2d 29, 48 St. Rep. 211 (1991), in which it was held that the building of a fence around the poison site constituted abatement of the nuisance sufficient to trigger the statute of limitations. Graveley Ranch was distinguished in Country Estates Homeowners Ass'n, Inc. v. McMillan, 276 M 100, 915 P2d 806, 53 St. Rep. 297 (1996).

Exclusive Ownership of Joint Savings Account: A son was added as a joint tenant on his mother's savings accounts. Three years later the mother made a written demand on her son for the return of the passbooks and 1 month following the demand filed a lawsuit to establish exclusive ownership of the funds in the accounts. The lawsuit was not barred by the 2-year Statute of Limitations as the Statute did not begin to run until the written demand was made. Anderson v. Baker, 196 M 494, 641 P2d 1035, 39 St. Rep. 273 (1982).

Cases Falling Between Contract and Tort Law: Plaintiffs leased office space from defendant in a commercial office building. A fire gutted the building, destroying the plaintiffs' offices. Four

years later, plaintiffs brought this action for property and business loss. Defendant argues the plaintiffs' claim, which seeks recovery for injury to property, is covered by the 2-year statute on tort action. The Supreme Court said that there are circumstances in which liability in tort may coexist with a liability in contract, giving the injured party the right to elect which form of action he will pursue. The plaintiffs framed the action as a claim for breach of a covenant of quiet enjoyment, implied from the terms of the lease agreement, which results in the conclusion that the 8-year Statute of Limitations is applicable to contracts. Unruh v. Buffalo Bldg. Co., 194 M 553, 633 P2d 617, 38 St. Rep. 1156 (1981).

No Tacking on of Administrative Appeal Period to Limitations Period: Where appellant attempted to tack on the administrative appeal period to a 2-year period which elapsed and which was taken up by administrative hearings for the purpose of qualifying his action within a 2-year Statute of Limitations, the Supreme Court held that appellant's action was barred by the Statute of Limitations period. The record shows substantial evidence of inexcusable neglect, and the Supreme Court will not condone manipulation of the law so that a case may be further pursued. Rierson v. St., 191 M 66, 622 P2d 195, 38 St. Rep. 3 (1981).

No Error Where Claim of When Action Accrued Not Before Court: In an action for compensatory and exemplary damages for wrongful conversion of plaintiff's merchandise stored in defendant's warehouse, the District Court properly granted defendant's motion for summary judgment on the basis that the action was barred by the Statute of Limitations. Plaintiff's claims for recovery accrued 4 years previously when the defendant warehouse sold plaintiff's merchandise, not, as plaintiff claimed, when plaintiff discovered upon demand that defendant sold the merchandise. In this instance the allegation of knowledge, demand, and then refusal to return the goods was not raised in the complaint, the answer, the interrogatories, or in any affidavit properly before the District Court at the time summary judgment was granted, and thus plaintiff's allegations as to when the action accrued will not be considered on appeal. Seven Seas Import-Export & Mercantile, Inc. v. Handee Foods, 190 M 508, 621 P2d 1097, 38 St. Rep. 60 (1981).

Action to Enforce Implied Covenant in Oil and Gas Lease: In a suit by lessor's grantees to collect damages from defendants/lessees for failure to comply with the common-law offset drilling rule and drill a well to protect the plaintiffs' interests, the suit was not governed by the Statute of Limitations applying to suits to prevent waste to real property. Because the suit was brought to enforce implied provisions of an agreement, it was governed by the Statute of Limitations applicable to contracts. U. V. Indus., Inc. v. Danielson, 184 M 203, 602 P2d 571 (1979).

Rental — Effect of Payments Upon Limitation: Whether or not rent was paid, the lease contained no default clause and no evidence was presented as to termination of lease. Therefore, lease was voidable, not void, and the statute did not begin to run until there was a demand and refusal. Grinde v. Tindall, 172 M 199, 562 P2d 818 (1977).

Waiver: Although plaintiff filed complaint alleging injury to real property more than 2 years after injury occurred, defendants waived defense of Statute of Limitations when they failed to plead it affirmatively. Butte Country Club v. Metropolitan Sanitary & Storm Sewer District, 164 M 74, 519 P2d 408 (1974).

Wrongful Death: Section 27-2-204, rather than this section, applies to an action for wrongful death. Bryant v. Hall, 157 M 28, 482 P2d 147 (1971), overruling Smith v. Wiprud, 154 M 325, 463 P2d 317 (1969).

Injury to Personal Property: An action by an adoptive father and natural grandfather under 27-1-512 is an action for an injury to a pecuniary interest of the parent, therefore one for an injury to a property right which must be commenced within 2 years from the date the claim arose under (2) of this section. LaTray v. Mannix Elec. Co., 148 M 303, 419 P2d 744 (1966); but see Bryant v. Hall, 157 M 28, 482 P2d 147 (1971).

Claim and Delivery:

In an action for claim and delivery, where possession by the defendant is rightful, the Statute of Limitations begins to run when the defendant refuses upon demand to return the property. Interstate Mfg. Co. v. Interstate Prod. Co., 146 M 449, 408 P2d 478 (1965).

Where plaintiff, in a claim and delivery action against his former wife to whom at the time of their separation he had loaned his household furniture, did not know of her claim of ownership until some 2 ½ years thereafter, when he made demand for it, his right of action did not accrue until refusal of his demand and the limitation of 2 years (this section) did not commence to run until then. Gates v. Powell, 77 M 554, 252 P 377 (1926); Viers v. Webb, 76 M 38, 245 P 257 (1926).

In an action in claim and delivery to recover possession of a cow picked up by defendant and later in good faith purchased from one claiming to be but who was not the owner, defendant not

having done anything to prevent the true owner from ascertaining the whereabouts of the animal and learning of his right of action, the fact that plaintiff was ignorant of the circumstances which would have enabled him to bring timely suit did not entitle him to sue after the limitation of 2 years fixed by 27-2-207(2) had run. Bennett v. Meeker, 61 M 307, 202 P 203 (1921).

Damage by Fire: Two-year Statute of Limitations under this section barred suit brought by the United States under 50-63-103 for damage to property caused by alleged negligence of defendants in setting forest fire. U.S. v. Eytcheson, 237 F. Supp. 371 (D.C. Mont. 1965).

Damage to Building From Broken Water Pipes: Claim of owners of an apartment building against realtors for water damage to building from bursting of water pipes due to alleged negligence of realtors in caring for the building was barred by this section. Statute of Limitations concerning implied contracts, 27-2-202, was inapplicable. Quitmeyer v. Theroux, 144 M 302, 395 P2d 965 (1964). (Dissenting opinion, 144 M 302, 395 P2d 965 (1964).)

Waste: The landlord's cause of action because the tenants removed a balcony in the building accrued at the time of the removal, and the Statute of Limitations commenced to run at that time against an action for waste. Pappas v. Braithwaite, 117 M 569, 162 P2d 212 (1945).

Collateral References

Limitation of Actions *key* 31, 32.

54 C.J.S. Limitations of Actions §202, et seq.

51 Am. Jur. 2d Limitation of Actions §§84 through 91.

27-2-208. Actions for damages arising out of work on improvements to real property or land surveying.

Compiler's Comments

2003 Amendment: Chapter 412 in (1) at beginning after "Except as provided in" inserted "70-19-427(1) and"; and made minor changes in style. Amendment effective October 1, 2003.

Saving Clause: Section 6, Ch. 412, L. 2003, was a saving clause.

Severability: Section 7, Ch. 412, L. 2003, was a severability clause.

1999 Amendment: Chapter 62 in (1) after "construction of" substituted "any improvement to real property or resulting from or arising out of land surveying of real property" for "or land surveying done in connection with any improvement to real property" and at end after "improvement" inserted "or land surveying"; in (2) after "completion" inserted "of the improvement or land surveying"; in (3) after "improvement" inserted "or real property that is surveyed"; inserted (4)(b) defining land surveying; and made minor changes in style. Amendment effective October 1, 1999.

Case Notes

Applicable Statutes of Limitations Not Affected by Statute of Repose Applicable to Real Property Improvements: The plaintiffs, a condominium owners' association and its individual members, sued Big Sky of Montana Realty, Inc., the successor in interest of Big Sky of Montana, Inc., for breach of warranty, strict liability, negligence, fraud, and deceptive practices in connection with a fire in the Deer Lodge Condominiums at Big Sky. The defendants claimed that the actions were barred by the statute of limitations applicable to each individual cause of action. Plaintiffs claimed that the applicable statute of limitations in this section allows a 10-year period following completion of real property improvements in which to bring an action. The Supreme Court held that this section was a statute of repose and should be interpreted not to extend the statute of limitations otherwise applicable to a cause of action. The statute only provides that if the time for bringing an action was otherwise extended by law under 27-2-401 or 27-2-409, the extension could be for no longer than 10 years after completion of the improvement. The District Court therefore properly held that the action was barred by the statutes of limitations. Ass'n of Unit Owners of Deer Lodge Condominium v. Big Sky of Mont., Inc., 245 M 64, 798 P2d 1018, 47 St. Rep. 1814 (1990), followed in Carl v. Chilcote, 255 M 526, 844 P2d 79, 49 St. Rep. 1109 (1992).

Constitutionality: The Legislature has the power to eliminate a common-law right when there is no interference with a vested right, and this section was not unconstitutional under the provisions of Art. II, sec. 16, Mont. Const. A challenge to the constitutionality of a legislative enactment for embracing more than one subject and not clearly expressing that subject in the title of the act will not be permitted under Art. V, sec. 11, Mont. Const., when the challenge is raised more than 3 years following the effective date of the act because of the limitation of challenges to a period within 2 years after the effective date. This section does not violate equal protection under law by granting immunity from suit to one class of defendants and denying immunity to others or due process of law by depriving a person of a common-law right without

providing a reasonable substitute. Reeves v. Ille Elec. Co., 170 M 104, 551 P2d 647 (1976), distinguished in Carl v. Chilcote, 255 M 526, 844 P2d 79, 49 St. Rep. 1109 (1992).

Materialmen: Materialmen are excluded from the protection of this section. Where a whirlpool machine allegedly caused an electrocution death, the manufacturer was a materialman not subject to the provisions of this section because, although it manufactured and shipped the machine, it was not a member of the construction team. Reeves v. Ille Elec. Co., 170 M 104, 551 P2d 647 (1976).

Injuries From Unsafe Structure: A contractor following plans and specifications given to him, although not ordinarily liable for injuries resulting from a fault in the design of the structure, may be liable if a contractor of average skill and ordinary prudence would not have followed those specifications. Bush v. Albert D. Wardell Contractor, Inc., 165 M 312, 528 P2d 215 (1974), followed in Stewart v. Fisher, 235 M 432, 767 P2d 1321, 46 St. Rep. 116 (1989).

27-2-209. Actions against local government or local government official.

Compiler's Comments

2005 Amendment: Chapter 412 inserted (5) concerning 6-month limitation arising from decision relating to land use, construction, or development project; and made minor changes in style. Amendment effective October 1, 2005.

Case Notes

Action Against Police Officer for Assault Governed by Two-Year Statute of Limitations: The plaintiff argued that he had 3 years to bring suit for assault against a police officer. The Supreme Court held that this section, relied upon by the plaintiff, refers to Sheriffs and constables. The statute does not refer to peace officers; therefore, the applicable limitation period was the 2-year period for intentional torts provided under 27-2-204. Rouse v. Anaconda-Deer Lodge County, 250 M 1, 817 P2d 690, 48 St. Rep. 834 (1991).

Local Government to Deny Claim Before Six-Month Limitation for Filing in District Court Commences: Rouse sued the county to recover damages for alleged police brutality. The lower court dismissed the claim on the basis that the statute of limitations had run. The Supreme Court reversed, holding that the county had never denied the claim and that the 6-month limitation for filing an action in District Court did not commence until the county denied the claim. Rouse v. Anaconda-Deer Lodge County, 250 M 1, 817 P2d 690, 48 St. Rep. 834 (1991).

Hospital — Real Party in Interest: The Sisters of Charity, who operate Columbus Hospital, provided medical services to Austin, an indigent resident of Glacier County. Austin applied to Glacier County for medical assistance but her application was rejected. Columbus Hospital then submitted a claim to Glacier County for the services provided to Austin. The Supreme Court rejected Glacier County's defense that the claim was barred by 27-2-209. The court said that Columbus Hospital is a real party in interest and therefore the statute begins to run when the hospital's claim was rejected and not when Austin's welfare application was rejected. Sisters of Charity v. Glacier County, 177 M 259, 581 P2d 830 (1978).

Liability Created by Statute: Action against county by motorist who alleged he suffered personal injuries in a single vehicle accident due to negligent failure of county to properly maintain and mark a "T" intersection of county roads was subject to 3-year Statute of Limitations under this section, rather than the 2-year Statute of Limitations under 27-2-211 as an action "upon a liability created by statute", since 33-23-102, waiving sovereign immunity to extent of county's liability insurance, simply removes a defense previously available rather than creating a new cause of action. State ex rel. Fallon County v. District Court, 161 M 79, 505 P2d 120 (1972).

Exhaustion of Administrative Remedies: Cause of action on statutory bond did not accrue until required administrative proceedings were complete and Board had made final determination of amount due. Mont. Milk Control Bd. v. Hartford Accident & Indem. Co., 153 M 299, 456 P2d 302 (1969).

When Statute Begins to Run: In an action for Writ of Mandate against a City Treasurer to compel payment of special improvement bonds containing the statutory provisions with relation to manner of payment, leaving the date uncertain and making payment dependent on call of the Treasurer when there is money in the fund therefor, the Statute of Limitations does not begin to run until the bonds are called or until the holder has an immediate cause of action. State ex rel. Clark v. Bailey, 99 M 484, 44 P2d 740 (1935), distinguished as to creation of a trust and tolling of the statute of limitations in Samson v. St., 285 M 310, 948 P2d 232, 54 St. Rep. 1165 (1997).

Sheriff's Official Actions: An action for conversion against a Sheriff and the surety on his official bond, being on a liability incurred "by the doing of an act in his official capacity and by

virtue of his office", must be brought within 3 years under 27-2-209(1). Wingate v. Davis, 77 M 572, 252 P 307 (1926).

County Claims:

The subject matter of an action against a county by which it was sought to obtain compensation for land taken for road purposes under an agreement, the consideration for which failed, was not a "claim" against the county within the meaning of this section. Flynn v. Beaverhead County, 54 M 309, 170 P 13 (1917).

The refusal of a Board of County Commissioners to allow a claim is not conclusive even though the claimant does not appeal. Albers v. Barnett, 53 M 71, 161 P 518 (1916); Greeley v. Cascade County, 22 M 580, 57 P 274 (1899).

Attorney General's Opinions

Payment of Proportionate Share of Administrative Costs by Nonassumed Counties — Action to Recover Disputed Claims: Under 53-2-322 (now repealed), a nonassumed county is required to pay its proportionate share of administrative costs for protective services, including rent, adequate equipment, and supplies. The responsibility to pay a proportionate share, other than salaries, travel expenses, and indirect employee costs, is not capped at the amount paid in fiscal year 1987. An action to recover a disputed claim filed more than 6 months after denial of the claim is barred by the statute of limitations in this section. 45 A.G. Op. 23 (1994).

Law Review Articles

White v. State: Raising the Stakes of State Tort Claims, Heringer, 45 Mont. L. Rev. 151 (1984).

Collateral References

Counties *key* 216; Municipal Corporations *key* 742; Officers and Public Employees *key* 83, 101.

20 C.J.S. Counties §259; 54 C.J.S. Limitations of Actions §32; 67 C.J.S. Officers and Public Employees §324.

27-2-210. Actions arising from the seizure or sale of property for taxes.

Compiler's Comments

1985 Amendment — Subsection Enactment: Section 3, Ch. 458, inserted (3)(a) that read: "An action against a county to recover a royalty interest in land acquired by the county by tax deed must be brought within 3 years after the commencement of commercial production of oil, gas, or other minerals from the land." (Applies to actions filed after September 30, 1985; sec. 5, Ch. 458, L. 1985.)

Section 1, Ch. 458, L. 1985, enacted a separate purpose section. It is codified as (3)(b) of this section for convenience. Section 1, Ch. 458, contained a reference to "this act", which literally included 70-19-421 and amendments to 15-17-312, as well as the amendments to this section inserting (3)(a). Given the content of (3)(b) and that (3)(a) was the primary substance of the "act", the Code Commissioner has substituted reference to "subsection (3)(a)" for "this act" in (3)(b).

Case Notes

Failure to Assert Royalty Interest in Tax Deed Land — Laches:

A tax deed issued to the county in 1930 without affidavits setting forth the statutorily requisite statements as to notice to the owner and as to occupancy was void. The county sold the land to A.O., reserving a 6 ¼% royalty interest. Plaintiff children of the original owner who had lost the land for failure to pay taxes quitclaimed all their interest in the land to A.O.'s successors, reserving their claim to and interest in the 6 ¼% royalty claimed by the county, and in turn A.O.'s successors conveyed to plaintiffs all of the successors' interest in that royalty. Plaintiffs' conveyance cleared the title of any insufficiency in the tax deed proceedings but did not convey or give up plaintiffs' claim to the 6 ¼% royalty interest. Plaintiffs' redemption argument failed because they had never attempted a redemption. After analyzing nine factors relating to laches, the court ruled that laches barred plaintiffs' claim to the county's royalty interest. Richardson v. Richland County, 219 M 48, 711 P2d 777, 42 St. Rep. 1834 (1985), followed in Filler v. Richland County, 247 M 285, 806 P2d 537, 48 St. Rep. 200 (1991). (The court also stated that King v. Rosebud County, 193 M 268, 631 P2d 711, 38 St. Rep. 1145 (1981), in which the court concluded that laches was inapplicable because laches did not commence until oil was produced and royalties earned, was incomplete in its laches analysis because the court overlooked the inchoate ownership of the royalty interest.)

County's tax deed was void for insufficient notice of the tax sale and failure to give notice of application for a tax deed to the owners of the property. The county had deeded the land to Swigart, reserving a 6 ¼% royalty interest. Swigart, using a statutory proceeding, applied for

and received a deed confirming the tax deed. The confirmation deed did not mention the county's 6 ¼% royalty interest. The confirmation deed was void for failure to give sufficient notice to the owners who had lost the land to the county or to their successors in interest. The two original owners had each had an undivided one-half interest in the land. Plaintiff heirs of one of the original owners sued to quiet title to the county's 6 ¼% royalty interest and then quitclaimed to Swigart's heirs all plaintiffs' interest in the land, reserving a 6 ¼% royalty interest. In return, Swigart's heirs quitclaimed the 6 ¼% royalty interest to plaintiffs. Plaintiffs' quitclaim to Swigart's heirs did not convey or give up any claim plaintiffs had to or any interest they had in the 6 ¼% royalty interest. The court analyzed 10 factors relating to laches and ruled that laches barred plaintiffs' claim and that the 6 ¼% royalty interest was vested in the county. Anderson v. Richland County, 219 M 60, 711 P2d 784, 42 St. Rep. 1843 (1985).

Collateral References

Taxation *key* 562.

27-2-211. Actions to enforce penalty or forfeiture or other statutory liability.

Compiler's Comments

1995 Amendment: Chapter 60 in (4), at end of third sentence, inserted "or within 10 years from entry of a lump-sum judgment or order for support arrears, whichever is later".

Severability: Section 18, Ch. 60, L. 1995, was a severability clause.

1993 Amendment: Chapter 631 near beginning of first sentence of (4), after "involved", inserted "or unless a support obligation has been entered" and inserted third sentence that read: "If a support obligation has been entered, an action must be brought within 10 years of the termination of the support obligation."

Preamble: The preamble attached to Ch. 631, L. 1993, provided: "WHEREAS, it is necessary to draft a composite bill containing unrelated sections in order to present the proposed program improvements in a single, comprehensive bill that promotes the needs of legislative energy, efficiency, and economy by limiting the number of possible bills and by reducing the need for hearings and readings on those bills.

THEREFORE, the Legislature finds it appropriate to enact the following legislation."

Severability: Section 29, Ch. 631, L. 1993, was a severability clause.

1981 Amendment: Inserted (1)(c)(ii) relating to statutory debt created by payment of public assistance; and inserted (4) relating to statute of limitations to enforce statutory debt created by payment of public assistance.

Case Notes

Statutory Cause of Action for Railroad Mismanagement — Complaint Dismissed for Failure to Meet Statute of Limitations for Filing Statutory Claim: Haux's employment with defendant was terminated December 27, 1999, and Haux filed a complaint on October 10, 2002, asserting that the termination was negligent and malicious and part of defendant's general business practice of firing employees without cause, constituting mismanagement. The District Court found that 39-2-703 does not create a cause of action for mismanagement and granted defendant's motion for summary dismissal, and Haux appealed. The Supreme Court held that a plain reading of 39-2-703 does in fact create a cause of action for mismanagement, so the District Court erred in dismissing the action on those grounds. However, dismissal was still proper because Haux's action for mismanagement was barred when Haux failed to meet the 2-year statute of limitations for filing the statutory claim. Thus, dismissal was affirmed because the right result was reached for the wrong reason. Haux v. Mont. Rail Link, Inc., 2004 MT 233, 322 M 456, 97 P3d 540 (2004), following Winslow v. Mont. Rail Link, Inc., 2000 MT 292, 302 M 289, 16 P3d 992 (2000), and distinguishing Dillon v. Great N. Ry., 38 M 485, 100 P 960 (1909), Johnson v. Butte & Superior Copper Co., 41 M 158, 108 P 1057 (1910), Beeler v. Butte & London Copper Dev. Co., 41 M 465, 110 P 528 (1910), and Melzner v. Raven Copper Co., 47 M 351, 132 P 552 (1913).

Claims Under Unfair Trade Practices Act Subject to Statute of Limitations on Actions for Constructive Fraud: As a liability created by statute that is neither a penalty nor a statutory debt, claims brought under the Montana Unfair Trade Practices and Consumer Protection Act of 1973 are subject to the 2-year statute of limitations in this section. Osterman v. Sears, Roebuck & Co., 2003 MT 327, 318 M 342, 80 P3d 435 (2003), following Royal Ins. Co. v. Roadarmel, 2000 MT 259, 301 M 508, 11 P3d 105 (2000).

Exercise of Ordinary Diligence Required in Discovery of Unfair Trade Practices Constituting Fraud for Tolling Statute of Limitations: For purposes of tolling the statute of limitations in an action for fraud or unfair trade practices, ordinary diligence must be exercised by the aggrieved

party in discovery of the facts constituting the fraud or deceptive practice. Pursuant to Johnson v. Barrett, 1999 MT 176, 295 M 254, 983 P2d 925 (1999), the test is whether the plaintiff has information of circumstances sufficient to put a reasonable person on inquiry or has the opportunity to obtain knowledge from sources open to the plaintiff's investigation. Mere ignorance of the facts will not suffice to toll the statute of limitations. In this case, plaintiff filed an unfair trade practices complaint about 2 years and 9 months after entering an agreement with defendant siding installer, believing at the time that the contract was with the defendant company that manufactured the siding. However, plaintiff showed no affirmative conduct by either defendant that was calculated to obscure the existence of a cause of action, nor were the facts giving rise to the alleged fraud concealed. Thus, plaintiff discovered or should have discovered the facts constituting the alleged fraud when the contract was entered more than 2 years prior to filing suit, so the claim was barred by the 2-year statute of limitations in this section. Osterman v. Sears, Roebuck & Co., 2003 MT 327, 318 M 342, 80 P3d 435 (2003).

Statute of Limitations Applicable to Workers' Compensation Subrogation Right Created by Statute — Subrogation Agreement Not Created by Correspondence Between Attorneys for Claimant and Insurer: Roadarmel suffered an industrial injury and filed a workers' compensation claim against his employer, and the claim was defended by Royal Insurance Company (Royal). Roadarmel received a judgment and then filed a third-party action against two companies that had supplied the chemicals that injured him. Roadarmel's attorney, White, properly notified Royal that the third-party action was being commenced. Pursuant to 39-71-414, Roadarmel requested that Royal pay a portion of the costs, and Royal agreed to participate in the costs rather than waive its subrogation rights, tendering a check for $5,000 toward the costs. Roadarmel was successful in the third-party action, and White advised Royal that the third parties would appeal. The appeal was upheld, and White notified Royal of that fact, attaching copies of the settlement check and jury verdict forms, a breakdown of the actual costs of the third-party action, and a request that Royal determine its subrogation interest in a portion of the third-party proceeds. Royal independently computed the amount that it contended that it was owed and advised Roadarmel in letters that an action would be filed to determine Royal's subrogation interests. White did not respond to the letters, and 3 1/2 years passed before Royal filed a petition to determine its subrogation rights. Royal later learned through discovery that White had disbursed the third-party proceeds on the same day that Royal had been requested to determine its subrogation interest, allegedly instructing Roadarmel to hold the funds pending a subrogation determination. Royal then also filed a separate count against White for an alleged breach of the duty of trust owed Royal as a third-party beneficiary of the trust imposed on the third-party proceeds. The Workers' Compensation Court determined that a subrogation agreement had been formed in the exchange of letters between White and Royal's counsel, that the statute of limitations on the contract had not expired, and that Roadarmel and White were jointly and severally liable for $63,864.79 for breaching the subrogation contract and failing to honor Royal's first lien of the third-party judgment. Roadarmel and White appealed, contending that Royal's subrogation action was based on a statutory liability that was time-barred by the 2-year statute of limitations in this section and that the 3-year statute of limitations in 72-34-511, which governs actions based on an alleged breach of trust, also barred Royal's action against White. Royal argued that the correspondence between the parties formed an enforceable contract that was subject to the longer statute of limitations in 27-2-202. The Supreme Court agreed with Roadarmel and White. The correspondence only confirmed in writing that which was required by and took place entirely in the context of the mandatory statutory procedures and did not create an enforceable contract. Although the court recognized the rights of equitable subrogation at common law, those rights were conceptually distinguished from an insurer's first lien against third-party proceeds recovered by an injured employee, which constitutes a statutory liability amounting to an unqualified right of reimbursement not found at common law. As set out in St. Paul Fire & Marine Ins. Co. v. Glassing, 269 M 76, 887 P2d 218 (1994), the concept of subrogation merely gives the insurer the right to prosecute the cause of action that the insurer possessed, so the insurer's claim by subrogation, being purely derivative, is subject to the same statute of limitations as though the cause of action were sued upon by the insured. The statutory right to reimbursement or recoupment is distinguishable from the insurer's right of subrogation proper. Thus, Royal's claim against Roadarmel, being based on a liability created by statute, was time-barred under subsection (1)(c) of this section. Further, Royal's breach of trust claim against White was time-barred by 72-34-511. Because Royal's statutory lien was extinguished as a matter of law 2 years after Royal received notice that the third-party action was settled, by the time that the statute of limitations on White's actions began to run, even if that time was determined to be the date on which he disbursed the

third-party funds, he could no longer be characterized as a trustee, constructive or otherwise, of the third-party proceeds. The case was reversed and remanded for summary judgment in favor of Roadarmel and White. Royal Ins. Co. v. Roadarmel, 2000 MT 259, 301 M 508, 11 P3d 105, 57 St. Rep. 1080 (2000).

Action by Minority Stockholder Against Majority Stockholder — Three-Year Statute of Limitations Applicable: A complaint by a minority stockholder against a majority stockholder is subject to the 3-year statute of limitations in subsection (3) of this section. Hansen v. 75 Ranch Co., 1998 MT 77, 288 M 310, 957 P2d 32, 55 St. Rep. 322 (1998).

Section Not Appropriate Limitations Period for Civil Suit Under Federal Individuals With Disabilities Education Act: In a suit under the federal Individuals With Disabilities Education Act, because the Act does not specify a limitations period, the courts will use the most analogous state statute of limitations unless that statute would undermine the federal policies underlying the Act. Montana's statute of limitations applicable to judicial reviews of administrative appeals, 2-4-702, was applicable to the school district's civil action challenging the administrative hearings officer's decision after the due process hearing. Livingston School District Nos. 4 and 1 v. Keenan, 82 F3d 912 (9th Cir. 1996).

Claim for Utility Relocation Project Reimbursement Not Time-Barred: Although the bulk of primary work in a utility relocation project was accomplished by April 1988, various items of related work were done as late as March 1989. Because the claim for reimbursement was filed in July 1990, less than 2 years later, payment of the claim was not barred by the applicable statute of limitations in this section. N. Lights, Inc. v. St., 265 M 47, 874 P2d 6, 51 St. Rep. 394 (1994).

Conflicting Statutes of Limitations Resolved in Favor of Longest Statute: Kearney, a news manager working for a television station under an oral contract, sued KXLF for overtime compensation. The District Court applied a 5-year statute of limitations pursuant to 27-2-202(2). KXLF argued that the applicable statute of limitations was the 2-year limit contained in this section. Citing Ritland v. Rowe, 260 M 453, 861 P2d 175 (1993), and Thiel v. Taurus Drilling Ltd. 1980-II, 218 M 201, 710 P2d 33 (1985), the Supreme Court held that conflict between the statutes applicable in this case should be resolved in favor of the statute containing the longer limitation. Kearney v. KXLF Communications, Inc., 263 M 407, 869 P2d 772, 51 St. Rep. 119 (1994). See also Travelers Indem. Co. v. Andersen, 1999 MT 201, 295 M 438, 983 P2d 999, 56 St. Rep. 782 (1999).

Statute of Limitations Applicable to Penalty for Deceit: Because 37-61-406, which provides a penalty for deceit or collusion by an attorney, is clearly a penalty statute, the 2-year statute of limitations in this section applies rather than the 3-year general tort statute of limitations. Barrett v. Holland & Hart, 256 M 101, 845 P2d 714, 49 St. Rep. 1156 (1992), and 50 St. Rep. 63 (1993).

Applicability of Ten-Year Statute of Limitations to Pre-1983 Mines Net Proceeds Tax: Prior to 1983, the limitations period for assessment revisions of property taxes, including the mines net proceeds tax, was 10 years as set in 15-8-601. Because this specific statute of limitations was governing, the general 2-year limitations period prescribed in this section did not apply to these particular taxes. W.R. Grace & Co. v. Dept. of Revenue, 238 M 439, 779 P2d 470, 46 St. Rep. 1399 (1989), distinguishing Caterpillar Tractor Co. v. Dept. of Revenue, 194 M 537, 633 P2d 618, 38 St. Rep. 1245 (1981).

Statute of Limitations Begins at Time of Injury: Plaintiff alleged defendant violated 37-51-323 by misrepresenting himself as being a real estate broker licensed by another state. Plaintiff's complaint was filed over 2 years after the alleged tort. Plaintiff contends that defendant's alleged misrepresentation constitutes concealment of a material fact, and therefore the statute of limitations should be tolled. The court held that defendant's misrepresentation was not an affirmative act calculated to obscure plaintiff's cause of action. In nonmalpractice tort actions, the statute of limitations begins to run on the date of plaintiff's injury. This action is barred because plaintiff did not file within the 2-year period. Payne v. Stratman, 229 M 377, 747 P2d 210, 44 St. Rep. 2059 (1987).

Statute of Limitations as Applied to Civil RICO Actions: Section 27-2-211, rather than 27-2-215 (renumbered 27-2-231), provides the Statute of Limitations for claims most analogous to civil RICO claims in Montana since the Racketeer Influenced and Corrupt Organizations Act (RICO) itself contains no limitations. Jacobson v. W. Mont. Prod. Credit Ass'n, 643 F. Supp. 391, 43 St. Rep. 1598 (D.C. Mont. 1986).

Eight-Year Statute of Limitations for Civil Action Under Securities Act of Montana: The U.S. District Court for the District of Montana certified a question to the Supreme Court on the applicable Statute of Limitations for a civil action brought pursuant to 30-10-307. In deciding that the 8-year limitation period rather than the 2-year period applied, the court traced the legislative history of the civil enforcement limitation period under the Securities Act of Montana.

In 1967, the Legislature eliminated the relevant 2-year limitation and left a void. The court reviewed the legislative intent, underlying purposes of the Act, and characterization of the essence of the claim. Finding that each count of plaintiff's complaint could be interpreted as sounding in tort, contract, or statutory violation, the court resolved the case in favor of the longest limitation period. Thiel v. Taurus Drilling Ltd. 1980-II, 218 M 201, 710 P2d 33, 42 St. Rep. 1520 (1985), followed in Ritland v. Rowe, 260 M 453, 861 P2d 175, 50 St. Rep. 1183 (1993), and in Kearney v. KXLF Communications, Inc., 263 M 407, 869 P2d 772, 51 St. Rep. 119 (1994).

Federal Civil Rights Action — Accrual of Action: Although federal courts apply the state Statute of Limitations in a civil rights action brought under 42 U.S.C. §1983, the date on which the action accrues is determined by federal standards. The time of accrual under federal law is when the plaintiff knows or has reason to know of the injury that is the basis for the action. Where the only incident that could give rise to a cause of action occurred 4 years prior to the federal court filing, the parties were properly dismissed, there being a 2-year Statute of Limitations in effect. Harvey v. Pomroy, 535 F. Supp. 78, 39 St. Rep. 657 (D.C. Mont. 1982).

Corporate License Tax — Limitations on Assessment Where No Return — No Revival of Impliedly Repealed Section by Internal Reference: The 2-year Statute of Limitations in 27-2-211 applied to the assessment of corporate license tax for corporations that failed to file a return for the reason that the Supreme Court in St. v. King Colony Ranch, 137 M 145, 350 P2d 841 (1960), had held that sec. 1, Ch. 209, L. 1945 (amending 15-31-526), had superseded sec. 9, Ch. 166, L. 1933 (enacting 15-31-542, repealed in 1983), as to the time limitation and the Legislature, in sec. 2, Ch. 186, L. 1963 (enacting 15-31-509), though referencing 15-31-542 on an exception, had not used language to revive it; therefore 15-31-542 remained superseded or repealed. (But see 15-31-544.) Caterpillar Tractor Co., Inc. v. Dept. of Revenue, 194 M 537, 633 P2d 618, 38 St. Rep. 1245 (1981).

Misrepresentation Action in Real Estate Sale: The court properly awarded summary judgment to defendants in a misrepresentation action under the Montana real estate license law when the record indicated that no fraudulent representations were made by defendants and the Statute of Limitations had expired, notwithstanding the "discovery" exception. Anderson v. Applebury, 173 M 411, 567 P2d 951 (1977).

Rental — Effect of Payments Upon Limitation: Whether or not rent was paid, the lease contained no default clause and no evidence was presented as to termination of lease. Therefore, lease was voidable, not void, and the statute did not begin to run until there was a demand and refusal. Grinde v. Tindall, 172 M 199, 562 P2d 818 (1977).

"Liability Created by Statute": Action against county by motorist who alleged he suffered personal injuries in a single vehicle accident due to negligent failure of county to properly maintain and mark a "T" intersection of county roads was subject to 3-year Statute of Limitations under 27-2-209, rather than 2-year Statute of Limitations under 27-2-211 as an action "upon a liability created by statute", since 33-23-102, waiving sovereign immunity to extent of county's liability insurance, simply removes a defense previously existing rather than creating a new cause of action. State ex rel. Fallon County v. District Court, 161 M 79, 505 P2d 120 (1972).

Action Under Federal Civil Rights Statute: Cause of action under federal civil rights statute for improper search accrued at the time of the search, not at the time the search was adjudicated invalid or when criminal prosecution was terminated, so that action brought more than 2 years after the search was barred by this section. Strung v. Anderson, 452 F2d 632 (9th Cir. 1971).

Railroad's Statutory Duty: The cause of action based on a railroad's statutory duty to maintain a cement drop, siphon, and wooden flume on its right-of-way did not accrue on the taking of the right-of-way or on the abandonment of the right-of-way and notice to water rights owners that it would no longer maintain the works but rather would accrue only after injury occurred from the railroad's failure to maintain the works. Harrer v. N. Pac. Ry., 147 M 130, 410 P2d 713 (1966).

Antitrust Civil Actions:

Federal District Court properly dismissed counterclaims charging deliberate course of conduct on the part of a utility aimed at destroying business of one of the defendants and failure of utility to operate its pipelines as a common carrier as required by the Federal Leasing Act and the Natural Gas Act and seeking damages for violations of antitrust laws, which were barred by this section. Wight v. Montana-Dakota Util. Co., 299 F2d 470 (9th Cir. 1962).

Action by packing company to recover treble damages from competitors for alleged violation of antitrust laws, filed more than 2 years after competitors had been engaged in a local price war in Montana, was barred by 2-year limitation under this section, though within that period short weighting and varying prices occasioned by keen competition occurred, in absence of evidence of

concerted effort by competitors or systematic price cutting. Action for treble damages is not for a "penalty" or "forfeiture" under this section; liability is not mere codification of common law but is "liability created by statute". Hansen Packing Co. v. Swift & Co., 27 F. Supp. 364 (D.C. Mont. 1939).

Public Officers' Obligations:

Action against former Commissioner of Public Works, appointed by former Mayor of city, to recover money received as additional salary for managing housing projects was not barred by this section where city had no knowledge of the payments taken by Commissioner. Roundup v. Liebetrau, 134 M 114, 327 P2d 810 (1958).

The duty of a County Treasurer to receive, keep safely, and account for all money of the county, as well as that directed by a court or statute to be deposited with him for safekeeping, being one imposed by express statutory requirement, an action on the official bond of such an officer is on "a liability created by statute" and is barred in 2 years by 27-2-211. Gallatin County v. USF&G Co., 50 M 55, 144 P 1085 (1914), distinguished in School District v. Pondera County, 89 M 342, 297 P 498 (1931).

Section 27-2-211(1)(c) does not apply to an action against a City Treasurer to recover interest received by him on deposits of city funds that he failed to turn over to his principal. Butte v. Goodwin, 47 M 155, 134 P 670 (1913).

Burden of Proof as to Timeliness of Action: Section 27-2-211(3) is not a Statute of Limitations but is of the essence of the right itself, and one who seeks to enforce a right must show affirmatively that his action is timely. (Opinion on rehearing.) State ex rel. Lewis & Clark County v. District Court, 90 M 213, 300 P 544 (1931).

Oil and Gas Lease Forfeiture: An action for the cancellation of record of an oil and gas lease which had theretofore been declared forfeited, brought under 82-1-201 through 82-1-203, was not an action "upon a statute for a penalty or forfeiture" within the meaning of this section or one "upon a liability created by statute other than a penalty or forfeiture". Abell v. Bishop, 86 M 478, 284 P 525 (1930).

Oil and Gas Leases: A Statute of Limitations, such as this section, prescribing a limitation of 2 years for an action "upon a liability created by statute" does not extend to an action based upon defendant's alleged negligence in addition to a statutory liability or to an action in which the element of agreement enters, as where defendant in an action of the nature of the above specifically agreed, as lessee in an oil and gas lease, in case of default on his part to release the lease of record. Abell v. Bishop, 86 M 478, 284 P 525 (1930).

Double Liability of Bank Stockholders:

The statutory liability imposed upon holders of bank stock by section 6036, R.C.M. 1921 (since repealed), for debts of the bank, is in the nature of a guaranty, not primary but secondary, and the liability is created within the meaning of this section, not when the statute imposing it was enacted or when the relation of debtor and creditor between the bank and plaintiff first arose but when the bank became insolvent; therefore, the complaint in such an action showing on its face that it was commenced within the 3-year period was sufficient as against a general demurrer (demurrer abolished, Rule 7(c), M.R.Civ.P., and 25-31-503 (25-31-503 now repealed)). Mitchell v. Banking Corp. of Mont., 83 M 581, 273 P 1055 (1929).

Quaere: When is the double statutory liability of a stockholder in a state bank "created" within the meaning of this section, fixing a limitation of 3 years; was it created at the time the creditor made the deposit in question or at the time the corporation was shown to be without assets? Brown v. Roberts, 78 M 301, 254 P 419 (1927).

While the double liability of stockholders in state banks is contractual in nature, the 5-year limitation on contracts not in writing (27-2-202) does not apply in an action on such liability, but, the liability being one created by law, the provision of this section, that an action of that nature must be brought within 3 years after it was created, applies. Brown v. Roberts, 78 M 301, 254 P 419 (1927).

Accrual of Cause of Action:

Limitation does not begin to run against suit to charge directors of national bank with personal liability for making excessive loans so long as defendants remain in control. Adams v. Clarke, 22 F2d 957 (9th Cir. 1927).

An action by a depositor in an insolvent bank to enforce the stockholders' liability is based on a statutory rather than a contractual liability and is not penal in nature, so under this section it must be commenced within 3 years after the liability was created by law, without reference as to when plaintiff made discovery of the facts in the case. Brown v. Roberts, 78 M 301, 254 P 419 (1927).

An action against a director to enforce his statutory liability for failure of his corporation to file its annual statement is not for a penalty or forfeiture, so it must be brought within 3 years after the liability was created by law and not within 3 years after the aggrieved party discovered the fact with relation thereto. Williams v. Hilger, 77 M 399, 251 P 524 (1926).

Notary Public's Liability: An action against a notary public to recover damages for making a false certificate to a mortgage is one "upon a liability created by statute" within the meaning of this section and barred if not brought within 2 years from the date of false making. Steinbrenner v. Elder, 80 M 395, 260 P 725 (1927).

Actions in Other States:

In an action brought in the federal District Court of a foreign state to enforce directors' liability for failure of a corporation to file the required annual report, the 3-year limitation prescribed by this section governs. N. Pac. Ry. v. Crowell, 245 F 668 (D.C. N.J. 1917).

This section applies to liabilities incurred before its passage under a different statute and goes with them as a qualification when they are sued upon in other states. Davis v. Mills, 194 US 451, 48 L Ed 1067, 24 S Ct 692 (1904), distinguished in Pearson v. NE. Airlines, Inc., 309 F2d 553 (2nd Cir. 1962).

Mining Company's Liability: An action under 39-2-704(1) for personal injuries, founded upon actionable negligence, is not an action on a "liability created by statute"; hence, such an action is not barred in 2 years. Beeler v. Butte & London Copper Dev. Co., 41 M 465, 110 P 528 (1910).

Attorney General's Opinions

Wage Claims by Public Officers Considered Liability Created by Statute — Two-Year Statute of Limitations Applicable: Because the extent and nature of public officers' duties and the amount of compensation are statutorily defined, claims for compensation must be considered liabilities created by statute. Therefore, the 2-year statute of limitations set out in subsection (1)(c) of this section applies to wage claims by public officers, including elected county officials and their deputies, and claims for longevity payments from Deputy Sheriffs and undersheriffs. 43 A.G. Op. 58 (1990).

Collateral References

Banks and Banking *key* 55(2), 58(1); Corporations *key* 264, 356.

9 C.J.S. Banks and Banking §§119, 126; 18 C.J.S. Corporations §414; 19 C.J.S. Corporations §§537, 552.

27-2-213. Actions against banks.

Case Notes

Stockholders' Liability: An action by a depositor in an insolvent bank to recover on the statutory liability of its stockholders is not one against a bank, and therefore this section has no application. Brown v. Roberts, 78 M 301, 254 P 419 (1927).

Collateral References

Banks and Banking *key* 154(2).

9 C.J.S. Banks and Banking §§478 through 481.

Necessity of demand to start Statute of Limitations running against depositor's cause of action against bank to recover funds paid out on check bearing forged endorsement. 82 ALR 2d 936.

27-2-214. Actions for mesne profits of real property.

Case Notes

Mesne Profits: The period of limitation for an action in ejectment, with claim for mesne profits and the value and use of the property during the period of its wrongful withholding, was 10 years under this section. Kurth v. Le Jeune, 83 M 100, 269 P 408 (1928).

27-2-216. Tort actions — childhood sexual abuse.

Compiler's Comments

Severability: Section 4, Ch. 158, L. 1989, was a severability clause.

Retroactive Applicability: Section 5, Ch. 158, L. 1989, provided: "[This act] applies to all causes of action commenced on or after October 1, 1989, regardless of when the cause of action arose. To this extent, [this act] applies retroactively, within the meaning of 1-2-109."

Case Notes

Time of Discovery of Injury Because of Childhood Sexual Abuse as Jury Question — Motion for Directed Verdict Properly Denied: Substantial conflicts in the evidence existed regarding the time at which plaintiff discovered that her mental disorders were connected to sexual abuse that

she experienced as a child. It is within the province of the jury to resolve conflicting evidence; therefore, the District Court properly denied defendant's motion for a directed verdict based on the time bar in this section. Werre v. David, 275 M 376, 913 P2d 625, 53 St. Rep. 187 (1996).

Tolling Provision Inclusive of Negligence Claims Against Nonperpetrator — "Based On" Defined: Defendant argued that the plain language of this section refers only to intentional conduct and that the statute does not toll the general 3-year statute of limitations for negligence actions. Defendant further argued that this section includes only claims against perpetrators of intentional sexual abuse and that because defendant was not the perpetrator, a negligence claim could not be maintained. The meaning of the term "based on" is determinative of whether this section includes negligence claims. The plain statutory meaning is that an action is based on intentional conduct if intentional sexual abuse is the starting point or foundation of the claim. Harmonizing 27-2-204 with this section, the Supreme Court held that this section is not limited to intentional tort actions against perpetrators of childhood sexual abuse. The District Court properly concluded that this section includes negligence claims based on intentional conduct by a nonperpetrator. Further, the court distinguished Deeds v. U.S., 306 F. Supp. 348 (D.C. Mont. 1969), and Azure v. U.S. Health & Human Serv., 758 F. Supp. 1382 (D.C. Mont. 1991), in holding that the proposition that when harm is intentionally caused by a third person and is not within the scope of risk created by the defendant's conduct, the third person's intentional act precludes imposition of liability against the defendant applies only to cases on intervening, superseding causes. Werre v. David, 275 M 376, 913 P2d 625, 53 St. Rep. 187 (1996), following State ex rel. Snidow v. St. Bd. of Equalization, 93 M 19, 17 P2d 68 (1933).

Constitutionality of Retroactive Statute of Limitations for Claims Involving Childhood Sexual Abuse: At age 41, appellant filed a complaint of sexual abuse against her father for incidents occurring when she was between the ages of 16 and 19, averring that through counseling she had discovered the alleged abuse and filed the complaint a short time later. The District Court dismissed the complaint by summary judgment, holding that the retroactive application of the childhood sexual abuse statute of limitations placed an unreasonable hardship and oppression on respondent, basically destroying any limitations of actions by reviving a claim after that claim was barred by the conventional statute of limitations in violation of respondent's due process rights. However, as determined in Penrod v. Hoskinson, 170 M 277, 552 P2d 325 (1976), the Legislature has specific power to extend a statute of limitations and apply it retroactively to reverse barred claims. The Supreme Court will not examine the actions of the Legislature in addressing a public need when a statute has a reasonable relation to a legitimate state purpose. The language of this section clearly allows the bringing of a claim for childhood sexual abuse within 3 years of discovering the injuries. Respondent failed to prove unconstitutionality beyond a reasonable doubt. Because there was a genuine issue of fact as to when appellant knew or should have known of her injury and its cause, summary judgment was improper and the case was remanded for trial. Cosgriffe v. Cosgriffe, 262 M 175, 864 P2d 776, 50 St. Rep. 1501 (1993), overruling E.W. v. D.C.H., 231 M 481, 754 P2d 817 (1988).

Law Review Articles

Easing Access to the Courts for Incest Victims: Toward an Equitable Application of the Delayed Discovery Rule, 100 Yale L.J. 2189 (1991).

Tolling the Statute of Limitations in Actions Brought by Adult Survivors of Childhood Sexual Abuse, Bickel, 33 Ariz. L. Rev. 427 (1991).

Collateral References

Emotional or psychological "blocking" or repression as tolling running of statute of limitations. 11 ALR 5th 588.

Running of limitations against action for civil damages for sexual abuse of child. 9 ALR 5th 321.

27-2-217. Tort actions — ritual abuse of minor.

Compiler's Comments

1993 Statement of Intent: The statement of intent attached to Ch. 560, L. 1993, provided: "It is the intent of the legislature that the phrase "ceremony, rite, or ritual" be interpreted in a manner that does not include a ceremony, rite, or ritual performed in a formal, commonly recognized religious ceremony."

Severability: Section 6, Ch. 560, L. 1993, was a severability clause.

Retroactive Applicability: Section 7, Ch. 560, L. 1993, provided: "[Sections 3 and 4] [27-2-217 and 27-2-204] apply to all causes of action commenced on or after October 1, 1993, regardless of

when the cause of action arose. To this extent, [sections 3 and 4] [27-2-217 and 27-2-204] apply retroactively, within the meaning of 1-2-109."

Collateral References

Emotional or psychological "blocking" or repression as tolling running of statute of limitations. 11 ALR 5th 588.

27-2-231. Other actions.

Case Notes

Time Bar on Writ of Certiorari to Review Contempt Proceedings: In a case of first impression, the Supreme Court was asked to establish a timeframe within which a petition for review of a contempt order must be filed. The issue was whether the time limitation should come from Title 25, which includes the Montana Rules of Civil Procedure and the Montana Rules of Appellate Procedure, or from Title 27, which prescribes the various statutes of limitation for the commencement of actions. The court noted that there is no appeal, as such, from an order of contempt in a civil proceeding and that the exclusive method of review of civil contempt orders (with certain exceptions) is through a writ of certiorari or writ of review. That review is generally limited to jurisdictional questions and whether evidence supports the contempt. Therefore, the issue of timeliness for filing a petition for a writ of certiorari or review is not a statute of limitations issue, and to mechanically characterize those writs for the review of contempt proceedings as original proceedings governed by the 5-year statute of limitations in this section would be to deny the basic nature of appellate review. Further, petitions for writs of certiorari to review contempt proceedings are fundamentally different from other original proceedings commenced in the Supreme Court and from petitions for writs of supervisory control, which do not so much involve appellate review of and a decision on the underlying proceedings as they involve the court dealing with discreet questions of law during the pendency of the underlying proceedings. Because the timeframe in which to file petitions for writs of certiorari to review contempt proceedings is a procedural issue analogous to the procedure for filing a notice of appeal, the Supreme Court held that Rule 72, M.R.Civ.P. (Title 25, ch. 20), Rule 1, M.R.App.P. (Title 25, ch. 21), Rule 17, M.R.App.P., and 27-25-103 require that the timeframe for those petitions be determined by the Montana Rules of Appellate Procedure. Specifically, pursuant to Rule 5, M.R.App.P., a petition for a writ of certiorari to review contempt proceedings must be filed with the Clerk of the District Court within 30 days of the date on which the District Court enters the contempt finding, unless the state is a party, in which case the petition must be filed within 60 days of the date on which the District Court enters the contempt finding. This may not be construed to limit the Supreme Court's power to grant writs of supervisory control or to consider applications for other types of original proceedings. The Supreme Court chose not to establish a precedent that allows contempt proceedings to be delayed until the underlying cause is resolved. Jones v. District Court, 2001 MT 276, 307 M 305, 37 P3d 682 (2001), overruling Shaffroth v. Lamere, 104 M 175, 65 P2d 610 (1937), to the extent that Shaffroth holds that the general 5-year statute of limitations in this section applies to all writs of review authorized in 27-25-102.

Statute of Limitations as Applied to Civil RICO Actions: Section 27-2-211, rather than 27-2-215 (renumbered 27-2-231), provides the Statute of Limitations for claims most analogous to civil RICO claims in Montana since the Racketeer Influenced and Corrupt Organizations Act (RICO) itself contains no limitations. Jacobson v. W. Mont. Prod. Credit Ass'n, 643 F. Supp. 391, 43 St. Rep. 1598 (D.C. Mont. 1986).

Real Estate Actions:

Some causes of action do not clearly fall within the provisions of the specific Statutes of Limitation found in this Code. Normally, the residual Statute of Limitations in 27-2-215 (renumbered 27-2-231) would then be applicable. This is not the case, however, when the cause concerns real estate. Under 70-19-402, it appears that seizure or possession within the 5 years prior to the commencement of the action is the only limitation imposed by statute on plaintiff in this case, who sued to quiet title. Since she was seized of a mineral interest during that period, she was entitled to wait until her title was questioned before filing suit. The running of time (here, more than 25 years) tends to strengthen rather than destroy title determined by decree. Peterson v. Hopkins, 210 M 429, 684 P2d 1061, 41 St. Rep. 1140 (1984).

Specific performance of an oral contract for the sale of real estate may be decreed where possession thereunder, taken by the vendee with the vendor's knowledge or consent, is followed by improvement of the property, even though no part of the purchase price has been paid; in such a case, where the payment and conveyance are to be concurrent acts and the vendee has been ready to pay, the vendor stands in the same position as if payment had been made, that is to say,

he holds the legal title in trust for the vendee; and the Statute of Limitations does not run against the action for specific performance until the vendor has, in some manner, disavowed his trust. Wright v. Brooks, 47 M 99, 130 P 968 (1913).

This section does not apply to a suit to have the executors and heirs of the plaintiff's co-owner in a mining claim declared trustees for his benefit. Delmoe v. Long, 35 M 139, 88 P 778 (1907).

This section does not apply to actions concerning real estate. Grogan v. Valley Trading Co., 30 M 229, 76 P 211 (1904); Burt v. Cook Sheep Co., 10 M 571, 27 P 399 (1891).

Accrual of Cause of Action Shown by Litigation Brought in Different State: Where the plaintiffs brought an action in Oregon in 1977 for an accounting of certain properties and that action was dismissed in 1981 with the stipulation that the claims could be asserted in Montana courts by June 13, 1981, the District Court did not err in dismissing the suit filed in Montana on July 2, 1981. The 5-year period of the statute began to run in 1970 or 1971 when the plaintiffs state they became aware of the dispute; their argument that they did not become aware of the cause of action until 1978 or 1979 must fail, as the previous action was begun in 1977. Wellman v. Wellman, 205 M 504, 668 P2d 1060, 40 St. Rep. 1459 (1983).

Mandamus:

A proceeding in mandamus to compel reinstatement of a member of the faculty of the state university is governed by this section and not by 27-2-203, providing for a 2-year limitation. State ex rel. Phillips v. Ford, 116 M 190, 151 P2d 171 (1944).

The 5-year limitation prescribed by this section was held applicable in a mandamus proceeding; hence a County Treasurer, by law custodian of the funds of an irrigation district, therefore charged with duty not to pay out funds on claims believed by him to be invalid, could properly assert the defense of such limitation in a proceeding to compel payment of a registered district warrant. State ex rel. DeKalb v. Ferrell, 105 M 218, 70 P2d 290 (1937).

This section contains the only limitation applicable to mandamus proceedings, being a general provision applicable to all actions for which special provision is not otherwise made. Notwithstanding the provision, however, the courts may, in their discretion, deny relief when there has been a long delay in applying for it, in the absence of excuse or explanation. State ex rel. Bennetts v. Duncan, 47 M 447, 133 P 109 (1913), distinguished in State ex rel. Boorman v. St. Bd. of Land Comm'rs, 109 M 127, 94 P2d 201 (1939).

While the District Court may in its discretion, notwithstanding the provisions of this section and of 27-2-101, deny an application for a Writ of Mandamus where there has been a long delay in making it, in the absence of excuse or explanation, the propriety of issuing it in any particular case will be determined upon the facts of that case; and if it is apparent that the delay has not resulted in prejudice to the rights of the adverse party and that the relief sought does not depend upon the determination of doubtful and disputed questions of fact, the Writ may go. State ex rel. Bennetts v. Duncan, 47 M 447, 133 P 109 (1913), distinguished in O'Neill v. Butte, 96 M 403, 30 P2d 819 (1934); State ex rel. Bailey v. Edwards, 40 M 313, 106 P 703 (1910).

Probate Claims: Statutes of Limitations have no application to creditors' claims in probate that have been approved by the personal representative and allowed by the court. Montgomery v. First Nat'l Bank, 114 M 395, 136 P2d 760 (1943).

Certiorari and Review: This section was applicable to Writs of Certiorari and Review, by virtue of 27-2-404 construing the word "action" to include special proceedings. Shaffroth v. Lamere, 104 M 175, 65 P2d 610 (1937), overruled in Jones v. District Court, 2001 MT 276, 307 M 305, 37 P3d 682 (2001), to the extent that Shaffroth holds that the general 5-year statute of limitations in this section applies to all writs of review authorized in 27-25-102 because pursuant to Rule 5, M.R.App.P. (Title 25, ch. 21), a petition for a writ of certiorari to review contempt proceedings must be filed with the Clerk of the District Court within 30 days of the date on which the District Court enters the contempt finding, unless the state is a party, in which case the petition must be filed within 60 days of the date on which the District Court enters the contempt finding.

Setting Aside Judgment: Under this section the cause of action (a suit to set aside a judgment in a mortgage foreclosure proceeding) accrued on entry of the judgment. Frisbee v. Coburn, 101 M 58, 52 P2d 882 (1935).

Corporate Stockholder's Action: A stockholder in a reservoir company, a corporation organized for profit with power to sell its assets upon a proper vote, who, upon a sale having been made, took no timely steps to assail its legality nor brought suit until after the lapse of 5 years, was estopped by his delay from questioning the proceedings leading to the sale and barred by either this section or 27-2-203 from prosecuting the action. Canyon Creek Irrigation District v. Martin, 52 M 339, 159 P 418 (1916).

Public Land Contest: An action to recover land claimed by plaintiff to have been rightfully entered by him under the public land laws of the United States but wrongfully patented in the Northern Pacific Railway Company under its land grant was barred by this section because it was not commenced until 15 years after patent to the railway company. Kimes v. N. Pac. Ry., 49 M 573, 144 P 156 (1914).

Trust Obligations: The Statute of Limitations applies to suits in equity and actions at law. As between the trustees of an express trust and the cestui que trust, the Statute of Limitations commences to run from the date of the disavowal of the trust by the trustees and knowledge of such disavowal by the cestui que trust. The pendency of another suit operates to suspend the Statute only as to the particular suit brought and not as to the cause of action involved. Mantle v. Speculator Min. Co., 27 M 473, 71 P 665 (1903).

Collateral References

Limitation of Actions *key* 39(1) through (15).

53 C.J.S. Limitations of Actions §103.

51 Am. Jur. 2d Limitation of Actions §83.

Limitation of actions for annulment of marriage. 52 ALR 2d 1163.

Part 3
Accrual of Cause of Action

Part Case Notes

Architectural Malpractice — Applicability of Continuing Relationship Doctrine: An architect was hired to design and oversee the building of a hospital. Shortly after completion in 1975, problems developed with the heating, air conditioning, and ventilating systems. The hospital contacted the architect about remedies for the problems, seeking and continuing to rely on his advice until 1979, when the parties' relationship ended. The hospital filed suit in 1981, which the architect contended was beyond the statute of limitations that normally would begin running upon substantial completion of the facility in 1975. Distinguishing Schneider v. Leaphart, 228 M 483, 743 P2d 613 (1987), the Supreme Court applied the continuing relationship doctrine because no specific statute of limitations governed the tort of architectural malpractice and because "accrual" was not statutorily defined at the time of the acts giving rise to the action. The continuing relationship doctrine may be used when, during the course of an ongoing, developing, and dependent relationship between a professional and a client, the professional commits a tortious act that injures the client. The doctrine suspends the accrual of the cause of action in order to give the professional an opportunity to remedy, avoid, or establish that there was no error or attempt to mitigate damages. The cause of action does not accrue until either the professional relationship ends or, if a general professional relationship continues between the parties, the professional ceases to treat or advise the client for the particular act causing the injury. Therefore, the statute of limitations in this case was suspended until the professional relationship ended in 1979 and the hospital's complaint in 1981 was filed well within the general 3-year tort statute of limitations. N. Mont. Hosp. v. Knight, 248 M 310, 811 P2d 1276, 48 St. Rep. 444 (1991).

Products Liability — Statute of Limitations — Fraudulent Concealment Test Adopted: Plaintiff was injured in May 1975, when his holstered Ruger revolver discharged into his leg as he crawled under some brush. He filed this products liability action in September 1979. Ruger moved for summary judgment based upon the Statute of Limitations. The statutory period for tort action in Montana is 3 years. The Statute begins to run from the time the right of action accrues and not from the time when the plaintiff who was ignorant before comes to knowledge of his rights. Plaintiff contended the Statute tolled due to Ruger's fraudulent concealment of the defective nature of the revolver. The Supreme Court has never considered fraudulent concealment in a products liability case but has considered it in malpractice actions, which could apply here. To toll the Statute, the fraud must be of such a character as to prevent inquiry, elude investigation, or to mislead the party who claims the cause of action. There first must be injury and then concealment. It is the cause of action which must be fraudulently concealed by failing to disclose the fact of injury. Application of this test to this case establishes no fraudulent concealment. There must be some affirmative act of the defendant calculated to obscure the existence of the cause action. Much v. Sturm, Ruger & Co., Inc., 502 F. Supp. 743, 37 St. Rep. 2116 (D.C. Mont. 1980).

Conflicting Evidence on Time of Accrual: The question of whether an action is barred by the Statute of Limitations is for the jury to decide when there is conflicting evidence as to when the cause of action accrued. Hill v. Squibb & Sons, 181 M 199, 592 P2d 1383 (1979).

Part Collateral References

Limitation of Actions *key* 43 through 56.
54 C.J.S. Limitations of Actions §110, et seq.
51 Am. Jur. 2d Limitation of Actions §§107 through 137.

27-2-301. When demand necessary to perfect right to action.

Compiler's Comments

1987 Amendment: Near middle of first sentence, after "time when the", substituted "demand is made except" for "right to make the demand is complete except in one of the following cases"; deleted former (2) that read: "(2) Where there was a deposit of money not to be paid at a fixed time but only upon a special demand or a delivery of personal property not to be returned, specifically or in kind, at a fixed time or upon a fixed contingency, the time must be computed from the demand"; and made minor changes in phraseology.

Case Notes

No Error Where Claim of When Action Accrued Not Before Court: In an action for compensatory and exemplary damages for wrongful conversion of plaintiff's merchandise stored in defendant's warehouse, the District Court properly granted defendant's motion for summary judgment on the basis that the action was barred by the Statute of Limitations. Plaintiff's claims for recovery accrued 4 years previously when the defendant warehouse sold plaintiff's merchandise, not, as plaintiff claimed, when plaintiff discovered upon demand that defendant sold the merchandise. In this instance the allegation of knowledge, demand, and then refusal to return the goods was not raised in the complaint, the answer, the interrogatories, or in any affidavit properly before the District Court at the time summary judgment was granted, and thus plaintiff's allegations as to when the action accrued will not be considered on appeal. Seven Seas Import-Export & Mercantile, Inc. v. Handee Foods, 190 M 508, 621 P2d 1097, 38 St. Rep. 60 (1981).

Separate Transactions: Where two brothers maintaining separate places of business entered into an agreement of partnership with relation to particular transactions in the purchase and sale of precious stones, each transaction was complete in itself, and the Statute of Limitations commenced to run with reference to each thereof from the time the surviving partner (suing the estate of his deceased brother) knows the facts justifying demand on his part for his share of the profits on any one of the transactions relied upon in his action. Pincus v. Davis, 95 M 375, 26 P2d 986 (1933).

Bailor's Demand for Property:

Under this section the limitation of 2 years against an action to recover personal property by a bailor against his bailee does not commence to run until the latter refuses to return it on demand. Gates v. Powell, 77 M 554, 252 P 377 (1926).

The Statute of Limitations does not run against the bailor's right to recover the bailed chattel so long as the bailment lasts and has not been put to an end by the bailee refusing to return the property on demand or otherwise denying the trust and claiming the chattel as his own. This is the rule as to trustees generally, and it applies also to bailees. These principles of law have been embodied in this section. Woods v. Latta, 35 M 9, 88 P 402 (1907), distinguished in Bennett v. Meeker, 61 M 307, 202 P 203 (1921), and explained in Viers v. Webb, 76 M 38, 245 P 257 (1926).

Collateral References

Limitation of Actions *key* 66(1) through (16).
54 C.J.S. Limitations of Actions §125.
51 Am. Jur. 2d Limitation of Actions §§113, 114.

Right to maintain malpractice suit against injured employee's attending physician notwithstanding receipt of workmen's compensation award. 28 ALR 3d 1066.

27-2-302. Actions based on mutual accounts.

Case Notes

Account Stated: One who freely pays an account, even though he has expressed dissatisfaction with it, does so with the intent to assent to it and with awareness that it is a final determination of all accounts. Big Sky Livestock v. Herzog, 171 M 409, 558 P2d 1107 (1976).

Collateral References

Limitation of Actions *key* 54(1) through (4).
54 C.J.S. Limitations of Actions §178.

What constitutes an open, current account within the Statute of Limitations. 57 ALR 201; 39 ALR 369; 1 ALR 1060.

27-2-303. Actions for waste, trespass, or injury committed during mining work or exploration.

Case Notes

Action to Enforce Implied Covenant in Oil and Gas Lease: In a suit by lessor's grantees to collect damages from defendants/lessees for failure to comply with the common-law offset drilling rule by failing to drill a well to protect the plaintiffs' interests, the suit was not governed by the Statute of Limitations applying to suits to prevent waste to real property. Because the suit was brought to enforce implied provisions of an agreement, it was governed by the Statute of Limitations applicable to contracts. U. V. Indus., Inc. v. Danielson, 184 M 203, 602 P2d 571 (1979).

Rental — Effect of Payments Upon Limitation: Whether or not rent was paid, the lease contained no default clause and no evidence was presented as to termination of lease. Therefore, lease was voidable, not void, and the statute did not begin to run until there was a demand and refusal. Grinde v. Tindall, 172 M 199, 562 P2d 818 (1977).

Injury to Real Property: Where defendant's geophysical exploration injured plaintiff's real property, Statute of Limitations under this section was not tolled by plaintiff's decision to permit defendant to repair the damage with approximately 1 year remaining under the Statute. Carlson v. Ray Geophysical Division, 156 M 450, 481 P2d 327 (1971).

27-2-304. Actions involving personal property accruing after death and before issuance of letters of administration.

Case Notes

Delay in Appointment of Administrator:

Under this section, where decedent died on August 5, 1946, letters of administration were deemed to have been issued on or before August 5, 1951. Cocanougher v. Cocanougher, 141 M 28, 375 P2d 1014 (1962).

Action by an administrator, appointed on May 3, 1960, for estate of decedent who died August 5, 1946, for an accounting to recover estate property was barred under this section. Cocanougher v. Cocanougher, 141 M 28, 375 P2d 1014 (1962).

Purpose of Section:

The purpose of this section is to fix a definite point of time from which an applicable Statute of Limitations commences to run rather than have an applicable Statute of Limitations start to run when an administrator is appointed, no matter how long a period has elapsed after the death of an intestate. Cocanougher v. Cocanougher, 141 M 28, 375 P2d 1014 (1962).

The purpose of this section was, by force of the presumption therein created, to fix definite points of time from which the Statute of Limitations would commence to run. Haydon v. Normandin, 55 M 539, 179 P 460 (1919).

Conversion After Appointment of Administrator: Where a conversion of personal property of a decedent takes place before letters of administration are deemed to have been issued, under this section the Statute of Limitations commences to run as fixed by that section; but where it takes place after letters are so deemed to have been issued, the Statute begins to run from the date of the conversion, from the time the cause of action accrues. Stagg v. Stagg, 90 M 180, 300 P 539 (1931).

Procedural Nature of Section: This section operates on the remedy alone; it does not create a new cause of action in favor of the heir. It does not operate retroactively, but it does affect rights of action which might have been enforced at the time it took effect. Haydon v. Normandin, 55 M 539, 179 P 460 (1919).

Collateral References

Statute of Limitations: effect of delay in appointing administrator or other representative on cause of action accruing at or after death of person in whose favor it would have accrued. 28 ALR 3d 1141.

Part 4
Circumstances Which Extend Period of Limitations

Part Case Notes

Architectural Malpractice — Applicability of Continuing Relationship Doctrine: An architect was hired to design and oversee the building of a hospital. Shortly after completion in 1975, problems developed with the heating, air conditioning, and ventilating systems. The hospital contacted the architect about remedies for the problems, seeking and continuing to rely on his

advice until 1979, when the parties' relationship ended. The hospital filed suit in 1981, which the architect contended was beyond the statute of limitations that normally would begin running upon substantial completion of the facility in 1975. Distinguishing Schneider v. Leaphart, 228 M 483, 743 P2d 613 (1987), the Supreme Court applied the continuing relationship doctrine because no specific statute of limitations governed the tort of architectural malpractice and because "accrual" was not statutorily defined at the time of the acts giving rise to the action. The continuing relationship doctrine may be used when, during the course of an ongoing, developing, and dependent relationship between a professional and a client, the professional commits a tortious act that injures the client. The doctrine suspends the accrual of the cause of action in order to give the professional an opportunity to remedy, avoid, or establish that there was no error or attempt to mitigate damages. The cause of action does not accrue until either the professional relationship ends or, if a general professional relationship continues between the parties, the professional ceases to treat or advise the client for the particular act causing the injury. Therefore, the statute of limitations in this case was suspended until the professional relationship ended in 1979 and the hospital's complaint in 1981 was filed well within the general 3-year tort statute of limitations. N. Mont. Hosp. v. Knight, 248 M 310, 811 P2d 1276, 48 St. Rep. 444 (1991).

Requirements of "Equitable Tolling" — Doctrine Not Recognized: Plaintiff relied on out-of-state decisions to present the proposition that, in instances when an injured person has several legal remedies and reasonably and in good faith pursues one, the statute of limitations will not be available as a defense where equitable principles justify tolling of the statute. Requirements of the doctrine, known as "equitable tolling", were outlined in Collier v. Pasadena, 191 Cal. Rep. 681 (Cal. App. 1983): (1) timely notice to the defendant (within the applicable statute of limitations) in filing the first claim; (2) lack of prejudice to defendant in gathering evidence to defend against the second claim; and (3) good faith and reasonable conduct by plaintiff in filing the second claim. The Supreme Court determined that in the present case the notice requirement was not met; therefore, the court did not address arguments with regard to the remaining two elements or recognize the doctrine of equitable tolling in Montana. Erickson v. Croft, 233 M 146, 760 P2d 706, 45 St. Rep. 1379 (1988).

No Judicial Discretion to Alter Statute of Limitations: Plaintiffs' complaint was dismissed because it was not timely filed, missing the statute of limitations by 1 day. Plaintiffs moved for relief under Rule 60(b), M.R.Civ.P., because of mistake, inadvertence, surprise, or excusable neglect. The statute of limitations does not discriminate between a just and unjust claim. The statute represents legislative and public policy controlling the rights of potential litigants. A trial court does not have judicial discretion to alter, change, or lessen statutory limits for commencement of actions. Schaffer v. Champion Home Builders Co., 229 M 533, 747 P2d 872, 44 St. Rep. 2196 (1987).

Products Liability — Statute of Limitations — Fraudulent Concealment Test Adopted: Plaintiff was injured in May 1975, when his holstered Ruger revolver discharged into his leg as he crawled under some brush. He filed this products liability action in September 1979. Ruger moved for summary judgment based upon the Statute of Limitations. The statutory period for tort action in Montana is 3 years. The Statute begins to run from the time the right of action accrues and not from the time when the plaintiff who was ignorant before comes to knowledge of his rights. Plaintiff contended the Statute tolled due to Ruger's fraudulent concealment of the defective nature of the revolver. The Supreme Court has never considered fraudulent concealment in a products liability case but has considered it in malpractice actions, which could apply here. To toll the Statute, the fraud must be of such a character as to prevent inquiry, elude investigation, or to mislead the party who claims the cause of action. There first must be injury and then concealment. It is the cause of action which must be fraudulently concealed by failing to disclose the fact of injury. Application of this test to this case establishes no fraudulent concealment. There must be some affirmative act of the defendant calculated to obscure the existence of the cause action. Much v. Sturm, Ruger & Co., Inc., 502 F. Supp. 743, 37 St. Rep. 2116 (D.C. Mont. 1980).

Bankruptcy Petitioner — Limitation Not Tolled: The Statute of Limitations does not toll for the bankrupt during a bankruptcy action. Under 11 U.S.C. 361, nothing prevents or stays the bankrupt from filing claims against other parties. Thus, the District Court did not err in dismissing a libel action brought after bankruptcy for an event occurring prior to bankruptcy but which was filed after the Statute of Limitations had run. A Statute of Limitations is tolled, under 11 U.S.C. 108, until 2 years after adjudication of bankruptcy for a trustee in bankruptcy, but there is no tolling provision for the debtor. Engine Rebuilders, Inc. v. Seven Seas Import-Export & Merc., Inc., 189 M 236, 615 P2d 871, 37 St. Rep. 1406 (1980).

Part Collateral References

51 Am. Jur. 2d Limitation of Actions §§138 through 177.

27-2-401. When person entitled to bring action is under a disability.

Compiler's Comments

1997 Amendment: Chapter 490 in (1), near middle after "minor or", substituted "has been committed pursuant to 53-21-127" for "seriously mentally ill" and at end substituted "commitment" for "serious mental illness"; in (2), near end, substituted "commenced in a timely manner" for "seasonably commenced"; and made minor changes in style. Amendment effective July 1, 1997.

Saving Clause: Section 40, Ch. 490, L. 1997, was a saving clause.

1995 Amendment: Chapter 46 in (1), in first sentence after "minor", inserted "or" and after "mentally ill" deleted "or imprisoned on a criminal charge or under a sentence for a term less than for life" and at end of second sentence, after "disability", substituted "of serious mental illness" for "except minority"; in (4), after "When", substituted "both disabilities referred to in subsection (1)" for "two or more disabilities" and near end, after "until", substituted "both" for "all"; and made minor changes in style.

Applicability — Retroactive Effect: Section 2, Ch. 46, L. 1995, provided: "[Section 1] [amending 27-2-401] applies retroactively, within the meaning of 1-2-109, as provided in this section. If a cause of action accrued before [the effective date of this act] [effective October 1, 1995] to a person incarcerated on a criminal charge or under a sentence for a term less than life, the person must bring an action by the earlier of the following dates:

(1) the last day on which the action could have been brought under 27-2-401 as that section read prior to [the effective date of this act] [effective October 1, 1995]; or

(2) the last day on which an action can be brought under 27-2-401, as amended by [section 1] [amending 27-2-401], for a cause of action that accrued on [the effective date of this act] [effective October 1, 1995]."

1987 Amendment: At end of (1), after "minority", deleted "or, in any case, more than 1 year after the disability ceases"; at end of (2) substituted "personal representative" for "executor or administrator"; and made minor changes in phraseology.

Case Notes

Extraordinary Circumstances Constituting Good Cause to Permit Withdrawal of Guilty Pleas: In 1982, Mallak entered the United States from Iraq as a refugee. In 1989, Mallak entered guilty pleas to two felony counts of sale of dangerous drugs (now criminal distribution of dangerous drugs); however, the record of the proceedings was destroyed. Mallak served a 5-year suspended sentence, and 5 years later applied for U.S. citizenship. When federal immigration officials discovered the drug conviction, deportation proceedings were instituted against Mallak, who resisted deportation by filing for asylum and by filing a petition for postconviction relief requesting that he be allowed to withdraw his guilty pleas. Without a hearing, the District Court denied Mallak's petition on grounds that it was time-barred, and Mallak appealed. The Supreme Court reversed. There is no bright-line rule on the timeliness of a motion to withdraw a guilty plea, and each case must be considered in light of its unique record. Rather, under 46-16-105, a guilty plea may be withdrawn at any time for good cause. In St. v. Koepplin, 213 M 55, 689 P2d 921 (1984), the Supreme Court set out the factors to be considered when determining whether good cause exists to withdraw a guilty plea: (1) the adequacy of the District Court's interrogation as to the defendant's understanding of the plea; (2) the promptness of the motion to withdraw the prior plea; and (3) whether the defendant's plea was apparently the result of a plea bargain in which the guilty plea was given in exchange for dismissal of another charge. The circumstances in Mallak's case were extraordinary, including his documented mental incapacity, his unfamiliarity with the English language at the time of the change of plea, and the absence of a record of the plea proceedings, all of which raised serious doubts about the voluntariness of Mallak's guilty pleas. Further, it was not until 1991 that the Legislature passed 46-12-210 requiring that foreign defendants be told during plea proceedings that a guilty plea could result in deportation. Given the unique combination of factors, the Supreme Court concluded that the District Court abused its discretion in denying Mallak's petition for leave to withdraw his guilty pleas, so the case was remanded to allow Mallak to withdraw his prior pleas. Mallak v. St., 2002 MT 35, 308 M 314, 42 P3d 794 (2002).

Postconviction Relief Barred by Statute of Limitations — Inapplicability of Civil Tolling Provisions in Postconviction Proceeding: Placzkiewicz pleaded guilty in 1992 to felony arson and was sentenced to 20 years in prison with 15 suspended. Following release to begin serving the suspended sentence, Placzkiewicz had four revocation hearings for various probation violations,

until the remaining term was 10 years with no time suspended. Placzkiewicz later requested to file a petition for postconviction relief to challenge the original sentence, but the request was denied as time-barred. Placzkiewicz appealed, contending that the statute of limitations should be tolled pursuant to this section to include months of incarceration, plus the 5-year limitations period in 46-21-102 (reduced to 1 year in 1997). The Supreme Court noted that the statutory time bar may be waived when there is a clear miscarriage of justice and the petitioner provides newly discovered evidence that demonstrates actual innocence, but Placzkiewicz failed to satisfy the exception. Placzkiewicz's argument that the civil tolling provisions in this section should apply also failed because that section does not apply to postconviction proceedings, despite the fact that such proceedings are civil in nature. Rather, the Legislature has provided a specific statute of limitations in 46-21-102 for postconviction proceedings, and that specific provision controls over other statutes of limitations. The District Court's ruling that the petition was time-barred was affirmed. St. v. Placzkiewicz, 2001 MT 254, 307 M 189, 36 P3d 934 (2001).

Statute of Limitations on Tort Claim Against Decedent's Estate: Campbell brought a claim against Allen's estate in connection with injuries allegedly sustained while a prisoner in the state prison, alleging that the injuries occurred as a result of negligent supervision by Allen, who was a prison guard at the time of injury. The ordinary statute of limitations on Campbell's tort claim would be 3 years under 27-2-204; however, because no action was commenced during that time, the claim would be barred. This section would normally extend the limit to 5 years because Campbell was imprisoned. However, 72-3-801 requires that a claim against a decedent's estate must be filed within 4 months from the date of the first publication of notice to creditors, which constitutes a special statute of limitations as to decedents, and there is no extension provided by law even for persons who are incarcerated or are otherwise under a statutory disability. Therefore, the District Court properly held that Campbell's claim was time-barred under 72-3-801 even if the general tort claim statute of limitations under Title 27, ch. 2, part 2, had not run. In re Estate of Allen, 255 M 469, 843 P2d 781, 49 St. Rep. 1071 (1992).

Applicable Statutes of Limitations Not Affected by Statute of Repose Applicable to Real Property Improvements: The plaintiffs, a condominium owners' association and its individual members, sued Big Sky of Montana Realty, Inc., the successor in interest of Big Sky of Montana, Inc., for breach of warranty, strict liability, negligence, fraud, and deceptive practices in connection with a fire in the Deer Lodge Condominiums at Big Sky. The defendants claimed that the actions were barred by the statute of limitations applicable to each individual cause of action. Plaintiffs claimed that the applicable statute of limitations in 27-2-208 allows a 10-year period following completion of real property improvements in which to bring an action. The Supreme Court held that 27-2-208 was a statute of repose and should be interpreted not to extend the statute of limitations otherwise applicable to a cause of action. The statute only provides that if the time for bringing an action was otherwise extended by law under 27-2-409 or this section, the extension could be for no longer than 10 years after completion of the improvement. The District Court therefore properly held that the action was barred by the statutes of limitations. Ass'n of Unit Owners of Deer Lodge Condominium v. Big Sky of Mont., Inc., 245 M 64, 798 P2d 1018, 47 St. Rep. 1814 (1990), followed in Carl v. Chilcote, 255 M 526, 844 P2d 79, 49 St. Rep. 1109 (1992).

Issue of Material Facts as to Plaintiff's Mental Illness — Tolling of Statute of Limitations: Nearly 8 years after the plaintiff was discharged from his employment, his guardian ad litem filed a complaint against his former employer alleging wrongful discharge and claiming that the 3-year statute of limitation was tolled due to the plaintiff's mental illness. Upon the employer's motion for summary judgment, the trial court dismissed the complaint as untimely filed. In response to the employer's contention that the plaintiff's pursuit of other benefit claims demonstrates an absence of mental illness, the Supreme Court held that that is an issue to be decided at trial, not on a motion for summary judgment, because it is not an issue that is susceptible to resolution based on written affidavits without the benefit of cross-examination in court. Therefore, the matter was remanded because there is a material issue of fact concerning the plaintiff's mental condition that precludes summary judgment. Bestwina v. Village Bank, 235 M 329, 767 P2d 338, 46 St. Rep. 27 (1989).

One-Year Extension Allowed For Attainment of Majority: Plaintiff whose ordinary period of limitations would have run completely and expired while under the disability of minority was allowed an additional 1-year period beyond attainment of the age of majority in which to file a claim. (Decision based on statute prior to 1987 amendment.) Livingstone v. Livingstone, 232 M 446, 756 P2d 1172, 45 St. Rep. 1184 (1988).

Period of Repose Different in Each Subsection: Appellant was a minor and was seriously mentally ill at time of alleged tortious conduct against her. She continues to be seriously mentally ill. The District Court construed subsection (1) of this section as providing for a

maximum repose of the statute of limitations (27-2-204) of 5 years, and it found subsection (4) of this section, which purports to provide repose until all disabilities are removed, to be inconsistent and ineffective. The Supreme Court held that the 5-year period of repose applies only to plaintiffs with a single disability under subsection (1) and that subsection (4) is effective and provides a different period for plaintiffs suffering from multiple disabilities. Murphy v. St., 229 M 342, 748 P2d 907, 44 St. Rep. 2030 (1987). On remand, the state was granted partial summary judgment on the grounds that sovereign immunity barred recovery for any state actions before July 1, 1973. Murphy v. St., 248 M 82, 809 P2d 16, 48 St. Rep. 335 (1991).

Minors — Tolled Period: Petitioner was injured by an accidental discharge from an allegedly defective revolver designed and manufactured by respondent. At the time of the injury, petitioner was 15 years 2 months of age and about 2 years 10 months under the age of majority. He filed suit 2 years 3 months after attaining majority, and the applicable Statute of Limitations provided for a 3-year period within which to bring an action. This section's provision that if a person entitled to bring an action is a minor at the time the cause of action accrues, the time of such disability is not a part of the time limit for commencing the action means that petitioner had the full 3-year limitation period in which to file suit after attaining majority. The intent of this section is to preserve rights of action that accrue during a disability. The law favors a right of action over a right of limitation, and a statute which tolls a Statute of Limitation will be liberally construed in order to accomplish that purpose. Smith v. Sturm, Ruger & Co., Inc., 198 M 47, 643 P2d 576, 39 St. Rep. 756 (1982).

Statute of Limitations Tolled for Minor Plaintiff: Where appellants brought suit against the respondent to establish paternity and for financial support, the District Court improperly held that 40-6-108(3) revived a claim previously barred by a Statute of Limitations. The claim of the appellants was never barred, as any Statute of Limitations was tolled during the time that the plaintiff child was a minor. Sutherland v. Hurin, 185 M 544, 605 P2d 1133 (1980).

Insanity Tolling Statute: Where plaintiff was insane for approximately 5 months following personal injuries, statute did not begin to run until he recovered his sanity and action was timely filed when commenced within statutory period after that date. State ex rel. Hi-Ball Contractors, Inc. v. District Court, 154 M 99, 460 P2d 751 (1969).

Law Review Articles

Montana Supreme Court Survey, Crnich, 44 Mont. L. Rev. 305, 315 (1983).

Collateral References

Limitation of Actions *key* 70 through 78.

54 C.J.S. Limitations of Actions §135, et seq.

51 Am. Jur. 2d Limitation of Actions §78, et seq.

Effect of appointment of legal representative for person under mental disability on running of state statute of limitations against such person. 111 ALR 5th 159.

Wrongful death: surviving parent's minority as tolling limitation period on suit for child's wrongful death. 54 ALR 4th 362.

Imprisonment of party to civil action as tolling statute of limitations. 77 ALR 3d 735.

Appointment of guardian for incompetent as affecting running of Statute of Limitations against ward. 86 ALR 2d 965, §§3, 4 superseded by 111 ALR 5th 159.

Time of existence of mental incompetency which will prevent or suspend running of Statute of Limitations. 41 ALR 2d 726.

Proof of unadjudged incompetency which prevents running of Statute of Limitations. 9 ALR 2d 964.

Prescription or adverse possession as against one under disability of infancy, coverture, or mental incompetency. 147 ALR 236; 43 ALR 941.

Statute providing that an insane person, minor, or other person under disability may bring suit within specified time after removal of disability as affecting right to bring action before disability removed. 109 ALR 954.

Infancy or incompetency of one on whom legal title devolves as interrupting adverse possession previously initiated. 65 ALR 975.

Tacking disabilities for purposes of the Statute of Limitations. 53 ALR 1303.

27-2-402. When defendant is out of state.

Compiler's Comments

1987 Amendment: In two places, after "state", inserted "and cannot be served with process" and made minor changes in phraseology.

Case Notes

Plaintiff Out-of-State — No Authority for Argument That Statute of Limitations Be Tolled by Delay Caused by Defendant: Plaintiff sought to apply a reverse rationale of this section in arguing that the statute of limitations be tolled for the time he was absent from the state while recovering from injuries caused by defendant's assault. He asserted that defendant should not be allowed to take advantage of the delay in filing charges when, in fact, defendant caused the delay. The Supreme Court found insufficient evidence that defendant affirmatively induced the delay and held that there was no authority supporting plaintiff's argument. Weston v. Cole, 233 M 61, 758 P2d 289, 45 St. Rep. 1292 (1988).

Known Out-of-State Address — No Tolling: When persons involved in a tort, who were residents of the state at its occurrence, subsequently moved to another state and plaintiff insurance company was aware of their address, the Statute of Limitations didn't toll due to absence from the state under this section because Montana District Courts had jurisdiction under Rule 4B(1), M.R.Civ.P., and process could be served under the long-arm statute, Rule 4D(3), M.R.Civ.P. Beedie v. Shelley, 187 M 556, 610 P2d 713 (1980).

Subject to Process: Harmer sued Antimony for attorney fees, and Antimony counterclaimed, sounding in fraud. The court concluded that Antimony knew of Harmer's relationship with Resources (a corporation contracting with Antimony), and therefore the counterclaim is barred by the 2-year Statute of Limitations, 27-2-203. Harmer's contacts with Montana were such as to subject him to the reach of Rule 4B, M.R.Civ.P., and therefore the Statute of Limitations is not tolled by 27-2-402. Harmer v. Lawrence, 37 St. Rep. 1333 (D.C. Mont. 1980) (apparently not reported in Federal Supplement).

Service Possible: Absence of alleged tortfeasor from state did not toll Statute of Limitations where it was possible to obtain service during the entire 3-year period, under Rule 4D(2)(a) initially and under Rule 4D(3) after he left the state. State ex rel. McGhee v. District Court, 162 M 31, 508 P2d 130 (1973).

Corporate Charter Suspended: This section does not toll the running of a Statute of Limitations in an action against a foreign corporation whose charter was suspended for nonpayment of taxes, since the plaintiff could have made service of process on such corporation through the Secretary of State in accordance with section 93-3007, R.C.M. 1947 (now repealed), and a personal judgment could have been entered on such service. Mont. Valley Land Co. v. Bestul, 126 M 426, 253 P2d 325 (1953).

Sufficiency of Evidence: Evidence did not sustain the contention that the running of the Statute of Limitations had been tolled, under this section, by reason of the absence from the state of the party pleading it. Cook v. MacGinniss, 72 M 280, 233 P 129 (1925).

Intermittent Absence From State: Under this section, where defendant in an action on a promissory note is out of the state at the time the cause of action accrued, the bar of the Statute of Limitations does not commence to run until after his return, and if he thereafter intermittently leaves and returns to the jurisdiction, the time of his absence must be deducted from the limitation of 8 years fixed by 27-2-202, in order to determine whether the full period has expired, i.e., defendant's presence in the state must aggregate the full statutory period to constitute a bar. Stoudt v. Hanson, 62 M 422, 205 P 253 (1922), distinguished in Bahn v. Estate of Fritz, 92 M 84, 10 P2d 1061 (1932).

Decedents' Estates:

This section applies to a cause of action against an executor or administrator. Smith v. Smith, 224 F 1 (9th Cir. 1915).

The legislative intent with respect to the Statute of Limitations is to suspend the Statute, whenever the absence of a party defendant from the state prevents the effective prosecution of a cause of action; hence, absence from the state of a debtor's personal representative, after the death of the debtor, suspends the running of limitations. Smith v. Smith, 210 F 947 (D.C. Mont. 1914).

Strict Construction Avoided: This section is not to be strictly construed so as to prevent the effective prosecution of a cause of action. Smith v. Smith, 210 F 947 (D.C. Mont. 1914).

Collateral References

Limitation of Actions *key* 84 through 94.

54 C.J.S. Limitations of Actions §§128 through 132.

51 Am. Jur. 2d Limitation of Actions §§154 through 169.

Tolling of statute of limitations during absence from state as affected by fact that party claiming benefit of limitations remained subject to service during absence or nonresidence. 55 ALR 3d 1158.

Absence of judgment debtor from state as suspending or tolling running of period of limitations as to judgment. 27 ALR 2d 839.

Provision of statute of limitations excluding period of defendant's absence from the state as applicable to a local cause of action against individual who was a nonresident when the same arose. 17 ALR 2d 502.

Provision of Statute of Limitations excluding period of absence of debtor or defendant from state as applicable to action on liability or cause of action accruing out of state. 148 ALR 732.

Nonresidence or absence of defendant from state as suspending or tolling Statute of Limitations, where relief is sought, or could have been sought, by action or proceeding in rem or quasi in rem. 119 ALR 331.

Provision suspending limitations while defendant is a nonresident or without the state as affected by nonresidence of party asserting cause of action. 83 ALR 271.

Provision in Statute of Limitations as to absence from state as applied to a nonresident individual who has an office or place of business in the state. 61 ALR 391.

Absence from state as suspending bar of Statute of Limitations as against judgment. 21 ALR 1039.

27-2-403. Actions involving aliens in time of war.

Case Notes

Defense by Aliens: While an enemy alien or ally of such enemy who is a nonresident of this country may not, under the Trading With the Enemy Act (50 U.S.C. Appendix, section 1, et seq.), institute any action in the United States after commencement of war with his country and an action by him is subject to suspension for the duration except possibly for interlocutory relief to maintain the status quo, both the law of nations and the act seem to give to him his day in court whenever he is brought within its jurisdiction for purposes of defense, and not even an "executive order" can deprive him of such right without further legislation. State ex rel. Biering v. District Court, 115 M 174, 140 P2d 583 (1943).

Resident Aliens: The rule that an enemy alien may not prosecute an action in the courts of this country does not apply to an alien enemy residing in this country. State ex rel. Gaspar v. District Court, 113 M 318, 124 P2d 1010 (1942).

Collateral References

Limitation of Actions *key* 113.

51 Am. Jur. 2d Limitation of Actions §§175, 176.

Validity and construction of war enactments in United States suspending operation of Statute of Limitations. 140 ALR 1518; 137 ALR 1440.

War as suspending running of limitations in absence of specific statutory provision to that effect. 137 ALR 1354.

27-2-404. When party dies before action commenced.

Compiler's Comments

1995 Amendment: Chapter 592 deleted (2) that read: "(2) If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof and the cause of action survives, an action may be commenced against his representatives after the expiration of that time and within 1 year after the issuing of letters testamentary or of administration. If a person against whom a cause of action exists dies without the state, the time which elapses between his death and the expiration of 1 year after the issuing within the state of letters testamentary or letters of administration is not a part of the time limited for the commencement of an action therefor against his executor or administrator"; and made minor changes in style.

Case Notes

Death of Defendant:

Where accident, in which defendant was driving, occurred November 26, 1941, and defendant died within 3 years thereof and letters of administration for his estate were issued December 13, 1944, and an action for tort against the defendant was instituted December 11, 1945, within 1 year after the issuing of letters testamentary, the action was timely under this section. (See 1995 amendment.) Kujich v. Lillie, 127 M 125, 260 P2d 383 (1953).

The Statute of Limitations does not cease to run on account of the death of the judgment debtor, except that the time between his death and the granting of letters of administration is not to be counted as part of the time within which an action on a judgment must be commenced. (See 1995 amendment.) Whiteside v. Catching, 19 M 394, 48 P 747 (1897).

Collateral References

Limitation of Actions *key* 80 through 83.

54 C.J.S. Limitations of Actions §150, et seq.

51 Am. Jur. 2d Limitation of Actions §§194 through 196.

Delay in procuring appointment of personal representative of deceased, or of person causing his death in event of latter's death, as extending period for bringing an action for death. 70 ALR 472.

Effect of the death of a judgment debtor as tolling the Statute of Limitations. 2 ALR 1706.

27-2-405. When controversy submitted to arbitration.

Collateral References

Limitation of Actions *key* 108.

54 C.J.S. Limitations of Actions §159.

51 Am. Jur. 2d Limitation of Actions §170.

27-2-406. When action stayed by injunction or other order or statutory prohibition.

Case Notes

Supersedeas Pending Appeal: Where action to renew a judgment was commenced more than 10 years after its entry, the Statute of Limitations was not tolled by this section because appeals from the judgment had been taken to the Supreme Court of the state and of the United States and supersedeas bonds had been filed on both appeals, since neither the appeals nor the supersedeas precluded an action upon the judgment for its renewal but merely prevented levy of execution thereon. St. v. Hart Refineries, 109 M 140, 92 P2d 766, 123 ALR 555 (1939).

Collateral References

Limitation of Actions *key* 111.

54 C.J.S. Limitations of Actions §153, et seq.

51 Am. Jur. 2d Limitation of Actions §171.

27-2-407. When action terminated or judgment reversed.

Case Notes

Saving Statute Inapplicable to Complaint Filed Against Party Not Originally Named in Complaint: On January 8, 1992, Williams filed a charge with the Human Rights Commission (HRC) of racial discrimination in employment against Zortman Mining, Inc. (Zortman), a wholly owned subsidiary of Pegasus Gold Corporation (Pegasus). At Zortman's request, a right-to-sue letter was issued by the HRC. On June 18, 1993, Williams filed a complaint against Pegasus in federal court, but that complaint was dismissed on November 3, 1993, because Williams had not exhausted his administrative remedies. The federal court noted that Williams was attempting to manipulate the diversity jurisdiction of the federal court by naming the foreign parent corporation, Pegasus, but not the Montana subsidiary, Zortman. Naming Zortman as a party would have defeated diversity jurisdiction under 28 U.S.C. 1332. On November 9, 1993, after the 90-day period to file following issuance of a right-to-sue letter, Williams filed a complaint in state District Court naming Zortman as the only defendant. Williams asserted that the federal filing satisfied 49-2-509(2) and that this section, which is the saving statute, gave him 1 year to refile his complaint following dismissal in federal court. However, Zortman was not named in the federal action. Because the federal action was against a different party, this section did not apply. The saving statute applies only when the new complaint and the original complaint are substantially for the same cause of action, including identity of the parties. The statute of limitations in 49-2-509 operated to bar Williams' claim against Zortman because Zortman was not a party to the first suit. As set out in Tietjen v. Heberlein, 54 M 486, 171 P 928 (1918), this section applies in cases in which an action has been commenced and, without plaintiff's fault, there is a failure to reach a determination of the merits and the statute of limitations runs during the pendency of the action. Williams v. Zortman Min., Inc., 275 M 510, 914 P2d 971, 53 St. Rep. 289 (1996), following Turner v. Aldor Co. of Nashville, Inc., 827 SW 2d 318 (Tenn. Ct. App. 1991).

Tolling of Statute of Limitations by Second Action Filed Before Dismissal of First Action — Refiled First Action Allowed if Second Action Still Pending: If a first action tolls a statute of limitations and a second (allowable) action is filed before a different forum before the first action is dismissed, the second action continues to toll the statute of limitations. If the first action is then refiled while the second action is pending, it is filed while the statute is tolled and is not barred by the statute of limitations. Webb v. T.D., 275 M 243, 912 P2d 202, 53 St. Rep. 117 (1996).

Tolling of Statute of Repose by Chiropractic Legal Panel Proceeding Filed Before Dismissal of Court Action — Filing of Second Court Action After Panel Decision Not Barred: A medical malpractice complaint filed in District Court on April 16, 1992, tolled the statute of repose pursuant to 27-2-205. On August 2, 1993, an application was timely filed with the Montana Chiropractic Legal Panel. Voluntary dismissal of the District Court complaint without prejudice on August 3, 1993, did not nullify the complaint's tolling of the statute of limitations because under 27-12-701, the filing of the Panel application also tolled the statute. The Montana Chiropractic Legal Panel Act continued to toll the statute while the application under it was pending, and because the second District Court complaint was timely filed under the Act within 30 days after the Panel's decision, the second complaint was not barred by the statute of repose. Webb v. T.D., 275 M 243, 912 P2d 202, 53 St. Rep. 117 (1996).

Statute of Limitations Tolled by Renewal Statute for One Year After Appeal: Hollister was dismissed from her job with the Rosebud County Attorney's Office in 1991 and filed a complaint in federal court the same year, alleging federal and state claims. In 1992, the United States District Court dismissed the complaint and Hollister appealed to the Ninth Circuit Court of Appeals. In 1994, the Ninth Circuit Court of Appeals affirmed, and in the same year, Hollister filed a complaint in Rosebud County District Court. The Rosebud County District Court dismissed, holding that the claims were barred by the 1-year statute of limitations under 39-2-911 and by the 3-year statute of limitations under 27-2-204. Citing Glass v. Basin & Bay St. Min. Co., 34 M 88, 85 P 746 (1906), the Supreme Court held that the word "terminated" in this section includes ultimate termination after final appellate action. For this reason, the Supreme Court held that Hollister's complaint was timely filed. Hollister v. Forsythe, 270 M 91, 889 P2d 1205, 52 St. Rep. 90 (1995).

Suit Dismissed for Failure to Follow Tort Claims Procedures — Refiling Permitted: The events upon which the plaintiff based his tort claim against the state occurred prior to the effective date of 2-9-301, which created new claim filing procedures. The plaintiff filed his claim directly in District Court after the new law became effective. The Supreme Court affirmed the dismissal of the claim on the basis that the statute applied retroactively because it was merely procedural and did not impair substantive rights. The court did point out that the plaintiff could file again under this section. Buettner v. St., 240 M 389, 784 P2d 906, 46 St. Rep. 2220 (1989).

Action Filed in Another State — Saving Statute Inapplicable: An action was filed in Utah but dismissed because it was barred by the Statute of Limitations. The action was then filed in Montana. If the original action had been filed in Montana, it would have been within Montana's Statute of Limitations but it was barred at the time it was filed in Montana. Montana's saving statute does not apply to an action which was originally filed in another state. Allen v. Greyhound Lines, Inc., 476 F. Supp. 244 (D.C. Mont. 1979).

New Action for the Same Cause: An untimely cause of action for intentional assault instituted in federal court was not "renewed" by this section to prevent the running of the Statute of Limitations against a subsequent action in state court for negligent conduct based on the same fact situation. Cassidy v. Finley, 173 M 475, 568 P2d 142 (1977).

Dismissal for Failure to File Amended Complaint: When plaintiff's complaint was dismissed for failure to file an amended complaint pursuant to an order of the court, that failure to do some act which would save a case from a dismissal is either a voluntary dismissal or a dismissal for failure to prosecute within the meaning of this section. Lehtonen v. E. I. DuPont DeNemours & Co., 389 F. Supp. 633 (D.C. Mont. 1975).

Neglect to Prosecute: Dismissal under Rule 41(e), M.R.Civ.P. (replaced with Rule 4E), for failure to have summons issued within 1 year after commencement of the action is a dismissal for neglect to prosecute within the meaning of this section, and this section does not operate to permit the commencement of a new action after expiration of the Statute of Limitations. State ex rel. Equity Supply Co. v. District Court, 159 M 34, 494 P2d 911 (1972).

Dismissal of Counterclaim: Quiet title action based on husband's fraud of wife's community property instituted as counterclaim and timely brought under Statute of Limitations but dismissed on husband's motion may be properly instituted as principal action within 1 year after involuntary dismissal. Rozan v. Rosen, 150 M 121, 431 P2d 870 (1967).

Special Statutes of Limitations: This section has no application to a cause of action for which a special limitation period is prescribed, i.e., one where the time within which suit must be brought is a condition attached to the right to sue. King v. Mayor, 71 M 309, 230 P 62 (1924).

Burden of Proof: A plaintiff who seeks to avail himself of the benefit of the provisions of this section and bring a new action for the same cause once sued upon by him but which suit was discontinued and against which the Statute of Limitations has run must show affirmatively that the discontinuance of the prior action was not voluntary on his part, the fact that it was

dismissed "without prejudice" being without significance. Tietjen v. Heberlein, 54 M 486, 171 P 928 (1918).

Scope of Section: The provision of this section applies to every case wherein there has been a failure to reach a determination of the merits without plaintiff's fault and the period of limitations becomes complete during the pendency of the action. Tietjen v. Heberlein, 54 M 486, 171 P 928 (1918).

Dismissal Without Prejudice: One who within 1 year after an action is dismissed without prejudice commences a new action brings himself within the privilege accorded by this section. Peterson v. Butte, 44 M 129, 120 P 231 (1911).

Nonsuit Judgment: Where an action is dismissed without prejudice and on the same day a new action is brought that results in a judgment of nonsuit on motion of the defendant and within 1 year from such judgment of nonsuit a third action is brought for the same cause, it is within time and a denial of the defendant's motion to dismiss the action on the ground that it is barred by any Statute of Limitations is proper. Wilson v. Norris, 43 M 454, 117 P 100 (1911).

Insufficient Complaint: The language employed in this section may perhaps be construed as a legislative recognition of the principle that an action is commenced by filing what purports to be a complaint, whether it states facts sufficient to constitute a cause of action or not. Clark v. Oreg. Short Line R.R., 38 M 177, 99 P 298 (1909).

Dismissal on Pleadings: Where, in a suit for money had and received, a judgment of dismissal on the pleadings had been affirmed on appeal, it was terminated by such affirmance in a manner other than those mentioned in this section, and a second suit on the same cause of action, brought within a year after such termination, was not barred. Glass v. Basin & Bay St. Min. Co., 34 M 88, 85 P 746 (1906).

Collateral References

Limitation of Actions *key* 130.

54 C.J.S. Limitations of Actions §§150 through 152.

51 Am. Jur. 2d Limitation of Actions §§301 through 303, 305, 314.

Applicability, as affected by change in parties, of statute permitting commencement of new action within specified time after failure of prior action not on merits. 13 ALR 3d 848.

Statute permitting new action after failure of original action commenced within period of limitation, as applicable in cases where original action failed for lack of jurisdiction. 6 ALR 3d 1043.

Character or kind of action or proceeding within operation of statute which permits new action after expiration of period of limitation, upon failure of previous action commenced within the period. 79 ALR 2d 1309; 120 ALR 376.

Statute permitting new action, after failure of original action timely commenced, as applicable where original action was filed in another state. 55 ALR 2d 1038.

Period within which new action may be commenced after nonsuit or judgment not on merits. 54 ALR 2d 1229; 83 ALR 478.

Estoppel to rely on Statute of Limitations. 24 ALR 2d 1413; 130 ALR 8.

Time covered by pendency of suit discontinued without decision on merits as included in computation of period of adverse possession. 80 ALR 439.

Defective pleading as within proviso or saving clause permitting new action after failure of previous action notwithstanding general limitation period has run. 77 ALR 495.

Amendment of pleading after limitation period by substituting new defendant, or changing allegations as to capacity in which defendant is sued or the theory upon which defendant is sought to be held responsible for another's wrong, as stating a new cause of action. 74 ALR 1280.

Amendment of pleadings after limitation has run by change in capacity in which suit is prosecuted. 74 ALR 1269.

27-2-408. Assertion of counterclaim.

Compiler's Comments

1987 Amendment: Substituted (1) and (2) (see 1987 Session Law for text) for former language that read: "Whenever a defendant in an action has interposed an answer in support of which he would be entitled to rely at the trial upon a defense or counterclaim then existing in his favor the remedy upon which, at the time of the commencement of the action, was not barred by any provision of this code and the complaint is dismissed or the action is discontinued or abates because of the plaintiff's death, the time between the commencement and the termination of the action is not a part of the time limited for the commencement of an action by the defendant to recover for the cause of action so interposed as a defense or to interpose the same defense in another action brought by the same plaintiff or a person deriving title from or under him."

Case Notes

Right to Assert Counterclaims Arising Out of Same Transaction as Foreclosure Action: Ranch Recovery Limited Liability Company (Ranch Recovery) was the assignee of the vendor's interest in real property that was subjected to a mortgage foreclosure brought by First Security Bank of Missoula (First Security). Upon the vendee's default, the District Court awarded summary judgment to First Security. Ranch Recovery moved for reconsideration and for permission to amend its counterclaim based on newly discovered evidence. The District Court denied Ranch Recovery's motion for leave to amend its answer. First Security alleged that leave to amend was properly denied because the counterclaims were barred by the applicable statute of limitations. The Supreme Court held that because Ranch Recovery's claims were counterclaims arising out of the same written contract from which First Security asserted its right to foreclose and to priority, Ranch Recovery was entitled to assert those claims notwithstanding any applicable limitation periods. First Sec. Bank of Missoula v. Ranch Recovery Ltd. Liab. Co., 1999 MT 43, 293 M 363, 976 P2d 956, 56 St. Rep. 188 (1999).

Counterclaims Entered After Judgment Not Barred by Estoppel: A judgment can bar counterclaims in existence at the time the judgment was entered, but it cannot bar claims that arose after its entry. Nimmick v. Hart, 248 M 1, 808 P2d 481, 48 St. Rep. 293 (1991).

Collateral References

Limitation of Actions *key* 129.

54 C.J.S. Limitations of Actions §263.

51 Am. Jur. 2d Limitation of Actions §78.

Setoffs, counterclaims, and the like as within operation of statute permitting new action after limitation period, upon failure of timely action. 79 ALR 2d 1335.

Claim barred by limitations as subject of setoff, counterclaim, recoupment, or cross bill. 1 ALR 2d 630.

Pleading or attempting to prove by way of setoff, counterclaim, or recoupment, related claim barred by Statute of Limitations, as waiver of defendant's plea of limitation against plaintiff's claim. 137 ALR 324.

Commencement of action as suspending running of limitations against claim which is subject of setoff, counterclaim, or recoupment. 127 ALR 909.

Setoff between judgments as applicable to outlawed judgment. 121 ALR 513.

27-2-409. Acknowledgment of debt or part payment.

Compiler's Comments

1987 Amendment: Substituted (1) through (3) (see 1987 Session Law for text) for former language that read: "No acknowledgment or promise is evidence of a new or continuing contract sufficient to cause the relevant statute of limitations to begin running anew unless the same is contained in some writing signed by the party to be charged thereby. However, this section does not alter the effect of any payment of principal or interest, which payment is equivalent to a new promise in writing, duly signed, to pay the residue of the debt."

Case Notes

Stipulation Acknowledging Child Support Arrearages — Tolling of Statute of Limitations: Jody and Stephen were divorced in 1979, and Stephen was ordered to pay child support. Jody brought a URESA action in 1982 to collect arrearages, and the parties stipulated to the amount of those arrearages. The District Court entered an order providing that the stipulation was enforceable by contempt. In 1992, Jody moved to enforce the 1982 stipulation and order. Stephen claimed that collection of certain arrearages was barred by the statute of limitations. Citing Marriage of Hooper & Crittendon, 247 M 322, 806 P2d 541 (1991), the Supreme Court held that the 10-year statute of limitations in 27-2-201 applied to each required payment as if it were a separate judgment, and therefore any payment accruing prior to 10 years before the 1992 motion for enforcement was barred. However, citing Dodd v. Simon, 113 M 536, 129 P2d 224 (1942), the Supreme Court also held that the statute of limitations was tolled by the 1982 stipulation acknowledging the unsatisfied judgments existing prior to the stipulation. Therefore, none of the arrearages were barred. In re Marriage of Brown, 263 M 184, 867 P2d 381, 51 St. Rep. 7 (1994).

Applicable Statutes of Limitations Not Affected by Statute of Repose Applicable to Real Property Improvements: The plaintiffs, a condominium owners' association and its individual members, sued Big Sky of Montana Realty, Inc., the successor in interest of Big Sky of Montana, Inc., for breach of warranty, strict liability, negligence, fraud, and deceptive practices in connection with a fire in the Deer Lodge Condominiums at Big Sky. The defendants claimed that the actions were barred by the statute of limitations applicable to each individual cause of action.

Plaintiffs claimed that the applicable statute of limitations in 27-2-208 allows a 10-year period following completion of real property improvements in which to bring an action. The Supreme Court held that 27-2-208 was a statute of repose and should be interpreted not to extend the statute of limitations otherwise applicable to a cause of action. The statute only provides that if the time for bringing an action was otherwise extended by law under 27-2-401 or this section, the extension could be for no longer than 10 years after completion of the improvement. The District Court therefore properly held that the action was barred by the statutes of limitations. Ass'n of Unit Owners of Deer Lodge Condominium v. Big Sky of Mont., Inc., 245 M 64, 798 P2d 1018, 47 St. Rep. 1814 (1990), followed in Carl v. Chilcote, 255 M 526, 844 P2d 79, 49 St. Rep. 1109 (1992).

Involuntary Payment Not Acknowledgment of Debt — Suspending Statute of Limitations: In 1965, loans made by Worden Trading Company to defendant Trenka were consolidated into two promissory notes. In addition, two other loans were made by means of promissory notes. No payments were made on the notes. In 1970, Trenka attempted to remove some items from his safe deposit box in Farmers State Bank but was prevented from doing so by Richard Hansen, president of the bank and of the Worden Trading Company. Hansen would not release the contents of the box until payment was made on the notes. Trenka's girlfriend wrote two checks to Worden Trading Company in order to obtain the contents of the box. Hansen claimed that he was substituting one form of collateral for another and that the payments were an acknowledgment of the debts. To be a valid acknowledgment of a debt and suspend the running of the Statute of Limitations, payments must be voluntary. The payments here were involuntary because neither Hansen nor Worden Trading Company had a valid security interest in the safe deposit box and the Statute of Limitations ran. Worden Trading Co. v. Trenka, 184 M 256, 602 P2d 601 (1979).

Partial Payment:

Where plaintiff rented building from defendant with understanding that rent was to be applied on several notes made by defendant which plaintiff held, in absence of specific directions by defendant as to application of rent to the various notes, plaintiff could apply rent as he saw fit to interrupt running of Statute of Limitations as to all of the notes. Mercer v. Mercer, 120 M 132, 180 P2d 248 (1947).

The rendering of service, transfer of property or goods, or assumption of obligations taken as part payment of principal or interest is sufficient to toll Statute of Limitations on note. Mercer v. Mercer, 120 M 132, 180 P2d 248 (1947).

In order for payment of principal or interest due on note to toll Statute of Limitations, it must be voluntary and the indebtedness clearly identified so as to warrant inference that debtor had acknowledged existence of liability in his obligation to pay remainder of debt. Mercer v. Mercer, 120 M 132, 180 P2d 248 (1947).

A payment of principal or interest extends time for commencement of action on note from date of last payment. Mercer v. Mercer, 120 M 132, 180 P2d 248 (1947).

Where plaintiff relies on a payment to toll the running of the Statute of Limitations in an action on a promissory note, the mere endorsement of a payment on the instrument by the holder or his agent does not raise a presumption that such payment was made by the makers or either of them; plaintiff to make out a prima facie case must show actual payment made by or for the makers with their knowledge and consent. Nathan v. Jenkins, 113 M 46, 123 P2d 975 (1942).

Partial payment by a joint maker of a note, without the assent or ratification of his comaker, does not suspend the operation of the statute as to the comakers. Nathan v. Jenkins, 113 M 46, 123 P2d 975 (1942); Oleson v. Wilson, 20 M 544, 52 P 372 (1898); First Nat'l Bank v. Bullard, 20 M 118, 49 P 658 (1897).

Part payment renews a note. Parchen v. Chessman, 49 M 326, 142 P 631 (1914).

One joint debtor cannot, by making part payments, suspend the running of the statute as to his joint obligors who do not authorize or ratify his act. Monidah Trust v. Kemper, 44 M 1, 118 P 811 (1911).

Agent Signing Writing: It is not necessary that the party to be charged sign writing himself to take case out of the Statute of Limitations; signing may be done by a duly authorized agent under 28-10-105; in the instant case, man's wife was held implied agent and signed letter which tolled Statute. Breese v. O'Brien, 102 M 547, 59 P2d 65 (1936).

Promise in Writing:

Letters written by a mortgagor 9 and 10 years after maturity of promissory notes secured thereby, in effect stating that the debtor was negotiating for money to make settlement as promised, that he was going to pay and that the mortgagee would be the first to receive his money, and again that he expected to be in a position to make settlement the following summer, were a sufficient acknowledgment or a new promise to interrupt the running of the bar of the Statute of Limitations. Leffek v. Luedeman, 95 M 457, 27 P2d 511, 91 ALR 286 (1933).

Letters referring to and acknowledging an entire indebtedness, with a promise to pay, will take the debt out of the Statute of Limitations. Galvin v. O'Gorman, 40 M 391, 106 P 887 (1910).

Statement of Account: Where, at the time an account was stated, the Statute of Limitations had not intervened against the items contained in the original account, the statement created a new cause of action against which the Statute commenced to run only from the date of its rendition. O'Hanlon Co. v. Jess, 58 M 415, 193 P 65, 14 ALR 237 (1920).

Collateral References

Limitation of Actions *key* 139 through 164.

54 C.J.S. Limitations of Actions §305, et seq.

51 Am. Jur. 2d Limitation of Actions §§319 through 324.

Payment by one of two or more joint or joint and several debtors as suspending or tolling limitation. 74 ALR 2d 1287.

Acknowledgment or new promise as affecting running of limitations on account stated. 51 ALR 2d 362.

Acknowledgment or promise to pay judgment as affecting running of Statute of Limitations. 45 ALR 2d 967.

Entry or endorsement by creditor on note, bond, or other obligation as evidence of part payment which will toll the Statute of Limitations. 23 ALR 2d 1331.

Mortgagee's possession before foreclosure, right of redemption as barred by, where mortgagee acknowledges mortgagor's rights. 7 ALR 2d 1142.

Time as of which postdated check deemed payment or acknowledgment of original obligation for purposes of Statute of Limitations in action on original obligation. 150 ALR 858.

Limitation of actions; acknowledgment, new promise, or payments by grantee of mortgaged premises. 142 ALR 615; 18 ALR 1027.

Statutory requirement that new promise or acknowledgment must be in writing in order to toll Statute of Limitations, as applicable where new promise or acknowledgment is supported by a contemporaneous consideration. 135 ALR 433.

Promise to pay part of obligation if another, or others, would pay part, as tolling Statute of Limitations. 133 ALR 974.

Promise by holder of obligation to extend time for payment or not to press for payment as tolling Statute of Limitations. 120 ALR 765.

To whom must acknowledgment, new promise, or payments be made in order to toll Statute of Limitations after creditor's death. 117 ALR 224.

Necessity and sufficiency of reply, setting up acknowledgment or new promise, to answer pleading Statute of Limitations. 115 ALR 767.

Payment, acknowledgment, or new promise by mortgagor as tolling Statute of Limitations as against grantee of mortgaged premises. 101 ALR 337.

Part payment or acknowledgment of indebtedness on bond or note as tolling Statute of Limitations on mortgage securing same. 41 ALR 822.

New promise as suspending or removing bar of Statute of Limitations as against judgment. 21 ALR 1059.

Part 5
Conflict of Laws

Part Commission Notes

Commissioners' Prefatory Note

Traditionally, statutes of limitations have been characterized as "procedural" laws, for conflict of laws purposes, so that the limitation periods prescribed by the forum state's laws were applied. This result was reached despite its substantive effect of determining which party won the lawsuit. Forum shopping by delay-prone plaintiffs, or by their attorneys, with suits filed in states with long limitation periods, inevitably occurred.

One consequence was that the courts developed some rather inexact "exceptions" to the "general rule." These included one that treated as "substantive" any limitation period that was "built into" the very statute, such as a wrongful death act, that created the cause of action sued on; another called the "specificity test" that treated a limitations statute as "substantive" if it was directed specifically to the sort of claim sued on; and possibly others less commonly employed. See Grossman, Statutes of Limitations and the Conflict of Laws: Modern Analysis, 1980 Ariz. St. L.J. 1.

Another consequence was that about three-fourths of the state enacted so-called "borrowing statutes" which followed no regular pattern but required application of a limitation period other

than the form state's if some stated aspect of the cause of action occurred in or was connected with another state. These borrowing statutes are often difficult to interpret and apply. They have been the source of considerable judicial confusion.

In 1957 the Conference promulgated a Uniform Statute of Limitations on Foreign Claims Act which was designed to replace these variant borrowing acts. It achieved no general adoption, and was officially withdrawn in 1978. The major difficulty with it was its abrupt harshness. It cut all sorts of Gordian knots by providing simply that the governing law, as between that of the forum and of the state "where the claim accrued," should be the one that prescribed the shorter period—"whichever bars the claim." That turned out to be not acceptable. The present committee was set up to draft a different "limitations borrowing statute." The consensus was that limitations laws should be deemed substantive in character, like other laws that affect the existence of the cause of action asserted.

Part Compiler's Comments

Source: This part is based on the Uniform Conflict of Laws—Limitations Act promulgated by the National Conference of Commissioners on Uniform State Laws in 1982. See 12 U.L.A. The Act has been enacted in Arkansas, Colorado, North Dakota, Oregon, and Washington.

Severability: Section 9, Ch. 293, L. 1991, was a severability clause.

27-2-501. Short title.

Compiler's Comments

Source: Section 7, Uniform Conflict of Laws—Limitations Act, 12 U.L.A.

27-2-502. Definitions.

Commission Notes

Under the definition of "state," the United States, though included in similar definitions in other uniform acts, is not included here because federal law will control federal limitations problems.

Under the definition of "State," claims based upon the law of governmental units within a State are included within the coverage of the Act.

Compiler's Comments

Source: Section 1, Uniform Conflict of Laws—Limitations Act, 12 U.L.A.

27-2-503. Conflict of laws — limitation periods.

Commission Notes

This section treats limitation periods as substantive, to be governed by the limitations law of a state whose law governs other substantive issues inherent in the claim. This is true whether the limitation period of the substantively governing law is longer or shorter than that of the forum's law.

The current judicial trend is in this direction. Cases illustrating this approach include Heavner v. Uniroyal, Inc., 63 N.J. 130, 305 A.2d 412 (1973); Air Products & Chemicals, Inc. v. Fairbanks Morse, Inc., 58 Wis.2d 193, 206 N.W.2d 414 (1973); and Henry v. Richardson-Merrell, Inc., 508 F.2d 28 (3d Cir. 1975). In none of these cases did the forum court seem to be averse to applying the other-state substantive law merely because the consequence would be to apply the other-state limitation period also.

This act [This part] does not lay down general conflict of laws rules to govern an adopting state's choice of law. Each enacting state will have its own choice-of-law law, its own conflict of laws law, as each state does now. The current conflict of laws trend is away from older mechanical choice-of-law rules and toward more modern approaches combining most significant relationships, governmental interest analysis, and choice-influencing considerations. It is possible that this combination of modern approaches will gain general acceptance. This act [This part], however, does not rely upon that development. It provides that the enacting state, as forum, will apply its own conflicts law, whatever it may be, to select the substantive law that governs the litigated claim. If different issues involved in a single claim are found to be governed by the substantive laws of different states, the governing limitations law will be that of the one of those two or more states chosen by the conflicts law of the forum, or enacting, state. Thus the forum state's own conflicts law will always choose the limitations law that is substantively governing.

The term "limitation period" refers only to the commencement of an action and does not refer to requirements for giving notice of claims (e.g., to a unit of government or the executor an an estate) as a condition to bringing an action.

Compiler's Comments

Source: Section 2, Uniform Conflict of Laws—Limitations Act, 12 U.L.A.

27-2-504. Rules applicable to computation of limitation period.

Commission Notes

The phrase "governing conflict of laws" applies to both "statutes" and "rules of law."

This section treats all tolling and accrual provisions as substantive parts of the limitations law of any state whose law may be held applicable. They are part of that state's law as that state would apply it. The limitation period of another state, however, does not include its rules as to when an action is commenced. These rules are part of the procedural law of each forum state.

The final clause in Section 3 [this section] constitutes the standard means of avoiding renvoi problems.

It should be noted that Section 3 [this section] could conceivably give rise to application of the "unfairness" exception in Section 4 [27-2-505], for example, if a state tolls the running of its limitation period because of a defendant's physical absence from the state even though he is at all times subject to service under a longarm statute. Tolling under such circumstances is unfair, and should be eliminated. Reliance upon the Section 4 [27-2-505] exception seems preferable, however, to complete disregard of tolling provisions. Most of them, like accrual provisions which determine when a cause of action comes into existence, are reasonable and not outmoded.

Compiler's Comments

Source: Section 3, Uniform Conflict of Laws—Limitations Act, 12 U.L.A.

27-2-505. Unfairness.

Commission Notes

This section provides and "escape clause" that will enable a court, in extreme cases, to do openly what has sometimes been done by indirection, to avoid injustice in particular cases. The "strong public policy" of a forum state can be effectuated. The section should rarely be employed, but will be useful if harsh results should in any case ensue from rigid application of the preceding sections. One illustrative possibility is note in the Comment following Section 3 [27-2-504], above.

Litigants will not often be able to take advantage of the "escape clause." It is not enough that the forum state's limitation period is different from that of the state whose substantive law is governing; the difference must be "substantial," and the "fair opportunity" provision constitutes a separate and additional requirement. An "escape clause" is needed, but it is not designed to afford an "easy escape".

Compiler's Comments

Source: Section 4, Uniform Conflict of Laws—Limitations Act, 12 U.L.A.

27-2-506. Existing and future claims.

Commission Notes

This section is designed to avoid any unfairness that might occur because of reliance on prior conflicts law.

Compiler's Comments

Source: Section 5, Uniform Conflict of Laws—Limitations Act, 12 U.L.A.

27-2-507. Uniformity of application and construction.

Compiler's Comments

Source: Section 6, Uniform Conflict of Laws—Limitations Act, 12 U.L.A.

CHAPTER 5
UNIFORM ARBITRATION ACT

Chapter Commission Notes

Commissioners' Prefatory Note

This Act covers voluntary written agreements to arbitrate. Its purpose is to validate arbitration agreements, make the arbitration process effective, provide necessary safeguards, and provide an efficient procedure when judicial assistance is necessary.

The Conference of Commissioners on Uniform State Laws promulgated a uniform arbitration act in the early 20's. It was adopted in a few states. It proved unsatisfactory and was later withdrawn by the Conference. With the growing interest in a number of states in enacting a modern arbitration statute, the Conference renewed its interest in the subject and approximately five years ago, appointed a committee to prepare a draft act for consideration by the Conference.

The committee so appointed presented its first draft at the Conference of Commissioners in 1954. After revision, it was again presented to and adopted by the Conference on August 20, 1955.

In general, this act follows the pattern of the arbitration statutes of New York and of some fifteen other states. It validates written agreements to arbitrate disputes whether arising subsequent to the agreement or existing at the time it was made. It covers labor-management agreements to arbitrate unless the agreement otherwise provides. In view of the fact that some states, such as New York, extend the coverage of their act without exception, the clause at the end of the last sentence of Section 1 was bracketed.

The act provides that the motion procedure of the state shall be used when orders are desired to enforce the agreement to arbitrate, or for confirming, vacating or modifying an award, or for other purposes designated in the act. An award, once confirmed, may be reduced to judgment which is enforceable as is any other judgment.

Many of the provisions, are designed to meet problems not anticipated by the parties when the agreement was made and for which no provision exists in the agreement. Many of the sections are subject to the terms upon which the parties have agreed.

The grounds specified for confirming, vacating or modifying an award are for the most part the traditional ones recognized by statutes of many states. A provision not generally found permits arbitrators to correct minor errors in their award or to clarify the award when needed.

The section on Appeals is intended to remove doubts as to what orders are appealable and to limit appeals prior to judgment to those instances where the element of finality is present.

Chapter Compiler's Comments

Source: This chapter is based on the Uniform Arbitration Act promulgated by the National Conference of Commissioners on Uniform State Laws in 1985. See 7 U.L.A. 1. The act has been enacted in Alaska, Arizona, Arkansas, Colorado, Delaware, District of Columbia, Idaho, Illinois, Indiana, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Mexico, North Carolina, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, and Wyoming.

Applicability: Section 26, Ch. 684, L. 1985, provided: "Application not retroactive. This act applies only to agreements made subsequent to October 1, 1985."

Severability: Section 27, Ch. 684, L. 1985, was a severability section.

Chapter Case Notes

DECISIONS UNDER UNIFORM ARBITRATION ACT

Investment Agreement Containing Arbitration Clause Considered Contract of Adhesion — Remand for Consideration of Investor's Reasonable Expectations and Potential Contract Formation Defenses: Zigrang entered an investment agreement with defendant investment company. The agreement contained an arbitration provision. When Zigrang learned that defendant frequently traded securities in Zigrang's account without permission, Zigrang filed a complaint, which was one of 23 suits filed by investors alleging defendant's mismanagement of accounts. Defendant moved to compel arbitration pursuant to the agreement. A panel of three judges sat en banc to hear evidence common to all 23 cases. Defendant's motion to compel arbitration was denied, but the order contained common findings of fact that did not apply to Zigrang, including a mischaracterization of Zigrang's investment agreement. Defendant appealed. The Supreme Court noted that the agreement constituted a contract of adhesion that supported other contract formation defenses, but did not in itself constitute a sufficient basis for invalidating the agreement. The Supreme Court was unable to completely examine Zigrang's contract formation defenses, including unconscionability, waiver, and reasonable expectations, because the District Court's order relied on the mistaken finding of fact. Thus, the court remanded for further findings of fact related to Zigrang's investment agreement, noting that an inquiry into Zigrang's expectations should consist only of an analysis of Zigrang's objectively reasonable expectations regarding the agreement from Zigrang's perspective and that Zigrang's expectations might negate the arbitration provisions. Zigrang v. U.S. Bancorp Piper Jaffray, Inc., 2005 MT 282, 329 M 239, 123 P3d 237 (2005). See also Iwen v. U.S. W. Direct, 1999 MT 63,

293 M 512, 977 P2d 989 (1999), and Kloss v. Edward D. Jones & Co., 2002 MT 129, 310 M 123, 54 P3d 1 (2002).

Predispute Arbitration Provisions Unenforceable — Motion to Compel Arbitration Properly Denied: Plaintiff opened several Piper Automatic Transfer Accounts and later brought an action alleging defendants' mismanagement of the accounts. Defendants sought to compel arbitration based on predispute arbitration clauses in the account agreements requiring that any dispute be resolved by arbitration. The motion to compel arbitration was denied, and defendants appealed. The Supreme Court held that because the agreements granted defendants' brokers the discretion to buy and sell securities, a fiduciary duty was created that defendants breached by failing to explain the consequences of the arbitration provision prior to formation of the contract. The predispute arbitration provisions were therefore unenforceable, and denial of the motion to compel arbitration was affirmed. Willems v. U.S. Bancorp Piper Jaffray, Inc., 2005 MT 37, 326 M 103, 107 P3d 465 (2005), following Kloss v. Edward D. Jones & Co., 2002 MT 129, 310 M 123, 54 P3d 1 (2002). See also Chor v. Piper, Jaffray & Hopwood, 261 M 143, 862 P2d 26 (1993).

No Showing of Acts Inconsistent With Right to Arbitrate — Finding of No Waiver of Arbitration Affirmed: A construction contract between the parties contained an arbitration clause. When plaintiff ceased making payments, defendant proposed attempting nonbinding mediation prior to binding arbitration. Mediation failed, so defendant filed a construction lien and sought arbitration. However, before arbitration occurred, plaintiff filed a breach of contract and slander of title action arising out of allegedly defective construction. Defendant then moved to compel arbitration, and the motion was granted. Plaintiff contended that defendant's actions constituted an implied waiver of arbitration, but the District Court found that defendant had not waived arbitration, so plaintiff appealed. The Supreme Court affirmed. A party asserting waiver bears a heavy burden and must show: (1) knowledge of the existing right to compel arbitration; (2) acts inconsistent with the right to arbitrate; and (3) prejudice to the party resisting arbitration. Here, defendant's counsel's letter proposing mediation was clear that if mediation failed, defendant would enforce arbitration, and the filing of the lien was not to advance litigation, but rather to protect defendant's security interests in the property. Any prejudice to plaintiff from the lien filing would have occurred whether the parties arbitrated or litigated. Therefore, defendant did not engage in acts inconsistent with the right to arbitrate, and the District Court correctly found that defendant did not waive the right to arbitration. Stewart v. Covill & Basham Constr., LLC, 2003 MT 220, 317 M 153, 75 P3d 1276 (2003). See also Downey v. Christensen, 251 M 386, 825 P2d 557 (1992), and Holm-Sutherland Co., Inc. v. Shelby, 1999 MT 150, 295 M 65, 982 P2d 1053 (1999).

Security Brokerage Contracts — Contract of Adhesion Rendering Arbitration Clause Unenforceable: Kloss opened a full-service brokerage account with defendant, which permitted Kloss to purchase securities and maintain a money market account and which included a living trust account. The account did well, and Kloss decided to set up a charitable trust with the bond proceeds. The initial account and the living trust agreement contained a mandatory arbitration clause, and the charitable trust incorporated the arbitration clause by reference. Kloss then had second thoughts about the charitable trust and petitioned to revoke it. Defendant moved to compel arbitration, and the District Court granted the motion, citing Chor v. Piper, Jaffray & Hopwood, 261 M 143, 862 P2d 26 (1993), and Iwen v. U.S. W. Direct, 1999 MT 63, 293 M 512, 977 P2d 989 (1999), for the holding that defendant had no obligation to explain the terms of the contract because it was within Kloss's reasonable expectations and that even if the contract was considered a contract of adhesion, it was not unenforceable because it was not unconscionable. Kloss appealed, arguing that the arbitration clause was part of a contract of adhesion and that waiver of the constitutional right to jury trial should not be presumed from the signing of a contract of adhesion. Defendant maintained that form contracts prepared by securities brokers are not contracts of adhesion dictated by one party to another who has no voice in its formulation, and that arbitration clauses contained in the contracts are not unconscionable. The Supreme Court examined Passage v. Prudential-Bache Sec., Inc., 223 M 60, 727 P2d 1298 (1986), for an explanation of contracts of adhesion in the securities context and the circumstances under which they are unenforceable. The court distinguished both Chor and Passage, finding that the contracts in this case were clearly contracts of adhesion because they were standardized forms containing terms that Kloss had no opportunity to negotiate if wishing to invest with defendant. Further, the arbitration clause by which Kloss waived the right to access to state courts, the right to jury trial, the right to reasonable discovery, the right to findings of fact based on the evidence, and the right to enforce the law by way of appeal was clearly not within Kloss's reasonable expectations. The arbitration clause was never explained by defendant, and Kloss was not aware of the arbitration provision in the contract. Thus, the District Court committed

reversible error when it concluded that the arbitration clause was enforceable. Kloss v. Edward D. Jones & Co., 2002 MT 129, 310 M 123, 54 P3d 1 (2002).

Failure of Employer to Respond to Arbitration Request — Waiver of Right to Arbitrate: The employment agreement between Firestone and Oasis Telecommunications, Data and Records, Inc. (Oasis), contained a dispute resolution clause providing that if a disagreement arose, the parties would negotiate in good faith, and that if they did not reach a solution within 30 days of the first written notice, then upon a 30-day notice by either party, the issue would be submitted to arbitration. Oasis terminated Firestone's employment on May 8, 2000. On May 18, Firestone requested arbitration. On June 7, Firestone submitted a list of potential arbitrators to Oasis for consideration, and requested a response within 10 days. Oasis never responded until August 11, after Firestone had filed federal suit against Oasis on July 7 (which was dismissed for lack of subject matter jurisdiction), and had filed virtually the same suit in state court on August 1, alleging Oasis's breach of the employment contract and the implied covenant of good faith and fair dealing. Oasis moved to compel arbitration on August 25, but the District Court denied the motion, so Oasis appealed. The Supreme Court affirmed. When the District Court denied Oasis's request to compel arbitration, the court impliedly found that Oasis's failure to respond constituted waiver of its right to arbitrate the dispute. The Supreme Court applied the factors in Downey v. Christensen, 251 M 386, 825 P2d 557 (1992), in deciding whether a waiver occurred. The factors require the party asserting waiver to demonstrate: (1) knowledge of the existing right to compel arbitration; (2) acts inconsistent with the right to arbitrate the dispute; and (3) prejudice to the party resisting arbitration. The existence of the first factor was undisputed because Oasis did not dispute knowledge of the right to arbitrate. Regarding the second factor, the May 18 notice commenced the 30-day period prescribed by the employment agreement, but Oasis did not deliver a response until well after the expiration of the 30-day period, and that indifference to Firestone's request constituted an act inconsistent with the right to arbitrate the dispute. Regarding the third factor, when Oasis failed to respond to the arbitration request, Firestone had no alternative other than to commence District Court proceedings, was subjected to unnecessary delay, and incurred court costs and fees that could otherwise have been avoided, so Firestone was prejudiced by Oasis's inaction. Therefore, the Downey factors were met, and Oasis's failure to respond to a request for arbitration within the period set out in the employment contract constituted waiver of the right to compel arbitration. Firestone v. Oasis Telecommunications, Data & Records, Inc., 2001 MT 297, 307 M 469, 38 P3d 796 (2001). See also Holm-Sutherland Co., Inc. v. Shelby, 1999 MT 150, 295 M 65, 982 P2d 1053 (1999).

Commencement of Litigation, Delay in Asserting Right to Arbitrate, and Other Acts Held Implied Waiver of Right to Arbitrate: Holm-Sutherland contracted with the town of Shelby to construct sewer and water improvements. When a dispute arose, Holm-Sutherland at first demanded arbitration, but Shelby sued to enjoin arbitration on the grounds that the arbitration clause in the contract did not comply with the then-existing statutory notice requirements. Holm-Sutherland agreed to the injunction. The statutory notice requirements were subsequently held by the U.S. Supreme Court in Doctor's Associates, Inc., v. Casarotto, 517 US 681 (1996), to have been preempted by the Federal Arbitration Act. In the meantime, Holm-Sutherland filed a civil action for damages against Shelby and its engineering firm, seeking damages for breach of contract but not seeking arbitration. Approximately 20 months after the Casarotto decision and less than 10 weeks prior to trial, Holm-Sutherland again demanded arbitration and Shelby responded that by demanding a jury trial in the city's action for damages, Holm-Sutherland had expressly waived its right to arbitration. Arbitration was ordered by the District Court. The Montana Supreme Court held that here had been no express waiver by Holm-Sutherland of its right to arbitrate. However, relying upon its opinions in Thiel v. Johnson, 219 M 271, 711 P2d 829 (1985), and Downey v. Christensen, 251 M 386, 825 P2d 557 (1992), the Supreme Court held that Holm-Sutherland's cumulative actions were so inconsistent with its initial demand for arbitration that the company had impliedly waived its contractual right to arbitration. These inconsistent actions included a demand for a jury trial in response to Shelby's action to enjoin arbitration, initiation of an action for damages against Shelby in which no demand for arbitration was made, and its much delayed demand for arbitration made 20 months after the Casarotto decision by the U.S. Supreme Court. The Montana Supreme Court found that Shelby had been prejudiced by the actions of Holm-Sutherland in electing to pursue a judicial remedy and consequently held those actions to constitute an implied waiver of its right to arbitration. Holm-Sutherland Co., Inc. v. Shelby, 1999 MT 150, 295 M 65, 982 P2d 1053, 56 St. Rep. 595 (1999).

Power of General Powers Town to Arbitrate Contract Held Included in Power to Contract: Holm-Sutherland contracted with the town of Shelby to construct sewer and water

improvements within the town. The contract included a provision requiring that all disputes involving the interpretation of the contract documents or breach of the contract were to be settled by arbitration. When a dispute arose, Holm-Sutherland sought arbitration. Litigation ensued, and the town argued that as a noncharter government, it had only those powers granted by the Legislature and that a municipality's council had a duty pursuant to 7-6-4301 and 7-6-4302 to determine the validity of claims and that duty could not be delegated to an arbitrator. The Supreme Court agreed with the District Court that a general powers municipality has broad powers to enter into contracts pursuant to 7-1-4124(4) and (23), that this chapter evidences a general state policy favoring arbitration, and that the powers granted a municipality establish its ability to be bound to the terms of a contract that contains a binding arbitration clause. Holm-Sutherland Co., Inc. v. Shelby, 1999 MT 150, 295 M 65, 982 P2d 1053, 56 St. Rep. 595 (1999).

Arbitration Improperly Remanded to Arbitrator for Reconsideration of Damages — Rationally Derived Arbitration Remedy to Be Upheld on Review: The District Court remanded a wrongful discharge case to the arbitrator for reconsideration of damages. The employee contended that the District Court could not enter judgment for the amended award because the case should not have been remanded and because the arbitrator did not have authority to amend the award. The employer contended that the arbitrator exceeded his powers when he made the first award and that the District Court properly gave the arbitrator authority to vacate portions of the first award pursuant to 27-5-312. However, the exceeding of power by an arbitrator is not one of the provisions in 27-5-217 pursuant to which an arbitrator may modify or correct an award. When the arbitrator granted the employer's motion to vacate portions of the original damage award, he exceeded his statutory authority. Further, the District Court was without authority to vacate or modify the award except for the statutory bases set forth in 27-5-312 and 27-5-313. If the remedy fashioned by the arbitrator is rationally derived from the arbitration agreement, it will be upheld. The Supreme Court remanded for judgment in the amount of the original arbitration award. Nelson v. Livingston Rebuild Center, Inc., 1999 MT 116, 294 M 408, 981 P2d 1185, 56 St. Rep. 486 (1999).

Valuation of Improvements — Standard of Review — All Factors Including Decision of Arbitrators to Be Reviewed De Novo by Department — Arbitration Act Inapplicable: After the Department of Natural Resources and Conservation (DNRC) awarded a lease to Hagemeister, a three-person panel of arbitrators was appointed by the DNRC to appraise the value of improvements made by the previous lessee, Winchell. Two arbitrators agreed to a value in excess of $20,000, while a third valued the improvements at $1,407.35. The DNRC then conducted its own appraisal, set aside the higher values, and established a value of $1,564 for the improvements. The Winchells appealed the valuation to the District Court pursuant to 77-6-306(4), and the District Court granted summary judgment for the DNRC. The Supreme Court affirmed, holding that: (1) the correct standard for a de novo review of the District Court's judgment is the standard applicable to the review of a case that is not a "contested" case under the Montana Administrative Procedure Act, the standard applicable in this case being whether the DNRC exceeded its statutory authority under 77-6-306(3) or whether its decision is wholly unsupported by the evidence; (2) even though the District Court applied the wrong standard of review, the standard applicable to a contested case, the District Court reached the correct result; (3) the language in 77-6-303 and 77-6-306(3) and (4), which are to be read together, indicate that the Legislature intended that the DNRC do more than review the paper records of the arbitrators in order to "fix" the value of the improvements, and the DNRC was therefore correct in using an independent valuation procedure conducted by its own appraiser in addition to considering the work of the three arbitrators; and (4) the Uniform Arbitration Act does not apply to this case because that Act establishes a District Court's standard of review in an appellate procedure. Winchell v. Dept. of Natural Resources and Conservation, 1999 MT 11, 293 M 89, 972 P2d 1132, 56 St. Rep. 48 (1999).

Montana Law Not Preempted by Federal Arbitration Act: Keystone, an auto parts business located in Montana, purchased a computer system from Triad for the management of Keystone's auto parts business. The contract was to be performed in Montana. The system failed to work properly, and Keystone sued Triad in Montana for breach of warranty, breach of contract, negligence, and negligent misrepresentation. The contract provided that disputes between the parties were to be settled before the American Arbitration Association in California, and the District Court held that the proper forum for arbitration was California because, among other reasons, Montana law was preempted by the Federal Arbitration Act (FAA)(9 U.S.C. 2). The Supreme Court reviewed the opinion of the U.S. Supreme Court in the case of Doctor's Associates, Inc. v. Casarotto, 517 US 681 (1996), and interpreted that opinion to mean that a

state may not place arbitration clauses on an unequal footing from general contract provisions. The Supreme Court pointed out that although 27-5-323 does apply only to arbitration provisions, 28-2-708 applies to contracts generally and that therefore it cannot be said that arbitration provisions are treated differently from contracts generally. The Supreme Court also pointed out that the Montana statutes preserve and do not nullify the parties' duty to arbitrate and for that reason, the case should be distinguished from those cases cited by Triad, holding that the FAA preempted state statute. For these reasons, the Supreme Court held that under the rationale of Casarotto, 28-2-708 and 27-5-323 are not preempted by the FAA. Keystone, Inc. v. Triad Sys. Corp., 1998 MT 326, 292 M 229, 971 P2d 1240, 55 St. Rep. 1321 (1998).

DECISIONS UNDER LAW IN EFFECT PRIOR TO OCTOBER 1, 1985

Arbitrability of Claims Against Multiple Defendants — Same Facts, Same Actions: Complaints relating to mishandling or unwise management of accounts were filed against Prudential-Bache Securities, Inc. (Prudential) and G.T. Murray Company (Murray). The Murray defendants' motion to compel arbitration was denied when the District Court found that they were not signatories to the customer agreement form, but Prudential's motion to compel arbitration was granted. Upon examination of the customer agreement, the Supreme Court found that Prudential was not a signatory either; in fact the agreement form did not clearly identify the party with whom plaintiffs were contracting. However, since the claims against Prudential and Murray arose out of the same facts and the same actions, to separate the claims as to the defendants would be inappropriate. Therefore, the court held that the claims against all defendants were arbitrable. Passage v. Prudential-Bache Sec., Inc., 223 M 60, 727 P2d 1298, 43 St. Rep. 1532 (1986).

Claims of Children Stayed Pending Arbitration of Parents' Claims — Arbitration Ordered: Both plaintiffs and defendants objected to a District Court order staying claims on children's accounts pending arbitration of the parents' claims. Defendants argued that the children's claims were subject to arbitration, along with the other claims. Plaintiffs argued that the District Court was correct in finding that the children's accounts were not included under the terms of the customer agreement forms but contended that it was unjust to stay court action on the children's claims. The Supreme Court, citing Merrill Lynch, et al. v. Haydu, 637 F2d 391 (5th Cir. 1981), held that issues that go to the formation of the contract as a whole may properly be arbitrated. Since a factual question remained as to whether the children's accounts were covered by the customer agreement forms, the District Court order was reversed and this issue was subjected to arbitration. Passage v. Prudential-Bache Sec., Inc., 223 M 60, 727 P2d 1298, 43 St. Rep. 1532 (1986).

Election of Arbitration Rules Properly Honored: An election of arbitration rules made within the time allowed by a customer agreement form but made contingent upon arbitration being compelled by the court was properly honored by the District Court once it determined that arbitration was proper. Passage v. Prudential-Bache Sec., Inc., 223 M 60, 727 P2d 1298, 43 St. Rep. 1532 (1986).

Jurisdiction of State Court to Order Arbitration Under Federal Arbitration Law: Under the U.S. Supreme Court decision set out in Southland Corp. v. Keating, 465 US 1, 79 L Ed 2d 1, 104 S Ct 852 (1984), a state court clearly has jurisdiction to order arbitration under the federal arbitration law, 9 U.S.C. 1, et seq. Passage v. Prudential-Bache Sec., Inc., 223 M 60, 727 P2d 1298, 43 St. Rep. 1532 (1986).

Arbitrator's Award Granting Reinstatement to Teachers Upheld: The Supreme Court rejected school district's contention that the arbitrator of a teacher termination case exceeded his authority by determining that the remedy for firing, in violation of union contract procedures, was to offer full reinstatement, which would thereby confer tenured status to the teachers. The school district, contrary to its assertion, had the statutory and constitutional authority to enter into collective bargaining agreements, and the provisions at issue were proper subjects of bargaining. The trustees, having entered into the agreement in good faith, were bound by it. When parties agree to binding arbitration, the role of a court in reviewing the arbitrator's findings is a narrow one. Savage Educ. Ass'n v. Trustees, 214 M 289, 692 P2d 1237, 41 St. Rep. 2479 (1984), followed in Nelson v. Livingston Rebuild Center, Inc., 1999 MT 116, 294 M 408, 981 P2d 1185, 56 St. Rep. 486 (1999).

Waiver of Right to Arbitration: The right to raise enforcement of the arbitration clause may be waived by failure to assert it in a timely manner. Failure to raise the right to arbitrate in the pleadings constitutes such waiver. Ace Plumbing & Heating, Inc. v. School District, 204 M 81, 662 P2d 1327, 40 St. Rep. 678 (1983).

Entry of Award in Judgment Book Proper: Where respondent properly followed the procedures set out in 27-5-303 by showing that notice of the filing of the arbitration award was served on the adverse party and where no order staying the entry of judgment had been served by the adverse party, the District Court committed no error in directing the clerk to enter the award in the judgment book. This is so despite the fact that the adverse party had filed a motion to vacate the award prior to respondent's request for entry of judgment and despite the fact that 10 minutes after respondent's filing, the adverse party filed an order staying the entry of judgment. Kay v. Bottomly, 192 M 149, 626 P2d 1263, 38 St. Rep. 586 (1981).

Failure to Assert Grounds to Vacate an Award: Where appellant fails to assert proper grounds upon which to vacate an arbitration award, the District Court's decision to allow the award to stand is affirmed. Appellant's contention in her motion to vacate an award of attorney's fees was based on arguments concerning the merits of the defendant attorney's actions, not on one of the four bases upon which a court may vacate an award under 27-5-301. Kay v. Bottomly, 192 M 149, 626 P2d 1263, 38 St. Rep. 586 (1981).

Invalidity of Agreement to Arbitrate All Disputes Under a Contract — Injunctive Relief: A contract may require future disputes as to value or quantity to be submitted to arbitration, but contract provisions that require parties to submit future disputes as to questions of law are void. Claims of breach of contract, negligence, and breach of warranty are issues of law or mixed issues of law and fact. In a case involving these claims, an agreement to arbitrate all future disputes is unenforceable and a nullity. An injunction to stay all arbitration proceedings is a proper remedy to avoid a real threat of irreparable injury when the rules of the arbitration body provide that the parties are presumed to have consented to the entry of a judgment upon the arbitrators' award. Palmer Steel Structures v. Westech, Inc., 178 M 347, 584 P2d 152 (1978).

Void Arbitration Clause: Any contract provision which states that all future contract disputes shall be submitted to arbitration is void because it restricts access to the courts. Smith v. Zepp, 173 M 358, 567 P2d 923 (1977).

Honest Effort by Arbitrators: Heating and plumbing contractor was entitled to enforcement of report of arbitrators against school district where arbitrators made a sincere, honest, and industrious effort to render a fair and just award. Hopkins v. School District, 133 M 530, 327 P2d 395 (1958).

Present Existence of Dispute: This section contemplates voluntary submission of disputes in existence at the time of the submission, not to a contractual provision requiring arbitration of future disputes. Green v. Wolff, 140 M 413, 372 P2d 427 (1962).

Legislative Power: The Legislature has power to provide a means by which the parties to a controversy may waive a trial by a court and submit the matter to arbitrators selected by themselves, by whose award it is finally concluded in the absence of fraud, gross error, excess of power, and the like. Shea v. North-Butte Min. Co., 55 M 522, 179 P 499 (1919).

Fire Insurance Loss: Where the parties to a contract of fire insurance, upon destruction of the property, agree to submit the amount of loss to arbitration, the award fixes the amount of loss sustained and is binding upon both parties so that the insured cannot maintain an action upon the policy and have a readjustment of the loss without first having the award set aside. Solem v. Conn. Fire Ins. Co., 41 M 351, 109 P 432 (1910). See also Aetna Ins. Co. v. Hefferlin, 260 F 695 (9th Cir. 1919).

Absence of Arbitrator From Investigation: Where one of the arbitrators was absent during part of the investigation, though he may have authorized one of the other arbitrators to sign his name to the award, the investigation could not lawfully proceed, the award was null and void, and no valid judgment could be entered thereon. Dunphy v. Ford, 2 M 300 (1875).

Chapter Law Review Articles

The War Against Arbitration in Montana, Burnham, 66 Mont. L. Rev. 139 (2005).

Mandatory Arbitration of Civil Rights Claims in the Workplace: No Enforceability Without Equivalency, France, 64 Mont. L. Rev. 449 (2003).

Keystone, Inc. v. Triad Systems Corporation: Is the Montana Supreme Court Undermining the Federal Arbitration Act?, Quick, 63 Mont. L. Rev. 445 (2002).

The Arbitration Alternative: Its Time Has Come, Faure, 46 Mont. L. Rev. 199 (1985).

Self-help: Extrajudicial Rights, Privileges and Remedies in Contemporary American Society, 37 Vand. L. Rev. 845 (1984).

Recent Developments: Uniform Arbitration Act, 48 Mo. L. Rev. 137 (1983).

Chapter Collateral References

Arbitration *key* 1, 1.1, 1.2, 3, 3.1, 3.2, 3.3, 3.4.

6 C.J.S. Arbitration §§1 through 8, 19, et seq.

4 Am. Jur. 2d Alternative Dispute Resolution §§8, 47.
Uniform Arbitration Act, 7 U.L.A. 1.
An Overview of the New Montana Arbitration Act, Corbett, Mont. Lawyer, Jan. 1986.
The Legal Status of Arbitration in Montana, Corbett, Mont. Lawyer, Oct. 1985.

Part 1
Submission to Arbitration

27-5-111. Short title.

Compiler's Comments

Source: Section 23, Uniform Arbitration Act, 7 U.L.A. 228.

27-5-112. Uniformity of interpretation.

Compiler's Comments

Source: Section 21, Uniform Arbitration Act, 7 U.L.A. 227.

Law Review Articles

The Arbitration Alternative: Its Time Has Come, Faure, 46 Mont. L. Rev. 199 (1985).

Collateral References

Arbitration *key* 1.
6 C.J.S. Arbitration §12.

27-5-113. Application to labor agreements.

Compiler's Comments

1991 Amendment: In exception clause inserted references to 27-5-115, 27-5-311, and 27-5-322; and made minor changes in style. Amendment effective March 29, 1991.

Collateral References

Vacating on public policy grounds arbitration awards reinstating discharged employees—state cases. 112 ALR 5th 263.

Validity and construction of statutes or ordinances providing for arbitration of labor disputes involving public employees. 68 ALR 3d 885.

Breach or repudiation of collective labor contract as subject to, or as affecting right to enforce, arbitration provision in contract. 29 ALR 3d 688.

An Overview of the New Montana Arbitration Act, Corbett, Mont. Lawyer, Jan. 1986.

27-5-114. Validity of arbitration agreement — exceptions.

Compiler's Comments

1997 Amendment: Chapter 19 deleted former (4) that read: "(4) Notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters on the first page of the contract; and unless such notice is displayed thereon, the contract may not be subject to arbitration"; and made minor changes in style. Amendment effective February 11, 1997.

Preamble: The preamble attached to Ch. 19, L. 1997, provided: "WHEREAS, in Doctor's Associates, Inc. v. Casarotto, No. 95-559, U.S. (1996), the United States Supreme Court held that the notice requirement in 27-5-114(4), MCA, was preempted by section 2 of the Federal Arbitration Act."

1989 Amendments: Chapter 236 in (2), at beginning of second sentence, inserted exception clause; inserted (3) allowing members of trade or professional organization to submit future controversies to arbitration; and made minor changes in phraseology and form.

Chapter 611 in (2)(b) changed dollar amount limitation from $35,000 or less to $5,000 or less; and made minor changes in form and phraseology.

Source: Section 1, Uniform Arbitration Act, 7 U.L.A. 5. The Uniform provision was amended extensively by Ch. 684, L. 1985, and by Ch. 236 and Ch. 611, L. 1989.

Case Notes

Predispute Arbitration Provisions Unenforceable — Motion to Compel Arbitration Properly Denied: Plaintiff opened several Piper Automatic Transfer Accounts and later brought an action alleging defendants' mismanagement of the accounts. Defendants sought to compel arbitration based on predispute arbitration clauses in the account agreements requiring that any dispute be resolved by arbitration. The motion to compel arbitration was denied, and defendants appealed. The Supreme Court held that because the agreements granted defendants' brokers the discretion to buy and sell securities, a fiduciary duty was created that defendants breached by failing to explain the consequences of the arbitration provision prior to formation of the contract.

The predispute arbitration provisions were therefore unenforceable, and denial of the motion to compel arbitration was affirmed. Willems v. U.S. Bancorp Piper Jaffray, Inc., 2005 MT 37, 326 M 103, 107 P3d 465 (2005), following Kloss v. Edward D. Jones & Co., 2002 MT 129, 310 M 123, 54 P3d 1 (2002). See also Chor v. Piper, Jaffray & Hopwood, 261 M 143, 862 P2d 26 (1993).

Waiver of Right to Object to Construction Contract Arbitration Provisions — Arbitration Properly Compelled: Plaintiff contracted to construct a pipeline and widen a road for defendant, but disputes arose regarding contract performance. The contract provided that disputes be settled by arbitration. Plaintiff notified defendant requesting arbitration, but defendant indicated a desire to settle the dispute through nonbinding mediation rather than arbitration in order to avoid fees. Subsequent settlement offers by defendant were refused, and plaintiff again requested arbitration. Following additional unsuccessful negotiation, plaintiff filed suit to enjoin arbitration, and defendant moved to stay litigation and compel arbitration. The District Court concluded that the contractual arbitration provisions were unambiguous and that by insisting on arbitration, plaintiff waived any legal objection to the arbitration provisions. Plaintiff appealed, but the Supreme Court affirmed. To establish a knowing waiver, the party asserting waiver must demonstrate the other party's knowledge of the existing right, acts inconsistent with that right, and resulting prejudice to the party asserting waiver. Here, plaintiff, through counsel, clearly had knowledge of its contractual rights regarding arbitration and litigation; letters from plaintiff's counsel were totally inconsistent with the right to object to arbitration; and the subsequent delay in resolving the matter and the additional cost to defendant in having to defend the arbitration provisions in District Court and on appeal were clearly prejudicial to defendant. The District Court correctly concluded that plaintiff waived the right to object to arbitration and properly compelled arbitration. VanDyke Constr. Co., Inc. v. Stillwater Min. Co., 2003 MT 279, 317 M 519, 78 P3d 844 (2003), followed, regarding elements of waiver, in R.C. Hobbs Enterprises, LLC v. J.G.L. Distrib., Inc., 2004 MT 396, 325 M 277, 104 P3d 503 (2004).

No Showing of Acts Inconsistent With Right to Arbitrate — Finding of No Waiver of Arbitration Affirmed: A construction contract between the parties contained an arbitration clause. When plaintiff ceased making payments, defendant proposed attempting nonbinding mediation prior to binding arbitration. Mediation failed, so defendant filed a construction lien and sought arbitration. However, before arbitration occurred, plaintiff filed a breach of contract and slander of title action arising out of allegedly defective construction. Defendant then moved to compel arbitration, and the motion was granted. Plaintiff contended that defendant's actions constituted an implied waiver of arbitration, but the District Court found that defendant had not waived arbitration, so plaintiff appealed. The Supreme Court affirmed. A party asserting waiver bears a heavy burden and must show: (1) knowledge of the existing right to compel arbitration; (2) acts inconsistent with the right to arbitrate; and (3) prejudice to the party resisting arbitration. Here, defendant's counsel's letter proposing mediation was clear that if mediation failed, defendant would enforce arbitration, and the filing of the lien was not to advance litigation, but rather to protect defendant's security interests in the property. Any prejudice to plaintiff from the lien filing would have occurred whether the parties arbitrated or litigated. Therefore, defendant did not engage in acts inconsistent with the right to arbitrate, and the District Court correctly found that defendant did not waive the right to arbitration. Stewart v. Covill & Basham Constr., LLC, 2003 MT 220, 317 M 153, 75 P3d 1276 (2003). See also Downey v. Christensen, 251 M 386, 825 P2d 557 (1992), and Holm-Sutherland Co., Inc. v. Shelby, 1999 MT 150, 295 M 65, 982 P2d 1053 (1999).

Real Estate Brokers and Salespersons — Agreement to Arbitrate Among Members Binding as to Nonmembers: A real estate client filed with the Helena Association of REALTORS, Inc., a request to arbitrate a dispute regarding a real estate transaction involving the plaintiffs, two members of the Association. The plaintiffs refused to arbitrate. The Association cited the plaintiffs' professional Code of Ethics and was prepared to proceed to arbitration without the plaintiffs. The plaintiffs sued to enjoin arbitration. The District Court granted summary judgment to the Association. The Supreme Court held that the District Court was correct in dismissing the action because the plaintiffs are bound to proceed to arbitration. The Association's bylaws incorporate the National Association of Realtors' Code of Ethics, which provides that realtors will arbitrate disputes with clients if the client agrees to arbitration. The plaintiffs' voluntary membership in the Association binds the plaintiffs to the provisions of the bylaws and Code of Ethics. Topolski v. Helena Ass'n of REALTORS, Inc., 2000 MT 343, 303 M 224, 15 P3d 414, 57 St. Rep. 1474 (2000).

Dispute Over Whether Agreement to Arbitrate Exists — Motion to Compel Arbitration Improper: The District Court found that the arbitration provision in a contract to provide on-line

stock trading was valid and enforceable and compelled arbitration. Although it is true that a court is required to follow a liberal policy in enforcing arbitration agreements, including resolving any doubts concerning the scope of arbitrable issues in favor of arbitration, under 27-5-115, arbitration may not be ordered if there is a substantial and bona fide dispute over whether an arbitration agreement exists. Further, the Federal Arbitration Act, 9 U.S.C. 1, et seq., provides that an agreement to arbitrate is valid except when grounds exist at law or in equity to revoke the contract, reversing the longtime judicial hostility to arbitration agreements and putting them on the same footing as other contract provisions. A District Court may properly adjudicate the validity of an arbitration agreement only when a party contests the validity of an arbitration clause within a contract but does not contest the validity of the contract as a whole. Here, plaintiffs were on notice that there was some form of arbitration governing the agreement, but they had no indication that they were agreeing to binding arbitration or that arbitration was their exclusive remedy because they allegedly never received the specific terms and conditions of the agreement, creating a substantial ambiguity. Because there was a substantial and bona fide dispute over the arbitration agreement that could not be overcome by the general policy encouraging upholding agreements to arbitrate, the District Court committed reversible error in not fully addressing whether a valid arbitration agreement existed, in dismissing the case for lack of jurisdiction, and in compelling arbitration. Kingston v. Ameritrade, Inc., 2000 MT 269, 302 M 90, 12 P3d 929, 57 St. Rep. 1137 (2000).

No District Court Jurisdiction to Grant Summary Judgment When Dispute Subject to Arbitration: A condition of Burkhart's employment agreement with Semitool, Inc. (Semitool), was that employment disputes would be subject to Montana law and the Uniform Arbitration Act. After 8 months of employment, Burkhart was terminated. He later brought suit against Semitool, alleging that: (1) he had been terminated without good cause; (2) his termination was in retaliation for his refusal to violate public policy; (3) Semitool's opposition to his application for unemployment benefits was without probable cause and motivated by malice; and (4) representations made to him prior to employment were deceptive and motivated by malice, contained misrepresentations, and included false advertisements concerning the kind or character of the employment. In its answer, Semitool demanded arbitration, and Burkhart accepted the arbitration offer on the first two issues. The parties agreed that because trade secrets were involved, the record would be sealed and hearings closed to the public to avoid disclosure of confidential information. Semitool then moved to dismiss for failure to state a claim or, alternatively, to compel arbitration of all four claims. The District Court converted the motion to dismiss into a motion for summary judgment and held a hearing to discuss both motions, after which it granted summary judgment to Semitool and dismissed all four claims. The court determined that because proof of the allegations in the complaint would require disclosure of confidential attorney-client matters and because violation of the attorney-client privilege prejudiced the public interest, that prejudice was a proper ground upon which to invalidate the arbitration agreement. Burkhart appealed. On appeal, the Supreme Court cited 39-2-914 and Ratchye v. Lucas, 1998 MT 87, 288 M 345, 957 P2d 1128 (1998), as controlling. Once an offer to arbitrate has been accepted, neither the District Court nor the parties have a right to continue the lawsuit. The exception relating to the public interest pertains to the validity of the arbitration agreement, not to the merits of the underlying dispute. Thus, the District Court erred in deciding the merits of the issues because it lacked jurisdiction to do so once the parties agreed to arbitrate. Summary judgment was reversed and the claims were remanded for arbitration. Burkhart v. Semitool, Inc., 2000 MT 201, 300 M 480, 5 P3d 1031, 57 St. Rep. 785 (2000).

No Claim for Wrongful Termination Apart From Either Contract or Wrongful Discharge Act: Solle claimed that her employer violated the common-law duty of good faith and fair dealing by failing to renew her employment contract when she had a reasonable expectation that a renewal would be offered. Solle's employer moved to compel arbitration, the motion was granted, and Solle appealed. Under Meech v. Hillhaven W., Inc., 238 M 21, 776 P2d 488, 46 St. Rep. 1058 (1989), claims for wrongful termination from tort or express or implied contract are no longer viable under Montana law. Rather, 39-2-913 explicitly preempts all common-law remedies but bars only tort and contract claims that are "for discharge". A threshold determination in cases alleging wrongful termination is whether the parties' relationship is governed by a written contract for a specific term or whether it falls under the provisions of the Wrongful Discharge From Employment Act, which applies to noncontract situations. Solle's employment was covered by a written contract containing an arbitration clause, and her claim for breach of the implied covenant of good faith and fair dealing was inextricably intertwined with and based upon her termination from employment. Although breach of a contract is not a prerequisite to breach of the implied covenant of good faith and fair dealing, the covenant arises out of a contractual

relationship between the parties, and a breach of the covenant is a breach of the contract. Solle's contract was silent as to whether there was an obligation on the employer's part to renew the contract or on Solle's part to accept a renewal offer, so Solle argued that the failure to include such a provision indicated the employer's intent not to cover a claim like this under the arbitration clause. The Supreme Court disagreed and proceeded to treat the dispute as arising out of the employment contract. Solle was not allowed to maintain a wrongful termination claim apart from either the contract or the Wrongful Discharge From Employment Act. Solle's contract contained a provision that any unresolved dispute would be subject to arbitration, but the arbitration clause did not explicitly provide that it would govern issues concerning contract nonrenewal. Nevertheless, the contract governed Solle's employment, termination, and postemployment relationship and did not explicitly exclude disputes arising after contract termination. The presumption favors arbitrability, and the District Court did not err in holding that Solle's claim was subject to arbitration. Solle v. W. St. Ins. Agency, Inc., 2000 MT 96, 299 M 237, 999 P2d 328, 57 St. Rep. 391 (2000). See also Nolde Bros., Inc. v. Bakery & Confectionery Workers Union, 430 US 243, 51 L Ed 2d 300, 97 S Ct 1067 (1977).

Construction Contract as Local Transaction Not Involving Interstate Commerce — Dismissal Improper: Based on the U.S. Supreme Court decision in Doctor's Associates, Inc. v. Casarotto, 517 US 681 (1996), that this section was preempted by the Federal Arbitration Act, the District Court dismissed with prejudice a claim by the city of Cut Bank, based on failure to state a cause of action. However, the construction contract at issue in the present case did not involve interstate commerce, a prerequisite for applicability of Casarotto; therefore, the District Court erred in dismissing the complaint for failure to state a claim. Cut Bank v. Tom Patrick Constr., Inc., 1998 MT 219, 290 M 470, 963 P2d 1283, 55 St. Rep. 915 (1998).

District Court Bound by Arbitration Agreement: In 1995, a homeowners' association filed a complaint seeking to compel subdivision developers to complete a water system as designed and approved in the 1970s. The developers contended that the water system was complete as built. Before trial, the parties entered into a settlement agreement that included a provision stating that any disputes would be settled by arbitration. The water system was not completed on time, so the association moved to enforce the settlement agreement by an order of specific performance or by arbitration. The District Court denied the motion for arbitration on grounds that the agreement was clear and ordered the developers to perform the specific terms of the settlement agreement. When a court is asked to compel arbitration of a dispute, the threshold inquiry is whether the parties agreed to arbitrate. Settlement agreements requiring arbitration are enforceable in Montana, as are other contracts, except on grounds that exist at law or in equity for the revocation of a contract. Although the settlement agreement in this case contemplated the remedy of specific performance, it was not an alternative to arbitration but rather a remedy available to the arbitrators when interpreting and enforcing the agreement. Because no conditions existed that would void the arbitration clause, the trial court erred in ignoring the arbitration agreement and deciding the dispute, rather than ordering the parties to arbitrate as they had agreed. Ratchye v. Lucas, 1998 MT 87, 288 M 345, 957 P2d 1128, 55 St. Rep. 354 (1998).

Rules Agreed Upon in Settlement Agreement as Binding Upon Arbitration: Parties agreed in a settlement agreement that controversies would be settled pursuant to the Commercial Arbitration Rules of the American Arbitration Association. A contention by one party that arbitration under those rules would be less efficient, slower, or more expensive than arbitration under Montana's Uniform Arbitration Act was immaterial. The parties were required to arbitrate according to the rules specifically designated in the settlement agreement. Ratchye v. Lucas, 1998 MT 87, 288 M 345, 957 P2d 1128, 55 St. Rep. 354 (1998).

Federal Preemption: A former subsection (see 1997 amendments) that conditioned enforceability of arbitration agreements on compliance with a special notice requirement that was not applicable to contracts generally was preempted by the Federal Arbitration Act (FAA) with respect to arbitration agreements covered by the FAA. States may regulate contracts, including arbitration clauses, under general contract law principles, and they may invalidate an arbitration clause upon such grounds as exist at law or in equity for the revocation of any contract. Courts may not invalidate arbitration agreements under state law applicable only to arbitration agreements. Doctor's Associates, Inc. v. Casarotto, 517 US 681, 134 L Ed 2d 902, 116 S Ct 1652 (1996). See also Keystone, Inc. v. Triad Sys. Corp., 1998 MT 326, 292 M 229, 971 P2d 1240, 55 St. Rep. 1321 (1998).

Franchise Agreement — Montana Law Governs — No Federal Preemption: Plaintiffs entered into a franchise agreement with defendants to open a sandwich shop. When informed that their first choice for location was unavailable, plaintiffs agreed to open the shop at a less desirable location, based on a verbal agreement with defendants that when the plaintiffs' preferred

location became available, plaintiffs would have the exclusive right to open a shop. Contrary to the agreement, the preferred location was subsequently awarded to another franchisee, resulting in the loss of plaintiffs' business and collateral that secured their loan. Plaintiffs sued, alleging defendants breached their agreement. Pursuant to the franchise agreement, which included, on page 9, an arbitration provision governed by Connecticut law, the District Court granted defendants' motion to stay the proceedings pending arbitration of plaintiffs' breach of contract claims. Plaintiffs appealed, claiming that the arbitration provision was unenforceable because notice was not provided on page 1 as required by Montana law. (See 1997 amendment.) Relying on the United States Supreme Court's decision in Volt Information Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ., 489 US 468 (1989), the Supreme Court reversed, ruling that application of Connecticut law would be contrary to Montana public policy entitling citizens to notice before entering into an agreement requiring arbitration and holding that Montana's notice requirement is not preempted by the Federal Arbitration Act. Casarotto v. Lombardi, 268 M 369, 886 P2d 931, 51 St. Rep. 1350 (1994), vacated and remanded in 515 US 1129, 132 L Ed 2d 807, 115 S Ct 2552, (1995), and reaffirmed and reinstated in Casarotto v. Lombardi, 274 M 3, 901 P2d 596, 52 St. Rep. 911 (1995), reversed and remanded in Doctor's Associates, Inc. v. Casarotto, 517 US 681, 134 L Ed 2d 902, 116 S Ct 1652 (1996).

Arbitration Clauses Subject to Principles of Contract Interpretation: The Supreme Court affirmed the lower court's holding that the defendant, by not stating what law would govern the arbitration clause, had created an ambiguity subject to the general rules of contract interpretation and that the ambiguity would be construed strictly against the defendant. Mueske v. Piper, Jaffray & Hopwood, Inc., 260 M 207, 859 P2d 444, 50 St. Rep. 1009 (1993), followed in Topco, Inc. v. St., 275 M 352, 912 P2d 805, 53 St. Rep. 175 (1996).

Participation in Discovery Not Preclusive of Right to Arbitration — Waiver Not Shown: Downeys presented a number of claims against Christensen and Baker Boy Bake Shops, Inc. (Baker Boy), a donut franchise, alleging fraud, breach of contract, breach of the implied covenant of good faith and fair dealing, and negligence stemming from a franchise agreement between Downeys and Baker Boy. Immediately after serving the complaint, Downeys began discovery by serving requests for production, which were answered separately by Christensen and Baker Boy, who subsequently began their own discovery procedures. The District Court denied a motion to compel arbitration and stay proceedings, finding that participation in discovery constituted a waiver of arbitration. Failure to compel the parties to submit their claims to arbitration was error, given a clause in the franchise agreement requiring arbitration rather than civil litigation, when the waiver was not proved by actions inconsistent with the right to arbitrate or by a showing of prejudice arising from any inconsistent actions. Downey v. Christensen, 251 M 386, 825 P2d 557, 49 St. Rep. 88 (1992), followed in Holm-Sutherland Co. Inc. v. Shelby, 1999 MT 150, 295 M 65, 982 P2d 1053, 56 St. Rep. 595 (1999). However, see Casarotto v. Lombardi, 268 M 369, 886 P2d 931, 51 St. Rep. 1350 (1994),

No Right to Arbitration When Probationary Period Not Served: The Supreme Court upheld the lower court's dismissal of the plaintiff's suit when the plaintiff had worked less than 6 months and the contract stated that arbitration was only available after the 6-month probationary period had been served. Burgess v. Lewis & Clark City-County Bd. of Health, 244 M 275, 796 P2d 1079, 47 St. Rep. 1619 (1990).

Arbitrator's Discrimination Award Proper: The defendant school district was required by the collective bargaining agreement to pay 85% of the teachers' medical insurance costs. The district had been paying 100% of the costs when both spouses worked for the district. The arbitrator ruled that the district had to pay the single teachers for the amount of benefits they had not received in the past. The Supreme Court upheld the order, stating that the remedy for a discrimination violation is to make the injured party whole. The court held that the district could pay 85% of all teachers' medical insurance costs in the future but had to pay the single teachers for the past inequity. Glasgow Educ. Ass'n v. Bd. of Trustees, 242 M 478, 791 P2d 1367, 47 St. Rep. 898 (1990).

Court Without Power to Set Aside Arbitrator's Decision: The parties had entered into a contract that contained a binding arbitration clause. The defendant argued that the award was not binding because the arbitrator had exceeded his authority. The Supreme Court held that the contract contained references to state law that allowed the arbitrator to fashion the remedy contained in his order. The court ruled that the courts are without power to set aside an arbitrator's decision if it is final and binding and within the arbitrator's contractual authority. Glasgow Educ. Ass'n v. Bd. of Trustees, 242 M 478, 791 P2d 1367, 47 St. Rep. 898 (1990).

Arbitration Clause as Part of Performance Review Form — Nonseverability: A statement that employment was subject to arbitration, included as an integral part of signed annual

performance reviews, was found to be part of a binding employment agreement between employer and employee. Further, the validity of the arbitration clause was not severable from the validity of other parts of the employment agreement. Vukasin v. D.A. Davidson & Co., 241 M 126, 785 P2d 713, 47 St. Rep. 135 (1990). However, see Miller v. Glacier County, 257 M 422, 851 P2d 401, 50 St. Rep. 339 (1993), and Casarotto v. Lombardi, 268 M 369, 886 P2d 931, 51 St. Rep. 1350 (1994).

Tort Claims Encompassed in Broad Arbitration Provisions: Employee signed an agreement that required arbitration in "any controversy between myself and the Company arising out of my employment or the termination of my employment with the Company for any reason whatsoever". Employee claimed that an allegation of assault was outside the scope of the arbitration clause; however, the incident occurred on company premises, involved company personnel, and resulted in the employee's termination. The Supreme Court cited numerous federal cases where similar broad arbitration provisions were found to encompass tort claims, holding that the assault controversy was clearly subject to arbitration. Vukasin v. D.A. Davidson & Co., 241 M 126, 785 P2d 713, 47 St. Rep. 135 (1990). However, see Casarotto v. Lombardi, 268 M 369, 886 P2d 931, 51 St. Rep. 1350 (1994).

When Arbitration Not Applicable — Insurance Contracts: Plaintiffs challenged a provision of their insurance contract that required arbitration of the value of loss in case of dispute between them and the insurer. The court held that arbitration of such disputes is not provided for under the Uniform Arbitration Act (specifically subsection (2)(b) of this section) and is therefore not exempt from the prohibition of 28-2-708. However, citing Randall v. Am. Fire Ins. Co., 10 M 340, 25 P 953 (1891), the court held that 28-2-708 did not prevent agreements to arbitrate factual questions relating to value or quantity and upheld the arbitration provision in plaintiffs' contract. Garretson v. Mtn. W. Farm Bureau Mut. Ins. Co., 234 M 103, 761 P2d 1288, 45 St. Rep. 1764 (1988).

State and Federal Policy on Arbitration — Exception on Grounds to Revoke Entire Contract: The federal policy, based on 9 U.S.C. 2 (similar to this section), is that arbitration is favored when a question of arbitration is raised and a contractual clause is present. The policy further mandates that arbitration agreements are valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. Frates v. Edward D. Jones & Co., 233 M 377, 760 P2d 748, 45 St. Rep. 1567 (1988), citing Shearson/Am. Express, Inc. v. McMahon, 482 US 220, 96 L Ed 2d 185, 107 S Ct 2332 (1987).

Law Review Articles

Conflict of Laws: The Recent History of Montana's Rules for Contracts, Lukes, 56 Mont. L. Rev. 553 (1995).

The Arbitration Alternative: Its Time Has Come, Faure, 46 Mont. L. Rev. 199 (1985).

Collateral References

Arbitration *key* 6, 6.1.

6 C.J.S. Arbitration §9, et seq.

4 Am. Jur. 2d Alternative Dispute Resolution §§70 through 125.

Validity and effect under state law of arbitration agreement provision for alternative method of appointment of arbitrator where one party fails or refuses to follow appointment procedure specified in agreement. 75 ALR 5th 595.

Participation in arbitration proceedings as waiver of objections to arbitrability under state law. 56 ALR 5th 757.

Validity and construction of provisions for arbitration of disputes as to alimony or support payments or child visitation or custody matters. 38 ALR 5th 69.

Claim of fraud in inducement of contract as subject to compulsory arbitration clause contained in contract. 11 ALR 4th 774.

Defendant's participation in action as waiver of right to arbitration of dispute involved therein. 98 ALR 3d 767.

Validity and construction of statutes or ordinances providing for arbitration of labor disputes involving public employees. 68 ALR 3d 885.

Breach or repudiation of contract as affecting right to enforce arbitration clause therein. 32 ALR 3d 377.

Waiver of, or estoppel to assert, substantive right or right to arbitrate as question for court or arbitrator. 26 ALR 3d 604.

Uninsured motorist endorsement: validity and enforceability of provision for binding arbitration, and waiver thereof. 24 ALR 3d 1325.

Validity and effect, and remedy in respect, of contractual stipulation to submit disputes to arbitration in another jurisdiction. 12 ALR 3d 892.

Availability and scope of declaratory judgment actions in determining rights of parties, or powers and exercise thereof by arbitrators, under arbitration agreements. 12 ALR 3d 854.

Arbitration of disputes within close corporation. 64 ALR 2d 643.

Constitutionality of arbitration statutes. 55 ALR 2d 432.

Construction of arbitration provisions of sales contracts as regards questions to be submitted to arbitrators. 136 ALR 364.

Validity of agreement to submit all future questions to arbitration. 135 ALR 79.

Arbitration of issues or questions pertaining to probate matters. 104 ALR 359.

Power of municipal corporation to submit to arbitration. 40 ALR 1370.

Validity of agreements to arbitrate disputes generally as a condition precedent to the bringing of an action. 26 ALR 1077.

An Overview of the New Montana Arbitration Act, Corbett, Mont. Lawyer, Jan. 1986.

The Legal Status of Arbitration in Montana, Corbett, Mont. Lawyer, Oct. 1985.

27-5-115. Proceedings to compel or stay arbitration.

Compiler's Comments

Source: Section 2, Uniform Arbitration Act, 7 U.L.A. 68.

Case Notes

Investment Agreement Containing Arbitration Clause Considered Contract of Adhesion — Remand for Consideration of Investor's Reasonable Expectations and Potential Contract Formation Defenses: Zigrang entered an investment agreement with defendant investment company. The agreement contained an arbitration provision. When Zigrang learned that defendant frequently traded securities in Zigrang's account without permission, Zigrang filed a complaint, which was one of 23 suits filed by investors alleging defendant's mismanagement of accounts. Defendant moved to compel arbitration pursuant to the agreement. A panel of three judges sat en banc to hear evidence common to all 23 cases. Defendant's motion to compel arbitration was denied, but the order contained common findings of fact that did not apply to Zigrang, including a mischaracterization of Zigrang's investment agreement. Defendant appealed. The Supreme Court noted that the agreement constituted a contract of adhesion that supported other contract formation defenses, but did not in itself constitute a sufficient basis for invalidating the agreement. The Supreme Court was unable to completely examine Zigrang's contract formation defenses, including unconscionability, waiver, and reasonable expectations, because the District Court's order relied on the mistaken finding of fact. Thus, the court remanded for further findings of fact related to Zigrang's investment agreement, noting that an inquiry into Zigrang's expectations should consist only of an analysis of Zigrang's objectively reasonable expectations regarding the agreement from Zigrang's perspective and that Zigrang's expectations might negate the arbitration provisions. Zigrang v. U.S. Bancorp Piper Jaffray, Inc., 2005 MT 282, 329 M 239, 123 P3d 237 (2005). See also Iwen v. U.S. W. Direct, 1999 MT 63, 293 M 512, 977 P2d 989 (1999), and Kloss v. Edward D. Jones & Co., 2002 MT 129, 310 M 123, 54 P3d 1 (2002).

Predispute Arbitration Provisions Unenforceable — Motion to Compel Arbitration Properly Denied: Plaintiff opened several Piper Automatic Transfer Accounts and later brought an action alleging defendants' mismanagement of the accounts. Defendants sought to compel arbitration based on predispute arbitration clauses in the account agreements requiring that any dispute be resolved by arbitration. The motion to compel arbitration was denied, and defendants appealed. The Supreme Court held that because the agreements granted defendants' brokers the discretion to buy and sell securities, a fiduciary duty was created that defendants breached by failing to explain the consequences of the arbitration provision prior to formation of the contract. The predispute arbitration provisions were therefore unenforceable, and denial of the motion to compel arbitration was affirmed. Willems v. U.S. Bancorp Piper Jaffray, Inc., 2005 MT 37, 326 M 103, 107 P3d 465 (2005), following Kloss v. Edward D. Jones & Co., 2002 MT 129, 310 M 123, 54 P3d 1 (2002). See also Chor v. Piper, Jaffray & Hopwood, 261 M 143, 862 P2d 26 (1993).

Contract to Arbitrate Not Formed by Employee Handbook and Employee's Acknowledgment — Ambiguous Arbitration Provisions: When Hubner began working for defendant communications company, she signed an acknowledgment in an employee handbook that contained an arbitration provision. The arbitration clause provided that all controversies would be subject to binding arbitration, but the clauses in the handbook specified that the handbook did not constitute a contract of employment or create any relationship other than an employment-at-will relationship. When Hubner's employment was subsequently terminated, she brought a state

claim for wrongful discharge, and defendant moved for a summary disposition compelling arbitration pursuant to this section. The District Court agreed with Hubner that there was no agreement to arbitrate and denied the motion, so defendant appealed. Defendant argued that because the arbitration clause was separable, it could be independently enforced. A state contract law defense that goes to the entire contract rather than specifically to an arbitration clause does not defeat a motion to compel arbitration; however, when a defense is aimed directly at the arbitration provision rather than the entire contract, state law contract defenses may be applied to hold that no enforceable agreement to arbitrate was made. Further, acceptance or consent by the party against whom a contract is sought to be enforced is required before a contract is enforceable. The language in the handbook was ambiguous and construed against the drafter. The ambiguity prevented Hubner from knowing and accepting that she was agreeing to binding arbitration by signing the handbook. Thus, no contract to arbitrate was formed by virtue of the handbook and Hubner's acknowledgment, even when the arbitration provision was considered separately from the rest of the handbook. The District Court was affirmed. Hubner v. Cutthroat Communications, Inc., 2003 MT 333, 318 M 421, 80 P3d 1256 (2003).

No Showing of Acts Inconsistent With Right to Arbitrate — Finding of No Waiver of Arbitration Affirmed: A construction contract between the parties contained an arbitration clause. When plaintiff ceased making payments, defendant proposed attempting nonbinding mediation prior to binding arbitration. Mediation failed, so defendant filed a construction lien and sought arbitration. However, before arbitration occurred, plaintiff filed a breach of contract and slander of title action arising out of allegedly defective construction. Defendant then moved to compel arbitration, and the motion was granted. Plaintiff contended that defendant's actions constituted an implied waiver of arbitration, but the District Court found that defendant had not waived arbitration, so plaintiff appealed. The Supreme Court affirmed. A party asserting waiver bears a heavy burden and must show: (1) knowledge of the existing right to compel arbitration; (2) acts inconsistent with the right to arbitrate; and (3) prejudice to the party resisting arbitration. Here, defendant's counsel's letter proposing mediation was clear that if mediation failed, defendant would enforce arbitration, and the filing of the lien was not to advance litigation, but rather to protect defendant's security interests in the property. Any prejudice to plaintiff from the lien filing would have occurred whether the parties arbitrated or litigated. Therefore, defendant did not engage in acts inconsistent with the right to arbitrate, and the District Court correctly found that defendant did not waive the right to arbitration. Stewart v. Covill & Basham Constr., LLC, 2003 MT 220, 317 M 153, 75 P3d 1276 (2003). See also Downey v. Christensen, 251 M 386, 825 P2d 557 (1992), and Holm-Sutherland Co., Inc. v. Shelby, 1999 MT 150, 295 M 65, 982 P2d 1053 (1999).

Security Brokerage Contracts — Contract of Adhesion Rendering Arbitration Clause Unenforceable: Kloss opened a full-service brokerage account with defendant, which permitted Kloss to purchase securities and maintain a money market account and which included a living trust account. The account did well, and Kloss decided to set up a charitable trust with the bond proceeds. The initial account and the living trust agreement contained a mandatory arbitration clause, and the charitable trust incorporated the arbitration clause by reference. Kloss then had second thoughts about the charitable trust and petitioned to revoke it. Defendant moved to compel arbitration, and the District Court granted the motion, citing Chor v. Piper, Jaffray & Hopwood, 261 M 143, 862 P2d 26 (1993), and Iwen v. U.S. W. Direct, 1999 MT 63, 293 M 512, 977 P2d 989 (1999), for the holding that defendant had no obligation to explain the terms of the contract because it was within Kloss's reasonable expectations and that even if the contract was considered a contract of adhesion, it was not unenforceable because it was not unconscionable. Kloss appealed, arguing that the arbitration clause was part of a contract of adhesion and that waiver of the constitutional right to jury trial should not be presumed from the signing of a contract of adhesion. Defendant maintained that form contracts prepared by securities brokers are not contracts of adhesion dictated by one party to another who has no voice in its formulation, and that arbitration clauses contained in the contracts are not unconscionable. The Supreme Court examined Passage v. Prudential-Bache Sec., Inc., 223 M 60, 727 P2d 1298 (1986), for an explanation of contracts of adhesion in the securities context and the circumstances under which they are unenforceable. The court distinguished both Chor and Passage, finding that the contracts in this case were clearly contracts of adhesion because they were standardized forms containing terms that Kloss had no opportunity to negotiate if wishing to invest with defendant. Further, the arbitration clause by which Kloss waived the right to access to state courts, the right to jury trial, the right to reasonable discovery, the right to findings of fact based on the evidence, and the right to enforce the law by way of appeal was clearly not within Kloss's reasonable expectations. The arbitration clause was never explained by defendant, and Kloss

was not aware of the arbitration provision in the contract. Thus, the District Court committed reversible error when it concluded that the arbitration clause was enforceable. Kloss v. Edward D. Jones & Co., 2002 MT 129, 310 M 123, 54 P3d 1 (2002).

Failure of Employer to Respond to Arbitration Request — Waiver of Right to Arbitrate: The employment agreement between Firestone and Oasis Telecommunications, Data and Records, Inc. (Oasis), contained a dispute resolution clause providing that if a disagreement arose, the parties would negotiate in good faith, and that if they did not reach a solution within 30 days of the first written notice, then upon a 30-day notice by either party, the issue would be submitted to arbitration. Oasis terminated Firestone's employment on May 8, 2000. On May 18, Firestone requested arbitration. On June 7, Firestone submitted a list of potential arbitrators to Oasis for consideration, and requested a response within 10 days. Oasis never responded until August 11, after Firestone had filed federal suit against Oasis on July 7 (which was dismissed for lack of subject matter jurisdiction), and had filed virtually the same suit in state court on August 1, alleging Oasis's breach of the employment contract and the implied covenant of good faith and fair dealing. Oasis moved to compel arbitration on August 25, but the District Court denied the motion, so Oasis appealed. The Supreme Court affirmed. When the District Court denied Oasis's request to compel arbitration, the court impliedly found that Oasis's failure to respond constituted waiver of its right to arbitrate the dispute. The Supreme Court applied the factors in Downey v. Christensen, 251 M 386, 825 P2d 557 (1992), in deciding whether a waiver occurred. The factors require the party asserting waiver to demonstrate: (1) knowledge of the existing right to compel arbitration; (2) acts inconsistent with the right to arbitrate the dispute; and (3) prejudice to the party resisting arbitration. The existence of the first factor was undisputed because Oasis did not dispute knowledge of the right to arbitrate. Regarding the second factor, the May 18 notice commenced the 30-day period prescribed by the employment agreement, but Oasis did not deliver a response until well after the expiration of the 30-day period, and that indifference to Firestone's request constituted an act inconsistent with the right to arbitrate the dispute. Regarding the third factor, when Oasis failed to respond to the arbitration request, Firestone had no alternative other than to commence District Court proceedings, was subjected to unnecessary delay, and incurred court costs and fees that could otherwise have been avoided, so Firestone was prejudiced by Oasis's inaction. Therefore, the Downey factors were met, and Oasis's failure to respond to a request for arbitration within the period set out in the employment contract constituted waiver of the right to compel arbitration. Firestone v. Oasis Telecommunications, Data & Records, Inc., 2001 MT 297, 307 M 469, 38 P3d 796 (2001). See also Holm-Sutherland Co., Inc. v. Shelby, 1999 MT 150, 295 M 65, 982 P2d 1053 (1999).

Dispute Over Whether Agreement to Arbitrate Exists — Motion to Compel Arbitration Improper: The District Court found that the arbitration provision in a contract to provide on-line stock trading was valid and enforceable and compelled arbitration. Although it is true that a court is required to follow a liberal policy in enforcing arbitration agreements, including resolving any doubts concerning the scope of arbitrable issues in favor of arbitration, under this section, arbitration may not be ordered if there is a substantial and bona fide dispute over whether an arbitration agreement exists. Further, the Federal Arbitration Act, 9 U.S.C. 1, et seq., provides that an agreement to arbitrate is valid except when grounds exist at law or in equity to revoke the contract, reversing the longtime judicial hostility to arbitration agreements and putting them on the same footing as other contract provisions. A District Court may properly adjudicate the validity of an arbitration agreement only when a party contests the validity of an arbitration clause within a contract but does not contest the validity of the contract as a whole. Here, plaintiffs were on notice that there was some form of arbitration governing the agreement, but they had no indication that they were agreeing to binding arbitration or that arbitration was their exclusive remedy because they allegedly never received the specific terms and conditions of the agreement, creating a substantial ambiguity. Because there was a substantial and bona fide dispute over the arbitration agreement that could not be overcome by the general policy encouraging upholding agreements to arbitrate, the District Court committed reversible error in not fully addressing whether a valid arbitration agreement existed, in dismissing the case for lack of jurisdiction, and in compelling arbitration. Kingston v. Ameritrade, Inc., 2000 MT 269, 302 M 90, 12 P3d 929, 57 St. Rep. 1137 (2000).

No District Court Jurisdiction to Grant Summary Judgment When Dispute Subject to Arbitration: A condition of Burkhart's employment agreement with Semitool, Inc. (Semitool), was that employment disputes would be subject to Montana law and the Uniform Arbitration Act. After 8 months of employment, Burkhart was terminated. He later brought suit against Semitool, alleging that: (1) he had been terminated without good cause; (2) his termination was in retaliation for his refusal to violate public policy; (3) Semitool's opposition to his application

for unemployment benefits was without probable cause and motivated by malice; and (4) representations made to him prior to employment were deceptive and motivated by malice, contained misrepresentations, and included false advertisements concerning the kind or character of the employment. In its answer, Semitool demanded arbitration, and Burkhart accepted the arbitration offer on the first two issues. The parties agreed that because trade secrets were involved, the record would be sealed and hearings closed to the public to avoid disclosure of confidential information. Semitool then moved to dismiss for failure to state a claim or, alternatively, to compel arbitration of all four claims. The District Court converted the motion to dismiss into a motion for summary judgment and held a hearing to discuss both motions, after which it granted summary judgment to Semitool and dismissed all four claims. The court determined that because proof of the allegations in the complaint would require disclosure of confidential attorney-client matters and because violation of the attorney-client privilege prejudiced the public interest, that prejudice was a proper ground upon which to invalidate the arbitration agreement. Burkhart appealed. On appeal, the Supreme Court cited 39-2-914 and Ratchye v. Lucas, 1998 MT 87, 288 M 345, 957 P2d 1128 (1998), as controlling. Once an offer to arbitrate has been accepted, neither the District Court nor the parties have a right to continue the lawsuit. The exception relating to the public interest pertains to the validity of the arbitration agreement, not to the merits of the underlying dispute. Thus, the District Court erred in deciding the merits of the issues because it lacked jurisdiction to do so once the parties agreed to arbitrate. Summary judgment was reversed and the claims were remanded for arbitration. Burkhart v. Semitool, Inc., 2000 MT 201, 300 M 480, 5 P3d 1031, 57 St. Rep. 785 (2000).

Commencement of Litigation, Delay in Asserting Right to Arbitrate, and Other Acts Held Implied Waiver of Right to Arbitrate: Holm-Sutherland contracted with the town of Shelby to construct sewer and water improvements. When a dispute arose, Holm-Sutherland at first demanded arbitration, but Shelby sued to enjoin arbitration on the grounds that the arbitration clause in the contract did not comply with the then-existing statutory notice requirements. Holm-Sutherland agreed to the injunction. The statutory notice requirements were subsequently held by the U.S. Supreme Court in Doctor's Associates, Inc., v. Casarotto, 517 US 681 (1996), to have been preempted by the Federal Arbitration Act. In the meantime, Holm-Sutherland filed a civil action for damages against Shelby and its engineering firm, seeking damages for breach of contract but not seeking arbitration. Approximately 20 months after the Casarotto decision and less than 10 weeks prior to trial, Holm-Sutherland again demanded arbitration and Shelby responded that by demanding a jury trial in the city's action for damages, Holm-Sutherland had expressly waived its right to arbitration. Arbitration was ordered by the District Court. The Montana Supreme Court held that here had been no express waiver by Holm-Sutherland of its right to arbitrate. However, relying upon its opinions in Thiel v. Johnson, 219 M 271, 711 P2d 829 (1985), and Downey v. Christensen, 251 M 386, 825 P2d 557 (1992), the Supreme Court held that Holm-Sutherland's cumulative actions were so inconsistent with its initial demand for arbitration that the company had impliedly waived its contractual right to arbitration. These inconsistent actions included a demand for a jury trial in response to Shelby's action to enjoin arbitration, initiation of an action for damages against Shelby in which no demand for arbitration was made, and its much delayed demand for arbitration made 20 months after the Casarotto decision by the U.S. Supreme Court. The Montana Supreme Court found that Shelby had been prejudiced by the actions of Holm-Sutherland in electing to pursue a judicial remedy and consequently held those actions to constitute an implied waiver of its right to arbitration. Holm-Sutherland Co., Inc. v. Shelby, 1999 MT 150, 295 M 65, 982 P2d 1053, 56 St. Rep. 595 (1999).

Arbitration Clause in Standardized Form Advertising Agreement — Lack of Mutuality of Obligation and Meaningful Choice Considered Unconscionable Contract of Adhesion: Iwen sued U.S. West Direct for damages for negligent construction of a yellow pages advertisement, infliction of emotional distress, and punitive damages. The District Court held that the parties were bound by the arbitration clause in the directory advertising order. The advertising order was a standardized form, the terms of which Iwen was unable to negotiate and for which Iwen's only choice was to accept or reject, constituting an agreement of adhesion. The arbitration provision lacked mutuality of obligation, was one-sided, and contained terms that were unreasonably favorable to U.S. West Direct, leaving Iwen, as the weaker bargaining party, no meaningful choice regarding acceptance of its provisions. Viewed from the perspective of consumer Iwen, the arbitration clause was held to be unconscionable, and the Supreme Court reversed, striking the arbitration clause, pursuant to 30-2-302, and remanding for further proceedings. Iwen v. U.S. W. Direct, 1999 MT 63, 293 M 512, 977 P2d 989, 56 St. Rep. 263 (1999), following Passage v. Prudential-Bache Sec., Inc., 223 M 60, 727 P2d 1298, 43 St. Rep. 1532

(1986), and Leibrand v. Nat'l Farmers Union Property & Cas. Co., 272 M 1, 898 P2d 1220, 52 St. Rep. 557 (1995), and distinguishing Snap-on Tools Corp. v. Vetter, 838 F. Supp. 468 (D.C. Mont. 1993).

District Court Bound by Arbitration Agreement: In 1995, a homeowners' association filed a complaint seeking to compel subdivision developers to complete a water system as designed and approved in the 1970s. The developers contended that the water system was complete as built. Before trial, the parties entered into a settlement agreement that included a provision stating that any disputes would be settled by arbitration. The water system was not completed on time, so the association moved to enforce the settlement agreement by an order of specific performance or by arbitration. The District Court denied the motion for arbitration on grounds that the agreement was clear and ordered the developers to perform the specific terms of the settlement agreement. When a court is asked to compel arbitration of a dispute, the threshold inquiry is whether the parties agreed to arbitrate. Settlement agreements requiring arbitration are enforceable in Montana, as are other contracts, except on grounds that exist at law or in equity for the revocation of a contract. Although the settlement agreement in this case contemplated the remedy of specific performance, it was not an alternative to arbitration but rather a remedy available to the arbitrators when interpreting and enforcing the agreement. Because no conditions existed that would void the arbitration clause, the trial court erred in ignoring the arbitration agreement and deciding the dispute, rather than ordering the parties to arbitrate as they had agreed. Ratchye v. Lucas, 1998 MT 87, 288 M 345, 957 P2d 1128, 55 St. Rep. 354 (1998).

Collective Bargaining — Arbitration — Once Matter Determined to Be Arbitrable Procedure, Wholly Within Jurisdiction of Arbitrator: The union filed a grievance on an employee's behalf, challenging the employee's transfer as a violation of the collective bargaining agreement. Later, the employee reached a retirement agreement with Montana Power Company (MPC) that included a release by the employee of grievances against MPC. MPC claimed that the arbitrability of the grievance was precluded by the private contract entered into by MPC and the employee. MPC went to court seeking an alternative writ of prohibition to prevent arbitration. The court issued a writ of prohibition and, after hearing, made the writ permanent. The union appealed to the Supreme Court, which held that this was a procedural, rather than a substantive, challenge to the collective bargaining agreement and that once a grievance is determined to be arbitrable according to the collective bargaining agreement, subsequent procedural questions are wholly within the jurisdiction of the arbitrator. Int'l Bhd. of Elec. Workers v. Mont. Power Co., 280 M 55, 929 P2d 839, 53 St. Rep. 1296 (1996).

District Court Ruling on Validity of Arbitration Clause: Mueske argued that the arbitration clause in his contract with a securities firm was invalid. The Supreme Court held that as long as a party was disputing the validity of an arbitration clause and not the contract as a whole, then the District Court may rule on the clause's validity rather than require the parties to submit to arbitration, as would be the case if the contract as a whole were being contested. Mueske v. Piper, Jaffray & Hopwood, Inc., 260 M 207, 859 P2d 444, 50 St. Rep. 1009 (1993).

Not All Disputes Subject to Arbitration by Mere Presence of Grievance Clause: Statutes governing collective bargaining for public employees do not provide a basis for requiring arbitration. Although a bargaining agreement may contain a grievance procedure culminating in arbitration, the mere existence of that provision does not require all controversies to be arbitrated, nor does entry by a party into a bargaining agreement containing a grievance procedure imply consent to submitting all disputes to arbitration. Under this section, the District Court must determine the arbitrability of a controversy when one party denies that the issue requires arbitration. If the court determines that an agreement to arbitrate the controversy does not exist, denial of an application for arbitration is proper. Missoula County High School Educ. Ass'n v. Bd. of Trustees, 259 M 438, 857 P2d 696, 50 St. Rep. 870 (1993).

Concurrent Proceedings Not Precluded: A terminated teacher filed an appeal pursuant to 20-3-210. The teacher's union filed a grievance, alleging that the termination was a violation of the collective bargaining agreement. The school superintendent refused to process the grievance pending the teacher's statutory appeal. When the teacher dismissed the statutory appeal, the union filed an action to compel arbitration of the grievance pursuant to the Uniform Arbitration Act and the collective bargaining agreement. On appeal, the Supreme Court held that nothing in the teacher's collective bargaining agreement or in the election of remedies law precludes concurrent proceedings on the termination. Frazer Educ. Ass'n v. Valley County School District No. 2, 256 M 223, 846 P2d 267, 50 St. Rep. 41 (1993).

Participation in Discovery Not Preclusive of Right to Arbitration — Waiver Not Shown: Downeys presented a number of claims against Christensen and Baker Boy Bake Shops, Inc. (Baker Boy), a donut franchise, alleging fraud, breach of contract, breach of the implied covenant

of good faith and fair dealing, and negligence stemming from a franchise agreement between Downeys and Baker Boy. Immediately after serving the complaint, Downeys began discovery by serving requests for production, which were answered separately by Christensen and Baker Boy, who subsequently began their own discovery procedures. The District Court denied a motion to compel arbitration and stay proceedings, finding that participation in discovery constituted a waiver of arbitration. Failure to compel the parties to submit their claims to arbitration was error, given a clause in the franchise agreement requiring arbitration rather than civil litigation, when the waiver was not proved by actions inconsistent with the right to arbitrate or by a showing of prejudice arising from any inconsistent actions. Downey v. Christensen, 251 M 386, 825 P2d 557, 49 St. Rep. 88 (1992), followed in Holm-Sutherland Co. Inc. v. Shelby, 1999 MT 150, 295 M 65, 982 P2d 1053, 56 St. Rep. 595 (1999). However, see Casarotto v. Lombardi, 268 M 369, 886 P2d 931, 51 St. Rep. 1350 (1994), vacated and remanded in 515 US 1129, 132 L Ed 2d 807, 115 S Ct 2552, (1995), and reaffirmed and reinstated in Casarotto v. Lombardi, 274 M 3, 901 P2d 596, 52 St. Rep. 911 (1995), reversed and remanded in Doctor's Associates, Inc. v. Casarotto, 517 US 681, 134 L Ed 2d 902, 116 S Ct 1652 (1996).

Jurisdiction in Determining Arbitration Issues: The District Court has jurisdiction only if the issue is the making of the arbitration portion of an agreement. If the issue is the validity of the entire agreement, this must be submitted to the arbitrators. Vukasin v. D.A. Davidson & Co., 241 M 126, 785 P2d 713, 47 St. Rep. 135 (1990), following Larsen v. Opie, 237 M 108, 771 P2d 977, 46 St. Rep. 660 (1989). See also Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 US 395, 18 L Ed 2d 1270, 87 S Ct 1801 (1967).

Court Review of Claim of Fraud Inducing Arbitration Clause Not Fraud Inducing Entry Into Contract Allowed Under Federal Arbitration Act: The appellant alleged that fraud had induced him to enter into an option agreement and margin contract with the respondents. The appellant further stated that he had not read the arbitration clause or the clause that exposed him to unlimited losses. The Supreme Court ruled that since the appellant only alleged fraud in the inducement and did not specifically allege that he had been induced to agree to the arbitration clause, the entire matter, including fraud in the inducement, was subject to arbitration under the Uniform Arbitration Act (Title 27, ch. 5). Larsen v. Opie, 237 M 108, 771 P2d 977, 46 St. Rep. 660 (1989).

Motion to Compel Arbitration Properly Denied: Where purchase of limited partnership interests occurred prior to execution of an arbitration agreement that prospectively applied arbitration to future accounts, the District Court properly denied a motion to compel arbitration retroactively. Frates v. Edward D. Jones & Co., 233 M 377, 760 P2d 748, 45 St. Rep. 1567 (1988), distinguishing Gilmore v. Shearson/Am. Express, Inc., 668 F. Supp. 314 (S.D.N.Y. 1987).

Arbitrability of Claims Against Multiple Defendants — Same Facts, Same Actions: Complaints relating to mishandling or unwise management of accounts were filed against Prudential-Bache Securities, Inc. (Prudential) and G.T. Murray Company (Murray). The Murray defendants' motion to compel arbitration was denied when the District Court found that they were not signatories to the customer agreement form, but Prudential's motion to compel arbitration was granted. Upon examination of the customer agreement, the Supreme Court found that Prudential was not a signatory either; in fact the agreement form did not clearly identify the party with whom plaintiffs were contracting. However, since the claims against Prudential and Murray arose out of the same facts and the same actions, to separate the claims as to the defendants would be inappropriate. Therefore, the court held that the claims against all defendants were arbitrable. Passage v. Prudential-Bache Sec., Inc., 223 M 60, 727 P2d 1298, 43 St. Rep. 1532 (1986).

Claims of Children Stayed Pending Arbitration of Parents' Claims — Arbitration Ordered: Both plaintiffs and defendants objected to a District Court order staying claims on children's accounts pending arbitration of the parents' claims. Defendants argued that the children's claims were subject to arbitration, along with the other claims. Plaintiffs argued that the District Court was correct in finding that the children's accounts were not included under the terms of the customer agreement forms but contended that it was unjust to stay court action on the children's claims. The Supreme Court, citing Merrill Lynch, et al. v. Haydu, 637 F2d 391 (5th Cir. 1981), held that issues that go to the formation of the contract as a whole may properly be arbitrated. Since a factual question remained as to whether the children's accounts were covered by the customer agreement forms, the District Court order was reversed and this issue was subjected to arbitration. Passage v. Prudential-Bache Sec., Inc., 223 M 60, 727 P2d 1298, 43 St. Rep. 1532 (1986).

Enforceability of Arbitration Clause in Adhesion Contract: Plaintiffs contended that an arbitration clause in a brokerage agreement should have been declared unenforceable because it

appeared in a contract of adhesion. The Supreme Court found nothing in the record to indicate that the arbitration clause was not within the parties' expectations or that the clause was oppressive or unconscionable. The court noted that federal case law demonstrates that arbitration clauses are common and enforceable in brokerage agreements (citing Finkle & Ross v. A.G. Becker Paribas, Inc., 622 F. Supp. 1505 (D.C. N.Y. 1985), and Southland Corp. v. Keating, 465 US 1, 79 L Ed 2d 1, 104 S Ct 852 (1984)) and held that even if the customer agreement form was an adhesion contract, the arbitration clause was enforceable. Passage v. Prudential-Bache Sec., Inc., 223 M 60, 727 P2d 1298, 43 St. Rep. 1532 (1986), followed in Chor v. Piper, Jaffray & Hopwood, 261 M 143, 862 P2d 26, 50 St. Rep. 1234 (1993), and Iwen v. U.S. W. Direct, 1999 MT 63, 293 M 512, 977 P2d 989, 56 St. Rep. 263 (1999). See also Cohen v. Wedbush, Noble, Cooke, Inc., 841 F2d 282 (9th Cir. 1988).

Law Review Articles

The Arbitration Alternative: Its Time Has Come, Faure, 46 Mont. L. Rev. 199 (1985).

Collateral References

Arbitration *key* 23.7, et seq.

6 C.J.S. Arbitration §49, et seq.

4 Am. Jur. 2d Alternative Dispute Resolution §§109 through 125.

27 Am. Jur. Trials Resolving real estate disputes through arbitration, pp. 621 through 678.

Participation in arbitration proceedings as waiver of objections to arbitrability under state law. 56 ALR 5th 757.

Arbitration of medical malpractice claims. 24 ALR 5th 1.

Appealability of state court's order or decree compelling or refusing to compel arbitration. 6 ALR 4th 652.

Defendant's participation in action as waiver of right to arbitration of dispute involved therein. 98 ALR 3d 767.

Statute of Limitations as bar to arbitration under agreement. 94 ALR 3d 533.

Filing of mechanics' lien or proceeding for its enforcement as affecting right to arbitration. 73 ALR 3d 1066.

Demand for or submission to arbitration as affecting enforcement of mechanics' lien. 73 ALR 3d 1042.

Waiver of, or estoppel to assert, substantive right or right to arbitrate as question for court or arbitrator. 26 ALR 3d 604.

Delay in asserting contractual right to arbitration as precluding enforcement thereof. 25 ALR 3d 117.

Uninsured motorist endorsement: Validity and enforceability of provision for binding arbitration, and waiver thereof. 24 ALR 3d 1325.

Power of municipal corporation to submit to arbitration. 20 ALR 3d 569.

Enforcement of contractual arbitration clause as affected by expiration of contract prior to demand for arbitration. 5 ALR 3d 1008.

An Overview of the New Montana Arbitration Act, Corbett, Mont. Lawyer, Jan. 1986.

The Legal Status of Arbitration in Montana, Corbett, Mont. Lawyer, Oct. 1985.

Part 2
Action by Arbitrators

27-5-211. Appointment of arbitrators.

Compiler's Comments

Source: Section 3, Uniform Arbitration Act, 7 U.L.A. 96.

Collateral References

Arbitration *key* 26.

6 C.J.S. Arbitration §§92 through 94.

4 Am. Jur. 2d Alternative Dispute Resolution §§148 through 176.

27-5-212. Majority action by arbitrators.

Compiler's Comments

Source: Section 4, Uniform Arbitration Act, 7 U.L.A. 99.

Collateral References

Arbitration *key* 35.

6 C.J.S. Arbitration §128.

4 Am. Jur. 2d Alternative Dispute Resolution §§195 through 199.

Modern status of rules respecting concurrence of all arbitrators as condition of binding award under private agreement not specifying unanimity. 83 ALR 3d 996.

27-5-213. Hearing.

Compiler's Comments

Source: Section 5, Uniform Arbitration Act, 7 U.L.A. 99.

Case Notes

Injunction in Arbitration Award Not Restrictive of Constitutional Right to Access Courts: The Langemeiers and Kuehls became involved in a dispute over a county road easement between their adjoining lands, and the dispute eventually was submitted to arbitration. The final arbitration award provided injunctive relief to the Langemeiers by prohibiting the Kuehls from commencing or prosecuting any further action or proceeding regarding the property or challenging the ownership of the parcel. The Kuehls complained that the injunctive language was so overbroad that it took property from them without due process of law and improperly restricted their constitutional right to access courts. However, the initial memorandum of understanding, the settlement agreement, and the final arbitration award all established that the Kuehls had no property interest in the disputed roadway, so they could not complain that they were deprived of the use of property that was not theirs to use. Further, the injunctive language only sought to restrain the Kuehls from contesting matters already decided and from pursuing repetitive claims previously resolved by the settlement agreement concerning property in which they had no interest. The Kuehls had already enjoyed access to the courts as the dispute wound its way through two arbitrations, approval by the District Court, and a Supreme Court appeal. Although the constitution guarantees every person access to the courts, it does not grant a license to relitigate a cause or to burden the resources of the courts with successive claims. Therefore, the injunction did not deny the Kuehls of the use of property or access to the courts, and the arbitration award was affirmed. Langemeier v. Kuehl, 2001 MT 306, 307 M 499, 40 P3d 343 (2001).

No Error in Arbitrator Allowing Signatory to Settlement Agreement to Be Made Party to Proceedings and Awarding Judgment Against Signatory: Although defendant Kuehl's father, Robert, was not a party to the original lawsuit, Robert accompanied Kuehl at the settlement conference and signed a memorandum of understanding and a settlement agreement, having purchased a one-half interest in the property at issue for $10. After Kuehl violated the settlement agreement by refusing a survey of the property at issue, the arbitrator made Robert a party to the proceedings and awarded $801 against Kuehl, provided an injunction against any further action by Kuehl and Robert concerning the disputed property, and awarded attorney fees jointly and severally against Kuehl and Robert. Robert appealed, contending that the District Court exceeded its authority by confirming the actions of the arbitrator in making Robert a party and awarding judgment against him. The Supreme Court affirmed. The dispute over the final arbitration award arose out of the settlement agreement, which Robert signed more than 2 years prior to the proceedings, and his signature provided the arbitrator a rational basis to find that Robert was properly a party to the proceedings and to award judgment against him. Langemeier v. Kuehl, 2001 MT 306, 307 M 499, 40 P3d 343 (2001).

Collateral References

Arbitration *key* 31.10 through 35.
6 C.J.S. Arbitration §114, et seq.
4 Am. Jur. 2d Alternative Dispute Resolution §§177 through 190.

27-5-214. Representation by attorney.

Compiler's Comments

Source: Section 6, Uniform Arbitration Act, 7 U.L.A. 113.

Collateral References

Arbitration *key* 32.6.
4 Am. Jur. 2d Alternative Dispute Resolution §§102, 104.

27-5-215. Witnesses, subpoenas, and depositions.

Compiler's Comments

Source: Section 7, Uniform Arbitration Act, 7 U.L.A. 114.

Collateral References

Arbitration *key* 31, 34.2.
6 C.J.S. Arbitration §§125 through 127.

4 Am. Jur. 2d Alternative Dispute Resolution §189.

An Overview of the New Montana Arbitration Act, Corbett, Mont. Lawyer, Jan. 1986.

27-5-216. Award.

Compiler's Comments

Source: Section 8, Uniform Arbitration Act, 7 U.L.A. 116.

Case Notes

Refusal to Vacate or Modify Arbitration Award — No Abuse of Discretion: Following an automobile accident, plaintiffs and defendant agreed by stipulation to submit the dispute to binding arbitration. By stipulation, each party agreed to pay for its own attorney fees. When the arbitrator's statement included general damages and attorney fees for Margaret, the parties informed the arbitrator of the stipulated agreement. Withdrawing the initial general damages award, the arbitrator then withdrew the initial award but issued a formal written award increasing Margaret's general damages by $40,000 and included a statement that no attorney fees were awarded. Claiming that the arbitrator had improperly "juggled" general damages to cover plaintiff's attorney fees, the defendant appealed, asking the District Court to modify or partially vacate the award by $40,000. The District Court refused, ruling that the state Uniform Arbitration Act statutorily prohibits judicial review of awards on merit. On appeal, the Supreme Court affirmed, ruling that although the arbitrator may have briefly considered awarding attorney fees, the final written arbitration award, which did not exist until the arbitrator reduced it to writing and delivered it to the parties, did not provide for attorney fees. Duchscher v. Vaile, 269 M 1, 887 P2d 181, 51 St. Rep. 1364 (1994). See Geissler v. Sanem, 285 M 411, 949 P2d 243, 54 St. Rep. 1218 (1997), modifying the holding with respect to the scope of review and adopting the manifest disregard of the law standard.

Collateral References

Arbitration *key* 48, et seq.

6 C.J.S. Arbitration §§129, 130.

4 Am. Jur. 2d Alternative Dispute Resolution §§191 through 217.

Arbitrator's power to award punitive damages. 83 ALR 3d 1037.

27-5-217. Change of award by arbitrators.

Compiler's Comments

Source: Section 9, Uniform Arbitration Act, 7 U.L.A. 128.

Case Notes

Arbitration Improperly Remanded to Arbitrator for Reconsideration of Damages — Rationally Derived Arbitration Remedy to Be Upheld on Review: The District Court remanded a wrongful discharge case to the arbitrator for reconsideration of damages. The employee contended that the District Court could not enter judgment for the amended award because the case should not have been remanded and because the arbitrator did not have authority to amend the award. The employer contended that the arbitrator exceeded his powers when he made the first award and that the District Court properly gave the arbitrator authority to vacate portions of the first award pursuant to 27-5-312. However, the exceeding of power by an arbitrator is not one of the provisions in this section pursuant to which an arbitrator may modify or correct an award. When the arbitrator granted the employer's motion to vacate portions of the original damage award, he exceeded his statutory authority. Further, the District Court was without authority to vacate or modify the award except for the statutory bases set forth in 27-5-312 and 27-5-313. If the remedy fashioned by the arbitrator is rationally derived from the arbitration agreement, it will be upheld. The Supreme Court remanded for judgment in the amount of the original arbitration award. Nelson v. Livingston Rebuild Center, Inc., 1999 MT 116, 294 M 408, 981 P2d 1185, 56 St. Rep. 486 (1999).

Collateral References

Arbitration *key* 70, 71.

6 C.J.S. Arbitration §§113, 233 through 235.

4 Am. Jur. 2d Alternative Dispute Resolution §210.

Comment note on power of court to resubmit matter to arbitrators for correction or clarification, because of ambiguity or error in, or omission from, arbitration award. 37 ALR 3d 200.

Power of arbitrator to correct, or power of court to correct or resubmit, nonlabor award because of incompleteness or failure to pass on all matters submitted. 36 ALR 3d 939.

Comment note on determination of validity of arbitration award under requirement that arbitrators shall pass on all matters submitted. 36 ALR 3d 649.

27-5-218. Fees and expenses of arbitration.

Compiler's Comments

Source: Section 10, Uniform Arbitration Act, 7 U.L.A. 131.

Case Notes

Equitable Power of Arbitrator to Award Attorney Fees When Bad Faith or Malicious Behavior Involved: The traditional rule is that an arbitrator should not award attorney fees without a statutory or contractual basis; however, an arbitrator may, under limited circumstances, award attorney fees through the arbitrator's equity powers when bad faith or malicious behavior is involved. Here, the arbitrator noted that defendant Kuehl exhibited malicious and reprehensible behavior after the parties had executed a settlement agreement by turning a dispute over 900 square feet of ground, in a beet field that never belonged to him and that was worth not even $2,000, into litigation that cost the parties tens of thousands of dollars. The award of attorney fees against Kuehl was properly within the arbitrator's equitable powers, and the District Court did not abuse its discretion in confirming the award. Langemeier v. Kuehl, 2001 MT 306, 307 M 499, 40 P3d 343 (2001). See also Nelson v. Livingston Rebuild Center, Inc., 1999 MT 116, 294 M 408, 981 P2d 1185 (1999), and Terra W. Townhomes, L.L.C. v. Stu Henkle Realty, 2000 MT 43, 298 M 344, 996 P2d 866 (2000).

Collateral References

Arbitration *key* 42.

6 C.J.S. Arbitration §247, et seq.

4 Am. Jur. 2d Alternative Dispute Resolution §§204 through 206, 233.

Awarding attorneys' fees in connection with arbitration. 60 ALR 5th 669.

Liability of parties to arbitration for costs, fees, and expenses. 57 ALR 3d 633, §12 superseded by 60 ALR 5th 669.

Part 3
Procedure Following Award

Part Collateral References

Vacating on public policy grounds arbitration awards reinstating discharged employees—state cases. 112 ALR 5th 263.

27-5-311. Confirmation of award by court.

Compiler's Comments

Source: Section 11, Uniform Arbitration Act, 7 U.L.A. 133.

Case Notes

Refusal to Vacate Arbitrator's Award Affirmed Absent Abuse of Discretion — Standard of Review: Parties entered into a written agreement to submit a complex real estate matter to binding arbitration. After the arbitrator made initial summary findings and an award, plaintiff requested vacation of the award on the basis that the award contained miscalculations and that the arbitrator had disregarded Montana law and exceeded his powers. The District Court affirmed the award. On appeal, the Supreme Court noted that judicial review of arbitration is limited in that once a matter is submitted to arbitration, courts are not permitted to review the merits of the controversy, but may only confirm, vacate, modify, or correct an arbitration award pursuant to 27-5-311 through 27-5-313. The Supreme Court's standard of review for a lower court's refusal to modify or vacate an arbitration award is whether there was an abuse of discretion. Here, the arbitrator was presented with a number of complex claims, all of which were considered in rendering the final decision. The arbitrator considered applicable law, but misapplied it; however, under the narrow standard of review, an award cannot be overturned simply because the law has been misapplied. Rather, the test for manifest disregard of the law, as set out in Geissler v. Sanem, 285 M 411, 949 P2d 234 (1997), requires that the arbitrator appreciated the existence of a clearly governing legal principle but decided to ignore it. Absent an abuse of discretion in this case, the Supreme Court affirmed the District Court's refusal to vacate the award. Terra W. Townhomes, L.L.C. v. Stu Henkel Realty, 2000 MT 43, 298 M 344, 996 P2d 866, 57 St. Rep. 207 (2000), following Nelson v. Livingston Rebuild Center, Inc., 1999 MT 116, 294 M 408, 981 P2d 1185, 56 St. Rep. 486 (1999).

Loss of District Court Jurisdiction When Wrongful Discharge Claim Submitted to Arbitration — Leave to Amend Complaint Denied: Dahl brought a wrongful discharge action against Fred

Meyer, Inc. The parties agreed to arbitration and chose an arbitrator. Prior to the hearing, the arbitrator dismissed the arbitration on grounds that federal law applied. Dahl did not object to the District Court's confirmation of the arbitrator's decision but did move for leave to amend the complaint to remove the federal implications. However, the District Court lost jurisdiction when the parties agreed to arbitration, at which point the court had authority only to confirm, modify and confirm, or vacate and remand for hearing pursuant to 27-5-311 through 27-5-314, but not the authority to allow Dahl to amend the complaint. Dahl v. Fred Meyer, Inc., 1999 MT 285, 297 M 28, 993 P2d 6, 56 St. Rep. 1149 (1999).

Collateral References

Arbitration *key* 72, et seq.

6 C.J.S. Arbitration §178, et seq.

4 Am. Jur. 2d Alternative Dispute Resolution §§229, 230.

Setting aside arbitration award on ground of interest or bias of arbitrators—commercial, business, or real estate transactions. 67 ALR 5th 179.

Setting aside arbitration award on ground of interest or bias of arbitrator—labor disputes. 66 ALR 5th 611.

Setting aside arbitration award on ground of interest or bias of arbitrators—torts. 64 ALR 5th 475.

Setting aside arbitration award on ground of interest or bias of arbitrators—insurance appraisals or arbitrations. 63 ALR 5th 675.

Appealability of judgment confirming or setting aside arbitration award. 7 ALR 3d 608.

27-5-312. Vacating an award.

Compiler's Comments

Source: Section 12, Uniform Arbitration Act, 7 U.L.A. 140.

Case Notes

No Abuse of Discretion in Refusing to Vacate Arbitration Award Based on Allegations of Arbitrator Partiality Absent Showing of Evident Partiality: Plaintiffs contended that an arbitration award should be vacated because one of the arbitrators, a former employee of one of the agencies involved in the arbitration, was not neutral. The motion to vacate was denied, and on appeal, the Supreme Court affirmed. Employment status is insufficient, of itself, to establish partiality, and plaintiffs' argument amounted to a speculative and conclusory allegation of partiality, rather than the direct and demonstrable evidence of partiality required to vacate an award. Paulson v. Flathead Conserv. District, 2004 MT 136, 321 M 364, 91 P3d 569 (2004).

Equitable Power of Arbitrator to Award Attorney Fees When Bad Faith or Malicious Behavior Involved: The traditional rule is that an arbitrator should not award attorney fees without a statutory or contractual basis; however, an arbitrator may, under limited circumstances, award attorney fees through the arbitrator's equity powers when bad faith or malicious behavior is involved. Here, the arbitrator noted that defendant Kuehl exhibited malicious and reprehensible behavior after the parties had executed a settlement agreement by turning a dispute over 900 square feet of ground, in a beet field that never belonged to him and that was worth not even $2,000, into litigation that cost the parties tens of thousands of dollars. The award of attorney fees against Kuehl was properly within the arbitrator's equitable powers, and the District Court did not abuse its discretion in confirming the award. Langemeier v. Kuehl, 2001 MT 306, 307 M 499, 40 P3d 343 (2001). See also Nelson v. Livingston Rebuild Center, Inc., 1999 MT 116, 294 M 408, 981 P2d 1185 (1999), and Terra W. Townhomes, L.L.C. v. Stu Henkle Realty, 2000 MT 43, 298 M 344, 996 P2d 866 (2000).

Injunction in Arbitration Award Not Restrictive of Constitutional Right to Access Courts: The Langemeiers and Kuehls became involved in a dispute over a county road easement between their adjoining lands, and the dispute eventually was submitted to arbitration. The final arbitration award provided injunctive relief to the Langemeiers by prohibiting the Kuehls from commencing or prosecuting any further action or proceeding regarding the property or challenging the ownership of the parcel. The Kuehls complained that the injunctive language was so overbroad that it took property from them without due process of law and improperly restricted their constitutional right to access courts. However, the initial memorandum of understanding, the settlement agreement, and the final arbitration award all established that the Kuehls had no property interest in the disputed roadway, so they could not complain that they were deprived of the use of property that was not theirs to use. Further, the injunctive language only sought to restrain the Kuehls from contesting matters already decided and from pursuing repetitive claims previously resolved by the settlement agreement concerning property

in which they had no interest. The Kuehls had already enjoyed access to the courts as the dispute wound its way through two arbitrations, approval by the District Court, and a Supreme Court appeal. Although the constitution guarantees every person access to the courts, it does not grant a license to relitigate a cause or to burden the resources of the courts with successive claims. Therefore, the injunction did not deny the Kuehls of the use of property or access to the courts, and the arbitration award was affirmed. Langemeier v. Kuehl, 2001 MT 306, 307 M 499, 40 P3d 343 (2001).

No Error in Arbitrator Allowing Signatory to Settlement Agreement to Be Made Party to Proceedings and Awarding Judgment Against Signatory: Although defendant Kuehl's father, Robert, was not a party to the original lawsuit, Robert accompanied Kuehl at the settlement conference and signed a memorandum of understanding and a settlement agreement, having purchased a one-half interest in the property at issue for $10. After Kuehl violated the settlement agreement by refusing a survey of the property at issue, the arbitrator made Robert a party to the proceedings and awarded $801 against Kuehl, provided an injunction against any further action by Kuehl and Robert concerning the disputed property, and awarded attorney fees jointly and severally against Kuehl and Robert. Robert appealed, contending that the District Court exceeded its authority by confirming the actions of the arbitrator in making Robert a party and awarding judgment against him. The Supreme Court affirmed. The dispute over the final arbitration award arose out of the settlement agreement, which Robert signed more than 2 years prior to the proceedings, and his signature provided the arbitrator a rational basis to find that Robert was properly a party to the proceedings and to award judgment against him. Langemeier v. Kuehl, 2001 MT 306, 307 M 499, 40 P3d 343 (2001).

Refusal to Vacate Arbitrator's Award Affirmed Absent Abuse of Discretion — Standard of Review: Parties entered into a written agreement to submit a complex real estate matter to binding arbitration. After the arbitrator made initial summary findings and an award, plaintiff requested vacation of the award on the basis that the award contained miscalculations and that the arbitrator had disregarded Montana law and exceeded his powers. The District Court affirmed the award. On appeal, the Supreme Court noted that judicial review of arbitration is limited in that once a matter is submitted to arbitration, courts are not permitted to review the merits of the controversy, but may only confirm, vacate, modify, or correct an arbitration award pursuant to 27-5-311 through 27-5-313. The Supreme Court's standard of review for a lower court's refusal to modify or vacate an arbitration award is whether there was an abuse of discretion. Here, the arbitrator was presented with a number of complex claims, all of which were considered in rendering the final decision. The arbitrator considered applicable law, but misapplied it; however, under the narrow standard of review, an award cannot be overturned simply because the law has been misapplied. Rather, the test for manifest disregard of the law, as set out in Geissler v. Sanem, 285 M 411, 949 P2d 234 (1997), requires that the arbitrator appreciated the existence of a clearly governing legal principle but decided to ignore it. Absent an abuse of discretion in this case, the Supreme Court affirmed the District Court's refusal to vacate the award. Terra W. Townhomes, L.L.C. v. Stu Henkel Realty, 2000 MT 43, 298 M 344, 996 P2d 866, 57 St. Rep. 207 (2000), following Nelson v. Livingston Rebuild Center, Inc., 1999 MT 116, 294 M 408, 981 P2d 1185, 56 St. Rep. 486 (1999).

Failure to Raise Issue of Arbitrator's Authority in Arbitration or District Court as Waiver of Right to Object to Arbitrator's Ruling on Appeal: Dahl brought a wrongful discharge action against Fred Meyer, Inc. The parties agreed to arbitration and chose an arbitrator. Prior to the hearing, the arbitrator determined that because the complaint alleged a motive for the discharge, it was intended to state a cause of action under ERISA (29 U.S.C. 1001, et seq.), requiring exclusive federal court jurisdiction, so arbitration was dismissed. By failing to raise the issue of whether the arbitrator lacked authority to decide that the issue was preempted by federal law, failing to contest the basis of the arbitrator's decision, and failing to object to the motion in District Court to confirm the arbitrator's award through a motion to vacate, Dahl waived the right to object to the ruling on appeal. Dahl v. Fred Meyer, Inc., 1999 MT 285, 297 M 28, 993 P2d 6, 56 St. Rep. 1149 (1999). See also St. Farm v. Cabs, Inc., 751 P2d 61 (Colo. 1988).

Arbitration Improperly Remanded to Arbitrator for Reconsideration of Damages — Rationally Derived Arbitration Remedy to Be Upheld on Review: The District Court remanded a wrongful discharge case to the arbitrator for reconsideration of damages. The employee contended that the District Court could not enter judgment for the amended award because the case should not have been remanded and because the arbitrator did not have authority to amend the award. The employer contended that the arbitrator exceeded his powers when he made the first award and that the District Court properly gave the arbitrator authority to vacate portions of the first award pursuant to this section. However, the exceeding of power by an arbitrator is

not one of the provisions in 27-5-217 pursuant to which an arbitrator may modify or correct an award. When the arbitrator granted the employer's motion to vacate portions of the original damage award, he exceeded his statutory authority. Further, the District Court was without authority to vacate or modify the award except for the statutory bases set forth in 27-5-313 and this section. If the remedy fashioned by the arbitrator is rationally derived from the arbitration agreement, it will be upheld. The Supreme Court remanded for judgment in the amount of the original arbitration award. Nelson v. Livingston Rebuild Center, Inc., 1999 MT 116, 294 M 408, 981 P2d 1185, 56 St. Rep. 486 (1999), followed in Terra W. Townhomes, L.L.C. v. Stu Henkel Realty, 2000 MT 43, 298 M 344, 996 P2d 866, 57 St. Rep. 207 (2000).

"Manifest Disregard of Law" Standard Applied on Review — Prior Holdings Modified: After an arbitration ruling in favor of the defendants, the plaintiffs filed an appeal from the arbitration, claiming partiality and misconduct by the panel and that the panel had exceeded its authority. The District Court granted the defendants' motions to dismiss on the grounds that the appeal failed to state a claim for which relief could be granted. The Supreme Court held that the District Court did not err in dismissing the appeal. The Supreme Court adopted a manifest disregard of the law standard of review for arbitration awards under this section and modified prior holdings that held otherwise. In this case, the panel acted entirely within its power when it made an award without including specific findings of fact or conclusions of law. To determine that an arbitrator ruled in manifest disregard of the law requires more than simply a misapplication of the law by the arbitrator. Geissler v. Sanem, 285 M 411, 949 P2d 234, 54 St. Rep. 1218 (1997).

Review of Arbitration Award Based on Sufficiency of Evidence Beyond Scope of Judicial Review: Stockade Enterprises argued that the lower court erred in refusing to set aside or modify the decision rendered by the arbitrator. The Supreme Court stated that the District Court had incorrectly refused to review the arbitration award on the basis that the lower court felt that it had no authority to review the award based upon the stipulation and order provisions indicating that the arbitrator's decision was binding and final. The Supreme Court indicated that Montana's Uniform Arbitration Act does allow a court to review an arbitration award regardless of the "binding" nature of the arbitration procedure. However, in the case before it, the Supreme Court held that Stockade Enterprises based its request for modification of the award on the sufficiency of the evidence and that was not one of the statutory grounds on which a court could review the award. Therefore, the refusal to review the award was not an abuse of discretion. Stockade Enterprises v. Ahl, 273 M 520, 905 P2d 156, 52 St. Rep. 1096 (1995), followed in Nelson v. Livingston Rebuild Center, Inc., 1999 MT 116, 294 M 408, 981 P2d 1185, 56 St. Rep. 486 (1999), and Terra W. Townhomes, L.L.C. v. Stu Henkel Realty, 2000 MT 43, 298 M 344, 996 P2d 866, 57 St. Rep. 207 (2000).

Refusal to Vacate or Modify Arbitration Award — No Abuse of Discretion: Following an automobile accident, plaintiffs and defendant agreed by stipulation to submit the dispute to binding arbitration. By stipulation, each party agreed to pay for its own attorney fees. When the arbitrator's statement included general damages and attorney fees for Margaret, the parties informed the arbitrator of the stipulated agreement. Withdrawing the initial general damages award, the arbitrator then withdrew the initial award but issued a formal written award increasing Margaret's general damages by $40,000 and included a statement that no attorney fees were awarded. Claiming that the arbitrator had improperly "juggled" general damages to cover plaintiff's attorney fees, the defendant appealed, asking the District Court to modify or partially vacate the award by $40,000. The District Court refused, ruling that the state Uniform Arbitration Act statutorily prohibits judicial review of awards on merit. On appeal, the Supreme Court affirmed, ruling that although the arbitrator may have briefly considered awarding attorney fees, the final written arbitration award, which did not exist until the arbitrator reduced it to writing and delivered it to the parties, did not provide for attorney fees. Duchscher v. Vaile, 269 M 1, 887 P2d 181, 51 St. Rep. 1364 (1994), followed in May v. First Nat'l Pawn Brokers, Ltd., 269 M 19, 887 P2d 185, 51 St. Rep. 1367 (1994). The Duchscher and May holdings were modified in Geissler v. Sanem, 285 M 411, 949 P2d 234, 54 St. Rep. 1218 (1997), which adopted the manifest disregard of the law standard on appeals.

Collateral References

Arbitration *key* 75, et seq.

6 C.J.S. Arbitration §197, et seq.

4 Am. Jur. 2d Alternative Dispute Resolution §234, et seq.

Setting aside arbitration award on ground of interest or bias of arbitrators—commercial, business, or real estate transactions. 67 ALR 5th 179.

Setting aside arbitration award on ground of interest or bias of arbitrator—labor disputes. 66 ALR 5th 611.

Setting aside arbitration award on ground of interest or bias of arbitrators—torts. 64 ALR 5th 475.

Setting aside arbitration award on ground of interest or bias of arbitrators—insurance appraisals or arbitrations. 63 ALR 5th 675.

What constitutes corruption, fraud, or undue means in obtaining arbitration award justifying avoidance of award under state law. 22 ALR 4th 366.

Claim of fraud in inducement of contract as subject to compulsory arbitration clause contained in contract. 11 ALR 4th 774.

Appealability of judgment confirming or setting aside arbitration award. 7 ALR 3d 608.

An Overview of the New Montana Arbitration Act, Corbett, Mont. Lawyer, Jan. 1986.

27-5-313. Modification or correction of award by court.

Compiler's Comments

Source: Section 13, Uniform Arbitration Act, 7 U.L.A. 201.

Case Notes

Refusal to Vacate Arbitrator's Award Affirmed Absent Abuse of Discretion — Standard of Review: Parties entered into a written agreement to submit a complex real estate matter to binding arbitration. After the arbitrator made initial summary findings and an award, plaintiff requested vacation of the award on the basis that the award contained miscalculations and that the arbitrator had disregarded Montana law and exceeded his powers. The District Court affirmed the award. On appeal, the Supreme Court noted that judicial review of arbitration is limited in that once a matter is submitted to arbitration, courts are not permitted to review the merits of the controversy, but may only confirm, vacate, modify, or correct an arbitration award pursuant to 27-5-311 through 27-5-313. The Supreme Court's standard of review for a lower court's refusal to modify or vacate an arbitration award is whether there was an abuse of discretion. Here, the arbitrator was presented with a number of complex claims, all of which were considered in rendering the final decision. The arbitrator considered applicable law, but misapplied it; however, under the narrow standard of review, an award cannot be overturned simply because the law has been misapplied. Rather, the test for manifest disregard of the law, as set out in Geissler v. Sanem, 285 M 411, 949 P2d 234 (1997), requires that the arbitrator appreciated the existence of a clearly governing legal principle but decided to ignore it. Absent an abuse of discretion in this case, the Supreme Court affirmed the District Court's refusal to vacate the award. Terra W. Townhomes, L.L.C. v. Stu Henkel Realty, 2000 MT 43, 298 M 344, 996 P2d 866, 57 St. Rep. 207 (2000), following Nelson v. Livingston Rebuild Center, Inc., 1999 MT 116, 294 M 408, 981 P2d 1185, 56 St. Rep. 486 (1999).

Arbitration Improperly Remanded to Arbitrator for Reconsideration of Damages — Rationally Derived Arbitration Remedy to Be Upheld on Review: The District Court remanded a wrongful discharge case to the arbitrator for reconsideration of damages. The employee contended that the District Court could not enter judgment for the amended award because the case should not have been remanded and because the arbitrator did not have authority to amend the award. The employer contended that the arbitrator exceeded his powers when he made the first award and that the District Court properly gave the arbitrator authority to vacate portions of the first award pursuant to 27-5-312. However, the exceeding of power by an arbitrator is not one of the provisions in 27-5-217 pursuant to which an arbitrator may modify or correct an award. When the arbitrator granted the employer's motion to vacate portions of the original damage award, he exceeded his statutory authority. Further, the District Court was without authority to vacate or modify the award except for the statutory bases set forth in 27-5-312 and this section. If the remedy fashioned by the arbitrator is rationally derived from the arbitration agreement, it will be upheld. The Supreme Court remanded for judgment in the amount of the original arbitration award. Nelson v. Livingston Rebuild Center, Inc., 1999 MT 116, 294 M 408, 981 P2d 1185, 56 St. Rep. 486 (1999), followed in Terra W. Townhomes, L.L.C. v. Stu Henkel Realty, 2000 MT 43, 298 M 344, 996 P2d 866, 57 St. Rep. 207 (2000).

"Manifest Disregard of Law" Standard Applied on Review — Prior Holdings Modified: After an arbitration ruling in favor of the defendants, the plaintiffs filed an appeal from the arbitration, claiming partiality and misconduct by the panel and that the panel had exceeded its authority. The District Court granted the defendants' motions to dismiss on the grounds that the appeal failed to state a claim for which relief could be granted. The Supreme Court held that the District Court did not err in dismissing the appeal. The Supreme Court adopted a manifest disregard of the law standard of review for arbitration awards under 27-5-312 and modified prior

holdings that held otherwise. In this case, the panel acted entirely within its power when it made an award without including specific findings of fact or conclusions of law. To determine that an arbitrator ruled in manifest disregard of the law requires more than simply a misapplication of the law by the arbitrator. Geissler v. Sanem, 285 M 411, 949 P2d 234, 54 St. Rep. 1218 (1997).

Review of Arbitration Award Based on Sufficiency of Evidence Beyond Scope of Judicial Review: Stockade Enterprises argued that the lower court erred in refusing to set aside or modify the decision rendered by the arbitrator. The Supreme Court stated that the District Court had incorrectly refused to review the arbitration award on the basis that the lower court felt that it had no authority to review the award based upon the stipulation and order provisions indicating that the arbitrator's decision was binding and final. The Supreme Court indicated that Montana's Uniform Arbitration Act does allow a court to review an arbitration award regardless of the "binding" nature of the arbitration procedure. However, in the case before it, the Supreme Court held that Stockade Enterprises based its request for modification of the award on the sufficiency of the evidence and that was not one of the statutory grounds on which a court could review the award. Therefore, the refusal to review the award was not an abuse of discretion. Stockade Enterprises v. Ahl, 273 M 520, 905 P2d 156, 52 St. Rep. 1096 (1995), followed in Nelson v. Livingston Rebuild Center, Inc., 1999 MT 116, 294 M 408, 981 P2d 1185, 56 St. Rep. 486 (1999), and Terra W. Townhomes, L.L.C. v. Stu Henkel Realty, 2000 MT 43, 298 M 344, 996 P2d 866, 57 St. Rep. 207 (2000).

Refusal to Vacate or Modify Arbitration Award — No Abuse of Discretion: Following an automobile accident, plaintiffs and defendant agreed by stipulation to submit the dispute to binding arbitration. By stipulation, each party agreed to pay for its own attorney fees. When the arbitrator's statement included general damages and attorney fees for Margaret, the parties informed the arbitrator of the stipulated agreement. Withdrawing the initial general damages award, the arbitrator then withdrew the initial award but issued a formal written award increasing Margaret's general damages by $40,000 and included a statement that no attorney fees were awarded. Claiming that the arbitrator had improperly "juggled" general damages to cover plaintiff's attorney fees, the defendant appealed, asking the District Court to modify or partially vacate the award by $40,000. The District Court refused, ruling that the state Uniform Arbitration Act statutorily prohibits judicial review of awards on merit. On appeal, the Supreme Court affirmed, ruling that although the arbitrator may have briefly considered awarding attorney fees, the final written arbitration award, which did not exist until the arbitrator reduced it to writing and delivered it to the parties, did not provide for attorney fees. Duchscher v. Vaile, 269 M 1, 887 P2d 181, 51 St. Rep. 1364 (1994). See Geissler v. Sanem, 285 M 411, 949 P2d 243, 54 St. Rep. 1218 (1997), modifying the holding with respect to the scope of review and adopting the manifest disregard of the law standard.

Collateral References

Arbitration *key* 73.9, 77(7).

6 C.J.S. Arbitration §§231, 232.

4 Am. Jur. 2d Alternative Dispute Resolution §210.

Setting aside arbitration award on ground of interest or bias of arbitrators—commercial, business, or real estate transactions. 67 ALR 5th 179.

Setting aside arbitration award on ground of interest or bias of arbitrator—labor disputes. 66 ALR 5th 611.

Setting aside arbitration award on ground of interest or bias of arbitrators—torts. 64 ALR 5th 475.

Setting aside arbitration award on ground of interest or bias of arbitrators—insurance appraisals or arbitrations. 63 ALR 5th 675.

Comment note on power of court to resubmit matter to arbitrators for correction or clarification, because of ambiguity or error in, or omission from, arbitration award. 37 ALR 3d 200.

Power of arbitrator to correct, or power of court to correct or resubmit, nonlabor award because of incompleteness or failure to pass on all matters submitted. 36 ALR 3d 939.

Comment note on determination of validity of arbitration award under requirement that arbitrators shall pass on all matters submitted. 36 ALR 3d 649.

An Overview of the New Montana Arbitration Act, Corbett, Mont. Lawyer, Jan. 1986.

27-5-314. Judgment on award — costs.

Compiler's Comments

Source: Sections 14 and 15, Uniform Arbitration Act, 7 U.L.A. 204, 208.

Case Notes

No Statutory Basis for Award of Attorney Fees in Arbitrated Case: Defendant in an arbitrated case contended that attorney fees should have been awarded because defendant prevailed on the question of whether the arbitration award should be vacated. The District Court concluded that under Montana law, attorney fees are not allowed unless specifically provided by statute or agreement, except under extraordinary circumstances that did not apply here. The Supreme Court affirmed, noting that this section does not provided for an award of attorney fees in an arbitrated case, that fees were not provided for by contract between the parties, and that this case did not fit any of the narrow exceptions to the traditional rule. Terra W. Townhomes, L.L.C. v. Stu Henkel Realty, 2000 MT 43, 298 M 344, 996 P2d 866, 57 St. Rep. 207 (2000), following Tanner v. Dream Island, Inc., 275 M 414, 913 P2d 641, 53 St. Rep. 208 (1996).

Loss of District Court Jurisdiction When Wrongful Discharge Claim Submitted to Arbitration — Leave to Amend Complaint Denied: Dahl brought a wrongful discharge action against Fred Meyer, Inc. The parties agreed to arbitration and chose an arbitrator. Prior to the hearing, the arbitrator dismissed the arbitration on grounds that federal law applied. Dahl did not object to the District Court's confirmation of the arbitrator's decision but did move for leave to amend the complaint to remove the federal implications. However, the District Court lost jurisdiction when the parties agreed to arbitration, at which point the court had authority only to confirm, modify and confirm, or vacate and remand for hearing pursuant to 27-5-311 through 27-5-314, but not the authority to allow Dahl to amend the complaint. Dahl v. Fred Meyer, Inc., 1999 MT 285, 297 M 28, 993 P2d 6, 56 St. Rep. 1149 (1999).

Collateral References

Arbitration *key* 15, 84.
6 C.J.S. Arbitration §193, et seq.
4 Am. Jur. 2d Alternative Dispute Resolution §233.

27-5-321. Applications to court — how made.

Compiler's Comments

Source: Section 16, Uniform Arbitration Act, 7 U.L.A. 208.

Collateral References

Arbitration *key* 72.3, 73.5, 77(3), 84.
6 C.J.S. Arbitration §§178, et seq., 193, et seq.

27-5-322. Jurisdiction of district court.

Compiler's Comments

Source: Section 17, Uniform Arbitration Act, 7 U.L.A. 211.

Case Notes

Court Review of Claim of Fraud Inducing Arbitration Clause Not Fraud Inducing Entry Into Contract Allowed Under Federal Arbitration Act: The appellant alleged that fraud had induced him to enter into an option agreement and margin contract with the respondents. The appellant further stated that he had not read the arbitration clause or the clause that exposed him to unlimited losses. The Supreme Court ruled that since the appellant only alleged fraud in the inducement and did not specifically allege that he had been induced to agree to the arbitration clause, the entire matter, including fraud in the inducement, was subject to arbitration under the Uniform Arbitration Act (Title 27, ch. 5). Larsen v. Opie, 237 M 108, 771 P2d 977, 46 St. Rep. 660 (1989).

Jurisdiction of State Court to Order Arbitration Under Federal Arbitration Law: Under the U.S. Supreme Court decision set out in Southland Corp. v. Keating, 465 US 1, 79 L Ed 2d 1, 104 S Ct 852 (1984), a state court clearly has jurisdiction to order arbitration under the federal arbitration law, 9 U.S.C. 1, et seq. Passage v. Prudential-Bache Sec., Inc., 223 M 60, 727 P2d 1298, 43 St. Rep. 1532 (1986).

Collateral References

Arbitration *key* 72.3, 73, 77(1), 84.
6 C.J.S. Arbitration §§178, et seq., 193, et seq., 224, et seq.
State court's power to consolidate arbitration proceedings. 64 ALR 3d 528.

27-5-323. Venue.

Compiler's Comments

Source: Section 18, Uniform Arbitration Act, 7 U.L.A. 215.

Case Notes

Choice of California Forum for Arbitration Held Void: Keystone, an auto parts business located in Montana, purchased a computer system from Triad for the management of Keystone's auto parts business. The contract was to be performed in Montana. The system failed to work properly, and Keystone sued Triad in Montana for breach of warranty, breach of contract, negligence, and negligent misrepresentation. The contract provided that disputes between the parties were to be settled before the American Arbitration Association in California, and the District Court held that the proper forum for arbitration was California. Citing Casarotto v. Lombardi, 268 M 369, 886 P2d 931 (1994), reversed on other grounds in Doctor's Associates, Inc. v. Casarotto, 517 US 681 (1996), the Supreme Court held that a contractual choice of law is governed in Montana by sections 187 and 188 of Restatement (Second) of Conflict of Laws. These sections provide that: (1) the state chosen by the parties will be the forum unless the application of the law of the chosen state would be contrary to the fundamental policies of another state that has a materially greater interest than the chosen state; (2) the other state would be the forum in the absence of an effective choice of law by the parties; and (3) one of the factors to be considered in making the determination of whether another state has a material interest in the enforcement of the contract is the place where the contract is to be performed. The Supreme Court noted that the contract was to be performed exclusively in Montana and therefore held that Montana had a materially greater interest in the contract issue than did California and that Montana law would therefore apply in the absence of the choice of a forum provision in the contract. The Supreme Court then held, citing State ex rel. Polaris Indus., Inc. v. District Court, 215 M 110, 695 P2d 471 (1985), and Rindal v. Seckler, 786 F. Supp. 890 (D.C. Mont. 1992), that the application of California law would be contrary to a fundamental policy of Montana as expressed in 28-2-708 because that section has historically been applied: (1) to protect Montana residents from having to litigate outside of Montana; and (2) to invalidate predispute arbitration agreements. The Supreme Court noted that whether or not 28-2-708 applies to arbitration contracts, this section provides the same protection as 28-2-708 does, but explicitly in the context of arbitration agreements. Because this section allows the waiver of a party's right to arbitration in Montana only upon advice of counsel and because there was no evidence that the right was waived based on the advice of counsel, the Supreme Court held that the provision in the contract making California the forum for arbitration was void. Keystone, Inc. v. Triad Sys. Corp., 1998 MT 326, 292 M 229, 971 P2d 1240, 55 St. Rep. 1321 (1998).

Montana Law Not Preempted by Federal Arbitration Act: Keystone, an auto parts business located in Montana, purchased a computer system from Triad for the management of Keystone's auto parts business. The contract was to be performed in Montana. The system failed to work properly, and Keystone sued Triad in Montana for breach of warranty, breach of contract, negligence, and negligent misrepresentation. The contract provided that disputes between the parties were to be settled before the American Arbitration Association in California, and the District Court held that the proper forum for arbitration was California because, among other reasons, Montana law was preempted by the Federal Arbitration Act (FAA)(9 U.S.C. 2). The Supreme Court reviewed the opinion of the U.S. Supreme Court in the case of Doctor's Associates, Inc. v. Casarotto, 517 US 681 (1996), and interpreted that opinion to mean that a state may not place arbitration clauses on an unequal footing from general contract provisions. The Supreme Court pointed out that although this section does apply only to arbitration provisions, 28-2-708 applies to contracts generally and that therefore it cannot be said that arbitration provisions are treated differently from contracts generally. The Supreme Court also pointed out that the Montana statutes preserve and do not nullify the parties' duty to arbitrate and for that reason, the case should be distinguished from those cases cited by Triad, holding that the FAA preempted state statute. For these reasons, the Supreme Court held that under the rationale of Casarotto, 28-2-708 and this section are not preempted by the FAA. Keystone, Inc. v. Triad Sys. Corp., 1998 MT 326, 292 M 229, 971 P2d 1240, 55 St. Rep. 1321 (1998).

Law Review Articles

Keystone, Inc. v. Triad Systems Corporation: Is the Montana Supreme Court Undermining the Federal Arbitration Act?, Quick, 63 Mont. L. Rev. 445 (2002).

Collateral References

Arbitration *key* 72.3, 73, 77(1), 84.

6 C.J.S. Arbitration §178, et seq.

An Overview of the New Montana Arbitration Act, Corbett, Mont. Lawyer, Jan. 1986.

27-5-324. Appeals.

Compiler's Comments

Source: Section 19, Uniform Arbitration Act, 7 U.L.A. 216.

Case Notes

No Abuse of Discretion in Refusing to Vacate Arbitration Award Based on Allegations of Arbitrator Partiality Absent Showing of Evident Partiality: Plaintiffs contended that an arbitration award should be vacated because one of the arbitrators, a former employee of one of the agencies involved in the arbitration, was not neutral. The motion to vacate was denied, and on appeal, the Supreme Court affirmed. Employment status is insufficient, of itself, to establish partiality, and plaintiffs' argument amounted to a speculative and conclusory allegation of partiality, rather than the direct and demonstrable evidence of partiality required to vacate an award. Paulson v. Flathead Conserv. District, 2004 MT 136, 321 M 364, 91 P3d 569 (2004).

District Court Bound by Arbitration Agreement: In 1995, a homeowners' association filed a complaint seeking to compel subdivision developers to complete a water system as designed and approved in the 1970s. The developers contended that the water system was complete as built. Before trial, the parties entered into a settlement agreement that included a provision stating that any disputes would be settled by arbitration. The water system was not completed on time, so the association moved to enforce the settlement agreement by an order of specific performance or by arbitration. The District Court denied the motion for arbitration on grounds that the agreement was clear and ordered the developers to perform the specific terms of the settlement agreement. When a court is asked to compel arbitration of a dispute, the threshold inquiry is whether the parties agreed to arbitrate. Settlement agreements requiring arbitration are enforceable in Montana, as are other contracts, except on grounds that exist at law or in equity for the revocation of a contract. Although the settlement agreement in this case contemplated the remedy of specific performance, it was not an alternative to arbitration but rather a remedy available to the arbitrators when interpreting and enforcing the agreement. Because no conditions existed that would void the arbitration clause, the trial court erred in ignoring the arbitration agreement and deciding the dispute, rather than ordering the parties to arbitrate as they had agreed. Ratchye v. Lucas, 1998 MT 87, 288 M 345, 957 P2d 1128, 55 St. Rep. 354 (1998).

Appeal Upon Denial of Motion to Compel Arbitration: This section allows appeal when a District Court denies a motion to compel arbitration. Further, 28 U.S.C. 1292(a)(1) permits appeal from an order denying arbitration as an interlocutory appeal. Frates v. Edward D. Jones & Co., 233 M 377, 760 P2d 748, 45 St. Rep. 1567 (1988).

Collateral References

Arbitration *key* 73 through 73.9.

6 C.J.S. Arbitration §215, et seq.

Appealability of state court's order or decree compelling or refusing to compel arbitration. 6 ALR 4th 652.

CHAPTER 6
MONTANA MEDICAL LEGAL PANEL ACT

Chapter Case Notes

General Practitioner's Standard of Care — Geographical Limitation Eliminated: The Supreme Court adopted a new standard of care to be applied prospectively to treatment extended to patients, commencing on March 31, 1990. The court ruled that a nonboard-certified general practitioner is held to the standard of care of a reasonably competent general practitioner acting in the same or similar circumstances in the same or a similar community in the United States. The new rule abandons the "locality" rule that was limited to Montana communities and reverses anything to the contrary in Tallbull v. Whitney, 172 M 326, 564 P2d 162 (1977). Chapel v. Allison, 241 M 83, 785 P2d 204, 47 St. Rep. 101 (1990).

Confidentiality of Medical Legal Panel — Denial of Transcript Upheld: Plaintiffs who filed a claim with the Montana Medical Legal Panel alleging malpractice against two doctors requested a stenographic record of the hearing. The doctors opposed the request, and the Panel chairman ruled that under Rule 15(c), Panel Rules of Procedure, no transcript would be made. Plaintiffs then applied to the District Court for a Writ of Mandamus, and the court ruled that denial of the transcript violated due process under the 14th amendment of the U.S. Constitution and Art. II, sec. 17., Mont. Const. On appeal, the Supreme Court found that the language of 27-6-502

indicated legislative intent that the Montana Administrative Procedure Act provisions concerning transcripts do not apply. The court held that the Panel is a purely advisory body and therefore confidential. Given its confidential nature, it cannot be said that Rule 15(c) arbitrarily denies parties a transcript or that denial of a transcript destroys the right to fully cross-examine witnesses at trial. The court found no constitutional infirmities in the workings of Rule 15(c); therefore, the District Court was reversed. State ex rel. Hufford v. Mont. Medical Legal Panel, 223 M 73, 724 P2d 186, 43 St. Rep. 1541 (1986).

Mandatory Submission of Claims to Panel — Jury Trial: Mandatory submission of claims to the panel does not unconstitutionally interfere with the right to trial by jury. A claimant is free to continue to jury trial no matter what the decision of the panel, and the jury remains the final determiner of fact. Further, the panel decision is not binding, nor is it admissible at trial. Submission to the panel is merely a permissible delay in the path to the ultimate jury verdict. Linder v. Smith, 193 M 20, 629 P2d 1187, 38 St. Rep. 912 (1981).

Expansion of Locality Rule — Medical Standards: Montana's "locality rule" imposes on a physician undertaking the care of a patient the legal duty of possessing and exercising that reasonable and ordinary degree of learning, skill, and care possessed and exercised by physicians of good standing of the same school of practice in the same or similar (emphasis added) locality in Montana. A "similar locality in Montana" within the meaning of this rule is a locality of similar geographical location, size, and character in a medical context. Tallbull v. Whitney, 172 M 326, 564 P2d 356 (1977), geographical limit eliminated, Chapel v. Allison, 241 M 83, 785 P2d 204, 47 St. Rep. 101 (1990).

Chapter Law Review Articles

Standards of Medical Care for General Practitioners in Montana: The Chapel Decision and a Move Toward a National Standard, McGrath, 53 Mont. L. Rev. 119 (1992).

Constitutional Initiative 30: What Constitutional Rights Did Montanans Surrender in Hopes of Securing Liability Insurance?, C. No Longer a Mandate Exclusive to the Courts, Burke, 48 Mont. L. Rev. 67 (1987).

The Montana Medical Malpractice Panel Act: Origin, Procedure, and Effect, Moe, 44 Mont. L. Rev. 281 (1983).

Accrual of the Cause of Action for Medical Malpractice: Penrod v. Hoskinson, Reynolds, 38 Mont. L. Rev. 399 (1977).

Chapter Collateral References

Medical Malpractice—Legislative Research Publication, 1975-76 Interim.

1 Am. Jur. 2d Abortion and Birth Control §§103, 104.

Liability of hospital or sanitarium for negligence of physician or surgeon. 51 ALR 4th 235.

Statute of limitations relating to medical malpractice actions as applicable to actions against unlicensed practitioner. 70 ALR 3d 114.

Liability of operating surgeon for negligence of nurse assisting him. 12 ALR 3d 1017.

Part 1
General Provisions

Part Case Notes

Confidentiality of Medical Legal Panel — Denial of Transcript Upheld: Plaintiffs who filed a claim with the Montana Medical Legal Panel alleging malpractice against two doctors requested a stenographic record of the hearing. The doctors opposed the request, and the Panel chairman ruled that under Rule 15(c), Panel Rules of Procedure, no transcript would be made. Plaintiffs then applied to the District Court for a Writ of Mandamus, and the court ruled that denial of the transcript violated due process under the 14th amendment of the U.S. Constitution and Art. II, sec. 17., Mont. Const. On appeal, the Supreme Court found that the language of 27-6-502 indicated legislative intent that the Montana Administrative Procedure Act provisions concerning transcripts do not apply. The court held that the Panel is a purely advisory body and therefore confidential. Given its confidential nature, it cannot be said that Rule 15(c) arbitrarily denies parties a transcript or that denial of a transcript destroys the right to fully cross-examine witnesses at trial. The court found no constitutional infirmities in the workings of Rule 15(c); therefore, the District Court was reversed. State ex rel. Hufford v. Mont. Medical Legal Panel, 223 M 73, 724 P2d 186, 43 St. Rep. 1541 (1986).

Part Collateral References

Medical malpractice in connection with diagnosis, care, or treatment of diabetes. 43 ALR 5th 87.

27-6-101. Short title.

Compiler's Comments

1983 Amendment: Changed name from "Montana Medical Malpractice Panel Act" to "Montana Medical Legal Panel Act".

27-6-102. Purpose.

Case Notes

Right of Access to Courts Hindered — Rational Basis: The panel act does not deny plaintiff his right of access to the courts. In cases not involving a fundamental right, access may be hindered if there exists a rational basis for doing so. The articulated basis for the panel acts in other states has been the malpractice crises existing in many states, with this legislation intended as a means to limit malpractice filings to those which are clearly meritorious. The Montana act was enacted by the Legislature for the same reason. Linder v. Smith, 193 M 20, 629 P2d 1187, 38 St. Rep. 912 (1981).

27-6-103. Definitions.

Compiler's Comments

2001 Amendment: Chapter 370 in definition of health care facility in (b) near middle after "include" deleted "a chemical dependency facility"; and made minor changes in style. Amendment effective October 1, 2001.

1997 Amendment: Chapter 133 in definition of health care provider inserted reference to podiatrist; and inserted definition of podiatrist.

Applicability: Section 8, Ch. 133, L. 1997, provided: "[This act] applies to causes of action arising on or after [the effective date of this act]." Effective October 1, 1997.

1995 Amendment: Chapter 366 in definition of health care facility inserted (b) excluding certain facilities from definition; and made minor changes in style.

1989 Amendment: In definition of health care facility, before "governmental", deleted "university, college, or" and before "licensed" inserted "but including a university or college infirmary".

Applicability: Section 2, Ch. 96, L. 1989, provided: "[This act] applies to malpractice claims occurring on or after [the effective date of this act]." Effective October 1, 1989.

1987 Amendment: Inserted definition of dentist; in definition of health care provider inserted "a dentist"; in definition of malpractice claim inserted references to dental treatment; and made minor changes in grammar.

1985 Amendment: In middle of definition of health care facility, after "governmental", deleted "hospital or"; in definition of malpractice claim near beginning, after "potential claim", inserted "of a claimant" and near middle substituted "claimant" for "patient" and "claimant's" for "patient's"; in definition of physician substituted language (see 1985 Session Law for text) for ""Physician" means an individual licensed to practice medicine under the provisions of Title 37, chapter 3."

1983 Amendment: Inserted definition of health care facility; in definition of health care provider after "physician" deleted "licensed to practice medicine in Montana or a hospital, hospital-related facility"; after "or" substituted "a health" for "long-term"; inserted definition of hospital; in definition of panel after "medical" substituted "legal" for "malpractice"; and inserted definition of physician.

27-6-104. Creation of panel.

Compiler's Comments

1983 Amendment: After "medical" substituted "legal" for "malpractice".

Part 2
Administration of Act

Part Case Notes

Confidentiality of Medical Legal Panel — Denial of Transcript Upheld: Plaintiffs who filed a claim with the Montana Medical Legal Panel alleging malpractice against two doctors requested a stenographic record of the hearing. The doctors opposed the request, and the Panel chairman ruled that under Rule 15(c), Panel Rules of Procedure, no transcript would be made. Plaintiffs then applied to the District Court for a Writ of Mandamus, and the court ruled that denial of the transcript violated due process under the 14th amendment of the U.S. Constitution and Art. II, sec. 17., Mont. Const. On appeal, the Supreme Court found that the language of 27-6-502 indicated legislative intent that the Montana Administrative Procedure Act provisions

concerning transcripts do not apply. The court held that the Panel is a purely advisory body and therefore confidential. Given its confidential nature, it cannot be said that Rule 15(c) arbitrarily denies parties a transcript or that denial of a transcript destroys the right to fully cross-examine witnesses at trial. The court found no constitutional infirmities in the workings of Rule 15(c); therefore, the District Court was reversed. State ex rel. Hufford v. Mont. Medical Legal Panel, 223 M 73, 724 P2d 186, 43 St. Rep. 1541 (1986).

27-6-204. Authority to adopt rules.

Compiler's Comments

Rules of Procedure: The following rules of procedure for the Montana Medical Legal Panel became effective August 30, 2001. Revisions reflecting 1985, 1987, and 1989 legislative changes in the Montana Medical Legal Panel Act were drafted by the director as of September 1990. Persons wishing to obtain a copy of the panel's revised rules may contact the director, Montana Medical Legal Panel, 2021 Eleventh Avenue, Helena, Montana 59601.

RULE 1. Definitions. As used in these Rules:

(a) "Health care provider" means a "physician," "dentist," "podiatrist," or a "health care facility."

(b) "Physician" means, for all purposes other than assessment of the annual surcharge required under §27-6-206(3), an individual or business entity, who at the time of the occurrence of the incident giving rise to the claim:

(1) was an individual, licensed to practice medicine under the provisions of Title 37, Chapter 3, who had the State of Montana as his or her principal residence or place of medical practice and was not employed full-time by any federal governmental agency or entity; or

(2) was a professional service corporation, partnership, or other business entity organized under the laws of any state to render medical services, whose shareholders, partners, or owners were all individual physicians licensed to practice medicine under the provisions of Title 37, Chapter 3, or included a shareholder, partner, owner or employee who was a physician under (b)(i) of this Rule and is a proper party to the claim.

(c) "Dentist" means, for all purposes other than assessment of the annual surcharge required under §27-6-206(3), an individual or business entity, who at the time of the occurrence of the incident giving rise to the claim:

(1) was an individual, licensed to practice dentistry under the provisions of Title 37, Chapter 4, who had the State of Montana as his or her principal residence or place of dental practice and was not employed full-time by any federal governmental agency or entity; or

(2) was a professional service corporation, partnership, or other business entity organized under the laws of any state to render dental services, and whose shareholders, partners, or owners were all individual dentists licensed to practice dentistry under the provisions of Title 37, Chapter 4, or included a shareholder, partner, owner or employee who was a dentist under (c)(i) of this Rule and is a proper party to the claim.

(d) "Health care facility" means, for all purposes other than assessment of the annual surcharge required under 27-6-206(3), a facility (other than an infirmary) licensed as a health care facility under Title 50, Chapter 5, at the time of the occurrence of the incident giving rise to the claim, excluding a chemical dependency facility, an end-stage renal dialysis facility, a home infusion therapy agency, or a residential care facility.

(e) "Malpractice claim" means any claim or potential claim of a claimant against a health care provider for medical or dental treatment, lack of medical or dental treatment, or other alleged departure from accepted standards of health care in the rendering of professional services which causes injury to the claimant, whether the claimant's claim or potential claim sounds in tort or contract, and includes but is not limited to allegations of battery or wrongful death.

(f) "Panel" means the Montana Medical Legal Panel provided for in Section 27-6-104, MCA.

(g) "Act" means the Montana Medical Legal Panel Act as established by Sections 27-6-101 through 27-6-704, MCA.

(h) "Director" means the Director of the Panel, or an authorized member of the Director's staff.

(i) "Substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, or, stated another way, enough evidence to justify refusal to direct a verdict on a factual issue in jury trial.

(j) "Claimant" is the person (or persons) who was the patient who received or was to receive services from the health care provider against whom the claim is made, or is the authorized representative of the patient.

(k) "Patient" is the person who received or was to receive services from the health care provider against whom the claim is made or who received services from other health care providers prior or subsequent to that of the health care provider against whom the claim is made.

(l) "Hospital" means a hospital as defined in 50-5-101, MCA, licensed as a hospital at the time of the occurrence of the incident giving rise to the claim.

(m) "Podiatrist" means, for all purposes other than assessment of the annual surcharge required under §27-6-206(3), MCA, an individual licensed to practice podiatry under the provisions of Title 37, Chapter 6, who at the time of the occurrence of the incident giving rise to the claim:

(1) was an individual, licensed to practice podiatry under the provisions of Title 37, Chapter 6, who had the State of Montana as his or her principal residence or place of podiatric practice and was not employed full-time by any federal governmental agency or entity; or

(2) was a professional service corporation, partnership, or other business entity organized under the laws of any state to render podiatric services, and whose shareholders, partners, or owners were all individual podiatrists licensed to practice podiatry under the provisions of Title 37, Chapter 4, or included a shareholder, partner, owner or employee who was a podiatrist under (c)(i) of this Rule and is a proper party to the claim.

RULE 2. Scope of Rules. These Rules apply to all proceedings before the Montana Medical Legal Panel established by the Act.

RULE 3. Purpose of the Panel. The purpose of the Panel is to prevent, where possible, the filing in court of actions against health care providers and their employees for professional liability in situations where the facts do not permit at least a reasonable inference of malpractice and to make possible the fair and equitable disposition of such claims against health care providers as are or reasonably may be well founded.

RULE 4. Fees. No fees or charges are to be levied upon claimants as a precondition to the bringing of a malpractice claim before the Panel.

RULE 5. Representation and Appearance - Counsel. The parties may be represented by counsel in proceedings before the Panel though it shall not be required. Any party acting as their own counsel will be required to adhere to these Rules of Procedure.

If any party retains legal counsel, such legal counsel shall informally enter his or her appearance with the Director, by letter if representing a pro se claimant, or upon by the filing of the required Application, a responsive Motion to the Application, or an Answer. Thereafter, all communications required by these Rules to be transmitted to a party and all other communications directed to a represented party shall be directed to the appropriate counsel, with a copy to the Director, except that the Notice of Hearing required by Rule 12 shall be provided to all parties involved and their counsel, if any.

RULE 6. Presentation of Claims.

(a) These Rules shall apply to all malpractice claims arising from a health care provider's acts and/or omissions, unless the claim is the subject of a valid arbitration agreement under the Uniform Arbitration Act, at §27-5-111, et seq., MCA, where the agreement to arbitrate was signed after the alleged incident occurred:

(1) as to all physicians and health care facilities, where the alleged incident occurred on or after April 1, 1977;

(2) as to all dentists, where the alleged incident occurred on or after October 1, 1987;

(3) as to all podiatrists, where the alleged incident occurred on or after January 1, 1999;

(4) with respect to (1), (2) and (3) above, claims arising prior to the respective dates may be submitted to the Panel upon all parties consenting thereto.

(b) Prior to filing a complaint in any State District or Justice Court in Montana, claimants shall submit a case for consideration of the Panel, and no malpractice claim to which the Act is applicable may be filed in any such court against a health care provider before an application is made to the Panel and its decision rendered. If a complaint has been filed in any such court prior to the filing of an application before the Panel, the claimant, at the time of filing an application with the Panel, shall notify the Panel of such fact by providing to the Panel a conformed copy of the complaint and a conformed copy of any order related to the submission of the claim to the Panel, along with a brief report as to the status of the case.

(c) Claimants shall submit a case for consideration of the Panel by delivery of an application in writing and signed by the claimant or his or her attorney, by certified mail, to the office of the Director. Facsimile copies of applications received by the Panel shall be shown as received by the Panel on the date of receipt, and shall be placed in the claim file. The use of such a procedure shall not relieve a party from the requirements of the first sentence of this paragraph.

(d) The application, on a form provided by the Director, must be signed by the claimant or his or her attorney and must contain the following:

(1) A statement in reasonable detail of the elements of the health care provider's conduct that are believed to constitute a malpractice claim, the dates the conduct occurred, and the names and addresses of all persons having knowledge of any facts relating to the claim or defense to it, and the names and addresses of all physicians, dentists, podiatrists, hospitals, long-term care facilities or other persons or entities (whether named as parties to the claim or not) who have possession, custody, or control of any medical, dental, podiatric, hospital or long-term care facility records (such as xrays) or other such information pertaining to the claim. Any claim against an employee of a health care provider who is other than a health care provider as defined in Rule 1 shall be brought only by naming the employer as a party before the Panel.

(2) A statement signed by the claimant, and dated, on a form provided by the Director, for each health care provider involved (whether a party or not), authorizing the Panel to obtain access to all medical, dental, podiatric, and hospital records and information pertaining to the claim and, for purposes of its consideration of the matter only, which includes distribution of such records only to the health care providers named in the claim before the Panel or their attorneys and the panelists reviewing the claim, waiving any privilege as to the contents of those records. The statement may not in any way be construed as waiving that privilege for any other purpose or in any other context, in or out of court nor is this Rule intended to provide for discovery of information which would be privileged or otherwise beyond discovery, pursuant to Rule 26(b)(4)(B), Montana Rules of Civil Procedure.

(3) A claimant may amend the application as a matter of course within twenty (20) days of the receipt of the application by the Panel, but thereafter only upon approval of the Director, or the Chairperson of the Panel, if one is selected. The Director or, the Chairperson in the event of the selection of a Panel Chairperson, may, upon his or her own initiative or upon the written request of the health care provider, request the application be amended to provide additional details of the claim. Such an amendment, and any other amendments to the application, must be delivered to the Director within twenty (20) days of receipt of a written request or authorization by the Director or Chairperson, along with sufficient copies for service by the Panel on all other parties. In the event an amendment to the claim is filed less than thirty (30) days prior to hearing, upon request of the Director, Panel Chairperson or health care provider, the hearing may be continued by the Panel Chairperson or the Director without a request from a party, or upon the request of a party upon a showing of good cause and in the manner required by Rule 12(b) of these Rules.

(4) Upon receipt of a completed application, the Director shall immediately notify the health care provider of filing of the claim and furnish the health care provider a copy thereof. For purposes of this paragraph, a completed application shall be one which is in compliance with subsections (1) and (2) of section (d) of this Rule. If a claimant revokes the required written consent provided in section(d)(2) of this Rule, the application shall not be a completed application.

(e) If a claimant or health care provider has retained or otherwise obtained legal counsel for prosecution or defense of a claim during or subsequent to any panel proceeding, that attorney shall file an appearance with the Director, pursuant to Rules of Procedure.

RULE 7. Answer to Application.

(a) Within twenty (20) days after receipt of the claim, the health care provider shall answer the application for review, by delivery of the answer in writing and signed by the health care provider or his or her attorney, by certified mail, to the office of the Director, with sufficient copies for service by the Panel on all other parties. For good cause shown, the Director may extend the answer time.

The answer shall be deemed an answer to any amended application, unless within twenty (20) days after the receipt of the amended application, the health care provider delivers in the same manner as required above, an amended answer.

(b) The health care provider shall, on a form provided by the Director, authorize the Panel to inspect all medical, dental, podiatric and hospital records and information pertaining to the application and, for the purposes of such inspection only, which includes distribution of such records only to the claimant or his or her attorney and the panelists reviewing the claim, waiving any privilege as to the contents of those records. Nothing in the statement waives that privilege for any other purpose or in any other context, in or out of court nor is this Rule intended to provide for discovery of information which would be privileged or otherwise beyond discovery, pursuant to Rule 26(b)(4)(B), Montana Rules of Civil Procedure.

(c) Upon the receipt of an answer or an amended answer to an application, the Director shall serve a true copy of the same upon the claimant and all other health care providers in the same manner as provided for service of the application in Rule 8(a).

RULE 8. Transmittal of Records and Documents.

(a) Upon receipt of an application for review or an amendment thereto, the Director shall serve a true copy of the same upon all health care providers whose conduct is claimed by the application to have constituted the basis for a malpractice claim. Service shall be effected by mailing, certified, a copy of the claim to the health care provider, postage prepaid, return receipt requested, to the provider's last-known address.

(b) Additionally, upon the receipt of the application for review, the Director shall mail a copy of the application to the directors of the health care provider's professional society or association and the State Bar. If no state professional society or association exists with respect to such health care provider, or if the health care provider does not belong to such a society or association, the Director shall transmit the application to the health care provider's state licensing board.

(c) Upon receipt of the names of selected panelists pursuant to Rule 9, the Director shall transmit by mail to all parties a list of all panel members selected, including a short professional biographical sketch of each panelist.

(d) At least ten (10) days prior to the hearing date set for a claim, the Director shall furnish to each panel member copies of all claims, briefs, medical, podiatric, hospital, or dental records of the patient which have been obtained by the Panel, and other documents pertaining to the claim; except when the Chairperson, or Director if a Chairperson has not been selected, of the Panel determines that it is impractical to reproduce or mail a medical, podiatric, hospital, or dental record or other document, or where the Panel Chairperson has ruled after application of a party and a telephonic hearing that certain records should not be transmitted on grounds of relevancy, privilege, or prohibition in state or federal law. Where access to health care information is denied by a health care provider under 50-16-542(1), the Panel Chair may order disclosure of health care information, with or without restrictions as to its use, as the Panel Chair considers necessary, subject to an allowance for any party being provided a full opportunity for district court review of the Panel Chair's decision. In deciding whether to order disclosure, the Panel Chair shall consider the explanation submitted by the health care provider, the reasons for denying access to health care information set forth in 50-16-542(1), and any arguments presented by interested parties. Such records or documents as are required or allowed to be transmitted shall be made available to panel members at the hearing and at the Panel office prior to the hearing, and each panel member and party shall be notified of the decision of the Chairperson or Director and the availability of the materials.

At or prior to the above time, the Director shall furnish to each party, or their attorney if represented, a copy of the medical, podiatric, hospital, or dental records of the patient which have been obtained by the Panel and which are required and allowed to be transmitted and which have been determined to be practical to reproduce or mail. At or prior to such time, the Panel shall notify the parties which records are deemed to be impractical to reproduce or mail, which records shall then be available for inspection by the parties, or their attorneys if they are represented, at the offices of the Panel, during regular business hours, upon reasonable notice of the intended time and date of inspection.

If a party claims that medical or other records or information which pertain to the claim are in the possession, custody and control of another party to the claim or persons other than a party to the claim, or if the application to the claim alleges that the mental or physical condition of a health care provider who is a party to the Panel claim is an element of the claim, or if a party has failed or refuses to execute the necessary consent forms required by Rule 6(d)(2) or 7(b) of these Rules, a party who seeks such records and information shall, as a condition of obtaining a subpoena: (a) make a request in writing to the Panel that the Panel obtain specified records or information on behalf of the party, stating how the records or information pertain to the claim and the name and address of the custodian of those records; and (b) comply with the notice requirements of MCA 50-16-536(1) and provide proof of compliance to the Panel; and (d) shall provide the Panel with the written certification required under MCA 50-16-536(2); and (e) shall request the issuance of a subpoena by the Panel Chairperson.

The cost of a request for records or other information, either pursuant to an appropriate consent form or a subpoena, and the reproduction and transmission of the records or other information to the parties, shall be at the expense of the Panel, but not including the cost of service of subpoenas or witness fees, which shall be at the expense of the party seeking service of the same.

The Panel Chairperson, upon being selected, shall issue a subpoena for all such records and information which pertain to the claim unless relieved of the responsibility therefor by order of a district court. The Panel shall report the results of the service to the parties, including any denial of information from the holder of the records and the reasons therefor.

(e) It is the responsibility of each panel member to return the copies of the claim, medical, podiatric, or dental records, exhibits and other documents to the Panel office upon completion of the claim.

(f) Except as otherwise provided in Rule 7 and Rule 8 of these Rules with respect to the service of the application, answer, and any amendments thereto by the Director, all motions, memoranda, and other papers presented to the Panel shall be served upon all parties and a copy filed with the Panel in the manner provided by Rule 5 of the Montana Rules of Civil Procedure.

RULE 9. Selection of Panel Members.

(a) Except as otherwise provided in Rule 9(f), those eligible to sit on the Panel are health care providers licensed pursuant to Montana law residing in Montana and members of the State Bar of Montana residing in Montana.

(b) Except as otherwise provided in Rule 9(f), the health care provider's professional association or society and the State Bar shall, as to each claim, select twelve (12) prospective panel members within fourteen (14) days from the date of transmittal of the application for review to said societies, for use by the Panel and parties as the pool of available panelists for a claim. If no such society or association exists or if the health care provider does not belong to such a society or association, the health care provider's state licensing board shall, within the same time period as required above, select such twelve (12) persons from the health care provider's profession and, where applicable, persons specializing in the same field or discipline as the health care provider. Alternatively, the entire list of available prospective panel members shall be annually provided by such association, society or licensing board to the Panel as a pool of available panelists for the claims filed during that year. The Panel shall provide to the parties, or their counsel if a counsel has appeared before the Panel, a list of 12 selected prospective panelists for a claim, either as the 12 provided to the Panel as required by this subsection or as randomly selected by the Panel from the annual lists provided to the Panel as allowed in this subsection.

(c) Whenever there are multiple health care providers the claim against each health care provider may be reviewed by a separate Panel, or at the discretion of the Panel initially appointed or by stipulation of the parties, a single Panel may review all the claims against all parties.

(d) Except as otherwise provided in (f), six (6) panel members shall sit in review of each case. Where a panel has six members, each claim shall have three (3) panel members who are health care providers, as specified in subsection (e) and three (3) panel members who are attorneys. Not later than ten (10) days prior to the date set for the hearing of the claim, the Panel Director shall select one of the attorney panelists as Chairperson of the Panel, unless one of the parties objects to the Chairperson selected, in which case the Chairperson selected by the Panel shall thereafter cease to act as the Chairperson and the attorney panelists shall select any one of the attorney panelists as Chairperson within the time requirements of this provision.

(e) The health care provider panel members shall consist of:

(1) Three (3) physicians when the claim is only against one or more physicians; or three (3) dentists when the claim is only against one or more dentists; or three (3) podiatrists when the claim is only against one or more podiatrists. If the claim is only against one or more health care facilities, two (2) of the panel members must be administrators of the same type of facility or facilities and one (1) panel member must be a physician.

(2) In cases against physicians and/or dentists and/or podiatrists, and a health care facility, two (2) panel members must be chosen from the physician's and/or dentist's and/or podiatrist's profession(s) and one (1) Panel member must be an administrator from the same type of facility.

(3) In cases against one or more physicians or one or more dentists or one or more podiatrists and no facility, two (2) panel members must be physicians and one (1) panel member must be a dentist, if there is a dentist in the claim, or one (1) panel member must be a podiatrist, if there is a podiatrist in the claim, unless the number of dentists or podiatrists named exceeds the number of physicians named, then in that event two (2) panel members must be dentists if dentists exceed the number of physicians named, or two (2) panel members must be podiatrists if podiatrists exceed the number of physicians named, and one (1) panel member must be a physician.

(f) Provided, however, that in each instance the parties may stipulate to a lesser number of health care provider or attorney panelists, which stipulation shall be effective only upon approval of the director, or of the Panel Chairperson if one be selected. There shall be no

requirement that a physician, dentist, or podiatrist panelist be in the same specialty or sub-specialty as one or more of the individual health care providers against whom a claim is made if all such panelists as are selected would otherwise be competent to act as an expert witness in a suit at law involving the individual health care providers and if the number of prospective panelists available in the specialty or sub-specialty would be insufficient from which to select a panel.

(g) Upon selection of panel members, the names of those selected shall be communicated to the Director, along with short professional biographical sketches of the persons selected and their business telephone numbers and addresses.

RULE 10. Disqualification of Proposed Panelists.

(a) Any Panel member shall disqualify himself or herself from consideration of any case in which, by virtue of circumstances, the Panel member feels his or her presence on the Panel would be inappropriate, considering the purpose of the Panel.

(b) The Director may excuse a proposed panelist from serving on the Panel.

(c) Whenever a party makes and files an affidavit that a Panel member selected by these Rules cannot, according to the belief of the party making an affidavit, sit in review of the application nor review the claim with impartiality, that Panel member may proceed no further. A party may not disqualify by affidavit more than three Panel members in any single malpractice claim. Any such affidavit to be effective must be filed within fifteen (15) days of the transmittal by mail to the parties by the Director of the name or names of the proposed panelist[s] who is [are] sought to be disqualified. Nothing in these rules shall additionally be construed so as to defeat a party's right to such disqualification.

(d) To replace any Panel member disqualified or excused under these Rules, a replacement Panel member shall be selected, pursuant to Rule 9 of these Rules, by the entity originally selecting the Panel member under that Rule. The replacement shall be selected by said entity within five (5) days of receipt of notification from the Director of the Panel member disqualified or excused. Notification of replacement Panel members shall be made by the Director pursuant to Rule 8 (c).

RULE 11. Medical and Dental Consultation. A claimant request for Director cooperation in retaining a consultant must be made within four (4) weeks of transmittal of the application to the defendants. The Director shall cooperate fully with the claimant in retaining a physician, dentist, podiatrist, or other health care provider qualified in the field of medicine, dentistry, or podiatry involved, who will consult for purposes of the panel hearing with the claimant upon payment of a reasonable fee by the claimant. The fee shall be calculated on an hourly rate and, upon claimant's request, reviewed by the Panel. If the full Panel selected to hear the claim determines the consulting fee charged the claimant is unreasonably high, that Panel shall, upon vote of majority, reduce the same to a reasonable fee. Communications between the consultant and the claimant or the claimant's attorney are privileged unless that privilege is waived by the claimant or is otherwise required to be disclosed by Rule 26(b) of the Montana Rules of Civil Procedure.

RULE 12. Time and Place of Hearing.

(a) Except as otherwise provided in Rule 12(d), after the application has been received, a date, time and place for the hearing shall be fixed by the Director, and prompt notice thereof shall be given by the Director to the parties involved and the members of the Panel.

A telephonic hearing shall be authorized upon the written stipulation of all parties and upon the approval of the Panel Chairperson, where the interests of justice would not be served by requiring an in-person hearing and then only under the following specific circumstances where the circumstances of the case and the requirements of orderly processing of the claim: (i) make physical travel to the Panel offices in Helena, Montana impractical for panelists who must be utilized; (ii) impose an unusual economic burden upon a party; or (iii) the issues as represented by each of the parties are such that the use of a telephonic hearing would allow full consideration of the matter by the Panel selected to hear the claim.

(b) In no instance may the date of the hearing set be more than one hundred twenty (120) days after the transmittal by the Director to the health care provider of the application for review, unless the Panel Chairperson or the Director finds good cause exists for extending the period. All requests for a continuance and change of hearing date must be submitted to the Panel in writing, stating the reasons therefor, and must include a selection of four alternative future dates for the hearing which are known to be available to each of the parties to the claim. If the request is on an emergency basis within five (5) calendar days from the date of the scheduled hearing, facsimile requests to the Panel are acceptable if the original is mailed on the date of the request.

(c) Panel hearings may be held in any county the Panel considers necessary or advisable. The county commissioners or other governing authority shall provide, upon request of the Director, suitable facilities for any such hearing.

(d) A hearing need not be held, telephonic or otherwise, and a decision shall be rendered by the Panel only on the written record, where all of the parties or their counsel have stipulated in writing to the waiver of a hearing.

RULE 13. Pre-hearing Telephone Conference.

(a) At least five (5) days prior to the hearing date set, the following parties shall confer, by telephone conference call or personally, with the Chairperson of the Panel: claimant or the claimant's attorney, the health care provider or the health care provider's attorney, and the Director of the Panel. During the pre-hearing conference call, the parties shall consider the following:

(1) Simplification and identification of issues;

(2) Obtaining of admissions to or stipulations of facts not remaining in dispute and of the authenticity of documents;

(3) Limitation of the number of witnesses to be called and scheduling of their appearances;

(4) Estimation of length of hearing and, if applicable, consideration of any transcription request;

(5) Any other matters that might aid in expeditious consideration and determination of the claim;

(6) Any materials submitted pursuant to Rule 14.

RULE 14. Exhibits and Documentary Evidence. No later than fourteen (14) days prior to the hearing date set for the claim, the parties shall furnish each other a copy and the Director seven (7) copies of all records and other documents and exhibits other than medical, hospital, podiatric or dental records obtained by the Panel, properly identified, upon which they intend to rely at the time of the hearing. If a party makes a sufficient showing by affidavit, filed with the Panel and provided to the parties and the Panel Chairperson, that documents or records upon which they intend to rely were not available within such fourteen (14) day period, the Chairperson shall have the discretionary authority to admit such later-acquired evidence upon such terms and conditions as are just and equitable in the premises. At the time of filing the required affidavit, the party providing the same shall serve copies of the documents or records in dispute on the Panel, the Chairperson and all other parties.

RULE 15. Hearing Procedures.

(a) At the time set for hearing, the claimant submitting the case for review shall be present, personally, unless that presence is: (1) waived by all health care providers; or (2) excused by the Panel Chairperson or the Director upon a timely request stating the reasons therefor. The claimant or claimant's counsel shall make a brief introduction of the case, including a resume of the facts constituting the alleged professional malpractice which he or she is prepared to prove. The health care provider against whom the claim is brought shall also be present, which presence may be excused in like manner as the claimant as provided by this Rule, and may make an introductory statement of his or her case, personally or through counsel.

(b) Claimant shall proceed first with his or her case, followed by the health care provider. Both parties may call witnesses to testify, who shall be subject to cross-examination and who shall be sworn. Medical, hospital, podiatric, or dental texts, journals and other documentary evidence relied upon by either party may be offered and admitted, if relevant, and if submitted timely under Rule 14. Written statements of fact by treating health care providers or claimants may be reviewed by the Panel.

(c) The hearing will be confidential and informal, and the Panel shall not make, pay for or retain any transcript; with the consent of the Chairperson of the Panel and all parties to the claim, the parties may provide for the making, payment and retention of a transcript. The Montana Rules of Evidence shall not apply to hearings before the Panel; however, irrelevant, immaterial or unduly repetitious evidence may be excluded by the Chairperson.

(d) All members of the Panel and counsel to the parties, or the parties if unrepresented, shall have the right to examine the parties and witnesses, including the parties when called as witnesses, subject to the control of the Chairperson.

(e) At the conclusion of the hearing, the Panel may take the claim under advisement or may request that additional facts, records, witnesses or other information be obtained and presented to it at a supplemental hearing, which shall be set for a date and time certain, not longer than thirty (30) days from the date of the original hearing, unless the party bringing the matter for review consents in writing to a longer period.

(f) Any supplemental hearing shall be held in the same manner as the original hearing, and the parties and their attorneys may be present.

(g) No Panel member may be called to testify in any proceeding concerning the deliberations, discussions, decisions and internal proceedings of the Panel.

RULE 16. Panel Deliberations and Decisions.

(a) The deliberations of the Panel are confidential. Upon consideration of all the relevant material, the Panel shall decide:

(1) Is there substantial evidence that the acts or omissions constitute a departure from the accepted standards of health care;

(2) If the answer to (1) is "Yes," whether there is a reasonable probability that the patient was injured thereby.

(b) All votes of the Panel on the questions for discussion shall be by secret ballot. The decision shall be by a majority vote of those voting members of the Panel who sat on the entire case. The decision shall be communicated in writing to the parties and their attorneys of record, or to a party if that party has no attorney, and a copy thereof shall be retained in the permanent files of the Panel.

(c) The decision shall, in every case, be signed for the Panel by the Chairperson and shall contain only the conclusions reached by a majority of its members and shall list the number of members, if any, dissenting therefrom. Upon request of any party, the majority shall briefly explain the reasoning and the basis for their decision, and the dissenters may likewise explain the reason for disagreement.

(d) The decision and the reasoning and basis for the decision of the Panel is not admissible as evidence in any action subsequently brought in any court of law. A copy of the decision shall be sent by the Director to the health care provider's professional licensing board.

(e) Panelists and witnesses are immune from civil liability for all communications, findings, opinions and conclusions made in the course and scope of the duties prescribed by the Act.

(f) The Panel's decision is without administrative or judicial authority and is not binding upon any party. The Panel may, however, recommend an award, approve settlement agreements consented to by the parties and discuss the same and all such approved settlement agreements are binding on the parties.

RULE 17. Travel Expenses. All members of the Panel, the Director, and the Director's staff are entitled to travel expenses incurred while on the business of the Panel, as provided in Sections 2-18-501 through 2-18-503, MCA, but such expenses shall be approved by the Director before payment is made.

RULE 18. Compensation of the Panel. All members of the Panel shall be paid a fee of Forty Dollars ($40.00) per hour, up to a maximum of Three Hundred Twenty Dollars ($320.00) per day in which a hearing or part of a hearing is held, for the time spent in hearing claims, subject to the approval of the Director and upon presentation of a billing itemizing to the one-tenth(1/10th) of an hour the nature of the services performed and the time involved. Upon the effective date of an amendment to Section 27-6-203, MCA, authorizing the same, the amount of such compensation shall be increased to Fifty Dollars ($50.00) per hour, up to a maximum of Five Hundred Dollars ($500.00) per day in which a hearing or part of a hearing is held, for the time spent in hearing claims. Additional compensation for travel time and other services shall be considered by the Director under circumstances including, but not limited to, weather or distance.

RULE 19. Additional authority of panel. The Panel may provide for the administration of oaths, the receipt of claims filed, the promulgation of forms required by the Act, the issuance of subpoenas in connection with the administration of the Act, and the performance of other acts to fairly and effectively administer the Act.

RULE 20. Statute of Limitations - Separately-designated Necessary or Proper Parties.

(a) The running of the applicable limitation period in a malpractice claim is tolled upon receipt by the Director of the application for review, as to all health care providers named in the application as parties to the Panel proceeding, and as to all other persons or entities named in the application as necessary or proper parties, for any court action which might subsequently arise out of the same factual circumstances set forth in the application.

(b) The running of the applicable limitation period in a malpractice claim does not begin again until 30 days after either an order of dismissal, with or without prejudice against re-filing, is issued from the Panel Chairperson or from the Director upon the consent of the parties to the claim, or the Panel's final decision, whichever occurs first, is entered in the permanent files of the Panel and a copy is served upon the complainant or claimant's attorney, if he or she is represented by counsel, by certified mail.

27-6-206. Funding.

Compiler's Comments

1997 Amendments: Chapter 133 in (2)(a), at beginning after "surcharge", inserted "or assessment", near end of second sentence inserted "podiatrists", and in third sentence, at beginning, inserted exception clause and inserted "the group of all podiatrists"; in (2)(b), at beginning, inserted exception clause; inserted (2)(b)(iv) relating to podiatrists; inserted (2)(c) establishing minimum annual assessment of $15; near end of (2)(d) inserted reference to minimum annual assessment of $15; in (3), at end of first sentence, substituted "must be paid on April 1 of each year" for "must be paid on or before the date that physicians' and dentists' annual registration or renewal fees are due under 37-3-313 and 37-4-307", deleted former fourth sentence that read: "The director has the same powers and duties in connection with the collection of and failure to pay the annual surcharge as the department of commerce has under 37-3-313 and 37-4-307 in connection with physicians' and dentists' annual registration or renewal fees", and inserted last sentence allowing panel to collect surcharge by action at law; and made minor changes in style.

Chapter 492 in (2), in first sentence, substituted "a surcharge" for "an annual surcharge"; and in (3), at end of first sentence, substituted "April 1 of each year" for "the date that physicians' and dentists' annual registration or renewal fees are due under 37-3-313 and 37-4-307" and substituted last sentence concerning collection by action at law for former sentence concerning power and duty under 37-3-313 and 37-4-307. Amendment effective July 1, 1997.

Section Not Codified: Section 7, Ch. 133, L. 1997, provided: "Podiatric contributions to fund — delayed implementation — capital contribution. The director may not levy an annual assessment against or collect an annual assessment from podiatrists until 1998. For the years 1998 through 2002, podiatrists shall pay an additional capital contribution of $50 to the fund in addition to the amount of the annual assessment computed under 27-6-206."

Applicability: Section 8, Ch. 133, L. 1997, provided: "[This act] applies to causes of action arising on or after [the effective date of this act]." Effective October 1, 1997.

Preamble: The preamble attached to Ch. 492, L. 1997, provided: "WHEREAS, the Legislature finds that delays in licensing board responses to complaints of misconduct by licensees and unlicensed practice that result in frustration on behalf of the public, licensees, and boards is caused by a lack of personnel to assist with compliance issues; and

WHEREAS, licensing boards collect and accumulate sufficient funds from the fees charged to licensees to meet the cost of compliance and enforcement personnel, but these same boards often lack the authority to expend the funds that they collect; and

WHEREAS, the delayed processing and the accumulating complaint backlog have a deleterious effect on the productivity and reputation of the licensees; and

WHEREAS, the Legislature finds that certain licensing boards need to be granted temporary spending authority to address the delayed processing and accumulated complaint backlog; and

WHEREAS, a uniformly flexible approach to license renewal scheduling would also reduce frustration on the part of licensees and the public that they serve; and

WHEREAS, inflexible examination dates for license applicants in the plumbing and electrical fields have caused undue hardship with no discernable [sic] public benefit; and

WHEREAS, the Committee on Business and Labor [now Economic Affairs Interim Committee] desires to alleviate these and other related problems by appropriating funds for certain professional and occupational boards that need additional compliance specialists, by allowing the Department of Commerce to establish license renewal dates by rule, and by allowing electrical and plumbing apprentices to take the examination required for licensure before the apprenticeships expire."

Coordination Instruction: Section 56(2), Ch. 492, L. 1997, provided: "If House Bill No. 396 and [this act] are both passed and approved, then 27-6-206(3) must read as follows:

"(3) The annual surcharge must be paid on or before April 1 of each year. All unpaid assessments bear a late charge fee equal to the judgment rate of interest. The late charge fee is part of the annual surcharge. The panel may collect the annual surcharge by an action at law."" House Bill No. 396 (Ch. 133, L. 1997) was approved March 24, 1997. Therefore, the amendment contained in this section is valid and an amendment made by sec. 3, Ch. 492, 1997, to subsection (3) is void.

1995 Amendments — Composite Section: Chapter 418 in (2), in fourth sentence at end, deleted "as to all claims closed since April 19, 1977" and in fifth sentence, at end, substituted "department of public health" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 in (2), at end of fifth sentence, substituted "department of public health and human services" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

A style change in the chapters was slightly different. The codifier chose the most appropriate.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clauses: Section 503, Ch. 418, L. 1995, and sec. 571, Ch. 546, L. 1995, were saving clauses.

1987 Amendment: Inserted references throughout to dentists; and in (3) added references to renewal fees and cites to 37-4-307.

1985 Amendment: In (2) at end of first sentence, deleted "except physicians not engaged in the private practice of medicine", near middle of second sentence, after "director", deleted "who shall allocate a projected cost" and inserted "and must be apportioned", at end of second sentence substituted "providers by group" for "facilities", and substituted third through seventh sentences, relating to the assessment of various groups, for former language that read: "The amount of the assessment for an individual physician, hospital, or other health care facility must be that portion of the total assessment which bears the same relationship to the total assessment as the number of claims against such physician, hospital, or other health care facility bears to the total number of claims against physicians, hospitals, and other health care facilities that have been filed with the panel since April 19, 1977, as that total number of claims is shown in the annual reports of the panel. However, the assessment for an individual hospital must also be determined by dividing the total percentage of the assessment for all hospitals by the total number of hospital beds existing at the time of the assessment and multiplying the result by the number of beds in the hospital to be assessed"; and in middle of (3) inserted "All unpaid assessments bear a late charge fee equal to the judgment rate of interest. The late charge fee is part of the annual surcharge."

1983 Amendment: Substituted (2) (see 1983 Session Law for text) for former (2) that read: "To create the fund, an annual surcharge shall be levied on all health care providers. The amount of the assessment shall be set by the director, who shall allocate a projected cost among health care providers on a per capita basis, except that an individual not engaged in the practice of his profession in Montana is exempt from payment of the assessment. The director may provide a different allocation upon approval by the supreme court. Surplus funds, if any, over and above the amount required for the annual administration of the chapter shall be retained by the director and used to finance the administration of this chapter in succeeding years, in which event the director shall reduce the annual assessment in subsequent years, commensurate with the proper administration of this chapter."

1981 Amendments: Chapter 6 in (2) exempted from payment of assessment those individuals not engaged in practice in Montana.

Chapter 274 substituted "department of commerce" for "department of professional and occupational licensing" in (3).

Case Notes

Cost Allocation Based on Other Than Per Capita Basis Disapproved: Prior to the 1983 amendment to this section, the director of the Montana Medical Malpractice Panel petitioned the Supreme Court for approval of an allocation of the cost of the pretrial review fund of 60% to Montana physicians and 40% to Montana hospitals. Under the proposal, the director of the Montana Hospital Association was to determine how much each hospital would pay. The court found the plan unworkable because the hospital association is voluntary and the director is not authorized by law to assess or collect the amount due from its members. Petition denied. In re Mont. Medical Malpractice Panel, 36 St. Rep. 206 (1979) (apparently not reported in Montana Reports). (Decided prior to 1981, 1983, and 1985 amendments to 27-6-206.)

27-6-207. Panel audits.

Compiler's Comments

Implementation: Section 2, Ch. 96, L. 1987, provided: "The first audit to be conducted under 27-6-207 must be for the 2 fiscal years ending June 30, 1987."

Part 3
Preliminary Procedure

27-6-301. How cases submitted.

Compiler's Comments

1985 Amendment: Near end of section substituted "claimant" for "patient".

27-6-302. Contents of application — waiver of confidentiality of medical and dental records.

Compiler's Comments

1997 Amendment: Chapter 133 near end of (1) inserted "podiatrists"; near beginning of (2) inserted "podiatric"; and made minor changes in style.

Applicability: Section 8, Ch. 133, L. 1997, provided: "[This act] applies to causes of action arising on or after [the effective date of this act]." Effective October 1, 1997.

1987 Amendment: In (1) added reference to dentists; and near beginning of (2) added "dental" to types of records and information.

27-6-303. Amendments to application.

Compiler's Comments

1985 Amendment: At beginning of section substituted "Amendments" for "Any amendments", and substituted "may be authorized by rule" for "must be filed not less that 14 days prior to the hearing date".

27-6-305. Service on health care provider.

Compiler's Comments

1983 Amendment: At end of section after "shall be effected" substituted language relating to mailing certified copy by certified mail for "pursuant to the Montana Rules of Civil Procedure".

27-6-306. Health care provider's appearance and answer — waiver of confidentiality of records.

Compiler's Comments

1997 Amendment: Chapter 133 near middle of first sentence in (2) inserted "podiatric"; and made minor changes in style.

Applicability: Section 8, Ch. 133, L. 1997, provided: "[This act] applies to causes of action arising on or after [the effective date of this act]." Effective October 1, 1997.

1987 Amendment: In (2) added "dental" to types of records and information.

27-6-307. Assistance to claimant in obtaining expert consultation.

Compiler's Comments

1987 Amendment: At end of introductory clause inserted "to consult with the claimant, upon payment of a reasonable fee by the claimant, in claims involving"; at beginning of (1) inserted "a physician"; at end of (1), after "involved", deleted "who will consult with the claimant upon payment of a reasonable fee by the claimant"; and inserted "(2) a dentist, a dentist qualified in the field of dentistry involved".

27-6-308. Director to furnish panel members with documents.

Compiler's Comments

1997 Amendment: Chapter 133 inserted "podiatric"; and made minor changes in style.

Applicability: Section 8, Ch. 133, L. 1997, provided: "[This act] applies to causes of action arising on or after [the effective date of this act]." Effective October 1, 1997.

1987 Amendment: Inserted reference to dental records.

Part 4
Formation and Composition of Panel

27-6-401. Composition of panel.

Compiler's Comments

1997 Amendment: Chapter 133 in (1) inserted fifth sentence establishing panel membership for claim against podiatrists; and at end of (2) inserted requirement that podiatrist sit on panel for claim against podiatrist.

Applicability: Section 8, Ch. 133, L. 1997, provided: "[This act] applies to causes of action arising on or after [the effective date of this act]." Effective October 1, 1997.

1987 Amendment: In (1) inserted fourth sentence relating to members for a claim against a dentist; and at end of (2) inserted exception for a claim against a dentist.

1985 Amendment: In (1) inserted "Six panel members shall sit in review of each case", near middle of third sentence substituted "who are physicians" for "from the health care provider's profession" and "who are attorneys" for "from the state bar", at end of third sentence inserted "in which the claim is heard only against one or more physicians", and inserted last sentence relating to claims heard only against one or more health care facilities; and in (2) substituted "In all other cases, two of the panel members must be physicians, one panel member must be an administrator of the same type of health care facility, and three panel members must be attorneys" for former language that read: "In those cases where the theory of respondeat superior or some other derivative theory of recovery is employed, two of the panel members shall be chosen from the individual health care provider's profession and one panel member shall be chosen from the profession of the health care provider named a respondent as employer, master, or principal".

27-6-402. Selection of panelists.

Compiler's Comments

1983 Amendment: In (1), after "which shall" inserted "within 14 days from the date of transmittal of the application"; after "each select" substituted "12 proposed" for "three"; and at end of (1) after "panelists" substituted "from which 3 will be selected" for "within 30 days from the date of transmittal of the application"; in (2) increased number selected from "three" to "12".

27-6-404. Disqualification of panel member.

Compiler's Comments

1983 Amendment: At end of (2), substituted "within 15 days of the transmittal by the director, under 27-6-402, of the names of the panel members selected" for "at least 20 days prior to the date of hearing".

Case Notes

Existence of Doctors on Panel — Due Process Not Violated: The Supreme Court rejected plaintiff's contention of a denial of due process by reason of the existence of doctors on the panel. The only effect of the panel's decision on a plaintiff's case would be to discourage him from taking his claim to court. Even in those states in which the decision is admissible at a later trial, the courts considering this issue have found an insufficient showing of bias or prejudice to amount to a denial of due process. In order to effectuate the purposes of the panel, it is advisable to have medical personnel on the panel. Additionally, a claimant has the opportunity to disqualify any member who is in fact subject to the charge of bias. Linder v. Smith, 193 M 20, 629 P2d 1187, 38 St. Rep. 912 (1981).

Part 5
Hearing Procedure

Part Case Notes

General Practitioner's Standard of Care — Geographical Limitation Eliminated: The Supreme Court adopted a new standard of care to be applied prospectively to treatment extended to patients, commencing on March 31, 1990. The court ruled that a nonboard-certified general practitioner is held to the standard of care of a reasonably competent general practitioner acting in the same or similar circumstances in the same or a similar community in the United States. The new rule abandons the "locality" rule that was limited to Montana communities and reverses anything to the contrary in Tallbull v. Whitney, 172 M 326, 564 P2d 162 (1977). Chapel v. Allison, 241 M 83, 785 P2d 204, 47 St. Rep. 101 (1990).

Confidentiality of Medical Legal Panel — Denial of Transcript Upheld: Plaintiffs who filed a claim with the Montana Medical Legal Panel alleging malpractice against two doctors requested a stenographic record of the hearing. The doctors opposed the request, and the Panel chairman ruled that under Rule 15(c), Panel Rules of Procedure, no transcript would be made. Plaintiffs then applied to the District Court for a Writ of Mandamus, and the court ruled that denial of the transcript violated due process under the 14th amendment of the U.S. Constitution and Art. II, sec. 17., Mont. Const. On appeal, the Supreme Court found that the language of 27-6-502 indicated legislative intent that the Montana Administrative Procedure Act provisions concerning transcripts do not apply. The court held that the Panel is a purely advisory body and therefore confidential. Given its confidential nature, it cannot be said that Rule 15(c) arbitrarily denies parties a transcript or that denial of a transcript destroys the right to fully cross-examine witnesses at trial. The court found no constitutional infirmities in the workings of Rule 15(c);

therefore, the District Court was reversed. State ex rel. Hufford v. Mont. Medical Legal Panel, 223 M 73, 724 P2d 186, 43 St. Rep. 1541 (1986).

Expansion of Locality Rule — Medical Standards: Montana's "locality rule" imposes on a physician undertaking the care of a patient the legal duty of possessing and exercising that reasonable and ordinary degree of learning, skill, and care possessed and exercised by physicians of good standing of the same school of practice in the same or similar (emphasis added) locality in Montana. A "similar locality in Montana" within the meaning of this rule is a locality of similar geographical location, size, and character in a medical context. Tallbull v. Whitney, 172 M 326, 564 P2d 356 (1977), geographical limit eliminated, Chapel v. Allison, 241 M 83, 785 P2d 204, 47 St. Rep. 101 (1990).

Part Law Review Articles

Standards of Medical Care for General Practitioners in Montana: The Chapel Decision and a Move Toward a National Standard, McGrath, 53 Mont. L. Rev. 119 (1992).

27-6-502. Conduct of hearing.

Case Notes

Confidentiality of Medical Legal Panel — Denial of Transcript Upheld: Plaintiffs who filed a claim with the Montana Medical Legal Panel alleging malpractice against two doctors requested a stenographic record of the hearing. The doctors opposed the request, and the Panel chairman ruled that under Rule 15(c), Panel Rules of Procedure, no transcript would be made. Plaintiffs then applied to the District Court for a Writ of Mandamus, and the court ruled that denial of the transcript violated due process under the 14th amendment of the U.S. Constitution and Art. II, sec. 17., Mont. Const. On appeal, the Supreme Court found that the language of 27-6-502 indicated legislative intent that the Montana Administrative Procedure Act provisions concerning transcripts do not apply. The court held that the Panel is a purely advisory body and therefore confidential. Given its confidential nature, it cannot be said that Rule 15(c) arbitrarily denies parties a transcript or that denial of a transcript destroys the right to fully cross-examine witnesses at trial. The court found no constitutional infirmities in the workings of Rule 15(c); therefore, the District Court was reversed. State ex rel. Hufford v. Mont. Medical Legal Panel, 223 M 73, 724 P2d 186, 43 St. Rep. 1541 (1986).

Part 6
Deliberations and Decision of Panel

27-6-604. Form and content of decision.

Compiler's Comments

1995 Amendment: Chapter 59 in second sentence, at beginning, inserted "Upon request of any party" and in two places substituted "shall" for "may" and inserted third sentence requiring that each party be informed of the right to nonbinding mediation; and made minor changes in style.

27-6-606. Decision not binding — settlement agreements — nonbinding mediation.

Compiler's Comments

1995 Amendment: Chapter 59 inserted (3) requiring participation in nonbinding mediation under certain circumstances; and made minor changes in style.

Case Notes

Separation of Powers Argument Rejected: The Supreme Court rejected plaintiff's contention that the panel act violates the prohibitions against unlawful delegation of judicial and legislative power and infringes on the doctrine of separation of powers. The decision of the panel is not enforceable, and unlike the panel decisions in most states, it is not even admissible at trial. Consequently, there are no constitutional violations under the Montana act. Linder v. Smith, 193 M 20, 629 P2d 1187, 38 St. Rep. 912 (1981).

Part 7
Effect of Proceedings in Court Action — Confidentiality

Part Case Notes

Confidentiality of Medical Legal Panel — Denial of Transcript Upheld: Plaintiffs who filed a claim with the Montana Medical Legal Panel alleging malpractice against two doctors requested a stenographic record of the hearing. The doctors opposed the request, and the Panel chairman ruled that under Rule 15(c), Panel Rules of Procedure, no transcript would be made. Plaintiffs

then applied to the District Court for a Writ of Mandamus, and the court ruled that denial of the transcript violated due process under the 14th amendment of the U.S. Constitution and Art. II, sec. 17., Mont. Const. On appeal, the Supreme Court found that the language of 27-6-502 indicated legislative intent that the Montana Administrative Procedure Act provisions concerning transcripts do not apply. The court held that the Panel is a purely advisory body and therefore confidential. Given its confidential nature, it cannot be said that Rule 15(c) arbitrarily denies parties a transcript or that denial of a transcript destroys the right to fully cross-examine witnesses at trial. The court found no constitutional infirmities in the workings of Rule 15(c); therefore, the District Court was reversed. State ex rel. Hufford v. Mont. Medical Legal Panel, 223 M 73, 724 P2d 186, 43 St. Rep. 1541 (1986).

27-6-701. No court action before application to and decision by panel.

Case Notes

Mandatory Submission of Claims to Panel — Jury Trial: Mandatory submission of claims to the panel does not unconstitutionally interfere with the right to trial by jury. A claimant is free to continue to jury trial no matter what the decision of the panel, and the jury remains the final determiner of fact. Further, the panel decision is not binding, nor is it admissible at trial. Submission to the panel is merely a permissible delay in the path to the ultimate jury verdict. Linder v. Smith, 193 M 20, 629 P2d 1187, 38 St. Rep. 912 (1981).

27-6-702. Tolling of statute of limitations.

Compiler's Comments

1995 Amendment: Chapter 16 near beginning of first sentence, after "period", substituted "related to a malpractice claim" for "in a malpractice claim" and near beginning of second sentence, after "period", deleted "in a malpractice claim"; and made minor changes in style.

1985 Amendment: Near beginning, after "application for review", substituted remainder of section (see 1985 Session Law for text) for "and does not begin again until 30 days after the panel's final decision is entered in the permanent files of the panel and a copy is served upon the complainant and his attorney by certified mail".

Case Notes

Tolling of Statute of Repose by Chiropractic Legal Panel Proceeding Filed Before Dismissal of Court Action — Filing of Second Court Action After Panel Decision Not Barred: A medical malpractice complaint filed in District Court on April 16, 1992, tolled the statute of repose pursuant to 27-2-205. On August 2, 1993, an application was timely filed with the Montana Chiropractic Legal Panel. Voluntary dismissal of the District Court complaint without prejudice on August 3, 1993, did not nullify the complaint's tolling of the statute of limitations because under 27-12-701, the filing of the Panel application also tolled the statute. The Montana Chiropractic Legal Panel Act continued to toll the statute while the application under it was pending, and because the second District Court complaint was timely filed under the Act within 30 days after the Panel's decision, the second complaint was not barred by the statute of repose. Webb v. T.D., 275 M 243, 912 P2d 202, 53 St. Rep. 117 (1996).

Tolling Provision Not Limited to Malpractice Claims: Plaintiff filed a products liability claim against Ethicon, a medical supply company, when a broken suture caused a subsequent stroke. Ethicon moved for dismissal, claiming that the provision tolling the statute of limitations applies only to malpractice claims. Affirming the District Court decision, the Supreme Court held that while the statute is ambiguous on its face, legislative history supports the conclusion that the tolling provision applies not only to malpractice claims but also to actions against all persons or entities named as necessary or proper parties for court action arising out of the same facts. (See 1995 amendment.) Eisenmenger v. Ethicon, Inc., 264 M 393, 871 P2d 1313, 51 St. Rep. 296 (1994).

27-6-704. Panel proceedings and decision privileged from disclosure in court actions.

Compiler's Comments

2005 Amendment: Chapter 253 in (2) at end inserted "and are not evidence for any purpose in an action brought under 33-18-201, 33-18-242, or common law". Amendment effective July 1, 2005.

Applicability: Section 3, Ch. 253, L. 2005, provided: "[This act] applies to causes of action that arise on or after [the effective date of this act]." Effective July 1, 2005.

1995 Amendment: Chapter 59 in (2), near beginning after "decision", inserted "and the reasoning and basis for the decision"; and made minor changes in style.

1983 Amendment: Deleted former first sentence of (2), which read: "No statement made by any person during a hearing before the panel may be used as impeaching evidence in court."

Case Notes

Language Excised to Uphold Constitutionality of Malpractice Panel Act: The phrase in subsection (2), "No statement made by any person during a hearing before the panel may be used as impeaching evidence in court" (deleted by 1983 amendment), must be severed from the act in order to uphold the constitutionality of the panel act. It is fundamental to our adversarial system that litigants retain the right to impeach the sworn testimony of a witness testifying against them. A litigant may not receive a full and fair hearing if he is unable to fully cross-examine in court the witness that testified in the prior hearing. Linder v. Smith, 193 M 20, 629 P2d 1187, 38 St. Rep. 912 (1981), cited in Newville v. St., 267 M 237, 883 P2d 793, 51 St. Rep. 758 (1994).

Law Review Articles

The Montana Medical Malpractice Panel Act: Origin, Procedure, and Effect, Moe, 44 Mont. L. Rev. 281 (1983).

CHAPTER 7
SUBMISSION OF CONTROVERSY WITHOUT ACTION

Part 1
General Provisions

27-7-101. When and in what court controversy may be submitted.

Case Notes

Heirship Proceedings: Proceedings to determine heirship, while partaking in form of the nature of a civil action, are not such, and therefore the provisions of this section have no application to such proceedings. In re Spriggs' Estate, 68 M 92, 216 P 1108 (1923).

Quiet Title Cause: A cause, having for its purpose the obtaining of a decree to quiet the title to land, may be submitted without pleadings under an agreed statement of facts. Lockey v. Bozeman, 42 M 387, 113 P 286 (1910).

Controversy Required:

This section may be said to encourage the submission of agreed cases where they involve a real controversy. Carlson v. Helena, 38 M 581, 101 P 163 (1909).

The action of the District Court in deciding or answering questions submitted under this section by a statement that fails to show the controversy between the parties does not constitute an enforceable or appealable order or judgment. Bd. of County Comm'rs v. Gilliam, 17 M 333, 42 P 852 (1895).

Stipulation Raising Issues: Where a complaint is filed giving jurisdiction and a stipulation is then filed, treated by the District Court and parties as amending the complaint and raising an issue, the case is not an agreed case that has to be submitted with the formalities required by this chapter to give jurisdiction. Bickford v. Kirwin, 30 M 1, 75 P 518 (1904).

Collateral References

Submission of Controversy *key* 1, et seq.
83 C.J.S. Submission of Controversy §1, et seq.
3 Am. Jur. 2d Agreed Case §1, et seq.

27-7-102. Action by court.

Collateral References

Submission of Controversy *key* 1, et seq.
83 C.J.S. Submission of Controversy §1, et seq.
3 Am. Jur. 2d Agreed Case §27.

27-7-103. Entry of judgment — costs.

Case Notes

Order Constituting Judgment: Where an order of the District Court constitutes its final judgment, it is properly a part of the judgment roll and the recitals therein are properly before the Supreme Court for its consideration on appeal. Weir v. Silver Bow County, 113 M 237, 124 P2d 1003 (1942).

Collateral References

Submission of Controversy *key* 19 through 21.
83 C.J.S. Submission of Controversy §§15, 17.
3 Am. Jur. 2d Agreed Case §§32 through 34.

CHAPTER 8
UNIFORM DECLARATORY JUDGMENTS ACT

Chapter Compiler's Comments

Uniform State Law: Title 27, ch. 8, constitutes the "Uniform Declaratory Judgments Act" approved by the National Conference of Commissioners on Uniform State Laws in 1922 and adopted in the states of Alabama, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming and also in Puerto Rico and the Virgin Islands.

Chapter Case Notes

Purpose of Act — Declaratory Judgment Properly Used to Test Constitutionality of Criminal Jurisdictional Statute — Previous Opinion Applied by Remand: Defendants in criminal proceedings in several different Justices' Courts filed actions under the Uniform Declaratory Judgments Act (UDJA) to have declared unconstitutional statutes requiring a criminal defendant in a Justice's Court proceeding to choose between a jury trial in Justice's Court or in District Court. Several civil actions requesting the same relief under the UDJA were consolidated for the purposes of appeal. The state argued that the UDJA was not intended to be used for this purpose and that the various criminal defendants could obtain the same relief by raising the unconstitutionality of the underlying statute as a defense in their individual criminal prosecutions. The Supreme Court noted that acceptance of the state's position would require each criminal defendant to litigate the constitutionality of the pertinent sections of law both in the District Courts and in the Montana Supreme Court. Citing Goff v. St., 141 M 605, 374 P2d 862 (1962), St. v. Wilson, 160 M 473, 503 P2d 522 (1972), and Gryczan v. St., 283 M 433, 942 P2d 112 (1997), and noting that the issue of the constitutionality of the pertinent statutes could be raised, but not finally decided, in the District Courts, the Supreme Court held that it was proper to use the UDJA to determine the constitutionality of the statutes requiring the election of a jury trial in one court and not both courts. On this substantive issue, the Supreme Court cited its recent decision in Woirhaye v. District Court, 1998 MT 320, 292 M 185, 972 P2d 800, 55 St. Rep. 1298 (1998), holding that the statute requiring the election was unconstitutional, and remanded the cases to the District Courts with directions to enter declaratory judgments in favor of the plaintiffs and appellants. McGillivray v. St., 1999 MT 3, 293 M 19, 972 P2d 804, 56 St. Rep. 11 (1999).

Review of Health Board Decision Not Proper Subject for Declaratory Judgment — Writ of Mandate and Declaratory Relief Properly Denied: Skinner Enterprises, Inc., sought relief in the form of a declaratory judgment stating that the local board of health could not require an intermittent sand filter sewage treatment system on a proposed subdivision, by making an issue of the District Court's failure to evaluate the factual basis for the board's decision, in effect attempting to appeal the board's decision. However, review of the board's decision was not a proper subject for a declaratory judgment, and that form of relief was properly denied. Further, a writ of mandate ordering the board to approve the subdivision was also inappropriate, given the board's discretionary authority to approve or disapprove a subdivision. Skinner Enterprises, Inc. v. Lewis & Clark County Bd. of Health, 286 M 256, 950 P2d 733, 54 St. Rep. 1398 (1997).

Taxpayer Action to Be Brought in Accordance With Statutory Requirements — Woith Distinguished: Taxpayers brought a civil action against the Department of Revenue and others, seeking a declaratory judgment relief and repayment of property taxes assessed in 1989 through 1992, based upon their rights as adjudicated in Dept. of Revenue v. Sheehy, 262 M 104, 862 P2d 1181 (1993). In that case, the Supreme Court found the stratified sales assessment ratio valuation adjustment in 15-7-111 to be unconstitutional. The taxpayers brought their action under both 15-1-406 and the Uniform Declaratory Judgments Act, Title 27, ch. 8. The District Court dismissed the cause of action under this chapter, reasoning that it was precluded by 15-1-406. The Supreme Court agreed with the District Court, holding that bringing an action

pursuant to 15-1-406 precludes an action under this chapter. In response to the taxpayers' argument that the Supreme Court's decision in Woith v. Cascade County Treasurer, 262 M 170, 864 P2d 752 (1993), recognizes that other causes of action may be brought under other statutes, the Supreme Court held that its decision in Woith does not exempt the taxpayers from having to comply with the provisions of those other statutes. Although an action under 15-1-405 is subject to this chapter by virtue of 15-1-407, the Supreme Court said, there is still a limited amount of time in which the action may be brought, and that period of time is specified in 15-1-406. For these reasons, the Supreme Court concluded that the District Court did not err in dismissing the taxpayers' claim brought pursuant to the Uniform Declaratory Judgments Act. Samson v. St., 285 M 310, 948 P2d 232, 54 St. Rep. 1165 (1997).

Standing to Bring Declaratory Judgment Action — Possibility of Prosecution Under Criminal Statute Held Sufficient: Gryczan and others, who were homosexuals, brought a declaratory judgment action against the state, seeking a determination of whether 45-5-505, proscribing deviate sexual conduct, was unconstitutional as applied, as a violation of their right to privacy. The plaintiffs alleged that they had in the past and intend in the future to engage in acts that violate the statute. The state contested the plaintiffs' right to bring the action, arguing that the statute had never been enforced. Relying upon Lee v. St., 195 M 1, 635 P2d 1282 (1981), and Helena Parents v. Lewis & Clark County, 277 M 367, 922 P2d 1140 (1996), the Supreme Court reviewed the criteria for standing generally and standing to challenge a criminal statute in particular and noted that it had never required a person to suffer arrest in order to challenge a criminal statute. Moreover, the Supreme Court noted that although it had never been enforced, the Legislature had amended the statute as late as 1991 and had even later rejected attempts to repeal the statute. The Supreme Court reviewed opinions decided by the U.S. Supreme Court and other federal courts and held that because the Legislature did not regard the statute as moribund and because the Attorney General had not foresworn the enforcement of the statute, plaintiffs had a legitimate and realistic fear of criminal prosecution along with other psychological harms. Noting that the plaintiffs are precisely the individuals against whom the statute is intended to operate, the Supreme Court held that the District Court did not err in holding that the plaintiffs had standing to challenge the statute. Gryczan v. St., 283 M 433, 942 P2d 112, 54 St. Rep. 699 (1997), followed in Mont. Envtl. Information Center v. Dept. of Environmental Quality, 1999 MT 248, 296 M 207, 988 P2d 1236, 56 St. Rep. 964 (1999).

Standing to Seek Declaratory Judgment: Plaintiff, a group of taxpayers residing in Lewis and Clark County who have children attending Helena School District No. 1, brought an action against the county, seeking a declaratory judgment that certain financial practices of the county were illegal. Citing Lee v. St., 195 M 1, 635 P2d 1282 (1981), and distinguishing Chovanak v. Matthews, 120 M 520, 188 P2d 582 (1948), the Supreme Court held that plaintiff association had standing to bring the action even though the harm claimed by plaintiff was a form of harm in common with other members of a larger class of people because the harm each claimed is not common to all members of the general public. Helena Parents Comm'n v. Lewis & Clark County Comm'rs, 277 M 367, 922 P2d 1140, 53 St. Rep. 687 (1996).

Award of Attorney Fees in Declaratory Judgment Insurance Action — Distinction Between Third-Party Claimant and Insured: As a general rule, an insured is not entitled to recover attorney fees and expenses incurred in defending a declaratory judgment action brought by an insurer to determine the existence of coverage under a liability insurance policy. However, recovery is appropriate where it is ultimately determined by the court that the insurer was not acting in good faith in contesting coverage and instituting declaratory judgment proceedings. A third-party claimant is not entitled to recover attorney fees incurred in a declaratory judgment proceeding, even if the claimant arguably falls within the policy definition of "insured". Iowa Mut. Ins. Co. v. Davis, 689 F. Supp. 1028, 45 St. Rep. 1361 (D.C. Mont. 1988).

Court Determination of Correct Loss-Per-Vehicle Figure Under Flat Fee System — Declaratory Judgment Proper: A declaratory judgment was affirmed by the Supreme Court after finding that a county had the right to have the District Court construe 61-3-536 and thereby to determine the correct loss-per-vehicle figure to be used by the state after the county miscalculated the amount due the county under the flat fee system. Lewis & Clark County v. St., 224 M 223, 728 P2d 1348, 43 St. Rep. 2150 (1986).

Supreme Court Original Jurisdiction Over Declaratory Action Concerning Statewide Water Adjudication: The Supreme Court had power to determine an action for declaratory judgment involving the constitutionality of the requirement in 85-2-234 that final water decrees state "the amount of water, rate, and volume, included in the right". The issue affects all rights in the statewide adjudication process. Determination of the issue by the Supreme Court: (1) will provide guidance to the water court; (2) is in the interests of judicial economy; and (3) would

serve the public policy of the state by expediting the determination of existing water rights. McDonald v. St., 220 M 519, 722 P2d 598, 43 St. Rep. 576 (1986), rehearing denied, 220 M 519, 722 P2d 598, 43 St. Rep. 1397 (1986).

Declaratory Judgment Not Plain, Speedy, and Adequate Remedy Precluding Writ of Prohibition: In an appeal of the District Court's issuance of a Writ of Prohibition prohibiting the County Commission and the County Recorder from placing on an election ballot the question of retaining the charter form of county government, appellants claimed that prohibition did not lie because there were other plain, speedy, and adequate remedies available to petitioners. The Supreme Court affirmed the Writ's issuance, ruling that a plain, speedy, and adequate remedy was not afforded by: (1) the judicial review procedure set forth in 7-3-154; (2) the injunction procedure set forth in Title 27, ch. 19; or (3) the declaratory judgment procedure set forth in Title 27, ch. 8. Allen v. Madison County Comm'n, 211 M 79, 684 P2d 1095, 41 St. Rep. 1226 (1984).

Criminal Cases: This chapter does not apply to criminal cases. Goff v. St., 141 M 605, 374 P2d 862 (1962).

Chapter Collateral References

Uniform Declaratory Judgments Act, 12 Uniform Laws Annotated.

Part 1
General Provisions

Part Case Notes

Factors in Determining Original Jurisdiction: The three major factors necessary for a valid exercise of Supreme Court original jurisdiction are where: (1) constitutional issues of major statewide importance are involved; (2) the questions involved are purely legal questions of statutory or constitutional construction; and (3) urgency and emergency factors exist, making the normal appeal process inadequate. White v. St., 233 M 81, 759 P2d 971, 45 St. Rep. 1310 (1988).

Duty to Defend — Intentional Versus Negligent Damage — Covered Occurrence: Plaintiff was retained to drill test holes on placer claims. The claim owners refused to pay plaintiff, causing plaintiff to foreclose on a mechanics' lien (now construction lien). The claim owners then counterclaimed, alleging plaintiff had intentionally or negligently salted the test results. Plaintiff tendered defense of the counterclaim to his insurer, the defendant. Defendant refused to defend, contending the allegations of the counterclaim were not covered by the insurance policy. The policy excluded from coverage damage "intended from the standpoint of the insured". In a declaratory judgment action the Supreme Court held that if the salting was done by third parties as a result of plaintiff's negligence, the action was covered by the policy. The drilling expense and inherent production costs established an intrinsic value in the core samples. There was a tangible property loss within the policy's coverage. The counterclaim set forth a covered "occurrence" as defined in the policy, and defendant was obliged to defend the counterclaim. Lindsay Drilling v. USF&G, 208 M 91, 676 P2d 203, 41 St. Rep. 193 (1984).

27-8-101. Short title.

Compiler's Comments

Uniform Act Section: The corresponding provision of the Uniform Declaratory Judgments Act as adopted by the National Conference of Commissioners on Uniform State Laws is section 16.

27-8-102. Purpose — liberal construction.

Compiler's Comments

Uniform Act Section: The corresponding provision of the Uniform Declaratory Judgments Act as adopted by the National Conference of Commissioners on Uniform State Laws is section 12.

Case Notes

Attorney Fees Not Considered Costs — Declaratory Judgment Equitable Exception to Rule That Attorney Fees Not Awarded Absent Contractual or Statutory Provision: The District Court initially awarded costs and attorney fees to defendants for defending a declaratory judgment action. Plaintiff moved under Rule 59(g), M.R.Civ.P. (Title 25, ch. 20), to strike the award of attorney fees. The District Court then concluded that it lacked authority to award attorney fees because plaintiff did not force defendants to defend against a frivolous or malicious action, so the court struck the award of attorney fees, and defendants appealed. Generally, under the American rule, a party in a civil action is not entitled to attorney fees absent a specific

contractual or statutory provision, although equitable exceptions are recognized. Section 27-8-311 provides that in any proceeding under this chapter, equitable and just costs may be awarded, but attorney fees are not, in any proper sense, considered part of the costs in a case and thus are not allowed as costs under 27-8-311. However, 27-8-313 draws no distinction between declaratory judgment actions adjudicating the rights of an insured against an insurer and actions adjudicating rights outside the confines of an insurance policy, so a court may award attorney fees pursuant to 27-8-313 when the court, in its discretion, considers such an award necessary or proper. Therefore, after finding that the District Court erred in concluding that it lacked authority to award attorney fees, the Supreme Court reversed for a determination of whether an award of attorney fees was necessary or proper in this case. Trustees of Ind. Univ. v. Buxbaum, 2003 MT 97, 315 M 210, 69 P3d 663 (2003), overruling State ex rel. Swart v. Casne, 172 M 302, 564 P2d 983 (1977), State ex rel. Dept. of Health and Environmental Sciences v. Lincoln County, 178 M 410, 584 P2d 1293 (1978), State ex rel. Leach v. Visser, 234 M 438, 767 P2d 858 (1988), McKamey v. St., 268 M 137, 885 P2d 515 (1994), and Dorwart v. Caraway, 1998 MT 191, 290 M 196, 966 P2d 1121 (1998), to the extent that those cases hold that a District Court has no discretionary authority to award attorney fees in a declaratory judgment action, and followed in Renville v. Farmers Ins. Exch., 2004 MT 366, 324 M 509, 105 P3d 280 (2004).

Incorrect Dismissal of Declaratory Judgment Seeking Payment of Prejudgment Medical Expenses — Ridley and Safeco Clarified: DuBray filed a complaint for a declaratory judgment, asking for a determination that Farmers Insurance Exchange (Farmers) was required to pay DuBray's medical expenses prior to settlement of or judgment on the underlying claim. DuBray also sought prejudgment interest, costs of suit, and compensatory and punitive damages. The District Court found that the complaint was effectively a bad faith action barred by 33-18-242 prior to resolution of the underlying claim against Farmers and dismissed the claim in its entirety for failure to state a claim upon which relief could be granted. DuBray appealed, citing Safeco Ins. Co. of Ill. v. District Court, 2000 MT 153, 300 M 123, 2 P3d 834 (2000), wherein the Supreme Court approved declaratory judgment actions as a means for compelling advance payment of medical expenses. Farmers contended that Safeco authorized declaratory judgment actions only for damages that, according to Ridley v. Guar. Nat'l Ins. Co., 286 M 325, 951 P2d 987 (1997), are owed prior to final judgment, that the only damages to which Ridley applied are undisputed medical expenses, and that the District Court should therefore be affirmed. The Supreme Court affirmed Safeco inasmuch as that case does not authorize a declaratory judgment to determine an insurer's liability prior to resolution of the underlying claim, with the exception of damages for which liability is reasonably clear, which are not barred by 33-18-242. Therefore, the District Court correctly dismissed DuBray's claims for pain and discomfort, mental distress, inconvenience, and punitive damages. However, Farmers' liability for medical damages was reasonably clear, so the District Court committed reversible error in dismissing the portion of DuBray's claim that sought payment of medical expenses. The Supreme Court went on to clarify Safeco and Ridley to ensure that those cases not be construed to apply only to medical expenses, because medical expenses are just one of the obligations incurred by victims that mandatory liability insurance laws were designed to eliminate, another being lost wages that are reasonably certain and directly related to an insured's negligence or wrongful act. DuBray v. Farmers Ins. Exch., 2001 MT 251, 307 M 134, 36 P3d 897 (2001).

State Court Determination of Indemnification Inappropriate When Underlying Federal Class Action Case Undecided — Dismissal of Declaratory Judgment Action Proper Absent Justiciable Controversy: A class action suit was brought against Park County and several individual county officials in federal District Court. The county's primary insurer assumed the defense and indemnification. Two secondary assurance companies sought a declaratory judgment in state District Court that under the terms of their policy with the primary insurer, they had no duty to indemnify the primary insurer in connection with the claims in federal court. The state District Court dismissed the action for lack of a justiciable controversy, and the secondary assurance companies appealed. The Supreme Court affirmed. The secondary assurance companies had no existing and genuine interest at stake at the time, nor could they claim any immediate danger of direct injury from the indemnification provisions of the policy. Putting a secondary insurer on notice of a lawsuit does not constitute a claim for indemnification, nor may a secondary insurer's duty to indemnify be said to exist if primary coverage has not been exhausted. The underlying federal case that was the subject of any potential indemnification had yet to be tried or settled. At this stage, the federal record contained only unproved and perhaps incomplete allegations of fact, and it would be premature to determine conclusively that any claims upon which the plaintiffs in the federal case might prevail arose from conduct that would preclude coverage under the policy. A declaratory judgment would serve only as speculative advice, subject to

possible amendment or nullification upon resolution of the federal case, rather than as a final adjudication of the indemnification issue. Thus, the judicial determination that the secondary assurance companies sought involved a contractual duty for indemnification that had not yet arisen and that might never arise, so a determination of the issue would involve an advisory opinion that courts have no jurisdiction to issue. Northfield Ins. Co. v. Mont. Ass'n of Counties, 2000 MT 256, 301 M 472, 10 P3d 813, 57 St. Rep. 1049 (2000). See also Hardy v. Krutzfeldt, 206 M 521, 672 P2d 274 (1983), Brisendine v. St., 253 M 361, 833 P2d 1019 (1992), Skinner v. Allstate Ins. Co., 2005 MT 323, 329 M 511, 127 P3d 359 (2005), and Stroebe v. St., 2006 MT 19, 331 M 23, 127 P3d 1051 (2006).

Declaratory Judgment Not Seeking Bad Faith Damages Not Statutorily Barred Under Unfair Trade Practices Act: Applying Ridley v. Guar. Nat'l Ins. Co., 286 M 325, 951 P2d 987 (1997), the District Court granted declaratory judgment against Safeco Insurance Company of Illinois (Safeco) for payment of medical expenses that were no longer in dispute and that were owed under a Safeco insured's policy. Safeco appealed on grounds that the declaratory judgment should be stayed under 33-18-242 until after the settlement or final adjudication of the claim against its insured. The Supreme Court pointed out that under Fisher v. St. Farm Gen. Ins. Co., 1999 MT 308, 297 M 201, 991 P2d 452 (1999), an unfair trade practices claim against an insurer is an independent cause of action and only a third-party claimant who prevails at trial or achieves a settlement may in turn bring an unfair trade practices claim, theoretically extinguishing meritless claims before they are filed, thus protecting insurers from frivolous claims and facilitating judicial economy. However, the Supreme Court declined to transform the declaratory judgment claim in this case into an unfair trade practices claim, noting that, in fact, the unfair trade practices claim and the common-law bad faith claim had been dismissed by stipulation of the parties. The District Court did not err in concluding that because the declaratory judgment claim did not directly seek bad faith damages for an unfair trade practices violation, there was no statutory bar under 33-18-242. The declaratory judgment did not constitute a money judgment for damages in the ordinary sense, but merely removed all uncertainty and controversy over the issue of when the inevitable policy proceeds were due, and that judgment was therefore affirmed. Safeco Ins. Co. of Ill. v. District Court, 2000 MT 153, 300 M 123, 2 P3d 834, 57 St. Rep. 604 (2000), followed and clarified in DuBray v. Farmers Ins. Exch., 2001 MT 251, 307 M 134, 36 P3d 897 (2001), insofar as nothing in Ridley or Safeco suggests that its scope should be limited to undisputed medical expenses.

Supervisory Control Granted to Address Stay of Declaratory Judgment Until Settlement Reached or Judgment Entered: Hill was injured in a vehicle accident caused by the negligence of Bennett, an insured of Safeco Insurance Company of Illinois (Safeco). Although Safeco apparently paid some of Hill's initial medical bills, Safeco eventually disputed the causal relationship between the accident and the injuries, refusing to pay any further medical bills after a specific date. Hill sued Bennett for negligence and Safeco for nonpayment of medical expenses, seeking a declaratory judgment that he was entitled to advance payment of medical costs prior to settlement or final judgment and claiming that a declaratory judgment was proper under the Unfair Trade Practices Act and Ridley v. Guar. Nat'l Ins. Co., 286 M 325, 951 P2d 987 (1997). The District Court granted the declaratory judgment, and Safeco sought a writ of supervisory control because a direct appeal would be an inadequate remedy. The Supreme Court agreed and granted the writ. Safeco's application presented an appropriate legal issue for supervisory control because if the ordered payment of medical expenses was a mistake of law or incorrect, the delay in awaiting the outcome of the corollary litigation could create an unfair prejudice for Safeco, while any unnecessary delay in the payment of the medical costs would certainly prejudice Hill. Ultimately, the Supreme Court affirmed on grounds that the declaratory judgment did not constitute a money judgment for damages in the ordinary sense, but merely removed all uncertainty and controversy over the issue of when the inevitable policy proceeds were due. Safeco Ins. Co. of Ill. v. District Court, 2000 MT 153, 300 M 123, 2 P3d 834, 57 St. Rep. 604 (2000).

Emergency Factor Warranting Declaratory Judgment Not Present: The appellants did not request a hearing when the state agency they worked for terminated them for cause and indicated it would not pay them for accrued leave. The lower court ruled that the appellants could not challenge the constitutionality of the state law concerning accrued leave because they had not exhausted their administrative remedies. The Supreme Court reversed on the basis that an individual does not have to submit to the provisions of a law he claims is unconstitutional before he can seek a declaratory ruling on the issue of constitutionality. However, the Supreme Court also held that the case should be remanded to the lower court to rule on the constitutional issues because no emergency existed that would justify a declaratory ruling. Stuart v. Dept. of Social and Rehabilitation Services, 247 M 433, 807 P2d 710, 48 St. Rep. 238 (1991).

Declaratory Judgment Substituted for Administrative Procedure: The plaintiffs initiated an action to obtain a declaratory judgment from the District Court granting relief from an agency's ruling. The Supreme Court ruled that the lower court did not have the discretion to proceed under the Uniform Declaratory Judgments Act when the Montana Administrative Procedure Act provided a remedy for the party alleging a grievance. Roeber v. St., 243 M 437, 795 P2d 424, 47 St. Rep. 1293 (1990).

Justiciable Controversy Required:

The Supreme Court applied the rationale in Hardy v. Krutzfeldt, 206 M 521, 672 P2d 274 (1983), in holding that plaintiff's request for a declaratory judgment regarding the legality of closing school board meetings to the public amounted to a request for an advisory opinion that would have no impact on present or future rights of the parties. Because plaintiff did not seek to void the meetings, a justiciable controversy did not exist and a declaratory judgment action could not be maintained. Flesh v. Bd. of Trustees, 241 M 158, 786 P2d 4, 47 St. Rep. 161 (1990).

When a declaratory judgment had been sought on the issue of whether a right of first refusal of real property was invalid under the rule against perpetuities, it should have been dismissed by the District Court because no justiciable controversy existed. Relying on Hardy v. Krutzfeldt, 206 M 521, 672 P2d 274, 40 St. Rep. 1823 (1983), the Supreme Court noted that in this case there was no pending sale or offer for sale or purchase or offer to purchase the affected property. Neither had a third party challenged the clause's application to him. Parker v. Weed, 220 M 49, 713 P2d 535, 43 St. Rep. 162 (1986).

The parties were all heirs of Robert Hardy. He created trusts that became operative upon his death. The trusts were terminated, and the heirs entered negotiations for the division of a ranch making up the corpus of the trust. An agreement was entered dividing the ranch into seven tracts. The agreement provided that prior to the sale of any tract the other six heirs were to be given the right of first refusal. If all declined and a contract was entered into with a third party, all six had the right to meet the offer, with the first to accept to be given priority. The plaintiffs filed a complaint for declaratory relief seeking to have the provisions on first refusal declared an unreasonable restraint on alienation. The District Court granted summary judgment to defendants. On appeal, the Supreme Court remanded with instructions to dismiss. The court held that there was no justiciable controversy as no attempts had been made to sell any of the tracts. The court held that the Uniform Declaratory Judgments Act could not be used as a platform for the courts in Montana to plunge into indefinite, amorphous ponds of contract interpretation. Hardy v. Krutzfeldt, 206 M 521, 672 P2d 274, 40 St. Rep. 1823 (1983).

Court Determination of Correct Loss-Per-Vehicle Figure Under Flat Fee System — Declaratory Judgment Proper: A declaratory judgment was affirmed by the Supreme Court after finding that a county had the right to have the District Court construe 61-3-536 and thereby to determine the correct loss-per-vehicle figure to be used by the state after the county miscalculated the amount due the county under the flat fee system. Lewis & Clark County v. St., 224 M 223, 728 P2d 1348, 43 St. Rep. 2150 (1986).

Jurisdiction to Determine Validity of Will Prior to Death: The courts have no power to pass on the validity of the will of a living person. Colbo v. Coty, 184 M 72, 601 P2d 697 (1979).

Adjudication of Hypothetical Contingencies: Courts have no jurisdiction to determine matters purely speculative, enter anticipatory judgments, or provide for contingencies which may later arise. Provisions in a judgment will be stricken if they purport to adjudicate rights and status under a future hypothetical contingency. Dept. of Natural Resources v. Intake Water Co., 171 M 416, 558 P2d 1110 (1976).

Collateral References

Declaratory Judgment *key* 24, et seq.

26 C.J.S. Declaratory Judgments §7, et seq.

22A Am. Jur. 2d Declaratory Judgments §§4 through 9.

27-8-103. Uniformity of interpretation.

Compiler's Comments

Uniform Act Section: The corresponding provision of the Uniform Declaratory Judgments Act as adopted by the National Conference of Commissioners on Uniform State Laws is section 15.

Collateral References

22A Am. Jur. 2d Declaratory Judgments §§4 through 9.

27-8-104. Definition of person.

Compiler's Comments

Uniform Act Section: The corresponding provision of the Uniform Declaratory Judgments Act as adopted by the National Conference of Commissioners on Uniform State Laws is section 13.

Collateral References

Declaratory Judgment *key* 23.
26 C.J.S. Declaratory Judgments §9.

Part 2
Availability of Declaratory Judgments

Part Case Notes

Mootness — Declaratory Ruling Refused: The Supreme Court refused to enter a declaratory judgment because the question was moot in that there was not enough time to grant legal or equitable relief under the old law and the Legislature had substantially changed the law. St. v. Murray, 183 M 499, 600 P2d 1174 (1979).

27-8-201. Scope of power to render declaratory judgments.

Compiler's Comments

Uniform Act Section: The corresponding provision of the Uniform Declaratory Judgments Act as adopted by the National Conference of Commissioners on Uniform State Laws is section 1.

Case Notes

Dismissal for Lack of Subject Matter Jurisdiction Proper Upon Failure to Exhaust Administrative Remedies Absent Showing of Futility: Plaintiff filed for declaratory judgment and injunctive relief against state agencies and a subdivision water development company regarding plaintiff's provision of water to subdivisions developed by the company. The District Court dismissed for lack of subject matter jurisdiction, and plaintiff appealed. Generally, before a party can seek declaratory relief in District Court, the party must exhaust its administrative remedies, although courts generally will not require exhaustion of administrative remedies when recourse to an administrative remedy would be futile. However, the mere possibility of an adverse decision does not mean that resort to an administrative agency is futile, nor does the possibility that agencies might render decisions that could in some degree conflict justify bypassing the administrative process. Plaintiff in this case could not demonstrate futility, and seeking to skip the administrative process constituted an unwarranted intrusion into the agencies' regulatory authority. Thus, the District Court did not abuse its discretion by dismissing the action for lack of subject matter jurisdiction when plaintiff did not first exhaust its administrative remedies before seeking judicial review. Mtn. Water Co. v. Dept. of Public Service Regulation, 2005 MT 84, 326 M 416, 110 P3d 20 (2005), following Brisendine v. St., 253 M 361, 833 P2d 1019 (1992), and Art v. Dept. of Labor and Industry, 2002 MT 327, 313 M 197, 60 P3d 958 (2002).

Incorrect Dismissal of Declaratory Judgment Seeking Payment of Prejudgment Medical Expenses — Ridley and Safeco Clarified: DuBray filed a complaint for a declaratory judgment, asking for a determination that Farmers Insurance Exchange (Farmers) was required to pay DuBray's medical expenses prior to settlement of or judgment on the underlying claim. DuBray also sought prejudgment interest, costs of suit, and compensatory and punitive damages. The District Court found that the complaint was effectively a bad faith action barred by 33-18-242 prior to resolution of the underlying claim against Farmers and dismissed the claim in its entirety for failure to state a claim upon which relief could be granted. DuBray appealed, citing Safeco Ins. Co. of Ill. v. District Court, 2000 MT 153, 300 M 123, 2 P3d 834 (2000), wherein the Supreme Court approved declaratory judgment actions as a means for compelling advance payment of medical expenses. Farmers contended that Safeco authorized declaratory judgment actions only for damages that, according to Ridley v. Guar. Nat'l Ins. Co., 286 M 325, 951 P2d 987 (1997), are owed prior to final judgment, that the only damages to which Ridley applied are undisputed medical expenses, and that the District Court should therefore be affirmed. The Supreme Court affirmed Safeco inasmuch as that case does not authorize a declaratory judgment to determine an insurer's liability prior to resolution of the underlying claim, with the exception of damages for which liability is reasonably clear, which are not barred by 33-18-242. Therefore, the District Court correctly dismissed DuBray's claims for pain and discomfort, mental distress, inconvenience, and punitive damages. However, Farmers' liability for medical damages was reasonably clear, so the District Court committed reversible error in dismissing the

portion of DuBray's claim that sought payment of medical expenses. The Supreme Court went on to clarify Safeco and Ridley to ensure that those cases not be construed to apply only to medical expenses, because medical expenses are just one of the obligations incurred by victims that mandatory liability insurance laws were designed to eliminate, another being lost wages that are reasonably certain and directly related to an insured's negligence or wrongful act. DuBray v. Farmers Ins. Exch., 2001 MT 251, 307 M 134, 36 P3d 897 (2001).

State Court Determination of Indemnification Inappropriate When Underlying Federal Class Action Case Undecided — Dismissal of Declaratory Judgment Action Proper Absent Justiciable Controversy: A class action suit was brought against Park County and several individual county officials in federal District Court. The county's primary insurer assumed the defense and indemnification. Two secondary assurance companies sought a declaratory judgment in state District Court that under the terms of their policy with the primary insurer, they had no duty to indemnify the primary insurer in connection with the claims in federal court. The state District Court dismissed the action for lack of a justiciable controversy, and the secondary assurance companies appealed. The Supreme Court affirmed. The secondary assurance companies had no existing and genuine interest at stake at the time, nor could they claim any immediate danger of direct injury from the indemnification provisions of the policy. Putting a secondary insurer on notice of a lawsuit does not constitute a claim for indemnification, nor may a secondary insurer's duty to indemnify be said to exist if primary coverage has not been exhausted. The underlying federal case that was the subject of any potential indemnification had yet to be tried or settled. At this stage, the federal record contained only unproved and perhaps incomplete allegations of fact, and it would be premature to determine conclusively that any claims upon which the plaintiffs in the federal case might prevail arose from conduct that would preclude coverage under the policy. A declaratory judgment would serve only as speculative advice, subject to possible amendment or nullification upon resolution of the federal case, rather than as a final adjudication of the indemnification issue. Thus, the judicial determination that the secondary assurance companies sought involved a contractual duty for indemnification that had not yet arisen and that might never arise, so a determination of the issue would involve an advisory opinion that courts have no jurisdiction to issue. Northfield Ins. Co. v. Mont. Ass'n of Counties, 2000 MT 256, 301 M 472, 10 P3d 813, 57 St. Rep. 1049 (2000). See also Hardy v. Krutzfeldt, 206 M 521, 672 P2d 274 (1983), Brisendine v. St., 253 M 361, 833 P2d 1019 (1992), Skinner v. Allstate Ins. Co., 2005 MT 323, 329 M 511, 127 P3d 359 (2005), and Stroebe v. St., 2006 MT 19, 331 M 23, 127 P3d 1051 (2006).

Mootness — No Appeal Absent District Court Ruling on Declaratory Judgment: The high school sports association decided that Grabow was ineligible to play basketball because his eligibility pursuant to the semester rule had elapsed while Grabow was an exchange student in Germany. Grabow filed a complaint in District Court asking for a declaratory ruling that the association lacked rulemaking and adjudicatory authority and requested a hearing on whether a preliminary injunction should be issued precluding enforcement of the association rule until the case could be adjudicated on its merits. After deciding that it was unlikely that Grabow would ultimately prevail, the District Court denied the injunction. Grabow appealed. The Supreme Court granted the injunction pending final disposition of the appeal, and Grabow played basketball during his senior year. The Supreme Court found that the 1999-2000 season was the only one in which Grabow claimed that he had a right to participate and that because the season was completed, the initial grounds for application of the mootness doctrine to the preliminary injunction issue were met. The declaratory judgment issue was not one capable of repetition, but was one that would evade review, so the Supreme Court remanded for further consideration of Grabow's complaint for declaratory judgment, which would then be subject to appeal following final judgment by the District Court. Grabow v. Mont. High School Assn., 2000 MT 159, 300 M 227, 3 P3d 650, 57 St. Rep. 654 (2000). See also Shamrock Motors, Inc. v. Ford Motor Co., 1999 MT 21, 293 M 188, 974 P2d 1150 (1999).

Declaratory Judgment Not Seeking Bad Faith Damages Not Statutorily Barred Under Unfair Trade Practices Act: Applying Ridley v. Guar. Nat'l Ins. Co., 286 M 325, 951 P2d 987 (1997), the District Court granted declaratory judgment against Safeco Insurance Company of Illinois (Safeco) for payment of medical expenses that were no longer in dispute and that were owed under a Safeco insured's policy. Safeco appealed on grounds that the declaratory judgment should be stayed under 33-18-242 until after the settlement or final adjudication of the claim against its insured. The Supreme Court pointed out that under Fisher v. St. Farm Gen. Ins. Co., 1999 MT 308, 297 M 201, 991 P2d 452 (1999), an unfair trade practices claim against an insurer is an independent cause of action and only a third-party claimant who prevails at trial or achieves a settlement may in turn bring an unfair trade practices claim, theoretically

extinguishing meritless claims before they are filed, thus protecting insurers from frivolous claims and facilitating judicial economy. However, the Supreme Court declined to transform the declaratory judgment claim in this case into an unfair trade practices claim, noting that, in fact, the unfair trade practices claim and the common-law bad faith claim had been dismissed by stipulation of the parties. The District Court did not err in concluding that because the declaratory judgment claim did not directly seek bad faith damages for an unfair trade practices violation, there was no statutory bar under 33-18-242. The declaratory judgment did not constitute a money judgment for damages in the ordinary sense, but merely removed all uncertainty and controversy over the issue of when the inevitable policy proceeds were due, and that judgment was therefore affirmed. Safeco Ins. Co. of Ill. v. District Court, 2000 MT 153, 300 M 123, 2 P3d 834, 57 St. Rep. 604 (2000), followed and clarified in DuBray v. Farmers Ins. Exch., 2001 MT 251, 307 M 134, 36 P3d 897 (2001), insofar as nothing in Ridley or Safeco suggests that its scope should be limited to undisputed medical expenses.

Power of Court in Declaratory Judgment Action — Justiciable Controversy Presented — Brisendine Distinguished: Guaranty National admitted 90% of the liability for an accident involving Ridley and its insured, Roope, but refused to pay Ridley's medical expenses without settling all of Ridley's claim against its insured. Ridley filed an action for a declaratory judgment against Guaranty National, asking the District Court to find that Guaranty National had a duty to pay medical expenses under 33-18-201. Citing Brisendine v. Dept. of Commerce, 253 M 361, 833 P2d 1019 (1992), the District Court held that the controversy was not justiciable under the Uniform Declaratory Judgments Act, because there were still factual issues left to be decided, and granted Guaranty National's motion for summary judgment. The Supreme Court distinguished Brisendine and noted that under the Uniform Declaratory Judgments Act, a party is entitled to a decision whether or not it determines all of the issues between the parties to the action. The Supreme Court also noted that Guaranty National had some legal basis for claiming that it could not legally settle part of Ridley's claims because two opinions of the U.S. District Court in Montana incorrectly construed 33-18-242(5) concerning an insurer's liability if the insurer has a reasonable basis in law or fact for contesting the claim. For these reasons, the Supreme Court concluded that the District Court erred when it granted the insurer's motion for summary judgment. Ridley v. Guar. Nat'l Ins. Co., 286 M 325, 951 P2d 987, 54 St. Rep. 1430 (1997), followed and clarified in DuBray v. Farmers Ins. Exch., 2001 MT 251, 307 M 134, 36 P3d 897 (2001), insofar as nothing in Ridley or in Safeco Ins. Co. of Ill. v. District Court, 2000 MT 153, 300 M 123, 2 P3d 834 (2000), which followed Ridley, suggests that its scope should be limited to undisputed medical expenses.

Exhaustion of Administrative Remedies Doctrine Not Applicable if Constitutional Violation Alleged: Since declaratory judgment petitioner argued that the state requirement that firefighters working for it at an airport and protecting civilian and military aircraft be members of the Montana Air National Guard was unconstitutional, the doctrine requiring exhaustion of administrative remedies before seeking a declaratory judgment did not apply. McKamey v. St., 268 M 137, 885 P2d 515, 51 St. Rep. 1218 (1994).

Possibility of Being Fired as Controversy With Employer: The state required firefighters working for it at an airport and protecting civilian and military aircraft to be members of the Montana Air National Guard. Since another firefighter was terminated because of noncompliance with this requirement, after retiring from the National Guard, petitioner firefighter's employment would be threatened if he resigned or retired from the National Guard. In addition, the existence of a case or controversy was amply demonstrated by multiple lawsuits concerning the pay and employment status of the firefighters. Therefore, the declaratory judgment requirement of a threatened injury and a case or controversy was met. It was proper to refuse to dismiss the petition for a judgment declaring the National Guard membership requirement unconstitutional. It was not necessary for petitioner to have already suffered an injury. McKamey v. St., 268 M 137, 885 P2d 515, 51 St. Rep. 1218 (1994).

Right to Declaratory Judgment on Discretionary Military Policy Threatening Public Sector Harm: The general rule of no subject matter court jurisdiction over a discretionary military policy (in this case, a state government military policy) did not apply to a state requirement that its firefighters protecting civilian and National Guard aircraft belong to the Montana Air National Guard. Loss of the job for failure to belong was a threatened injury resulting from military intrusion into the civilian sector by the state. The state did not show that the requirement was related to military employment. Therefore, the rule could not be used to dismiss a firefighter's petition for declaratory judgment. McKamey v. St., 268 M 137, 885 P2d 515, 51 St. Rep. 1218 (1994).

Justiciable Controversy Required:

The Supreme Court applied the rationale in Hardy v. Krutzfeldt, 206 M 521, 672 P2d 274 (1983), in holding that plaintiff's request for a declaratory judgment regarding the legality of closing school board meetings to the public amounted to a request for an advisory opinion that would have no impact on present or future rights of the parties. Because plaintiff did not seek to void the meetings, a justiciable controversy did not exist and a declaratory judgment action could not be maintained. Flesh v. Bd. of Trustees, 241 M 158, 786 P2d 4, 47 St. Rep. 161 (1990).

When a declaratory judgment had been sought on the issue of whether a right of first refusal of real property was invalid under the rule against perpetuities, it should have been dismissed by the District Court because no justiciable controversy existed. Relying on Hardy v. Krutzfeldt, 206 M 521, 672 P2d 274, 40 St. Rep. 1823 (1983), the Supreme Court noted that in this case there was no pending sale or offer for sale or purchase or offer to purchase the affected property. Neither had a third party challenged the clause's application to him. Parker v. Weed, 220 M 49, 713 P2d 535, 43 St. Rep. 162 (1986).

The parties were all heirs of Robert Hardy. He created trusts that became operative upon his death. The trusts were terminated, and the heirs entered negotiations for the division of a ranch making up the corpus of the trust. An agreement was entered dividing the ranch into seven tracts. The agreement provided that prior to the sale of any tract the other six heirs were to be given the right of first refusal. If all declined and a contract was entered into with a third party, all six had the right to meet the offer, with the first to accept to be given priority. The plaintiffs filed a complaint for declaratory relief seeking to have the provisions on first refusal declared an unreasonable restraint on alienation. The District Court granted summary judgment to defendants. On appeal, the Supreme Court remanded with instructions to dismiss. The court held that there was no justiciable controversy as no attempts had been made to sell any of the tracts. The court held that the Uniform Declaratory Judgments Act could not be used as a platform for the courts in Montana to plunge into indefinite, amorphous ponds of contract interpretation. Hardy v. Krutzfeldt, 206 M 521, 672 P2d 274, 40 St. Rep. 1823 (1983).

Declaratory Judgment on Requiring Prepayment of Jury Fees by Party Demanding Jury: The Supreme Court took original jurisdiction of, and heard, a petition for a declaratory judgment that it was unconstitutional to require prepayment, by a party requesting a civil jury trial, of each day's jury fees at or before the end of the prior day. The requirement was contained in Rule 14F, M.J.C.R.Civ.P. (Title 25, ch. 22, superseded 1990). There was a justiciable controversy of statewide impact in that the rule applied to all justice courts; delay could abridge vital constitutional rights of litigants; the purpose of the declaratory judgment would serve the office of a writ, and the court has jurisdiction to issue, hear, and determine writs; and it would promote judicial economy to accept jurisdiction rather than force piecemeal litigation on the constitutionality of the rule. The court said that the prepayment requirement was contained in the rule and 3-15-203, which provided that "In civil actions, the jurors' fees must be paid by the party demanding the jury and taxed as costs against the losing party", and declared both the statute and rule unconstitutional. Hammer v. Justice Court, 222 M 35, 720 P2d 281, 43 St. Rep. 1040 (1986).

Supreme Court Original Jurisdiction Over Declaratory Action Concerning Statewide Water Adjudication: The Supreme Court had power to determine an action for declaratory judgment involving the constitutionality of the requirement in 85-2-234 that final water decrees state "the amount of water, rate, and volume, included in the right". The issue affects all rights in the statewide adjudication process. Determination of the issue by the Supreme Court: (1) will provide guidance to the water court; (2) is in the interests of judicial economy; and (3) would serve the public policy of the state by expediting the determination of existing water rights. McDonald v. St., 220 M 519, 722 P2d 598, 43 St. Rep. 576 (1986), rehearing denied, 220 M 519, 722 P2d 598, 43 St. Rep. 1397 (1986).

Constitutional Claims Not Properly Before Court: In city's declaratory judgment action on interpretation of a particular statute, police officer also appealed city's decision to discharge him. The officer claimed he had been denied due process of law by the procedure used by the city. The District Court refused to consider the due process claim as it related to the declaratory judgment action. The Supreme Court affirmed the District Court decision. A declaratory judgment proceeding is primarily intended to determine the meaning of a law or a contract and to adjudicate the rights of the parties therein, but not to determine controversial issues of fact such as the existence or denial of a procedural due process. Raynes v. Great Falls, 215 M 114, 696 P2d 423, 42 St. Rep. 224 (1985), followed in Remington v. Dept. of Corrections and Human Services, 255 M 480, 844 P2d 50, 49 St. Rep. 1084 (1992).

Justiciable Controversy Found to Exist:

A motorist seeking to have the 55-mile-per-hour speed limit statute at 61-8-304 (now repealed) declared unconstitutional presented a justiciable controversy meeting the criteria of In re Secret Grand Jury Inquiry, 170 M 354, 553 P2d 987 (1976). The fact that all motorists in the state have an affected interest in the statute attacked does not insulate the statute from attack by the petitioner. Lee v. St., 195 M 1, 635 P2d 1282, 38 St. Rep. 1729 (1981), rehearing denied, 195 M 1, 38 St. Rep. 1931 (1981), and followed in Helena Parents Comm'n v. Lewis & Clark County Comm'rs, 277 M 367, 922 P2d 1140, 53 St. Rep. 687 (1996). See also Gryczan v. St., 283 M 433, 942 P2d 112, 54 St. Rep. 699 (1997).

District Judge's petition to the Supreme Court seeking determination of his authority over grand jury subpoenas, his authority to examine grand jury proceedings to determine whether instructions given upon empanelment are being adhered to, and his authority to determine whether agents of the grand jury are acquitting themselves legally and appropriately as attaches of the court was in the nature of a request for a declaratory judgment, not an advisory opinion, and presented a justiciable controversy within the contemplation of this act because: (1) it involved a controversy concerning existing and genuine rights; (2) a judgment of the court might effectively operate on such a controversy; and (3) judicial determination would have the effect of a final judgment upon the rights of the parties. In re Secret Grand Jury Inquiry, 170 M 354, 553 P2d 987 (1976).

All Issues Stipulated by Parties Not Adjudicated: In a declaratory judgment action a District Court is not bound to rule on all of the issues stipulated by the parties, especially issues that are ancillary, speculative, conjectural, and academic. In reviewing the findings and conclusions of the District Court, all of the major issues in this case were addressed by the court, and as to the other issues discussed in the briefs submitted to the District Court, rejection of those arguments may be implied from the court's general conclusion pertaining to the Public Service Commission's jurisdiction. Billings v. P.S.C., 193 M 358, 631 P2d 1295, 38 St. Rep. 1162 (1981).

Jurisdiction to Determine Validity of Will Prior to Death: The courts have no power to pass on the validity of the will of a living person. Colbo v. Coty, 184 M 72, 601 P2d 697 (1979).

Attorney's Fees: There is no provision for an award of attorney's fees in an action for declaratory judgment. State ex rel. Dept. of Health & Environmental Sciences v. Lincoln County, 178 M 410, 584 P2d 1293 (1978).

Administrative Orders and Regulations:

A declaratory judgment establishes the rights and duties of the parties. It is not a proper vehicle to obtain relief from rulings within the jurisdiction of administrative bodies exercising judicial or quasi-judicial powers. In re Dewar, 169 M 437, 548 P2d 149 (1976).

District Court should have denied application for Writ of Prohibition to restrain Board of Equalization from enforcing amendments to regulations relating to corporation license tax allegedly due on patronage dividends of farm cooperatives where action for declaratory judgment could have been brought under Title 27, ch. 8. State ex rel. Fulton v. District Court, 139 M 573, 366 P2d 435 (1961).

If a governmental board delays unreasonably in instituting legal action seeking enforcement of its order and compliance with section 50-435, R.C.M. 1947 (now repealed), which requires coal mines to erect washrooms if they have more than 12 employees, the coal mine may institute an action at law for declaratory judgment under this chapter. Jeffries Coal Co. v. Indus. Accident Bd., 126 M 411, 252 P2d 1046 (1952).

Jurisdiction: Original jurisdiction of action arising out of a dispute as to the interpretation of a tax statute and involving no factual dispute was accepted by the court where appeal to the State Tax Appeal Board was pending upon court's acceptance of jurisdiction. First Nat'l Bank of Lewistown v. Dept. of Revenue, 168 M 284, 541 P2d 1219 (1975).

Prior Federal Determination as Being Jurisdictional: Savings and loan associations were not required to secure prior federal approval before seeking a declaratory judgment because there were two questions of legality, federal and state, which were separate and gave rise to a justiciable controversy. Gate City S & L Ass'n v. Mont. S&L League, 166 M 411, 533 P2d 1083 (1975).

Contracts: In proceeding under this act a court's resolution of ambiguity on face of contract constituted construction, not contract reformation. Heller v. Osburnsen, 162 M 182, 510 P2d 13 (1973).

Supreme Court:

Supreme Court could entertain original action for declaratory judgment on calling, election of delegates to, and implementation of constitutional convention required by vote of the electors in

view of necessity for Legislature to act within 60-day session then in progress. Forty-Second Legislative Assembly v. Lennon, 156 M 416, 481 P2d 330 (1971).

Supreme Court could accept original jurisdiction in suit for declaratory judgment where statute that taxed nonresident contractors indiscriminately was declared unconstitutional, since Supreme Court was a court of record and under its own rules could accept original jurisdiction in emergency situations. State ex rel. Schultz-Lindsay Constr. Co. v. St. Bd. of Equalization, 145 M 380, 403 P2d 635 (1965).

Oral Testimony Proper: Oral testimony is properly within the matters that the court may consider on motions for summary judgment. Citizens St. Bank v. Duus, 154 M 18, 459 P2d 696 (1969); Daniels v. Paddock, 145 M 207, 399 P2d 740 (1965).

Termination of Annexation Proceedings: Where a majority of the resident freeholders of a first-class city validly protested proposed annexation under Title 7, ch. 2, part 43, but City Council instead of terminating the annexation proceedings took arbitrary action, mandamus was proper to compel Council to terminate the process. This chapter did not furnish the protestants a plain, speedy, and adequate remedy. State ex rel. Konen v. Butte, 144 M 95, 394 P2d 753 (1964).

Tax Exemption: The question as to whether property leased to a school district was exempt from taxation was proper to adjudicate in a declaratory judgment proceeding. NW. Improvement Co. v. Rosebud County, 129 M 412, 288 P2d 657 (1955).

Public Officers as Defendants: Suits against tax officials based upon the illegality of their action in assessing or collecting taxes are not considered suits against the state, so that it is not necessary for the plaintiff to allege that the state has consented to be sued under the Uniform Declaratory Judgments Act of Montana. Brophy Coal Co. v. Matthews, 125 M 212, 233 P2d 397 (1951).

Finding of Facts Required: In order to sustain a declaratory judgment, the court must first have made findings of fact upon which the judgment could be based and the findings of fact cannot go outside the issues formulated by the pleadings. Nat'l Sur. Corp. v. Kruse, 121 M 202, 192 P2d 317 (1948).

Abstract Questions: The judicial power under this act extends only to actual cases and controversies and not to abstract questions. Chovanak v. Matthews, 120 M 520, 188 P2d 582 (1948). See also Helena Parents Comm'n v. Lewis & Clark County Comm'rs, 277 M 367, 922 P2d 1140, 53 St. Rep. 687 (1996).

Collateral References

Action *key* 6; Declaratory Judgment *key* 1 through 69.

26 C.J.S. Declaratory Judgments §§1 through 30.

22A Am. Jur. 2d Declaratory Judgments §§53 through 57, 187, 188.

39 Am. Jur. POF2d Acquisition of title to property by adverse possession, pp. 261 through 372.

33 Am. Jur. POF2d Extent of easement over servient estate, pp. 669 through 720.

Relief other than by dissolution in cases of intracorporate deadlock or dissension. 34 ALR 4th 13.

Availability and scope of declaratory judgment actions in determining rights of parties, or powers and exercise thereof by arbitrators, under arbitration agreements. 12 ALR 3d 854.

Validity, construction, and application of criminal statutes or ordinances as proper subject for declaratory judgment. 10 ALR 3d 727.

Declaratory judgment proceeding as remedy for determining right or title to office in unincorporated private association. 82 ALR 2d 1172.

Declaratory judgment, during lifetime of spouses, as to construction of antenuptial agreement dealing with property rights of survivor. 80 ALR 2d 941.

Availability of declaratory judgment to determine validity of lease of real property. 60 ALR 2d 400.

Partnership or joint venture matters as subject of declaratory judgment. 32 ALR 2d 970.

Issue as to negligence as proper subject of declaratory judgment action. 28 ALR 2d 957.

Declaratory relief with respect to unemployment compensation. 14 ALR 2d 826.

Tax question as proper subject of action for declaratory judgment. 11 ALR 2d 359.

Extent to which principles of res judicata are applicable to judgments in actions for declaratory relief. 10 ALR 2d 782.

Relief against covenant restricting right to engage in business or profession as subject of declaratory judgment. 10 ALR 2d 743.

Declaration of rights or declaratory judgments. 142 ALR 8; 123 ALR 285; 114 ALR 1361; 87 ALR 1205; 68 ALR 110; 50 ALR 42; 19 ALR 1124; 12 ALR 52.

27-8-202. Who may obtain declaratory judgment.

Compiler's Comments

Uniform Act Section: The corresponding provision of the Uniform Declaratory Judgments Act as adopted by the National Conference of Commissioners on Uniform State Laws is section 2.

Case Notes

Dismissal for Lack of Subject Matter Jurisdiction Proper Upon Failure to Exhaust Administrative Remedies Absent Showing of Futility: Plaintiff filed for declaratory judgment and injunctive relief against state agencies and a subdivision water development company regarding plaintiff's provision of water to subdivisions developed by the company. The District Court dismissed for lack of subject matter jurisdiction, and plaintiff appealed. Generally, before a party can seek declaratory relief in District Court, the party must exhaust its administrative remedies, although courts generally will not require exhaustion of administrative remedies when recourse to an administrative remedy would be futile. However, the mere possibility of an adverse decision does not mean that resort to an administrative agency is futile, nor does the possibility that agencies might render decisions that could in some degree conflict justify bypassing the administrative process. Plaintiff in this case could not demonstrate futility, and seeking to skip the administrative process constituted an unwarranted intrusion into the agencies' regulatory authority. Thus, the District Court did not abuse its discretion by dismissing the action for lack of subject matter jurisdiction when plaintiff did not first exhaust its administrative remedies before seeking judicial review. Mtn. Water Co. v. Dept. of Public Service Regulation, 2005 MT 84, 326 M 416, 110 P3d 20 (2005), following Brisendine v. St., 253 M 361, 833 P2d 1019 (1992), and Art v. Dept. of Labor and Industry, 2002 MT 327, 313 M 197, 60 P3d 958 (2002).

Failure by Insurer to Present Facts to Controvert Testimony That Ongoing Medical Expenses Causally Related to Accident — Declaratory Judgment Proper: In Renville v. Taylor, 2000 MT 217, 301 M 99, 7 P3d 400 (2000), the Supreme Court held that defendant insurer was liable for all expenses related to a collision involving Renville and remanded for a new trial on the issue of damages. Renville then asked the District Court for a declaratory judgment ordering defendant to pay for ongoing medical expenses incurred by Renville subsequent to trial. The District Court denied the request on grounds that factual issues existed regarding Renville's ongoing medical expenses that required resolution by a jury. Renville appealed, asserting that the court failed to follow the law of the case, and the Supreme Court agreed and reversed. Although an insurer is entitled to dispute its obligation to pay medical expenses, there must be a factual basis for doing so. Here, defendant insurer refused to pay Renville's ongoing medical expenses because the expenses were allegedly not causally related to the collision; however, the insurer failed to present any evidence to controvert Renville's expert testimony on causation, choosing instead to rely on testimony from the first trial that had been disregarded by the jury and that was not relevant to the issue of ongoing medical expenses. Thus, the District Court erred in failing to grant Renville's motion for declaratory judgment, and defendant insurer was required to pay Renville's ongoing medical expenses pursuant to Ridley v. Guarantee Nat'l Ins. Co., 286 M 325, 951 P2d 987 (1997), and the law of the case. Renville v. Farmers Ins. Exch., 2003 MT 103, 315 M 295, 69 P3d 217 (2003).

Incorrect Dismissal of Declaratory Judgment Seeking Payment of Prejudgment Medical Expenses — Ridley and Safeco Clarified: DuBray filed a complaint for a declaratory judgment, asking for a determination that Farmers Insurance Exchange (Farmers) was required to pay DuBray's medical expenses prior to settlement of or judgment on the underlying claim. DuBray also sought prejudgment interest, costs of suit, and compensatory and punitive damages. The District Court found that the complaint was effectively a bad faith action barred by 33-18-242 prior to resolution of the underlying claim against Farmers and dismissed the claim in its entirety for failure to state a claim upon which relief could be granted. DuBray appealed, citing Safeco Ins. Co. of Ill. v. District Court, 2000 MT 153, 300 M 123, 2 P3d 834 (2000), wherein the Supreme Court approved declaratory judgment actions as a means for compelling advance payment of medical expenses. Farmers contended that Safeco authorized declaratory judgment actions only for damages that, according to Ridley v. Guar. Nat'l Ins. Co., 286 M 325, 951 P2d 987 (1997), are owed prior to final judgment, that the only damages to which Ridley applied are undisputed medical expenses, and that the District Court should therefore be affirmed. The Supreme Court affirmed Safeco inasmuch as that case does not authorize a declaratory judgment to determine an insurer's liability prior to resolution of the underlying claim, with the exception of damages for which liability is reasonably clear, which are not barred by 33-18-242. Therefore, the District Court correctly dismissed DuBray's claims for pain and discomfort,

mental distress, inconvenience, and punitive damages. However, Farmers' liability for medical damages was reasonably clear, so the District Court committed reversible error in dismissing the portion of DuBray's claim that sought payment of medical expenses. The Supreme Court went on to clarify Safeco and Ridley to ensure that those cases not be construed to apply only to medical expenses, because medical expenses are just one of the obligations incurred by victims that mandatory liability insurance laws were designed to eliminate, another being lost wages that are reasonably certain and directly related to an insured's negligence or wrongful act. DuBray v. Farmers Ins. Exch., 2001 MT 251, 307 M 134, 36 P3d 897 (2001).

State Court Determination of Indemnification Inappropriate When Underlying Federal Class Action Case Undecided — Dismissal of Declaratory Judgment Action Proper Absent Justiciable Controversy: A class action suit was brought against Park County and several individual county officials in federal District Court. The county's primary insurer assumed the defense and indemnification. Two secondary assurance companies sought a declaratory judgment in state District Court that under the terms of their policy with the primary insurer, they had no duty to indemnify the primary insurer in connection with the claims in federal court. The state District Court dismissed the action for lack of a justiciable controversy, and the secondary assurance companies appealed. The Supreme Court affirmed. The secondary assurance companies had no existing and genuine interest at stake at the time, nor could they claim any immediate danger of direct injury from the indemnification provisions of the policy. Putting a secondary insurer on notice of a lawsuit does not constitute a claim for indemnification, nor may a secondary insurer's duty to indemnify be said to exist if primary coverage has not been exhausted. The underlying federal case that was the subject of any potential indemnification had yet to be tried or settled. At this stage, the federal record contained only unproved and perhaps incomplete allegations of fact, and it would be premature to determine conclusively that any claims upon which the plaintiffs in the federal case might prevail arose from conduct that would preclude coverage under the policy. A declaratory judgment would serve only as speculative advice, subject to possible amendment or nullification upon resolution of the federal case, rather than as a final adjudication of the indemnification issue. Thus, the judicial determination that the secondary assurance companies sought involved a contractual duty for indemnification that had not yet arisen and that might never arise, so a determination of the issue would involve an advisory opinion that courts have no jurisdiction to issue. Northfield Ins. Co. v. Mont. Ass'n of Counties, 2000 MT 256, 301 M 472, 10 P3d 813, 57 St. Rep. 1049 (2000). See also Hardy v. Krutzfeldt, 206 M 521, 672 P2d 274 (1983), Brisendine v. St., 253 M 361, 833 P2d 1019 (1992), Skinner v. Allstate Ins. Co., 2005 MT 323, 329 M 511, 127 P3d 359 (2005), and Stroebe v. St., 2006 MT 19, 331 M 23, 127 P3d 1051 (2006).

Power of Court in Declaratory Judgment Action — Justiciable Controversy Presented — Brisendine Distinguished: Guaranty National admitted 90% of the liability for an accident involving Ridley and its insured, Roope, but refused to pay Ridley's medical expenses without settling all of Ridley's claim against its insured. Ridley filed an action for a declaratory judgment against Guaranty National, asking the District Court to find that Guaranty National had a duty to pay medical expenses under 33-18-201. Citing Brisendine v. Dept. of Commerce, 253 M 361, 833 P2d 1019 (1992), the District Court held that the controversy was not justiciable under the Uniform Declaratory Judgments Act, because there were still factual issues left to be decided, and granted Guaranty National's motion for summary judgment. The Supreme Court distinguished Brisendine and noted that under the Uniform Declaratory Judgments Act, a party is entitled to a decision whether or not it determines all of the issues between the parties to the action. The Supreme Court also noted that Guaranty National had some legal basis for claiming that it could not legally settle part of Ridley's claims because two opinions of the U.S. District Court in Montana incorrectly construed 33-18-242(5) concerning an insurer's liability if the insurer has a reasonable basis in law or fact for contesting the claim. For these reasons, the Supreme Court concluded that the District Court erred when it granted the insurer's motion for summary judgment. Ridley v. Guar. Nat'l Ins. Co., 286 M 325, 951 P2d 987, 54 St. Rep. 1430 (1997), followed and clarified in DuBray v. Farmers Ins. Exch., 2001 MT 251, 307 M 134, 36 P3d 897 (2001), insofar as nothing in Ridley or in Safeco Ins. Co. of Ill. v. District Court, 2000 MT 153, 300 M 123, 2 P3d 834 (2000), which followed Ridley, suggests that its scope should be limited to undisputed medical expenses.

Possibility of Being Fired as Controversy With Employer: The state required firefighters working for it at an airport and protecting civilian and military aircraft to be members of the Montana Air National Guard. Since another firefighter was terminated because of noncompliance with this requirement, after retiring from the National Guard, petitioner firefighter's employment would be threatened if he resigned or retired from the National Guard.

In addition, the existence of a case or controversy was amply demonstrated by multiple lawsuits concerning the pay and employment status of the firefighters. Therefore, the declaratory judgment requirement of a threatened injury and a case or controversy was met. It was proper to refuse to dismiss the petition for a judgment declaring the National Guard membership requirement unconstitutional. It was not necessary for petitioner to have already suffered an injury. McKamey v. St., 268 M 137, 885 P2d 515, 51 St. Rep. 1218 (1994), distinguished in Ridley v. Guar. Nat'l Ins. Co., 286 M 325, 951 P2d 987, 54 St. Rep. 1430 (1997).

Use of Declaratory Judgment to Settle Question of Business Association Between Dentist and Denturist Improper — Dismissal for Failure to State Claim and Exhaust Administrative Remedies: Brisendine, a licensed denturist, presented to the Board of Dentistry a proposal stating his desire to enter into a business association with a dentist regarding fees and compensation. The Board issued a letter stating that it was considering the proposal but that such association would probably constitute the illegal practice of dentistry. The Board further threatened sanctions against Brisendine if he went forward with his proposal, but no final decision was ever issued by the Board. Brisendine sought a declaratory judgment and injunctive relief in District Court, requesting a decision on whether the business association was legal. The District Court dismissed the complaint for failure to present a justiciable controversy. On appeal, the Supreme Court affirmed, holding that use of a declaratory judgment at this stage of the proceedings constituted an attempt to seek an advisory opinion and an unwarranted intrusion into the Board's regulatory authority. The Supreme Court noted that Brisendine could seek a declaratory judgment from the Board without subjecting his license to suspension or revocation and that dismissal of the motion for declaratory judgment was proper because Brisendine had not exhausted his administrative remedies. Brisendine v. St., 253 M 361, 833 P2d 1019, 49 St. Rep. 444 (1992).

Declaratory Judgment — Exhaustion of Administrative Remedies Not Required — Summary Judgment Improper: The District Court erred in granting the Town of West Yellowstone's motion for summary judgment in a declaratory judgment action brought to challenge the constitutionality of an off-street parking ordinance. When a bona fide constitutional issue is raised, a plaintiff has a right to resort to the Uniform Declaratory Judgments Act for a determination of his rights and he may not be required to submit himself to the provisions of the ordinance that he claims are unconstitutional. This is so even though, as the District Court implied, the monetary result to the plaintiff under the zoning ordinance may be inconsequential. Mitchell v. W. Yellowstone, 235 M 104, 765 P2d 745, 45 St. Rep. 2226 (1988).

Dismissal of "Friendly Suit" as Nonjusticiable Controversy: Relator applied to the Supreme Court to commence an original proceeding for declaratory judgment, writ of mandate, and other appropriate relief. He sought a court requirement of the Secretary of State to commence the administrative process for inclusion of two constitutional initiatives in the next regular statewide election. The court found no justiciable controversy existed because the Secretary of State had already advised county election officials that he intended to place the initiatives on the ballot, which was essentially the same relief relator sought through the court by his "friendly suit". A declaratory judgment and writ of mandate are inappropriate in the absence of a justiciable controversy; therefore, relator's application for an original proceeding was dismissed. Marbut v. Secretary of St., 231 M 131, 752 P2d 148, 45 St. Rep. 487 (1988).

Court Determination of Correct Loss-Per-Vehicle Figure Under Flat Fee System — Declaratory Judgment Proper: A declaratory judgment was affirmed by the Supreme Court after finding that a county had the right to have the District Court construe 61-3-536 and thereby to determine the correct loss-per-vehicle figure to be used by the state after the county miscalculated the amount due the county under the flat fee system. Lewis & Clark County v. St., 224 M 223, 728 P2d 1348, 43 St. Rep. 2150 (1986).

Constitutionality of Statutes:

Sections 3-1-607 and 3-1-608 forbid what Art. VII, sec. 10, Mont. Const., allows in that they require a Supreme Court Justice or Chief Justice or a District Court Judge to resign if he becomes a candidate for any elective office, while Art. VII, sec. 10, Mont. Const., provides that such a person does not have to resign if he runs for another judicial office. Standing to challenge the constitutionality of 3-1-607 and 3-1-608 existed where a petition for declaratory judgment was brought by registered voters and the two statutes adversely affected the election process contemplated by the constitution. The registered voters had standing to assert the public interest clearly intended by Art. VII, sec. 10, Mont. Const., to assert the integrity and supremacy of the constitution, and to assert the public interest in challenging the legality of legislative action that allegedly flies in the face of the constitution. The Comm. for an Effective Judiciary v. St., 209 M 105, 679 P2d 1223, 41 St. Rep. 581 (1984).

A decision on the constitutionality of a statute cannot be obtained under the Uniform Declaratory Judgments Act by a person who has no interest in the question except that of a "resident, citizen, taxpayer and elector". Chovanak v. Matthews, 120 M 520, 188 P2d 582 (1948).

In a proceeding involving the constitutionality of sections 91-519 through 91-522, R.C.M. 1947 (since repealed), relating to the status of escheated estates, the Attorney General, whose legal duty is affected by the act, is entitled to seek a declaratory judgment under this section. Bottomly v. Meagher County, 114 M 220, 133 P2d 770 (1943).

Declaratory Judgment to Determine Insurer's Duties and Preclude Charge of Bad Faith: Kevin Cumiskey leased a restaurant from Elizabeth Bradley. The lease provided Cumiskey could make improvements to the premises, but he was to insure Bradley's interests. Cumiskey's father and mother operated the restaurant after it was incorporated. The restaurant was damaged by fire that appeared to be intentionally set. Plaintiff brought suit for a declaratory judgment to determine if Kevin Cumiskey was the recipient of policy proceeds, to determine rights and relationships of parties, and to subrogate any claim paid by plaintiff from the father who was suspected of the arson. Cumiskey counterclaimed for bad faith on the insurer's part. The District Court granted the insurer summary judgment. The Supreme Court held that a declaratory judgment action may be brought for the purpose of settling and affording relief from uncertainty and insecurity with respect to rights, status, and other legal relations. In a proper case, an insurer may use a declaratory judgment to obtain a determination of the validity, continuance, or coverage of an insurance policy; a determination of the extent of liability; or a determination of the insurer's duties under the policy. The action was proper, and the summary judgment on the counterclaim was properly awarded. St. Paul Fire & Marine Ins. Co. v. Cumiskey, 204 M 350, 665 P2d 223, 40 St. Rep. 891 (1983).

Moratorium on Conditional-Use Permits — Zoning — Mandamus — Prohibition — Declaratory Judgment: Diehl requested a conditional-use permit for a planned shopping center. In response, the city of Helena established a 1-year moratorium on the granting of all conditional-use permits. Diehl then filed his complaint and petition for a declaratory judgment, Writ of Mandate, and order to show cause. On appeal, the court found: (1) the city may adopt a reasonable general moratorium, but the procedure required by 76-2-306 must be followed; (2) the discretion of the City Commission to approve, modify, or deny the recommendation of the Zoning Commission cannot be controlled by Writ of Mandate, prohibition, or by declaratory judgment; (3) a Writ of Mandate requiring the city to act on Diehl's application within a reasonable time is proper under the circumstances in this case. State ex rel. Diehl Co. v. Helena, 181 M 306, 593 P2d 458 (1979).

Standing: The plaintiff had the requisite standing to bring an action under Montana's Uniform Declaratory Judgments Act requesting interpretation of 7-5-2411, et seq. W. Litho v. Bd. of County Comm'rs, 174 M 245, 570 P2d 891 (1977). See also Helena Parents Comm'n v. Lewis & Clark County Comm'rs, 277 M 367, 922 P2d 1140, 53 St. Rep. 687 (1996).

Adjudication of Hypothetical Contingencies: Courts have no jurisdiction to determine matters purely speculative, enter anticipatory judgments, or provide for contingencies that may later arise. Provisions in a judgment will be stricken if they purport to adjudicate rights and status under a future hypothetical contingency. Dept. of Natural Resources v. Intake Water Co., 171 M 416, 558 P2d 1110 (1976).

Existence of Oral Contract in Controversy: Declaratory judgment is improper when existence of oral contract is in controversy, as a declaratory judgment proceeding is primarily intended to construe the meaning of a law and not to determine the existence of controverted facts. State ex rel. Indus. Indem. Co. v. District Court, 169 M 10, 544 P2d 438 (1975).

Franchises: Where a controversy existed between a rural electric cooperative and an electric power company as to the right of the cooperative to supply service to an addition to a city, the cooperative could have brought an action to determine its legal position before proceeding to install facilities to service the addition. Mont. Power Co. v. Park Elec. Co-op, 140 M 293, 371 P2d 1 (1962).

Oral Contract: An action for a declaratory judgment can be maintained to interpret an oral contract. Carpenter v. Free, 138 M 552, 357 P2d 882 (1960).

Collateral References

Declaratory Judgment *key* 121 through 129, 141 through 149, 241 through 244.

26 C.J.S. Declaratory Judgments §§46 through 69, 100 through 103.

22A Am. Jur. 2d Declaratory Judgments §§63 through 67, 163.

Relief other than by dissolution in cases of intracorporate deadlock or dissension. 34 ALR 4th 13.

Declaratory judgment, during lifetime of spouses, as to construction of antenuptial agreement dealing with property rights of survivor. 80 ALR 2d 941.

Applicability of declaratory judgment to determine validity of lease of real property. 60 ALR 2d 400.

Partnership or joint venture matters as subject to declaratory judgment. 32 ALR 2d 970.

Burden of proof in action under declaratory judgment. 23 ALR 2d 1243; 11 ALR 2d 359; 132 ALR 1108.

Declaratory relief with respect to unemployment compensation. 14 ALR 2d 826.

Tax questions as subject of declaratory judgment. 11 ALR 2d 359; 132 ALR 1108.

Relief against covenant restricting right to engage in business or profession as subject of declaratory judgment. 10 ALR 2d 743.

Application of Declaratory Judgments Act to contracts or alleged contracts. 162 ALR 756.

Combining declaratory or coercive or executory relief in same action. 155 ALR 501.

Declaratory judgment with respect to validity and effect of former judgment. 154 ALR 740.

Statute of Limitations or doctrine of laches in relation to declaratory action. 151 ALR 1076.

Advice or ruling of administrative officer as basis of declaratory judgment. 149 ALR 349.

Application of Declaratory Judgments Act to questions in respect of insurance policies. 142 ALR 8.

Jurisdiction of declaratory action as affected by pendency of another action. 135 ALR 934.

Action under Declaratory Judgments Act to test validity or effect of a decree of divorce. 124 ALR 1336.

Questions or controversy between public officers. 103 ALR 1094.

27-8-203. When contract may be construed.

Compiler's Comments

Uniform Act Section: The corresponding provision of the Uniform Declaratory Judgments Act as adopted by the National Conference of Commissioners on Uniform State Laws is section 3.

Case Notes

Declaratory Judgment — Interpretation of Land Exchange Agreement: Shortly after entering into a land purchase agreement, the parties changed the agreement into a tax-free land exchange agreement. The new agreement gave buyer 3 ½ years to acquire like-kind property to be exchanged for seller's ranch. The like-kind property was to be purchased with funds placed periodically by buyer in an escrow account. Several years later a dispute arose concerning the nature and timing of the payments. Buyer submitted the questions to the District Court in a declaratory judgment action. The District Court interpreted the contract in a manner generally favorable to seller, and buyer appealed, claiming that the District Court's decision was unreasonable, contrary to the parties' intentions, and improper under the rules of construction of contracts. The Supreme Court affirmed, ruling that the District Court's interpretation had not been unreasonable since: (1) its decision on the timing of the rental payments was reflective of the parties' intentions as shown by their past performance; (2) its decision on the timing of the amortization payments was consistent with the rule of construction requiring that a contract be construed in such a way as to give effect to all of its provisions; and (3) its ruling on the intention of the parties was supported by the evidence. Finally, 28-3-206 did not entitle buyer to have ambiguities construed in his favor; even though buyer claimed that the nature of the agreement was changed solely for seller's benefit, the agreement was prepared by an attorney for both parties, not by one party alone. Lewis v. Murphy, 199 M 368, 649 P2d 740, 39 St. Rep. 1459 (1982).

Collateral References

Declaratory Judgment *key* 67, 142, et seq.

26 C.J.S. Declaratory Judgments §§28, 54, et seq.

22A Am. Jur. 2d Declaratory Judgments §§117 through 119.

Application of Declaratory Judgments Act to contract or alleged contract. 162 ALR 756.

27-8-204. Declarations concerning administration of trusts and estates.

Compiler's Comments

1997 Amendment: Chapter 490 in introductory clause, near middle after "minor", deleted "seriously mentally ill", after "person" inserted "committed pursuant to 53-21-127", after "insolvent" inserted "person", and at end, after "relations", deleted "in respect thereto"; and made minor changes in style. Amendment effective July 1, 1997.

Saving Clause: Section 40, Ch. 490, L. 1997, was a saving clause.

Uniform Act Section: The corresponding provision of the Uniform Declaratory Judgments Act as adopted by the National Conference of Commissioners on Uniform State Laws is section 4.

Collateral References

Declaratory Judgment *key* 241, et seq.

26 C.J.S. Declaratory Judgments §100, et seq.

22A Am. Jur. 2d Declaratory Judgments §§147, 148, 210.

Questions regarding right of inheritance or other right in respect of another's estate after death as proper subject of declaratory action before latter's death. 139 ALR 1239.

27-8-205. Enumeration not restrictive of general powers.

Compiler's Comments

Uniform Act Section: The corresponding provision of the Uniform Declaratory Judgments Act as adopted by the National Conference of Commissioners on Uniform State Laws is section 5.

Case Notes

Declaratory Judgment Not Seeking Bad Faith Damages Not Statutorily Barred Under Unfair Trade Practices Act: Applying Ridley v. Guar. Nat'l Ins. Co., 286 M 325, 951 P2d 987 (1997), the District Court granted declaratory judgment against Safeco Insurance Company of Illinois (Safeco) for payment of medical expenses that were no longer in dispute and that were owed under a Safeco insured's policy. Safeco appealed on grounds that the declaratory judgment should be stayed under 33-18-242 until after the settlement or final adjudication of the claim against its insured. The Supreme Court pointed out that under Fisher v. St. Farm Gen. Ins. Co., 1999 MT 308, 297 M 201, 991 P2d 452 (1999), an unfair trade practices claim against an insurer is an independent cause of action and only a third-party claimant who prevails at trial or achieves a settlement may in turn bring an unfair trade practices claim, theoretically extinguishing meritless claims before they are filed, thus protecting insurers from frivolous claims and facilitating judicial economy. However, the Supreme Court declined to transform the declaratory judgment claim in this case into an unfair trade practices claim, noting that, in fact, the unfair trade practices claim and the common-law bad faith claim had been dismissed by stipulation of the parties. The District Court did not err in concluding that because the declaratory judgment claim did not directly seek bad faith damages for an unfair trade practices violation, there was no statutory bar under 33-18-242. The declaratory judgment did not constitute a money judgment for damages in the ordinary sense, but merely removed all uncertainty and controversy over the issue of when the inevitable policy proceeds were due, and that judgment was therefore affirmed. Safeco Ins. Co. of Ill. v. District Court, 2000 MT 153, 300 M 123, 2 P3d 834, 57 St. Rep. 604 (2000), followed and clarified in DuBray v. Farmers Ins. Exch., 2001 MT 251, 307 M 134, 36 P3d 897 (2001), insofar as nothing in Ridley or Safeco suggests that its scope should be limited to undisputed medical expenses.

Supervisory Control Granted to Address Stay of Declaratory Judgment Until Settlement Reached or Judgment Entered: Hill was injured in a vehicle accident caused by the negligence of Bennett, an insured of Safeco Insurance Company of Illinois (Safeco). Although Safeco apparently paid some of Hill's initial medical bills, Safeco eventually disputed the causal relationship between the accident and the injuries, refusing to pay any further medical bills after a specific date. Hill sued Bennett for negligence and Safeco for nonpayment of medical expenses, seeking a declaratory judgment that he was entitled to advance payment of medical costs prior to settlement or final judgment and claiming that a declaratory judgment was proper under the Unfair Trade Practices Act and Ridley v. Guar. Nat'l Ins. Co., 286 M 325, 951 P2d 987 (1997). The District Court granted the declaratory judgment, and Safeco sought a writ of supervisory control because a direct appeal would be an inadequate remedy. The Supreme Court agreed and granted the writ. Safeco's application presented an appropriate legal issue for supervisory control because if the ordered payment of medical expenses was a mistake of law or incorrect, the delay in awaiting the outcome of the corollary litigation could create an unfair prejudice for Safeco, while any unnecessary delay in the payment of the medical costs would certainly prejudice Hill. Ultimately, the Supreme Court affirmed on grounds that the declaratory judgment did not constitute a money judgment for damages in the ordinary sense, but merely removed all uncertainty and controversy over the issue of when the inevitable policy proceeds were due. Safeco Ins. Co. of Ill. v. District Court, 2000 MT 153, 300 M 123, 2 P3d 834, 57 St. Rep. 604 (2000).

Tax Exemption: The question as to whether property leased to a school district was exempt from taxation was proper to adjudicate in a declaratory judgment proceeding. NW. Improvement Co. v. Rosebud County, 129 M 412, 288 P2d 657 (1955).

Collateral References

Declaratory Judgment *key* 4, et seq.
26 C.J.S. Declaratory Judgments §10, et seq.
22A Am. Jur. 2d Declaratory Judgments §§53 through 55.

27-8-206. Court's discretion to refuse to render judgment.

Compiler's Comments

Uniform Act Section: The corresponding provision of the Uniform Declaratory Judgments Act as adopted by the National Conference of Commissioners on Uniform State Laws is section 6.

Case Notes

State Court Determination of Indemnification Inappropriate When Underlying Federal Class Action Case Undecided — Dismissal of Declaratory Judgment Action Proper Absent Justiciable Controversy: A class action suit was brought against Park County and several individual county officials in federal District Court. The county's primary insurer assumed the defense and indemnification. Two secondary assurance companies sought a declaratory judgment in state District Court that under the terms of their policy with the primary insurer, they had no duty to indemnify the primary insurer in connection with the claims in federal court. The state District Court dismissed the action for lack of a justiciable controversy, and the secondary assurance companies appealed. The Supreme Court affirmed. The secondary assurance companies had no existing and genuine interest at stake at the time, nor could they claim any immediate danger of direct injury from the indemnification provisions of the policy. Putting a secondary insurer on notice of a lawsuit does not constitute a claim for indemnification, nor may a secondary insurer's duty to indemnify be said to exist if primary coverage has not been exhausted. The underlying federal case that was the subject of any potential indemnification had yet to be tried or settled. At this stage, the federal record contained only unproved and perhaps incomplete allegations of fact, and it would be premature to determine conclusively that any claims upon which the plaintiffs in the federal case might prevail arose from conduct that would preclude coverage under the policy. A declaratory judgment would serve only as speculative advice, subject to possible amendment or nullification upon resolution of the federal case, rather than as a final adjudication of the indemnification issue. Thus, the judicial determination that the secondary assurance companies sought involved a contractual duty for indemnification that had not yet arisen and that might never arise, so a determination of the issue would involve an advisory opinion that courts have no jurisdiction to issue. Northfield Ins. Co. v. Mont. Ass'n of Counties, 2000 MT 256, 301 M 472, 10 P3d 813, 57 St. Rep. 1049 (2000). See also Hardy v. Krutzfeldt, 206 M 521, 672 P2d 274 (1983), Brisendine v. St., 253 M 361, 833 P2d 1019 (1992), Skinner v. Allstate Ins. Co., 2005 MT 323, 329 M 511, 127 P3d 359 (2005), and Stroebe v. St., 2006 MT 19, 331 M 23, 127 P3d 1051 (2006).

Mootness — No Appeal Absent District Court Ruling on Declaratory Judgment: The high school sports association decided that Grabow was ineligible to play basketball because his eligibility pursuant to the semester rule had elapsed while Grabow was an exchange student in Germany. Grabow filed a complaint in District Court asking for a declaratory ruling that the association lacked rulemaking and adjudicatory authority and requested a hearing on whether a preliminary injunction should be issued precluding enforcement of the association rule until the case could be adjudicated on its merits. After deciding that it was unlikely that Grabow would ultimately prevail, the District Court denied the injunction. Grabow appealed. The Supreme Court granted the injunction pending final disposition of the appeal, and Grabow played basketball during his senior year. The Supreme Court found that the 1999-2000 season was the only one in which Grabow claimed that he had a right to participate and that because the season was completed, the initial grounds for application of the mootness doctrine to the preliminary injunction issue were met. The declaratory judgment issue was not one capable of repetition, but was one that would evade review, so the Supreme Court remanded for further consideration of Grabow's complaint for declaratory judgment, which would then be subject to appeal following final judgment by the District Court. Grabow v. Mont. High School Assn., 2000 MT 159, 300 M 227, 3 P3d 650, 57 St. Rep. 654 (2000). See also Shamrock Motors, Inc. v. Ford Motor Co., 1999 MT 21, 293 M 188, 974 P2d 1150 (1999).

Discretion of Court: In absence of showing of abuse of discretion, refusal of lower court to rule on issue for reason that decree would not terminate controversy or remove uncertainty will not be reversed. Helena Valley Irrigation District v. St. Highway Comm'n, 150 M 192, 433 P2d 791 (1967).

Dismissal of Action — Possible Parties Not Joined: Court did not abuse its discretion in dismissing insurance company's action for declaratory judgment that defendant's policy was

void because obtained by fraud, since, under 27-8-301, there were possible parties not joined, defendant having been in an accident several months prior to expiration of the policy, and under this section, District Court could refuse to enter the judgment on the basis that it would not terminate the controversy as to all parties. Empire Fire & Marine Ins. Co. v. Goodman, 147 M 396, 412 P2d 569 (1966).

Collateral References

Declaratory Judgment *key* 5, 8.
26 C.J.S. Declaratory Judgments §§11, 14.
22A Am. Jur. 2d Declaratory Judgments §§16, 50.

Part 3
Procedure

27-8-301. Necessary parties.

Compiler's Comments

Uniform Act Section: The corresponding provision of the Uniform Declaratory Judgments Act as adopted by the National Conference of Commissioners on Uniform State Laws is section 11.

Case Notes

Rules Not Designed to Promote Litigation: When defendant in a personal injury accident attempted to compel a potential litigant to appear and bring suit by naming her a defendant in a third-party declaratory judgment action, the trial court properly dismissed the complaint since the third-party defendant was not an indispensable party or compelled to litigate a claim that she had no intention of pursuing. If equity was to be done in a situation such as this, attorney fees were properly awarded the third-party defendant. Foy v. Anderson, 176 M 507, 580 P2d 114 (1978).

Dismissal of Action: Court could take into account this section in refusing to grant declaratory judgment in favor of insurance company, which claimed that defendant's policy was void when accident in which he was involved occurred because there were other parties not joined, and therefore the declaratory judgment would not terminate the controversy should other parties sue defendant. Empire Fire & Marine Ins. Co. v. Goodman, 147 M 396, 412 P2d 569 (1966).

Joinder of Actions: In an action under this chapter by insured under a policy covering commercial hauling of trailer homes, against the insurer, the insurer's general agent, and local insurance agent, District Court did not err in overruling insurer's demurrer (demurrer abolished, Rule 7(c), M.R.Civ.P., and 25-31-503 (25-31-503 now repealed)) on grounds of misjoinder of causes of action and parties defendant, contending that action against local agent for tort and action against the insurer and general agent on a contract could not be combined and the defect could not be cured by a declaratory judgment, since the rights of all of the parties were intimately connected by the one transaction and the presence of all of the parties was necessary to a determination of their rights. The liability of the insurer depended upon the existence of an amendment to the contract and the liability of the local agent depended upon an absence of that same amendment. Adams & Gregoire, Inc. v. Nat'l Indem. Co., 141 M 103, 375 P2d 112 (1962).

Attorney General's Opinions

Compensation of County Clerk and Recorder — Effect of Declaration Judgment on Attorney General Opinion: In 1981, the Attorney General issued an opinion declaring it unlawful to pay the County Clerk and Recorder extra for serving as election administrator (39 A.G. Op. 7 (1981)). In 1984, a District Court held the reverse in a declaratory judgment. The opinion was not expressly overruled and remains valid. Although the parties to the declaratory judgment are bound, it is questionable that this judgment can serve as binding precedent for all judicial districts. The Attorney General is not bound by a declaratory judgment to which he is not a party and which does not explicitly overrule a previous opinion. Although the District Court opinion is entitled to weight, the Attorney General may reach a contrary result in his interpretation. 41 A.G. Op. 33 (1985).

District Court Declaratory Judgment — Effect on Attorney General Opinions: The Attorney General, in issuing advisory opinions, is not bound by a conclusion of law expressed in a District Court declaratory judgment in an action to which the Attorney General is not a party. 38 A.G. Op. 112 (1980).

Collateral References

Declaratory Judgment *key* 291 through 306.

26 C.J.S. Declaratory Judgments §§117 through 134.

22A Am. Jur. 2d Declaratory Judgments §§207 through 216.

Construction, application, and effect of section 11 of the Uniform Declaratory Judgments Act that all persons who have or claim any interest which would be affected by the declaration shall be made parties. 71 ALR 2d 723.

Burden of proof in actions under Declaratory Judgments Act. 23 ALR 2d 1243.

27-8-302. Jury trial.

Compiler's Comments

Uniform Act Section: The corresponding provision of the Uniform Declaratory Judgments Act as adopted by the National Conference of Commissioners on Uniform State Laws is section 9.

Case Notes

No Absolute Right to Jury Trial: Nothing in the Uniform Declaratory Judgments Act gives an absolute right to a trial by jury. It is a recognized general rule of law that the nature of the issues determines the right to a jury trial. If the issues are strictly equitable, there is no right to a jury trial. Thus, it was not error for the District Court to deny jury trial in an action originally filed as a declaratory judgment but amended to enjoin interference with recreational use of the Beaverhead River. Furthermore, the court did not err in granting leave to file an amended complaint since the matter was clearly injunctive in nature and the issues equitable since inception. Mont. Coalition for Stream Access v. Hildreth, 211 M 29, 684 P2d 1088, 41 St. Rep. 1192 (1984).

Existence of Oral Contract in Controversy: Declaratory judgment is improper when existence of oral contract is in controversy, since a declaratory judgment proceeding is primarily intended to construe the meaning of a law and not to determine the existence of controverted facts. State ex rel. Indus. Indem. Co. v. District Court, 169 M 10, 544 P2d 438 (1975).

Review of Declaratory Judgments: In a declaratory judgment action, the District Court determines issues of fact in the same manner as any other civil action, and the Supreme Court will review the judgment in the same manner as any other case. Highway Comm'n v. Flood Control & Drainage District, 155 M 157, 468 P2d 753 (1970).

Collateral References

Jury *key* 18.

50 C.J.S. Juries §16, et seq.

22A Am. Jur. 2d Declaratory Judgments §§236, 237.

Right to jury trial in action for declaratory relief in state court. 33 ALR 4th 146.

27-8-311. Costs.

Compiler's Comments

Uniform Act Section: The corresponding provision of the Uniform Declaratory Judgments Act as adopted by the National Conference of Commissioners on Uniform State Laws is section 10.

Case Notes

Attorney Fees Not Considered Costs — Declaratory Judgment Equitable Exception to Rule That Attorney Fees Not Awarded Absent Contractual or Statutory Provision: The District Court initially awarded costs and attorney fees to defendants for defending a declaratory judgment action. Plaintiff moved under Rule 59(g), M.R.Civ.P. (Title 25, ch. 20), to strike the award of attorney fees. The District Court then concluded that it lacked authority to award attorney fees because plaintiff did not force defendants to defend against a frivolous or malicious action, so the court struck the award of attorney fees, and defendants appealed. Generally, under the American rule, a party in a civil action is not entitled to attorney fees absent a specific contractual or statutory provision, although equitable exceptions are recognized. This section provides that in any proceeding under this chapter, equitable and just costs may be awarded, but attorney fees are not, in any proper sense, considered part of the costs in a case and thus are not allowed as costs under this section. However, 27-8-313 draws no distinction between declaratory judgment actions adjudicating the rights of an insured against an insurer and actions adjudicating rights outside the confines of an insurance policy, so a court may award attorney fees pursuant to 27-8-313 when the court, in its discretion, considers such an award necessary or proper. Therefore, after finding that the District Court erred in concluding that it lacked authority to award attorney fees, the Supreme Court reversed for a determination of whether an award of attorney fees was necessary or proper in this case. Trustees of Ind. Univ. v. Buxbaum, 2003 MT 97, 315 M 210, 69 P3d 663 (2003), overruling State ex rel. Swart v. Casne, 172 M 302,

564 P2d 983 (1977), State ex rel. Dept. of Health and Environmental Sciences v. Lincoln County, 178 M 410, 584 P2d 1293 (1978), State ex rel. Leach v. Visser, 234 M 438, 767 P2d 858 (1988), McKamey v. St., 268 M 137, 885 P2d 515 (1994), and Dorwart v. Caraway, 1998 MT 191, 290 M 196, 966 P2d 1121 (1998), to the extent that those cases hold that a District Court has no discretionary authority to award attorney fees in a declaratory judgment action.

Unsuccessful Defense to State's Requirement That Firefighters at Airport Belong to National Guard — Costs and Attorney Fees Denied: Because the state's defense to a firefighter's petition for judgment declaring it unconstitutional for the state to require Air National Guard membership of its firefighters protecting National Guard aircraft was not frivolous or in bad faith, it was not an abuse of discretion to refuse costs and attorney fees to the prevailing firefighter. McKamey v. St., 268 M 137, 885 P2d 515, 51 St. Rep. 1218 (1994), followed in Dorwart v. Caraway, 1998 MT 191, 290 M 196, 966 P2d 1121, 55 St. Rep. 777 (1998).

Award of Attorney Fees in Declaratory Judgment Insurance Action — Distinction Between Third-Party Claimant and Insured: As a general rule, an insured is not entitled to recover attorney fees and expenses incurred in defending a declaratory judgment action brought by an insurer to determine the existence of coverage under a liability insurance policy. However, recovery is appropriate where it is ultimately determined by the court that the insurer was not acting in good faith in contesting coverage and instituting declaratory judgment proceedings. A third-party claimant is not entitled to recover attorney fees incurred in a declaratory judgment proceeding, even if the claimant arguably falls within the policy definition of "insured". Iowa Mut. Ins. Co. v. Davis, 689 F. Supp. 1028, 45 St. Rep. 1361 (D.C. Mont. 1988).

Attorney's Fees: There is no provision for an award of attorney's fees in an action for declaratory judgment. State ex rel. Dept. of Health & Environmental Sciences v. Lincoln County, 178 M 410, 584 P2d 1293 (1978).

Collateral References

Costs *key* 12.

20 C.J.S. Costs §4.

22A Am. Jur. 2d Declaratory Judgments §260.

Insured's right to recover attorneys' fees incurred in declaratory judgment action to determine existence of coverage under liability policy. 87 ALR 3d 429.

27-8-312. Review of orders and judgments.

Compiler's Comments

Uniform Act Section: The corresponding provision of the Uniform Declaratory Judgments Act as adopted by the National Conference of Commissioners on Uniform State Laws is section 7.

Case Notes

Failure by Insurer to Present Facts to Controvert Testimony That Ongoing Medical Expenses Causally Related to Accident — Declaratory Judgment Proper: In Renville v. Taylor, 2000 MT 217, 301 M 99, 7 P3d 400 (2000), the Supreme Court held that defendant insurer was liable for all expenses related to a collision involving Renville and remanded for a new trial on the issue of damages. Renville then asked the District Court for a declaratory judgment ordering defendant to pay for ongoing medical expenses incurred by Renville subsequent to trial. The District Court denied the request on grounds that factual issues existed regarding Renville's ongoing medical expenses that required resolution by a jury. Renville appealed, asserting that the court failed to follow the law of the case, and the Supreme Court agreed and reversed. Although an insurer is entitled to dispute its obligation to pay medical expenses, there must be a factual basis for doing so. Here, defendant insurer refused to pay Renville's ongoing medical expenses because the expenses were allegedly not causally related to the collision; however, the insurer failed to present any evidence to controvert Renville's expert testimony on causation, choosing instead to rely on testimony from the first trial that had been disregarded by the jury and that was not relevant to the issue of ongoing medical expenses. Thus, the District Court erred in failing to grant Renville's motion for declaratory judgment, and defendant insurer was required to pay Renville's ongoing medical expenses pursuant to Ridley v. Guarantee Nat'l Ins. Co., 286 M 325, 951 P2d 987 (1997), and the law of the case. Renville v. Farmers Ins. Exch., 2003 MT 103, 315 M 295, 69 P3d 217 (2003).

Alteration of Theory on Appeal in Declaratory Action: An appellant has no more latitude to alter his theory on appeal in a declaratory action than in other types of civil actions. An appellate court will not determine legal issues that the parties failed to present to the trial court, either by objection or by pleadings. Velte v. Allstate Ins. Co., 181 M 300, 593 P2d 454 (1979).

Review of Declaratory Judgments Same as Other Civil Action: In a declaratory judgment action, the District Court determines issues of fact in the same manner as any other civil action, and the Supreme Court will review the judgment in the same manner as any other case. Highway Comm'n v. Flood Control & Drainage District, 155 M 157, 468 P2d 753 (1970).

Collateral References

Declaratory Judgment *key* 392, et seq.
26 C.J.S. Declaratory Judgments §147, et seq.
22A Am. Jur. 2d Declaratory Judgments §§251 through 254.

27-8-313. Supplemental relief.

Compiler's Comments

Uniform Act Section: The corresponding provision of the Uniform Declaratory Judgments Act as adopted by the National Conference of Commissioners on Uniform State Laws is section 8.

Case Notes

Insurer's Breach of Duty to Indemnify — Recovery of Attorney Fees by Injured Third-Party Claimant Who Prevails in Insurance Coverage Action Against Motor Vehicle Liability Insurer — Modification of Insurance Exception — Standard of Review of Question of Law: Following remand in Christensen v. Mtn. W. Farm Bureau Mut. Ins. Co., 2000 MT 378, 303 M 493, 22 P3d 624 (2000), the Christensens requested attorney fees incurred in the declaratory judgment action. The District Court denied the request, and the Christensens appealed. Generally, under the American rule, a party in a civil action is not entitled to attorney fees absent a specific contractual or statutory provision, although equitable exceptions are recognized. Here, the parties agreed that there was no contractual authority to support an award of attorney fees, although the Supreme Court held in Trustees of Ind. Univ. v. Buxbaum, 2003 MT 97, 315 M 210, 69 P3d 663 (2003), that this section authorizes a District Court to award attorney fees when the court, in its discretion, considers such an award to be necessary or proper. The Christensens submitted that the defendant insurer was obligated to reimburse them based on the insurance exception rationale articulated in Home Ins. Co. v. Pinski Bros., Inc., 160 M 219, 500 P2d 945 (1972), which approved an award of attorney fees in cases in which an insurer breaches its obligation to defend an insured. The Supreme Court noted that the issue presented a question of law, so the standard of review was whether the District Court's interpretation of law was correct. The Supreme Court held that an insurer that breaches its duty to indemnify is liable for attorney fees when an insured is forced to assume the burden of legal action to obtain the full benefit of the insurance contract, regardless of whether the insurer's duty to defend is at issue. However, in this case, the Christensens were third-party beneficiaries, and the Supreme Court declined to extend the insurance exception to third-party claimants because that would sanction attorney fee awards for simply demonstrating the existence of any insurance contract from which a third-party claimant successfully established coverage, which would undermine the American rule. Thus, although the Christensens were precluded from recovering attorney fees under the obligatory insurance exception, the case was remanded for a determination of whether attorney fees were necessary or proper under Trustees of Ind. Univ. v. Buxbaum and this section. Mtn. W. Farm Bureau Mut. Ins. Co. v. Brewer, 2003 MT 98, 315 M 231, 69 P3d 652 (2003), overruling Yovish v. United Serv. Auto. Ass'n, 243 M 284, 794 P2d 682 (1990).

No Waiver of Attorney Fees by Injured Third-Party Claimant Who Prevails in Insurance Coverage Action on Remand: Following remand in Christensen v. Mtn. W. Farm Bureau Mut. Ins. Co., 2000 MT 378, 303 M 493, 22 P3d 624 (2000), the Christensens requested attorney fees incurred in the declaratory judgment action. The District Court denied the request, and the Christensens appealed. Defendant insurer argued that because the Christensens never requested attorney fees in their motion for summary judgment or in their first appeal, their right to attorney fees was waived. Rule 8(a), M.R.Civ.P. (Title 25, ch. 20), requires that a party give notice of facts that the party expects to prove, and the facts must disclose the presence of all elements necessary to make out a claim. In this case, the defendant insurer had notice of the Christensens' desire to seek attorney fees because that relief was specifically prayed for in the initial petition for declaratory judgment, and defendant successfully defended against that request in District Court. However, the Christensens did not prevail until the case was remanded, so waiting to file a motion for attorney fees until prevailing on appeal was proper. Thus, the Christensens did not waive their entitlement to attorney fees. Mtn. W. Farm Bureau Mut. Ins. Co. v. Brewer, 2003 MT 98, 315 M 231, 69 P3d 652 (2003), following Kunst v. Pass, 1998 M 71, 288 M 264, 957 P2d 1 (1998).

Attorney Fees Not Considered Costs — Declaratory Judgment Equitable Exception to Rule That Attorney Fees Not Awarded Absent Contractual or Statutory Provision: The District Court initially awarded costs and attorney fees to defendants for defending a declaratory judgment action. Plaintiff moved under Rule 59(g), M.R.Civ.P. (Title 25, ch. 20), to strike the award of attorney fees. The District Court then concluded that it lacked authority to award attorney fees because plaintiff did not force defendants to defend against a frivolous or malicious action, so the court struck the award of attorney fees, and defendants appealed. Generally, under the American rule, a party in a civil action is not entitled to attorney fees absent a specific contractual or statutory provision, although equitable exceptions are recognized. Section 27-8-311 provides that in any proceeding under this chapter, equitable and just costs may be awarded, but attorney fees are not, in any proper sense, considered part of the costs in a case and thus are not allowed as costs under 27-8-311. However, this section draws no distinction between declaratory judgment actions adjudicating the rights of an insured against an insurer and actions adjudicating rights outside the confines of an insurance policy, so a court may award attorney fees pursuant to this section when the court, in its discretion, considers such an award necessary or proper. Therefore, after finding that the District Court erred in concluding that it lacked authority to award attorney fees, the Supreme Court reversed for a determination of whether an award of attorney fees was necessary or proper in this case. Trustees of Ind. Univ. v. Buxbaum, 2003 MT 97, 315 M 210, 69 P3d 663 (2003), overruling State ex rel. Swart v. Casne, 172 M 302, 564 P2d 983 (1977), State ex rel. Dept. of Health and Environmental Sciences v. Lincoln County, 178 M 410, 584 P2d 1293 (1978), State ex rel. Leach v. Visser, 234 M 438, 767 P2d 858 (1988), McKamey v. St., 268 M 137, 885 P2d 515 (1994), and Dorwart v. Caraway, 1998 MT 191, 290 M 196, 966 P2d 1121 (1998), to the extent that those cases hold that a District Court has no discretionary authority to award attorney fees in a declaratory judgment action, and followed in Renville v. Farmers Ins. Exch., 2004 MT 366, 324 M 509, 105 P3d 280 (2004).

Scope of Supplemental Relief: This section enables the District Court to retain jurisdiction to grant further relief as it considers necessary and proper to enforce a declaratory judgment. The supplemental relief should be designed to provide complete relief to the parties and may include a monetary judgment, coercive relief, or both. In fashioning the remedy, the court is not bound by the relief requested in the complaint but may order any relief needed to effectuate the judgment. Goodover v. Lindey's, Inc., 246 M 80, 802 P2d 1258, 47 St. Rep. 2268 (1990), citing Dry Canyon Farms, Inc. v. U.S. Nat'l Bank, 772 P2d 1343 (Or. App. 1989), and followed in Goodover v. Lindey's Inc., 255 M 430, 843 P2d 765, 49 St. Rep. 1059 (1992).

Collateral References

22A Am. Jur. 2d Declaratory Judgments §§258, 259.

CHAPTER 9
CONFESSION OF JUDGMENT

Part 1
General Provisions

27-9-101. When and in what courts judgment may be confessed.

Collateral References

Judgment *key* 29, et seq.; Justices of the Peace *key* 120.

49 C.J.S. Judgments §§7, 134, 146; 51 C.J.S. Justices of the Peace §106.

47 Am. Jur. 2d Judgments §726; 47 Am. Jur. 2d Justices of the Peace §58.

Modern views of state courts as to whether consent judgment is entitled to res judicata or collateral estoppel effect. 91 ALR 3d 1170.

Successive judgments by confession on cognovit note or similar instrument. 80 ALR 2d 1380.

Necessity, in order to enter judgment by confession on instrument containing warrant of attorney, that original note or other instrument and original warrant be produced or filed. 68 ALR 2d 1156.

Validity and enforceability of judgment entered in sister state under a warrant of attorney to confess judgment. 39 ALR 2d 1232.

What law governs validity of warrant or power of attorney to confess judgment. 19 ALR 2d 544.

27-9-102. Requirement of signed, verified statement by defendant.

Case Notes

Oral Confession in Open Court: Where defendant, in an action to recover a debt, in response to a summons out of a Justice's Court appeared in person on the day set for trial and orally acknowledged judgment, he in effect admitted the allegations of the complaint and the judgment entered thereon was to all intents and purposes a judgment on the pleadings and not open to the objection that as a confession of judgment it was void because not evidenced by a writing executed by defendant as required by this chapter. State ex rel. Kennedy v. Hubbard, 77 M 170, 253 P 271 (1926), overruling Hunter v. Eddy, 11 M 251, 28 P 296 (1891).

27-9-103. Filing and costs — district court.

Compiler's Comments

2001 Amendment: Chapter 585 in second sentence substituted "The clerk of district court shall forward the costs to the state treasurer for deposit in the state general fund" for "The clerk of the district court shall deposit the fee in the district court fund. If no district court fund exists, the fee must be deposited in the general fund for district court operations"; and made minor changes in style. Amendment effective July 1, 2002.

Code Commissioner Instruction: Pursuant to sec. 47, Ch. 257, L. 2001, in version effective July 1, 2002, the code commissioner changed "state treasurer" to "department of revenue".

Saving Clause: Section 55, Ch. 585, L. 2001, was a saving clause.

1995 Amendment: Chapter 153 near end of first sentence increased costs from $25 to $45.

1989 Amendment: At end of first sentence increased costs from $10 to $25; and inserted second and third sentences relating to deposit of fees in the District Court fund or general fund for District Court operations. Amendment effective July 1, 1989.

Collateral References

Judgment *key* 42, et seq.

49 C.J.S. Judgments §§137, 142, 151.

27-9-104. Filing and costs — justice's court.

Collateral References

Justices of the Peace *key* 120.

51 C.J.S. Justices of the Peace §§81 through 89.

CHAPTER 12
MONTANA CHIROPRACTIC LEGAL PANEL ACT

Chapter Compiler's Comments

Effective Date — Applicability: Section 39, Ch. 262, L. 1989, provided: "(1) [This act] is effective January 1, 1990.

(2) [This act] applies to causes of action arising on or after January 1, 1990."

Part 1
General Provisions

27-12-104. Creation of panel.

Compiler's Comments

2005 Amendment: Chapter 199 in second sentence at beginning after "panel" inserted "is a quasi-governmental entity and" and inserted third sentence regarding applicability of state laws. Amendment effective July 1, 2005.

2003 Amendment: Chapter 175 near beginning of second sentence after "is" deleted "a state agency". Amendment effective July 1, 2003.

Part 2
Administration of Act

27-12-204. Authority to adopt rules.

Compiler's Comments

Rules of Procedure: The following rules of procedure for the Montana Chiropractic Legal Panel became effective October 24, 1990.

Montana Chiropractic Legal Panel Rules of Procedure:

RULE 1. Definitions. As used in these rules, the following definitions apply:

(1) "Act" means the Montana Chiropractic Legal Panel Act provided for in 27-12-101 through 27-12-703, MCA.

(2) "Substantial evidence" means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion or, stated another way, enough evidence to justify refusal to direct a verdict on a factual issue in a jury trial.

Authority: 27-12-204, MCA Implemented: 27-12-101 through 27-12-703, MCA

RULE 2. Scope of rules — applicability. (1) These rules apply to all proceedings before the Montana Chiropractic Legal Panel created in 27-12-104, MCA, that are conducted pursuant to the act.

(2) These rules apply to a malpractice claim arising from a chiropractic physician's acts or omissions occurring on or after January 1, 1990. A claim arising prior to that date may be submitted to the panel for review upon the consent of the affected parties.

Authority: 27-12-204, MCA Implemented: 27-12-101 through 27-12-703, MCA

RULE 3. Fees. A claimant may not be required to pay a fee or other charge as a condition for bringing a malpractice claim before the panel.

Authority: 27-12-204, MCA Implemented: 27-12-204, MCA

RULE 4. Representation by and appearance of legal counsel. (1) A party may be represented by legal counsel in proceedings before the panel, although the party is not required to be represented. If a party chooses to retain legal counsel, his attorney shall informally enter an appearance with the director.

(2) If a party is represented by legal counsel and the attorney has entered an appearance, a notice or communication required by the act or these rules and any other communication must be transmitted to the party's legal counsel, with a copy transmitted to the director, except that the notice of hearing required by 27-12-501, MCA, must be provided to all parties and their respective legal counsel, if any.

Authority: 27-12-204, MCA Implemented: 27-12-306, MCA

RULE 5. Presentation of claim — application. (1) A claimant shall submit a malpractice claim for the panel's consideration by delivering, by certified mail, to the office of the director, a written application signed by the claimant or the claimant's legal counsel.

(2) The application must:

(a) be submitted on a form provided by the director; and

(b) comply with the requirements of 27-12-302, MCA.

(3) The director shall immediately notify the chiropractic physician against whom the claim is made that a claim has been filed and furnish him with a copy of the claim.

(4) This rule does not provide for discovery of information that would be privileged or otherwise beyond discovery pursuant to Rule 26(b)(4)(B), Montana Rules of Civil Procedure, Title 25, chapter 20, MCA.

Authority: 27-12-204, MCA Implemented: 27-12-301 and 27-12-302, MCA

RULE 6. Amendment of application — request for continuance of hearing. (1) A claimant may amend the application as a matter of course within 20 days of the date the director receives it. Thereafter, the claimant may amend it only with the director's approval, or if a panel has been selected, with the approval of the panel chairman.

(2) The following persons may request that the claimant amend the application to provide additional details of the claim:

(a) the director or, if a panel has been selected, the panel chairman; and

(b) the chiropractic physician against whom the claim is made, upon written request to the director, or, if a panel has been selected, to the panel chairman.

(3) (a) The claimant shall deliver an amendment to the director within 20 days of the date the claimant receives:

(i) the written request for additional information from the director or panel chairman; or

(ii) notice of approval by the director or panel chairman of the chiropractic physician's request.

(b) The claimant shall provide sufficient copies of the amendment for service by the director on all other parties.

(c) If an amendment is filed less than 30 days prior to the date set for hearing, the director or, if a panel has been selected, the panel chairman may continue the hearing upon a showing of good cause.

Authority: 27-12-204, MCA Implemented: 27-12-303, MCA

RULE 7. Answer to application — amended answer. (1) The chiropractic physician against whom the malpractice claim is made shall answer the application within 20 days after he receives it. He shall answer by delivering, by certified mail, to the office of the director, a written statement signed by the chiropractic physician or his legal counsel, with copies for service by the director on all other parties.

(2) The director or, if a panel has been selected, the panel chairman may extend the answer period upon a showing of good cause.

(3) The chiropractic physician against whom the malpractice claim is made shall submit an answer to an amended application within 20 days of the date the chiropractic physician receives the amended application. If he does not answer within 20 days, his original statement is considered the answer to the amended application.

(4) When the director receives an answer or amended answer, the director shall serve a copy of it upon the claimant in the manner provided in Rule 8 for service of the application.

Authority: 27-12-204, MCA Implemented: 27-12-306, MCA

RULE 8. Transmittal of documents. (1) (a) When the director receives an application or an amendment to an application, the director shall serve a copy of it upon the chiropractic physician against whom the malpractice claim is made. Service must be effected by mailing a certified copy of the application or amendment to the chiropractic physician at the chiropractic physician's last-known address, postage prepaid, return receipt requested.

(b) The director shall also mail a copy of the application to the directors of the chiropractic physician's professional society or association and the state bar. If the chiropractic physician does not belong to a professional society or association, the director shall mail a copy of the application to the chiropractic physician's state licensing board.

(2) When the director receives the names of the panelists selected pursuant to 27-12-402, MCA, the director shall transmit, by certified mail, to all parties a list of those selected and a brief professional biographical sketch of each panelist.

(3) At least 10 days prior to the date set for hearing, the director shall furnish each panelist with copies of all claims, briefs, medical or hospital records, and other documents pertaining to the claim. If the panel chairman, or the director if a chairman has not yet been selected, determines it is impractical to reproduce or mail a medical record or other document, the record or document must be made available to panel members at the hearing and at the director's office prior to the hearing. Each panelist must be notified of the decision of the chairman or the director and of the availability of the records or documents.

(4) Except as provided in Rule 7 and this rule relating to the service of the application, answer, and any amendments to the application or answer, all motions, memoranda, and other papers presented to the panel must be served upon the parties and copies filed with the director in a manner provided by Rule 5, Montana Rules of Civil Procedure, Title 25, chapter 20, MCA, relating to service and filing of pleadings and other papers.

Authority: 27-12-204, MCA Implemented: 27-12-305, 27-12-308, 27-12-402, 27-12-502, 27-12-603, 27-12-702, 27-12-703, MCA

RULE 9. Selection of panelists and panel chairman. (1) Upon selection of proposed panelists pursuant to 27-12-402, MCA, the directors of the chiropractic physician's professional society or association and the state bar shall transmit to the director a list of those selected, their respective business addresses and telephone numbers, and a brief professional biographical sketch of each proposed panelist.

(2) Pursuant to 27-12-601, MCA, the three attorney members of the panel shall select a panel chairman, who must be an attorney, as soon as possible after selection of the panelists and, if possible, at least 10 days prior to the date set for the hearing.

Authority: 27-12-204, MCA Implemented: 27-12-402 and 27-12-601, MCA

RULE 10. Disqualification — excuse of panelist. (1) An affidavit of disqualification of a panelist filed by a party pursuant to 27-12-404, MCA, must be filed within 15 days of the date the director transmits the panelists' names by mail to the parties. Nothing in these rules may be construed to defeat a party's right to the disqualification.

(2) The director may excuse a proposed panelist from serving on the panel at the panelist's request.

(3) If a panelist has been disqualified or excused, a replacement panelist must be selected pursuant to 27-12-402, MCA. The director shall promptly notify the professional society or association or the state bar of the need to select a replacement panelist. The organization, within 5 days of receipt of the notice, shall select another panelist and notify the director of the replacement.

Authority: 27-12-204, MCA Implemented: 27-12-402 and 27-12-404, MCA

RULE 11. Expert consultant. (1) Pursuant to 27-12-307, MCA, a claimant may request the director's cooperation in retaining a chiropractic physician as an expert consultant by submitting a written request to the director within 30 days of the date the director transmitted the claimant's application to the chiropractic physician against whom the claim is made. The director shall cooperate fully with the claimant in retaining a chiropractic physician qualified in the field of chiropractic who will consult for purposes of the panel hearing.

(2) Communications between the consultant and the claimant or the claimant's legal counsel are privileged unless the privilege is waived by the claimant or is otherwise required to be disclosed by Rule 26(b), Montana Rules of Civil Procedure, Title 25, chapter 20, [MCA.]

Authority: 27-12-204, MCA Implemented: 27-12-307, MCA

RULE 12. Time and place of hearing. (1) When the director receives the claimant's application, the director shall set a date, time, and place for the hearing and provide prompt notice of the hearing to the parties, their respective legal counsel, if any, and the panelists.

(2) The date may not be set more than 120 days after transmittal of the application by the director unless the panelists, by majority vote, find that good cause exists for extending the time period. The vote may be taken by letter or telephone.

Authority: 27-12-204, MCA Implemented: 27-12-501, MCA

RULE 13. Prehearing telephone conference. At least 5 days prior to the date set for hearing, the claimant and his legal counsel, if the claimant is represented, the chiropractic physician against whom the claim is made and his legal counsel, if the chiropractic physician is represented, and the director shall confer with the panel chairman by telephone conference call or in person. The purposes of the prehearing conference are to:

(1) identify and simplify issues;

(2) secure stipulations to, or admissions of, facts not remaining in dispute;

(3) confirm the authenticity of documents;

(4) limit the number of expert witnesses to be called and the schedule of their appearances;

(5) estimate the length of the hearing;

(6) consider, if applicable, a transcription request; and

(7) consider any other matter that may aid in expeditious consideration and determination of the claim.

Authority: 27-12-204, MCA. Implemented: 27-12-502, MCA

RULE 14. Exhibits and other documentary evidence — return of documents by panelists. (1) At least 30 days prior to the date set for hearing, each party shall furnish all other parties a copy, and the director with seven copies, of all records, exhibits, and documents other than medical records obtained by the panel, properly identified, upon which the party intends to rely at the hearing. However, if a party proves that competent evidence was not available within this period, the party producing the evidence shall notify the director, other parties, and all panelists of the evidence as soon as it becomes available and serve copies upon those persons. The panel chairman may admit later-acquired evidence upon terms and conditions he considers just and equitable.

(2) A panelist shall return the copies of the application and answer and any amendments to the application or answer, medical records, exhibits, and all other documents relating to the claim to the director's office upon completion of the hearing and issuance of the panel's decision. A party may retain his copies of any evidentiary materials. The acquiescence of a party to the consideration of such materials by the panel may not be construed as the party's consent to the admission of the material into evidence in a subsequent judicial proceeding.

Authority: 27-12-204, MCA. Implemented: 27-12-308 and 27-12-502, MCA

RULE 15. Conduct of hearing — hearing procedures — application of rules of evidence. (1) The panel chairman shall order the conduct of the hearing.

(2) The claimant must be present personally unless his presence is:

(a) waived by the chiropractic physician against whom the claim is made; or

(b) excused by the director, or the panel chairman if a chairman has been selected, upon a timely request to be excused. A request is timely if made at least 30 days before the hearing date unless the request is based on facts not reasonably known 30 days before the hearing date.

(3) At the hearing, the claimant shall proceed first, followed by the chiropractic physician against whom the claim is made, if the chiropractic physician appears.

(4) Both parties may call witnesses who must be sworn and who are subject to cross-examination. Records, exhibits, and other documents relied on by either party may be offered and admitted into evidence if relevant and timely submitted under Rule 14. The panel may review written statements of fact by the claimant and by treating chiropractic physicians.

(5) The hearing is confidential and informal. The panel may not make, pay for, or retain any transcript of the hearing or proceedings relating to the hearing. A party may make, pay for, and retain a transcript with the consent of the panel chairman and the other parties.

(6) The Montana Rules of Evidence, Title 26, chapter 10, MCA, do not apply to the hearing. However, the panel chairman may exclude irrelevant, immaterial, or unduly repetitious evidence.

(7) A panelist and a party, or a party's legal counsel if the party is represented, may examine a party and its witnesses, subject to the control of the panel chairman.

Authority: 27-12-204, MCA. Implemented: 27-12-502, MCA

RULE 16. Compensation of panelists. (1) A panelist must be paid a fee of $40 an hour, up to a maximum of $320 a day in which a hearing or part of a hearing is held, for the time spent in hearing the claim. The panel chairman must be paid the same fee for time spent hearing and deciding any preliminary matter. A panelist must also be a paid fee of $10 an hour for time spent preparing for the hearing.

(2) The director may pay additional compensation for travel time and other services under circumstances including but not limited to consideration of weather and distance.

(3) A claim for fees is subject to the approval of the director.

(4) To obtain compensation, a panelist and panel chairman shall present a bill for the approval of the director stating the nature of the services performed and itemizing to the one-tenth of an hour time spent.

Authority: 27-12-204, MCA. Implemented: 27-12-203(1), MCA

27-12-206. Funding.

Compiler's Comments

2005 Amendment: Chapter 467 in (3) in first and fourth sentences after "under" substituted "37-1-134" for "37-12-307". Amendment effective July 1, 2005.

2003 Amendment: Chapter 271 in (3) inserted fifth sentence to provide that nothing in this section may be interpreted to conflict with 37-1-138. Amendment effective April 9, 2003.

Retroactive Applicability: Section 63, Ch. 271, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to occurrences after December 31, 2002."

2001 Amendments — Composite Section: Chapter 5 in (1) deleted former first sentence that read: "There is an account in the state special revenue fund", inserted first three sentences describing the pretrial review fund, and at end of fourth sentence substituted "fund" for "account"; in (2) near middle of third sentence after "retained" substituted "by the director" for "in the account"; and made minor changes in style. Amendment effective July 1, 2001.

Chapter 483 in (3) near middle of fourth sentence after "department of" substituted "labor and industry" for "commerce"; and made minor changes in style. Amendment effective July 1, 2001.

1995 Amendment: Chapter 509 in (1) deleted second sentence that read: "The money in the account is statutorily appropriated, as provided in 17-7-502, to the director to be used to administer this chapter"; in (2), in third sentence, substituted "in the account" for "by the director"; and made minor changes in style. Amendment effective July 1, 1995.

1993 Amendment: Chapter 47 in (3), at end of second sentence, substituted "fee of $25" for "fee equal to the judgment rate of interest".

Part 3
Preliminary Procedure

27-12-306. Chiropractic physician's appearance and answer — waiver of confidentiality of records.

Compiler's Comments

2001 Amendment: Chapter 5 in (2) near middle of first sentence after "medical" inserted "chiropractic"; and made minor changes in style. Amendment effective July 1, 2001.

27-12-308. Director to furnish panel members with documents.

Compiler's Comments

2001 Amendment: Chapter 5 near middle before "briefs" inserted "all", after "briefs" inserted "all chiropractic", and before "other" inserted "all"; and made minor changes in style. Amendment effective July 1, 2001.

Part 4
Formation and Composition of Panel

27-12-402. Selection of panelists.

Compiler's Comments

2005 Amendment: Chapter 199 at beginning of first sentence substituted "The board of chiropractors and the director of" for "The director shall promptly transmit an application submitted under 27-12-301 to the directors of the chiropractic physician's state professional society or association and" and after "Montana" inserted "shall each annually transmit a list of licensees to the director of the panel" and in second sentence after "transmittal of" substituted "a list" for "the application", after "director" deleted "of the professional society or association and the state bar of Montana", after "shall" deleted "each", and at end after "from" inserted "the list"; deleted former (2) that read: "(2) If no state professional society or association exists or if the chiropractic physician does not belong to such a society or association, the director shall transmit the application to the chiropractic physician's state licensing board and the licensing board shall select 12 proposed panelists from the chiropractic physician's profession and, when applicable, from persons specializing in the same field or discipline as the chiropractic physician"; and made minor changes in style. Amendment effective July 1, 2005.

Part 5
Hearing Procedure

27-12-502. Conduct of hearing.

Compiler's Comments

2001 Amendment: Chapter 5 in (2) at beginning of third sentence after "Medical" inserted "and chiropractic"; and made minor changes in style. Amendment effective July 1, 2001.

Part 6
Deliberations and Decision of Panel

27-12-605. Decision to be filed and copies sent to parties, attorneys, and licensing board.

Compiler's Comments

2005 Amendment: Chapter 199 deleted former (3) that read: "(3) given to the chiropractic physician's professional licensing board"; and made minor changes in style. Amendment effective July 1, 2005.

Part 7
Effect of Proceedings in Court Action — Confidentiality

27-12-701. Tolling of statute of limitations.

Case Notes

Tolling of Statute of Repose by Chiropractic Legal Panel Proceeding Filed Before Dismissal of Court Action — Filing of Second Court Action After Panel Decision Not Barred: A medical malpractice complaint filed in District Court on April 16, 1992, tolled the statute of repose pursuant to 27-2-205. On August 2, 1993, an application was timely filed with the Montana Chiropractic Legal Panel. Voluntary dismissal of the District Court complaint without prejudice on August 3, 1993, did not nullify the complaint's tolling of the statute of limitations because under this section, the filing of the Panel application also tolled the statute. The Montana Chiropractic Legal Panel Act continued to toll the statute while the application under it was pending, and because the second District Court complaint was timely filed under the Act within 30 days after the Panel's decision, the second complaint was not barred by the statute of repose. Webb v. T.D., 275 M 243, 912 P2d 202, 53 St. Rep. 117 (1996).

CHAPTER 15
PROVISIONAL REMEDIES

Part 1
General Provisions

27-15-101. When plaintiff may be required to elect among arrest, injunction, and attachment.

Collateral References

Election of Remedies *key* 2.
28A C.J.S. Election of Remedies §33.
25 Am. Jur. 2d Election of Remedies §§8 through 20.

27-15-102. Availability of provisional remedies to defendant interposing counterclaim.

Case Notes

Pleadings: The provisions of this section are applicable to provisional remedies in civil actions and not to questions of pleading. Gilchrist v. Hore, 34 M 443, 87 P 443 (1906).

Collateral References

Arrest *key* 6; Attachment *key* 16; Injunction *key* 114(2).
7 C.J.S. Attachment §14.
Right of garnishee, other than bank holding deposit, to set off claims not due or certain when garnishment is served. 57 ALR 2d 700.

27-15-103. Time limit on decisions regarding arrest, injunction, or attachment.

Collateral References

Election of Remedies *key* 2.
28A C.J.S. Election of Remedies §33.

CHAPTER 16
ARREST AND BAIL IN CIVIL ACTIONS

Part 1
General Provisions

27-16-101. Exclusive procedure for prejudgment arrest in civil action.

Collateral References

Arrest *key* 1, et seq.
6A C.J.S Arrest §71, et seq.
5 Am. Jur. 2d Arrest §73.

27-16-102. When defendant may be arrested.

Collateral References

Arrest *key* 10 through 17.
6A C.J.S. Arrest §71, et seq.
5 Am. Jur. 2d Arrest §73.

Part 2
Order for Arrest — Execution

27-16-201. Order from judge required.

Collateral References

Arrest *key* 20.
6A C.J.S. Arrest §86, et seq.
5 Am. Jur. 2d Arrest §§85, 86, 88.

27-16-202. Time for making order.

Collateral References

Arrest *key* 33.
6A C.J.S. Arrest §86, et seq.

27-16-203. When order must be made.

Collateral References

Arrest *key* 34.
6A C.J.S. Arrest §92.

27-16-204. Plaintiff's undertaking.

Collateral References

Arrest *key* 34.
6A C.J.S. Arrest §91.

27-16-206. Directions to sheriff in order.

Collateral References

Arrest *key* 33.
6A C.J.S. Arrest §92.

27-16-207. Service of order and affidavit.

Collateral References

Arrest *key* 36.
6A C.J.S. Arrest §86, et seq.

27-16-208. Execution of order — prepayment of expense by plaintiff.

Collateral References

Arrest *key* 39; Sheriffs and Constables *key* 39.
6A C.J.S. Arrest §92, et seq.; 80 C.J.S. Sheriffs and Constables §49.

27-16-209. Liability of sheriff for escape or rescue.

Collateral References

Sheriffs and Constables *key* 104.
80 C.J.S. Sheriffs and Constables §118, et seq.

27-16-210. Recovery on sheriff's official bond.

Collateral References

Sheriffs and Constables *key* 154, et seq.
80 C.J.S. Sheriffs and Constables §189, et seq.

Part 3
Vacation of Order — Reduction of Bail

27-16-301. Proceedings to vacate order or reduce bail.

Collateral References

Arrest *key* 41, et seq.; Bail *key* 8.
6A C.J.S. Arrest §92, et seq.; 8 C.J.S. Bail §9.

Part 4
Giving Bail

27-16-401. Discharge of defendant upon giving bail before execution.

Collateral References

Bail *key* 3.
8 C.J.S. Bail §5.
8 Am. Jur. 2d Bail and Recognizance §5.

27-16-402. Form of undertaking for bail.

Collateral References

Bail *key* 9 through 16.
8 C.J.S. Bail §§8, 12 through 18.

27-16-403. Qualifications of sureties.

Collateral References

Lien or encumbrance on his real property as affecting qualification of surety on bail bond. 56 ALR 1097.

27-16-404. Filing of order with return and undertaking — plaintiff's notice of nonacceptance.

Collateral References

Arrest *key* 38; Bail *key* 14, 15.

6A C.J.S. Arrest §92; 8 C.J.S. Bail §§16, 17.

27-16-406. Procedure for justification.

Collateral References

8 Am. Jur. 2d Bail and Recognizance §83.

Part 5
Liability and Exoneration of Sureties

27-16-501. Surrender of defendant.

Collateral References

8 C.J.S. Bail §25.

8 Am. Jur. 2d Bail and Recognizance §134.

Right of bail to relief from forfeiture of bond or recognizance in event of subsequent surrender or production of principal. 84 ALR 420.

Surrender of principal by sureties on bail bond. 73 ALR 1369; 3 ALR 180.

27-16-502. Manner and time of surrender.

Collateral References

8 Am. Jur. 2d Bail and Recognizance §114, et seq.

27-16-503. Exoneration of sureties.

Collateral References

8 Am. Jur. 2d Bail and Recognizance §114, et seq.

27-16-504. Action to enforce sureties' liability.

Collateral References

Bail *key* 25, et seq.

8 C.J.S. Bail §26, et seq.

8 Am. Jur. 2d Bail and Recognizance §145, et seq.

27-16-505. Other circumstances in which sureties exonerated.

Collateral References

Bail *key* 18.

8 C.J.S. Bail §21.

Bail: effect on surety's liability under bail bond of principal's incarceration in other jurisdiction. 33 ALR 4th 663.

Death of principal as exoneration of sureties on bail or appearance bond. 63 ALR 2d 830.

Induction of principal into military or naval service as exonerating his bail for his nonappearance. 153 ALR 1431; 151 ALR 1462; 147 ALR 1428; 8 ALR 371.

Excuse for failure of accused to appear which will entitle surety to relief from forfeiture. 84 ALR 440.

Part 6
Deposit of Money in Lieu of Bail

27-16-601. Deposit of money by defendant with sheriff.

Collateral References

Bail *key* 17.

8 C.J.S. Bail §§10, 11.

Part 10
Arrest in Civil Actions in Justice's Court

27-16-1001. Justice's authority to order arrest.

Collateral References

Justices of the Peace *key* 85.

51 C.J.S. Justices of the Peace §148.
5 Am. Jur. 2d Arrest §§73 through 91.
Territorial extent of power to arrest under a warrant. 61 ALR 377.

CHAPTER 17
CLAIM AND DELIVERY OF PERSONAL PROPERTY

Chapter Case Notes

District Court Jurisdiction Over Probate of and Claim and Delivery Action by Estate of Enrolled Tribal Indian: Where, following the death of an enrolled member of an Indian tribe, the decedent's wife petitioned the District Court to probate her deceased husband's estate, and estate property consisting of a road grader was later unlawfully sold by the deceased's wife to her brother, the District Court erred in holding that it did not have jurisdiction over the claim and delivery action instituted on behalf of the estate to recover the road grader or its value. The fact that there is no federal treaty or statute preempting the jurisdiction of the District Court and the fact that the tribal court has not had and is not exercising jurisdiction over the case properly resulted in the District Court's taking jurisdiction of the probate of the estate. Because the action for claim and delivery is the enforcement process to recover property within the jurisdiction of the probate court, the District Court should have exercised subject matter jurisdiction over the claim and delivery action as well. Estate of Standing Bear v. Belcourt, 193 M 174, 631 P2d 285, 38 St. Rep. 1064 (1981).

Part 1
General Provisions

27-17-101. When plaintiff may claim delivery.

Case Notes

No Basis for Damages Absent Evidence of Wrongful Detainer — Summary Judgment Proper: Plaintiff sought damages for defendant's detention of a tractor in which plaintiff had a security interest. Defendant moved to dismiss the claims, and the District Court granted summary judgment for defendant. Plaintiff appealed, but the Supreme Court affirmed. Claim and delivery require that the claimant prove that property is wrongfully detained and that the claimant has the right to immediate possession at the time that the action is brought. However, in this case, there was insufficient evidence that defendant wrongfully detained the tractor because defendant had no contractual relationship with plaintiff regarding the tractor and owed no contractual duty to return the tractor to plaintiff. Absent evidence of wrongful detainer, there was no basis for plaintiff to recover damages, so summary judgment was proper. 1st Bank v. Winderl, 2002 MT 339, 313 M 306, 60 P3d 998 (2002).

Loss of Possession by Defendant: Where a Sheriff seized oil well piping under a search warrant and subsequently released it by order of the same Justice of the Peace to the custody from which he seized it, incidentally enabling the person who procured the warrant to take it under claim of ownership, claim and delivery does not lie against Sheriff on theory of wrongful and negligent loss of possession or constructive possession. Harri v. Isaac, 111 M 152, 107 P2d 137 (1940).

Lessee's Rights: In claim and delivery, plaintiff must plead and prove ownership or right of possession in himself and defendant's wrongful possession and recover on the strength of his own title rather than on weakness of his adversary's; under the facts presented, lessee, whose lease had expired but was later extended by oral agreement, was entitled to share of the crops planted as against plaintiff grazing permittee who in the meantime had been granted a permit for grazing from the owner but who also planted crop in addition to grazing. Hall v. Hilling, 107 M 432, 86 P2d 648 (1938).

Fixtures: In an action in claim and delivery to recover the possession of a dredge used in placer mining operations claimed by plaintiff lessee as personal property and defendant lessor as a fixture, the trial court erred in directing a verdict for plaintiff in view of the evidence relating to the intention of the parties in entering into the contract of lease, from which different inferences might have been drawn by different reasonable men. Story Gold Dredging Co. v. Wilson, 106 M 166, 76 P2d 73 (1938).

Conditional Sales:

The owner of an automobile who places it in the hands of an established dealer with apparent authority to sell it, although title is reserved to the owner under a conditional sale contract, is

estopped to deny title in an innocent purchaser who, in the absence of circumstances putting him on guard, was not required to make investigation relative to the status of the title. Rasmussen v. Lee & Co., 104 M 278, 66 P2d 119 (1937).

The buyer of an automobile from a dealer, even though cognizant that finance company had acquired conditional sale contract thereon by assignment with title reserved to the owner, could nevertheless be an innocent purchaser since he could rightfully assume that, waiving its interest in the car, the finance company had consented to the sale and was looking to the dealer for payment. Rasmussen v. Lee & Co., 104 M 278, 66 P2d 119 (1937).

Where the buyer of an automobile under a conditional sale contract prior to its seizure for taxes had defaulted, the right to its possession was in the seller, and after its seizure resulting in a void sale that right again reverted to him, and therefore he could properly sue the purchaser at the tax sale in claim and delivery to recover its possession. Perham v. Putnam, 82 M 349, 267 P 305 (1928).

Demand for Possession Required:

A demand for possession of personal property is not a condition precedent to bringing an action in claim and delivery where it appears that if made it would have been futile or where the taking was wrongful from its inception; therefore the contention that damages do not accrue until after demand is made and refused was not meritorious under the facts considered. Rasmussen v. Lee & Co., 104 M 278, 66 P2d 119 (1937).

Where defendants in an action in claim and delivery obtained possession of household goods rightfully under an executory contract of purchase, plaintiff was required to plead a demand for them and a refusal as prerequisites to a termination of their right of possession and the creation of the right to immediate possession in plaintiff. Hennessy Co. v. Wagner, 69 M 46, 220 P 101 (1923).

Measure of Damage: The fixing of damages for the wrongful taking and retention of personal property (an automobile in the instant case) is left largely to the discretion of the jury, and where automobile was used by plaintiff in his business of selling cars, the cost incurred in making trips in pursuit of the car and the fact that he was required to hire another car were proper elements of damage. Owner may testify as to value of its use to him. Rasmussen v. Lee & Co., 104 M 278, 66 P2d 119 (1937).

Forfeiture of Contract: In a claim and delivery action by an automobile dealer to recover possession of a car sold to the purchaser under conditional sale contract and bought by defendants on delinquent tax sale before it had been fully paid for, plaintiff was not required to plead the contract and forfeiture; nor, the purchaser having been in default and out of possession, was it necessary to show a demand upon him for possession. Perham v. Putnam, 82 M 349, 267 P 305 (1928); Hennessy Co. v. Wagner, 69 M 46, 220 P 101 (1923).

Tax Claims: While claim and delivery does not lie to recover possession of personal property seized for a tax and in possession of an officer unless the tax is absolutely void, it does lie against the purchaser at the tax sale for fatal irregularity in the sale. Perham v. Putnam, 82 M 349, 267 P 305 (1928).

Judgment in the Alternative: In claim and delivery the judgment must be in the alternative, for the delivery of the possession of the property or for its value in case delivery cannot be made. Hennessy Co. v. Wagner, 69 M 46, 220 P 101 (1923).

Replevin Abolished: The Writ of Replevin has been dispensed with in this state, and the proceedings provided for in this chapter, to gain possession of the property and to hold it pending the trial of the cause, have been substituted instead. State ex rel. Bruce v. District Court, 33 M 359, 83 P 641 (1906).

Collateral References

Replevin *key* 45.

77 C.J.S. Replevin §65.

66 Am. Jur. 2d Replevin §1.

Setoff, counterclaim, and recoupment in replevin or other action for possession of personal property. 151 ALR 519.

Persons not in possession at commencement of action at law to recover personal property as necessary or proper parties defendant. 145 ALR 905.

Claim of interest in property or other conduct of defendant, after commencement of replevin action, as excusing or waiving demand. 145 ALR 743.

Rule that in general inhibits foreign corporation which has failed to comply with conditions of doing business in state, or domestic corporation which has forfeited its charter, from maintaining action, as applicable to action of replevin. 136 ALR 1162.

Rule that denies remedy in case of a legal contract as applicable to an action of replevin or detinue for property possession of which was obtained by defendant as result of such a contract with the plaintiff or his predecessor in interest. 132 ALR 619.

May or must claim for damages from wrongful seizure of property be interposed in replevin action. 85 ALR 674.

Demand for payment or possession as condition precedent to conditional seller's action of replevin to recover possession of forfeited property. 59 ALR 140.

Demand as a condition of replevin against innocent purchaser of stolen chattels. 51 ALR 1465.

Bank account as subject to replevin. 44 ALR 1522.

Replevin against executor, administrator, or trustee in official capacity. 44 ALR 656, supplemented by 127 ALR 687.

Replevin for undivided share in or undivided quantity of a larger mass. 26 ALR 1015.

Partner's right to maintain action of replevin or unlawful detainer against copartner. 21 ALR 124.

Replevin to recover moving picture film. 14 ALR 1015.

Right to recover property held by public authorities as evidence for use in a criminal trial. 13 ALR 1168; 11 ALR 681.

27-17-102. Claim and delivery in justice's court.

Collateral References

Justices of the Peace *key* 66, et seq.; Replevin *key* 2, et seq.

51 C.J.S. Justices of the Peace §81; 77 C.J.S. Replevin §3, et seq.

Part 2
Procedure for Obtaining Seizure of Property

Part Case Notes

No Basis for Damages Absent Evidence of Wrongful Detainer — Summary Judgment Proper: Plaintiff sought damages for defendant's detention of a tractor in which plaintiff had a security interest. Defendant moved to dismiss the claims, and the District Court granted summary judgment for defendant. Plaintiff appealed, but the Supreme Court affirmed. Claim and delivery require that the claimant prove that property is wrongfully detained and that the claimant has the right to immediate possession at the time that the action is brought. However, in this case, there was insufficient evidence that defendant wrongfully detained the tractor because defendant had no contractual relationship with plaintiff regarding the tractor and owed no contractual duty to return the tractor to plaintiff. Absent evidence of wrongful detainer, there was no basis for plaintiff to recover damages, so summary judgment was proper. 1st Bank v. Winderl, 2002 MT 339, 313 M 306, 60 P3d 998 (2002).

Constitutionality: Replevin provisions which authorized state agents to seize property in possession of another person upon application of claimant and subsequent posting of bond prior to a hearing to determine parties' rights to possession are invalid because they work a deprivation of property without due process of law by denying an opportunity to be heard before chattels are taken from the possessor. Fuentes v. Shevin, 407 US 67, 32 L Ed 2d 556, 92 S Ct 1983 (1972), distinguished in Northrip v. Federal Nat'l Mtg. Ass'n, 527 F2d 23 (9th Cir. 1975), Mercy Gen. Hosp. v. Weinberger, 410 F. Supp. 344 (D.C. Mont. 1975), First Nat'l Bank v. Hasty, 410 F. Supp. 482 (D.C. Mont. 1976), Kenly v. Miracle Properties, 412 F. Supp. 1072 (D.C. Mont. 1976); Arkoosh v. Dean Witter & Co., Inc., 415 F. Supp. 535 (D.C. Mont. 1976); Batey v. Digirolamo, 418 F. Supp. 695 (D.C. Mont. 1976), explained in Professional Eng'rs, Inc. v. U.S., 527 F2d 597 (9th Cir. 1975); Tedeschi v. Blackwood, 410 F. Supp. 34 (D.C. Mont. 1976).

27-17-201. Plaintiff's affidavit.

Case Notes

Affidavit Containing Conclusory Allegations as Well as Required Statements — No Error in Issuance: The District Court did not err in issuing a claim and delivery order that contained the statutorily required statements and that alleged two grounds for the order when there was sufficient evidence to enable the judge to conclude that notice and delay would seriously impair plaintiff's remedy of repossession. First Bank W. Mont. Missoula v. Gregoroff, 236 M 345, 770 P2d 512, 46 St. Rep. 412 (1989).

Proof of Right to Possession: In such actions it is incumbent on plaintiff to establish by a preponderance of the evidence the right to the immediate possession in himself at the time the action is brought and that the defendant is wrongfully in possession. Plaintiff must rely upon the

strength of his own right of possession and not upon the weakness of his adversary's claim to such right. O'Connell v. Haggerty, 126 M 442, 253 P2d 578 (1953).

Cause of Action: To state a cause of action in claim and delivery, the complaint must allege ownership or right of possession in plaintiff, that defendant is wrongfully in possession, and the value of the property. Perham v. Putnam, 82 M 349, 267 P 305 (1928); Hennessy Co. v. Wagner, 69 M 46, 220 P 101 (1923).

Tax Claims: In an action of claim and delivery, an allegation in the complaint that the property sought to be recovered had not been taken by defendant's predecessor for a tax was surplusage and hence plaintiff was not required to prove it. Perham v. Putnam, 82 M 349, 267 P 305 (1928); Hennessy Co. v. Wagner, 69 M 46, 220 P 101 (1923).

Collateral References

Replevin *key* 26, et seq.
77 C.J.S. Replevin §47, et seq.
66 Am. Jur. 2d Replevin §§61 through 63.

27-17-202. Description of property in affidavit.

Collateral References

Replevin *key* 30.
77 C.J.S. Replevin §52.

27-17-203. Order from judge.

Case Notes

Constitutionality of Claim and Delivery Procedures: When presented with a claim that subsection (2) of this section is unconstitutional because it allows a court-ordered seizure of property without requiring notice of or opportunity for an immediate postseizure hearing, the Supreme Court held that Montana's claim and delivery procedure provides constitutional safeguards required by the state and federal constitutions. The procedure balances and protects the interests of both parties in the following ways: (1) a prehearing seizure may be obtained only if plaintiff swears to facts and posts a bond appropriate to protect defendant; (2) a delivery order must be obtained through a judge or Justice of the Peace rather than a court or administrative officer; (3) defendant may file a bond to immediately regain possession of the property; (4) defendant may immediately apply for a motion to quash the order; (5) defendant may promptly seek Supreme Court review under Rule 1, M.R.App.P. (Title 25, ch. 21); and (6) defendant may challenge the validity of the order at the final judicial determination of liability following seizure. First Bank W. Mont. Missoula v. Gregoroff, 236 M 345, 770 P2d 512, 46 St. Rep. 412 (1989). See also Mitchell v. W.T. Grant Co., 416 US 600, 40 L Ed 2d 406, 94 S Ct 1895 (1974).

"Open Court" Construed: Defendant argued the District Court erred in meeting with plaintiff's attorney and signing the order in the Clerk of Court's office rather than in open court as required by this section. However, subsection (2) of this section requires only that the evidence be presented in open court; it does not require that a record of the hearing be made. The "open court" language requires that the plaintiff or his attorney be present before the judge or justice when the ex parte motion for claim and delivery is made and prevents the plaintiff from obtaining the order merely upon written application. The judge was acting in his official capacity when he heard the evidence, and his decision to meet in the Clerk of Court's office did not constitute reversible error. First Bank W. Mont. Missoula v. Gregoroff, 236 M 345, 770 P2d 512, 46 St. Rep. 412 (1989).

Collateral References

Replevin *key* 26, et seq.
77 C.J.S. Replevin §47, et seq.
66 Am. Jur. 2d Replevin §§61 through 63.

27-17-204. Endorsement requiring sheriff to take property.

Collateral References

Replevin *key* 33 ½.
77 C.J.S. Replevin §64, et seq.

27-17-205. Plaintiff's undertaking — service and execution by sheriff.

Case Notes

Bond Benefits Only Person Named in Bond: Paccar leased trucks to MPT. MPT entered into an agreement to buy tires from Les Schwab on credit. When MPT defaulted on its purchase agreement, Schwab brought an action to recover the tires and simultaneously obtained a bond

from ICNA to indemnify MPT in the event that Schwab was found to have wrongfully repossessed the tires. Paccar argued that the lower court had erred in dismissing ICNA from the suit and that Paccar had the right to assert a claim against the bond for damages suffered as a result of MPT's actions. The Supreme Court held that the bond was expressly written for the benefit of MPT and therefore only MPT could act upon and enforce the bond. Paccar Financial Corp. v. Les Schwab Tire Centers of Mont., Inc., 277 M 171, 920 P2d 977, 53 St. Rep. 652 (1996).

Constitutionality: Replevin provisions which authorized state agents to seize property in possession of another person upon application of claimant and subsequent posting of bond prior to a hearing to determine parties' rights to possession are invalid because they work a deprivation of property without due process of law by denying an opportunity to be heard before chattels are taken from the possessor. Fuentes v. Shevin, 407 US 67, 32 L Ed 2d 556, 92 S Ct 1983 (1972), distinguished in Northrip v. Federal Nat'l Mtg. Ass'n, 527 F2d 23 (9th Cir. 1975), Mercy Gen. Hosp. v. Weinberger, 410 F. Supp. 344 (D.C. Mont. 1975), First Nat'l Bank v. Hasty, 410 F. Supp. 482 (D.C. Mont. 1976), Kenly v. Miracle Properties, 412 F. Supp. 1072 (D.C. Mont. 1976), Arkoosh v. Dean Witter & Co., Inc., 415 F. Supp. 535 (D.C. Mont. 1976); Batey v. Digirolamo, 418 F. Supp. 695 (D.C. Mont. 1976), explained in Professional Eng'rs, Inc. v. U.S., 527 F2d 597 (9th Cir. 1975); Tedeschi v. Blackwood, 410 F. Supp. 34 (D.C. Mont. 1976).

Amount of Recovery on Undertaking: Under this section, plaintiff in an action on the undertaking may recover the damages he is able to prove to the full amount of the penalty; where no other damages are asked, the full recovery is the value of the property at the time it was taken, with costs, regardless of whether or not a return of the property had theretofore been adjudged. Fergus Motor Co. v. Schott, 95 M 249, 26 P2d 365 (1933).

Surety's Liability on Undertaking:

The giving of a redelivery bond does not amount to a waiver or discharge of the undertaking in a claim and delivery action, nor does the fact that the property held under Writ of Attachment was subsequently sold under execution release the surety from liability for costs awarded in the claim and delivery action. Clark v. Nat'l Sur. Co., 81 M 113, 261 P 618 (1927).

The surety on an undertaking in an action in claim and delivery against a Sheriff, conditioned for the return of the property if return be adjudged and for the payment of such sum as might from any cause be recovered against plaintiff, is liable for the costs incurred by the defendant Sheriff on judgment in his favor. Clark v. Nat'l Sur. Co., 81 M 113, 261 P 618 (1927).

Where an undertaking in a claim and delivery action had accomplished the purpose for which it was given, the surety will not be permitted to free itself from the obligations and disadvantages of its engagement on the ground that the Sheriff never relinquished possession of the property in question and that therefore there was no consideration for the undertaking, it appearing that the same surety company had furnished a redelivery bond to permit the Sheriff to retain possession. Clark v. Nat'l Sur. Co., 81 M 113, 261 P 618 (1927).

Interference With Officer: Resistance of or interference with an officer while endeavoring to take property into his possession pursuant to the provisions of this section constitutes a contempt within the meaning of 3-1-501(1)(g). State ex rel. Bruce v. District Court, 33 M 359, 83 P 641 (1906).

Collateral References

Replevin *key* 33(1), (2); 40, 41.
77 C.J.S. Replevin §54, et seq.
66 Am. Jur. 2d Replevin §§64 through 66.

27-17-206. Manner of seizure of concealed property.

Collateral References

Replevin *key* 40.
77 C.J.S. Replevin §65.

27-17-207. Seizure when part of property cannot be found.

Collateral References

Replevin *key* 40.
77 C.J.S. Replevin §65.

27-17-208. Security for sheriff's costs when property seized.

Collateral References

66 Am. Jur. 2d Replevin §64.

Part 3
Procedure Following Seizure by Sheriff

27-17-301. Duty of sheriff to keep and deliver property.

Collateral References

Replevin *key* 44.

77 C.J.S. Replevin §79, et seq.

27-17-302. Sheriff's return of execution.

Collateral References

Replevin *key* 53.

77 C.J.S. Replevin §§56, 68.

27-17-303. Exception to plaintiff's sureties — justification — liability of sheriff.

Case Notes

Exceptions to Sufficiency of Sureties: Sureties are not required to justify unless the defendant excepts to their sufficiency and gives notice to the plaintiff. State ex rel. Johnson v. Collins, 41 M 526, 110 P 526 (1910).

27-17-304. When defendant may require return of property — his undertaking.

Case Notes

Plaintiff's Undertaking Not Discharged: The giving of a redelivery bond does not amount to a waiver or discharge of the undertaking in a claim and delivery action, nor does the fact that the property held under Writ of Attachment was subsequently sold under execution release the surety from liability for costs awarded in the claim and delivery action. Clark v. Nat'l Sur. Co., 81 M 113, 261 P 618 (1927).

Action on Deficient Bond: A bond, even though not executed in compliance with the provisions of this statute, may be good as a common-law bond, and an action may be maintained thereon upon failure of the defendant in replevin to comply with the terms of the judgment in the replevin suit. Hedderick v. Pontet, 6 M 345, 12 P 765 (1887).

Collateral References

Replevin *key* 47 through 50.

77 C.J.S. Replevin §74, et seq.

66 Am. Jur. 2d Replevin §§72, 73.

Sufficiency of offer or tender to satisfy requirement of judgment or condition of bond in replevin for delivery or redelivery of chattels. 57 ALR 806.

27-17-305. Return of part of the property.

Collateral References

Replevin *key* 30.

77 C.J.S. Replevin §52.

27-17-306. Justification of defendant's sureties — liability of sheriff.

Case Notes

Failure of Sureties to Justify: Where the sureties on a return bond of the defendant have failed to justify, it is the duty of the Sheriff, specially enjoined upon him by this section, to deliver possession of the property to the plaintiff. State ex rel. Johnson v. Collins, 41 M 526, 110 P 526 (1940).

Justification as Condition Precedent: Where the defendant in a claim and delivery action, after seizure of the property by the Sheriff, desires a redelivery to himself, he must not only tender to the officer the redelivery bond provided for by this section but also have the sureties on said bond justify, in the same manner as upon bail on arrest, as a condition precedent to his right to the return of the property, even though exception to their sufficiency is not taken by plaintiff or notice thereof given to defendant. State ex rel. Johnson v. Collins, 41 M 526, 110 P 526 (1940).

Notice to Defendant of Insufficiency: This section omits any requirement that written notice, or any notice, be given to the defendant that the sureties upon his redelivery bond are not judged sufficient. State ex rel. Johnson v. Collins, 41 M 526, 110 P 526 (1940).

Tender of Cash Bond: Where, in claim and delivery, defendant, at the time the Sheriff served the papers and sought to take possession of the property, tendered to the officer cash bond to retain the property, he thereby waived his right to tender a redelivery bond thereafter. State ex rel. Johnson v. Collins, 41 M 526, 110 P 526 (1940).

27-17-308. Delivery of property to plaintiff if not returned to defendant.

Case Notes

Sheriff's Liability: The only connection a Sheriff had with a transaction that culminated in a claim and delivery action was in his official capacity in serving process and in seizing a band of horses and delivering them to the plaintiff as provided by this section. No redelivery bond was furnished, and the owner made no third-party claim for possession as provided by 27-17-309. The owner was successful in a subsequent action for possession but was not entitled to damages for their detention or injuries. Jackson v. McDonald, 115 M 269, 143 P 898 (1943).

Collateral References

Replevin *key* 30, 47 through 50.

77 C.J.S. Replevin §74, et seq.

66 Am. Jur. 2d Replevin §72.

Sufficiency of offer or tender to satisfy requirement of judgment or condition of bond in replevin for delivery or redelivery of chattels. 57 ALR 806.

27-17-309. Claim of property by third person — plaintiff to indemnify sheriff.

Case Notes

Failure of Third Party to Assert Claim: The only connection a Sheriff had with a transaction that culminated in a claim and delivery action was in his official capacity in serving process and in seizing a band of horses and delivering them to the plaintiff as provided by 27-17-308. No redelivery bond was furnished, and the owner made no third-party claim for possession as provided by this section. The owner was successful in a subsequent action for possession but was not entitled to damages for their detention or injuries. Jackson v. McDonald, 115 M 269, 143 P 898 (1943), followed in Lurie v. Sheriff, 2000 MT 103, 299 M 283, 999 P2d 342, 57 St. Rep. 414 (2000).

Collateral References

Replevin *key* 52.

77 C.J.S. Replevin §73.

66 Am. Jur. 2d Replevin §60.

27-17-310. Answer of defendant claiming third person entitled to property.

Collateral References

Replevin *key* 12(1).

77 C.J.S. Replevin §41, et seq.

Part 4
Judgment — Return of Property

27-17-401. Form of judgment.

Case Notes

Hearing on Damages After Reversal: Where the trial court, after hearing a claim and delivery action on its merits, erroneously determined that the complaint did not state a cause of action but the evidence clearly showed that plaintiff was entitled to recover, necessitating reversal of the judgment and remand of the cause for further proceedings, the court may, if necessary, hear further evidence to determine the amount of damages to which plaintiff was entitled. Schneider v. Nelson, 111 M 377, 110 P2d 972 (1940).

Date of Valuation: In an action in claim and delivery to recover a band of sheep or their value, an instruction fixing the measure of damages recoverable as the value of the property as of the date of the trial was erroneous, the measure being its value at the time of the wrongful taking, with interest to the time of trial. First Nat'l Bank v. Perrine, 97 M 262, 33 P2d 997 (1934).

Alternative Judgment Required:

Prior to trial of a claim and delivery action, the property in controversy was turned back to plaintiff under appropriate proceedings. Failure of the District Court to enter judgment in his favor in the alternative (for its return or its value in case return could not be had) did not constitute error of which defendant could complain, because there was no necessity under such circumstances for incorporation of the alternative clause. Fergus Motor Co. v. Schott, 95 M 249, 26 P2d 365 (1933); Hayes v. Moffatt, 83 M 185, 271 P 452 (1928).

The judgment in a claim and delivery action must be in the alternative. Kelsey v. Yadish, 66 M 23, 212 P 495 (1923); Hynes v. Barnes, 30 M 25, 75 P 523 (1904).

The requirement that in an action in claim and delivery the judgment must be in the alternative, namely, for the return of the property or, in case return cannot be made, for its value,

applies only to a case tried upon the merits, and therefore such a judgment in a case in which a verdict was directed for defendant because the complaint did not state facts sufficient to state a cause of action was error. Barrett v. Shipley, 63 M 152, 206 P 430 (1922).

Under this section there can be no judgment for the value if there can be a delivery of the property, but a judgment is not necessarily erroneous if the alternative is not expressed on its face. An absolute judgment for the money is equivalent to a special finding that a delivery cannot be made. Boley v. Griswold, 20 Wall. (87 US) 486, 22 L Ed 375 (1874).

Failure of Defendant to Claim Damages: Where defendant in an action in claim and delivery fails in his answer to demand the return of the property or its value and the jury's verdict is in favor of plaintiff as to a portion thereof only, failure of the District Court to incorporate in the judgment a provision in favor of defendant as to the portion eliminated by the jury is not error. Hayes v. Moffatt, 83 M 185, 271 P 452 (1928).

Damages for Retention: This section and 25-7-503 recognize the right of the defendant in a claim and delivery action who is awarded a return of the property to recover damages for the wrongful taking and detention of it. Hammond v. Thompson, 54 M 609, 173 P 229 (1918).

Damages From Date of Judgment to Outcome of Appeal: Chesnut obtained a judgment against Sales for the return of two mules. Sales refused to return the mules pending the outcome of his appeal. Sales lost the appeal, and the court said that Chesnut was entitled to damages for the time after the judgment when he was denied possession of his mules. Chesnut v. Sales, 49 M 318, 141 P 986 (1914).

Collateral References

Justices of the Peace *key* 66, 124(2), et seq.; Replevin *key* 99, et seq.

51 C.J.S. Justices of the Peace §§81, 235 through 239; 77 C.J.S. Replevin §90,et seq.

27-17-402. Duty to return property in good condition.

Case Notes

Defective Title: Where, at the time of the alleged tender of return, title to the property was clouded by a chattel mortgage and other claims, defendant was not bound to accept the return or to designate a place of return. Hoeh v. Kirby, 98 M 391, 39 P2d 657 (1935).

Collateral References

Replevin *key* 44, 46.

77 C.J.S. Replevin §79, et seq.

27-17-403. Action for value of property and damages.

Collateral References

Damages for detention between judgment against principal and delivery or redelivery of property as covered by replevin bond or redelivery bond in replevin. 90 ALR 972.

Loss or destruction pending replevin action as affecting liability under bond given therein. 31 ALR 1290.

27-17-405. Continuing liability of sureties.

Collateral References

Replevin *key* 123.

CHAPTER 18
PREJUDGMENT ATTACHMENT

Chapter Case Notes

Wrongful Attachment — Action by Plaintiff Debtor Against Defendant Creditor: The Supreme Court relied on the decision in Lugar v. Edmondson Oil Co., 457 US 922, 73 L Ed 2d 482, 102 S Ct 2744 (1982), in holding that an action under 42 U.S.C. 1983 may be brought by a plaintiff debtor against a defendant creditor who has wrongfully obtained prejudgment attachment of plaintiff's assets under a defective state statute regarding prejudgment attachment. The necessary inquiry is whether: (1) the deprivation results from exercise of a right or privilege having its source in state authority; and (2) the creditor, as a private party, could be appropriately characterized as a "state actor". Stensvad v. Towe, 232 M 378, 759 P2d 138, 45 St. Rep. 1129 (1988).

Wrongful Attachment — Extent of Duty to Mitigate Damages: Damages for wrongful attachment were proper despite defendants' contention that plaintiff failed to mitigate by

posting an attachment bond or seeking to have the attachment released, considering plaintiff's presentation of expert testimony that he had no obligation to do more than he did and the fact that the jury was properly instructed on proximate cause and duty to mitigate. Stensvad v. Towe, 232 M 378, 759 P2d 138, 45 St. Rep. 1129 (1988).

Defects in Issuance — Persons Entitled to Raise Issue: Defects in the issuance of Writs of Attachment may be raised only by those named as defendants in the attachment proceeding. A third party not named as a defendant may assert its interest in the attached property but may not raise defects in the Writs. Hull v. D. Irvin Transp., Ltd., 213 M 75, 690 P2d 414, 41 St. Rep. 1954 (1984).

Constitutionality: Where prejudgment Writ of Attachment reached no property but real property of which the debtor retained the ownership, actual use, and physical control and therefore did "nothing more than impinge upon economic interests of the property owner", it did not violate the notice and hearing requirements of the 14th amendment Due Process Clause and was therefore constitutional. Bustell v. Bustell, 170 M 457, 555 P2d 722 (1976).

Third Person's Property: The attachment of one person's property to satisfy a claim against another is a conversion of the property. Cent. Mont. Stockyards v. Fraser, 133 M 168, 320 P2d 981 (1957).

Dissolution of Attachment: Where an attachment is dissolved the lien on the property seized thereunder is vacated, the right to hold the property ceases, and the officer holding it should return the same promptly. Cent. Mont. Stockyards v. Fraser, 133 M 168, 320 P2d 981 (1957).

Ancillary Remedy:

An attachment is a provisional remedy ancillary to the civil action in which it is issued; it but impounds and conserves the property as security for the satisfaction of a judgment that may be recovered, and the lien attaches only upon the title which the attachment debtor has in the property at the time of the levy. Short v. Karnop, 84 M 276, 275 P 278 (1929).

Attachment is a provisional remedy ancillary to the civil action in which it is issued. Am. Sur. Co. v. Kartowitz, 54 M 92, 166 P 685 (1917).

Attachment is classified by the Code as a provisional remedy. It is a summary proceeding ancillary to the action in which it is issued. As employed in this chapter, the writ was unknown to the common law. It is of statutory origin and depends for its validity entirely upon a compliance with the statutory requirements. Duluth Brewing & Malting Co. v. Allen, 51 M 89, 149 P 494 (1915).

Liberal Construction:

Although the attachment statute, being remedial in character, must be liberally construed, substantial compliance with its requirements is necessary. Gilna v. Barker, 78 M 343, 254 P 169 (1927).

The attachment law is a remedial statute and must be liberally construed. Cope v. Upper Missouri Min. & Prospecting Co., 1 M 53 (1868).

Writ Asking for More Than Due Valid: The validity of an attachment is not affected by the fact that the complaint upon which the writ was issued asked for more than was justly due, nor may the attachment be discharged on that ground. Gilna v. Barker, 78 M 343, 254 P 169 (1927).

Amendment of Pleadings: Where after a Writ of Attachment was issued the complaint was amended to show a reduction of the amount of the indebtedness due from defendant sureties because of payments made by other sureties on their bonds, the Writ issued was not rendered invalid thereby; having conformed to the demand made in the original complaint, it was not rendered void by what transpired thereafter. State ex rel. Nauman v. Pondera Valley St. Bank, 77 M 1, 248 P 207 (1926).

Merger in Judgment: Where an attachment exists at the time of judgment in favor of the attaching creditor, it becomes merged in the judgment. Harboldt v. Hensen, 75 M 512, 244 P 488 (1926).

Cancellation of Oil and Gas Leases: In an action brought under 82-1-201 through 82-1-203 to obtain the cancellation of an oil and gas lease and to recover the penalty provided therein for the lessee's failure to release within the time specified and resultant damages, a Writ of Attachment may issue as authorized by 82-1-202. Daley v. Torrey, 71 M 513, 230 P 782 (1924).

Invalid Attachment: Where an attachment is issued in an action not falling within the provision of this section and service of summons is made by publication only, the property of defendant is not brought within the jurisdiction and control of the court, and a judgment by default, being one in personam, is void. Hinderager v. MacGinniss, 61 M 312, 202 P 200 (1921).

Part 1
General Provisions

27-18-101. Cases in which property may be attached.

Compiler's Comments

1985 Amendment: Inserted (3) relating to guaranty of a loan.

Case Notes

Evidence of Malicious Attachment — Motion to Dismiss Properly Denied: In Spooner Constr. & Tree Serv., Inc. v. Maner, 2000 MT 161, 300 M 268, 3 P3d 641 (2000), it was held that plaintiff admitted no entitlement to any money from a logging agreement or any rental fees associated with defendant's use of a logging skidder. Nevertheless, plaintiff made no attempt to contact defendant to submit a bill, request payment, or discuss the logging contract, but instead, after disabling the skidder, plaintiff filed a lien against and later attached the skidder, with the intent to bid on it at a Sheriff's sale. Defendant presented both direct and circumstantial evidence that, without probable cause, plaintiff wrongfully attached the skidder with an improper motive and with reckless disregard for the facts, constituting a prima facie case of malicious wrongful attachment. Plaintiff's motion to dismiss was properly denied. Spooner Constr. & Tree Serv., Inc. v. Maner, 2003 MT 43, 314 M 268, 66 P3d 263 (2003).

Deficiency Judgment — Order to Assign Future Proceeds From Separate Cause of Action to Judgment Creditor Not Erroneous: Andersen executed a promissory note in favor of the Alpine Buffalo, Elk and Llama Ranch, Inc. (Alpine), and secured the note with real property. When no payments were made, Alpine received a judgment and foreclosure decree. After Andersen's property was sold, Alpine also received a deficiency judgment in the amount still owing. Andersen neither appealed the judgment nor made payment. Alpine later learned that Andersen was plaintiff in a pending malpractice claim against her former attorney, so Alpine sought and received an assignment of the prospective proceeds from that action. Andersen appealed the assignment order, claiming that Alpine's reliance on Rule 70, M.R.Civ.P. (Title 25, ch. 20), was misplaced because that rule is a civil contempt statute that applies only to a contemptuous party. Alpine conceded the inapplicability of the rule, but the Supreme Court pointed out that Rule 70 was not the sole basis for Alpine's motion for assignment, citing Smith v. Foss, 177 M 443, 582 P2d 329 (1978), for the proposition that a District Court possesses jurisdiction to enter any necessary orders to enforce its judgments. The District Court's assignment order did not assign Andersen's legal malpractice cause of action to Alpine, nor did Alpine receive all legal rights and title to that action. Rather, the assignment order merely required Andersen to assign future proceeds from the other litigation to Alpine in an amount limited to the funds necessary to satisfy the deficiency judgment amount. Andersen failed to establish error in the District Court's order requiring Andersen, as judgment debtor, to assign future proceeds from the separate cause of action to Alpine, the judgment creditor. Alpine Buffalo, Elk & Llama Ranch, Inc. v. Andersen, 2001 MT 307, 307 M 509, 38 P3d 815 (2001), distinguishing Coty v. Cogswell, 100 M 496, 50 P2d 249 (1935), and Youngblood v. Am. St. Ins. Co., 262 M 391, 866 P2d 203 (1993).

Promissory Note Secured by Alleged Mortgage on Real Property as Well as Collateral — Writ of Attachment for Possession of Collateral Harmless Error: Defendants, who borrowed $5,000, claimed the District Court erred in issuing a Writ of Attachment when the promissory note was secured by an alleged mortgage on real property as well as other collateral. The Supreme Court found a grave question as to whether the wording of the note constituted a hypothecation for real estate mortgage purposes, but noted that the parties did not dispute a security interest in the other collateral. Under the Uniform Commercial Code, plaintiff as secured party had the right to take possession of the collateral upon default, and the alleged erroneous issuance of the Writ of Attachment to take possession of the collateral was harmless error. Montgomery v. Hunt, 227 M 279, 738 P2d 887, 44 St. Rep. 1081 (1987).

Direct Payment of Money:

Plaintiff attended a party in a motel room. A fight erupted, and the room was damaged. The next day the owner of the motel brought an action in Justice Court against all persons present in the room. The complaint alleged liability on an implied contract basis. At the time the complaint was filed, the Justice Court issued an ex parte prejudgment attachment of plaintiff's pickup, which was impounded. At the hearing, plaintiff argued against the attachment, alleging it was not properly issued under the statute. The Justice Court upheld the attachment. Plaintiff filed a Writ of Certiorari in District Court, which was denied. On appeal, the Supreme Court held that the Justice Court's authority to issue a Writ of Prejudgment Attachment is subject to certain conditions precedent. Under 27-18-101 and 27-18-202, plaintiffs must show defendant is indebted to the plaintiff under a contract for the direct payment of money. The court found that

the implied contract not to damage the room was not one for the direct payment of money, therefore, the Justice Court was without jurisdiction to order the attachment. Buffalo v. Thiel, 213 M 280, 691 P2d 1343, 41 St. Rep. 2116 (1984).

The District Court correctly found that plaintiff had wrongfully attached defendant's property when the contract did not call for direct payment of money but required further performance as a condition to payment. Miller v. Fox, 174 M 504, 571 P2d 804 (1977).

In order to constitute a contract, express or implied, one for the direct payment of money, within the meaning of the attachment statute, the obligation sued upon must be for a definite sum, unconditional, absolute, payable at a specific time, and free from intervening agencies or conditions; it must not be a collateral agreement or dependent upon any other agreement. Gilna v. Barker, 78 M 343, 254 P 169 (1927).

Where the contract made the basis of attachment proceedings does not specify the precise amount to be paid by defendant but points to an instrument which furnishes the measure of ascertaining defendant's liability, it is sufficient to meet the requirement of this section, that it must be one for the "direct payment of money" to warrant the issuance of a Writ of Attachment. Gilna v. Barker, 78 M 343, 254 P 169 (1927).

A contract whereby defendants leased to plaintiff certain mining property for the purpose of mining, plaintiff to receive from defendants 65% of the net proceeds, was one for the "direct payment of money", and the court erred in discharging an attachment on the ground that it was not. Gilna v. Barker, 78 M 343, 254 P 169 (1927).

An action by the buyer of an automobile to recover its purchase price with interest thereon from the date of sale because of failure of title in the seller was not one upon a contract for the direct payment of money, and therefore an attachment issued therein was properly dissolved. Heffron v. Thomas, 61 M 10, 201 P 572 (1921).

Attachment does not lie in an action by the buyer of hay at an agreed price per ton to recover damages from the seller because of the inferior quality of the hay delivered, the action not being one upon a contract for the direct payment of money. Beartooth Stock Co. v. Grosscup, 57 M 595, 189 P 773 (1920), distinguished in State ex rel. Barnett v. Reynolds, 68 M 572, 220 P 525 (1923).

An action to recover damages, unliquidated in character, upon hail insurance policies, under which total and partial losses were alleged, was not one upon contracts for the direct payment of money, and an attachment was properly dissolved. Carter v. Bankers Ins. Co., 58 M 319, 192 P 827 (1920), distinguishing Ancient Order of Hibernians v. Sparrow, 29 M 132, 74 P 197 (1903).

Direct Payment of Money — Guaranty Not Contract (prior to 1985 amendment):

A guaranty of repayment of a loan is not a contract "for direct payment of money" within the meaning of this section and therefore cannot support the issuance of a Writ of Attachment. Stensvad v. Miners & Merchants Bank of Roundup, 183 M 160, 598 P2d 1083 (1979). (Decided prior to 1985 amendment which added subsection (3).)

The word "direct" denotes absence of any intervening agency, medium, or influence, an unconditional and absolute obligation to pay money, and not a collateral agreement dependent or contingent upon some other agreement. The guarantee made by a machinery company to a finance company to which it assigned a conditional sales contract, that the purchaser would faithfully perform all of its conditions, was not a contract for the direct payment of money but one conditioned upon the purchaser's default, a problematical event, and the District Court properly dissolved Writ of Attachment. Gen. Fin. Co. v. Powell, 112 M 535, 118 P2d 751 (1941). (Decided prior to 1985 amendment which added subsection (3).)

A contract guaranteeing "the collection and payment of the within note" was not one for the direct payment of money within the meaning of the attachment statute and therefore an attachment issued in an action to enforce the guaranty was properly dissolved. Square Butte St. Bank v. Ballard, 64 M 554, 210 P 1889 (1922), distinguished in Baroch v. Greater Mont. Oil Co., 70 M 93, 225 P 800 (1924). (Decided prior to 1985 amendment which added subsection (3).)

Unconstitutional Application: The Writ of Attachment statute, as applied, was violative of the requirements of notice and opportunity to be heard guaranteed by the Due Process Clause of the United States Constitution. Williams v. Matovich, 172 M 109, 560 P2d 1338 (1977).

Judgment as Basis for Attachment: A New York divorce judgment is not a contract, express or implied, for the direct payment of money so as to qualify under this section. Gibson v. Gibson, 137 M 528, 353 P2d 344 (1960).

Secured Debts — Future Advances: A chattel mortgage, which by its terms stated that it was to be security for future advances, was security for a later loan so that attachment was not available in an action for default of a later loan. The chattel mortgage was plain and unambiguous and needed no construction, so that parol evidence which tended to vary or alter

the terms of the written mortgage was required to be disregarded. First Nat'l Bank of Plains v. Green Mtn. Soil Conservation District, 130 M 1, 293 P2d 289 (1956).

Secured Debts — Real Property Contracts: In a contract for the sale of real property wherein there was provided a remedy for and security to the vendors for a breach thereof, this section precluded a rightful attachment and seizure of defendant's personal property. The contract was not one for the direct payment of money, and such payments due under the contract were secured by the provisions of the contract. Fraser v. Clark, 129 M 56, 282 P2d 459 (1955).

Surety Contract:

Where a surety is compelled to pay the principal's obligation, the law implies a contract on the part of the principal to reimburse his surety, and such a contract is one for the direct payment of money presenting a proper case for attachment proceedings. Kipp v. Paul, 110 M 513, 103 P2d 675 (1940).

A bond given in pursuance to Title 7, ch. 6, part 2, to insure the safety and prompt payment of county funds deposited by the County Treasurer, disregarding an unintelligible clause, was a contract for the direct payment of money, warranting the issuance of a Writ of Attachment against the property of the sureties in an action to recover thereon. State ex rel. Nauman v. Pondera Valley St. Bank, 77 M 1, 248 P 207 (1926).

An action by a County Treasurer to recover on a bond securing bank deposits of county funds is one on a contract for the direct payment of money, warranting the issuance of a Writ of Attachment against the property of the sureties. Jenkins v. First Nat'l Bank, 73 M 110, 236 P 1085 (1925).

An action by a surety for contribution from his cosurety is one on an implied contract for money paid by the former for the use and benefit of the latter, which the latter unconditionally and absolutely is required to pay, under 28-11-417(2), in a definite sum, namely, his proportion of the amount which plaintiff was required to pay on the undertaking; hence the action is one for the direct payment of money in which attachment may issue. Wall v. Brookman, 72 M 228, 232 P 774 (1925).

A bond in which the sureties unconditionally agreed to indemnify a County Treasurer for default of a bank to pay over to him on demand any funds he might have on deposit therein was a contract of surety and not of guaranty, by which they bound themselves to pay a fixed and definite sum not exceeding that named in the bond, namely, the amount on deposit. This was a contract for the direct payment of money, warranting the issuance of an attachment against the property of the sureties in an action on the bond. State ex rel. Barnett v. Reynolds, 68 M 572, 220 P 525 (1923).

An action against sureties on a bond, conditioned to be void if the principal performed his contract, is not an action on a contract for the "direct payment" of money. Ancient Order of Hibernians v. Sparrow, 29 M 132, 74 P 197 (1903), distinguished in Carter v. Bankers' Ins. Co., 58 M 319, 192 P 827 (1920), State ex rel. Barnett v. Reynolds, 68 M 572, 220 P 525 (1923), and St. v. Am. Sur. Co. of New York, 78 M 504, 255 P 1063 (1927).

Secured Debts — Worthless Security: Section 71-1-222 does not prohibit a personal action and levy of attachment by a mortgagee when the security has become valueless without fault on his part, and he is not required to first foreclose the mortgage and exhaust that remedy but may prove that the security is valueless in the attachment proceedings. Bailey v. Hansen, 105 M 552, 74 P2d 438 (1937).

Cause of Action Attached: A cause of action for personal injuries is not a "chose in action" such as may be classed as personal property, within the meaning of 25-13-501 and 27-18-407, and likewise does not constitute a "debt" as the term is used in 27-18-407 and is not subject to attachment before judgment. Coty v. Cogswell, 100 M 496, 50 P2d 249 (1935).

Support Obligations:

Contracts made by the wife for necessaries under authority of 40-2-103, where the husband fails or refuses to furnish them, are his contracts, and the obligations arising thereunder are his obligations; the agency referred to above is statutory but the husband's obligations are contractual; therefore attachment may issue in an action to recover for necessaries furnished the wife as upon contracts "express or implied, for the direct payment of money" within the meaning of this section. McQuay v. McQuay, 86 M 535, 284 P 532 (1930).

In an action by the assignee of claims against defendant to recover the reasonable value of medical and surgical attention and hospital care provided for his wife during her last illness, the claims were based upon contracts for the direct payment of money, authorizing attachment of funds belonging to defendant. (Mr. Justice Angstman, dissenting.) McQuay v. McQuay, 86 M 535, 284 P 532 (1930).

Effect of Judgment: Attachment may not issue upon a cause of action which has ripened into judgment. Harboldt v. Hensen, 75 M 512, 244 P 488 (1926).

Defects in Pleadings:

A mere defective statement of a cause of action readily susceptible of amendment is not a sufficient ground for the discharge of an attachment. Wall v. Brookman, 72 M 228, 232 P 774 (1925).

Where discharge of an attachment is sought on the ground that the complaint does not state a cause of action, the inquiry as to the sufficiency of the pleading is confined to the questions whether the action is upon a contract, express or implied, for the direct payment of money, whether it states facts sufficient to constitute a cause of action against the defendant, and if not, whether it can be amended so as to state a cause of action, a mere defective statement of a cause of action not being a sufficient ground for the discharge of an attachment. Savage Tire Sales Co. v. Stuart, 61 M 524, 203 P 364 (1921).

Tort Action: The Legislature, by enacting the general attachment statute under which the writ can issue only in an action upon a contract, express or implied, for the direct payment of money, was not thereby deprived of its power to grant the remedy in an action ex delicto. Daley v. Torrey, 71 M 513, 230 P 782 (1924).

Complaint as Basis of Writ: The question whether an action is one in which a Writ of Attachment may issue under this section must be determined upon the complaint alone. Heffron v. Thomas, 61 M 10, 201 P 572 (1921).

Acceleration of Debt: The plaintiff is entitled to an attachment, upon making and filing the affidavit required by section 93-4302, R.C.M. 1947 (now repealed), where, under the terms of a mortgage given upon personal property to secure the payment of a note, he is authorized to take possession of the mortgaged property whenever he considers possession essential to the security of the note, and at his option to declare the full amount of the note due; and where he has exercised such option, the unpaid balance of the note after exhaustion of the security is an indebtedness due upon an express contract for the payment of money and will support an attachment of other property. Union Bank & Trust Co. v. Himmelbauer, 56 M 82, 181 P 332 (1919), distinguished in Bice v. Daffern, 88 M 479, 293 P 433 (1930).

Requisites for Attachment: The necessary requisites for an attachment are the pendency of an action on a contract, express or implied, for the direct payment of money and an outstanding valid summons issued in such action. Am. Sur. Co. v. Kartowitz, 54 M 92, 166 P 685 (1917); Duluth Brewing & Malting Co. v. Allen, 51 M 89, 149 P 494 (1915).

Secured Debts — Burden of Proof: To justify a Justice of the Peace in discharging an attachment on the ground that the debt was secured, defendant had the burden of showing that it was secured in a manner described in this section. State ex rel. Malin-Yates Co. v. Justice of the Peace Court, 51 M 133, 149 P 709 (1915).

Secured Debts — Conditional Sale: Where personalty is sold under an agreement that title shall remain in the seller until the purchase price is paid, possession being delivered to the prospective purchaser upon giving his note for the amount thereof, the seller did not have a mortgage, pledge, or lien to secure its claim against the purchaser, within the meaning of this section, so as to destroy its right to a Writ of Attachment in an action on the note. State ex rel. Malin-Yates Co. v. Justice of the Peace Court, 51 M 133, 149 P 709 (1915).

Contractual Action: Where part of the debt sued for is on an express and part on an implied contract, an affidavit simply stating the affiant's conclusion, namely, that the defendants are indebted to the plaintiffs in a specified sum, upon an express and implied contract for the payment of money, which is now due and payable, is a sufficient compliance with the requirement of the statute that the debt sued for be upon contract. Newell v. Whitwell, 16 M 243, 40 P 866 (1895).

Collateral References

Attachment *key* 1 through 14.

7 C.J.S. Attachment §§1, et seq., 18, et seq.

6 Am. Jur. 2d Attachment and Garnishment §40.

27-18-102. What property subject to attachment.

Case Notes

Subcontractor's Lien Against Housing Authority Improper: A subcontractor's mechanics' lien (now construction lien) for utility installation on a Municipal Housing Authority project was improper. Even though Montana's mechanics' lien (now construction lien) laws are to be liberally construed to protect the rights of lien claimants and housing authorities may be sued, 7-15-4532 exempts Authority property from levy and sale by execution and 27-18-102 exempts it from

attachment and execution. Bender v. Rookhuizen, 211 M 366, 685 P2d 343, 41 St. Rep. 1418 (1984).

Unconstitutional Application: The Writ of Attachment statute, as applied, was violative of the requirements of notice and opportunity to be heard guaranteed by the Due Process Clause of the United States Constitution. Williams v. Matovich, 172 M 109, 560 P2d 1338 (1977).

Liquor License: A retail liquor license is subject to attachment. Stallinger v. Goss, 121 M 437, 193 P2d 810 (1948).

Debts Due Defendant:

Under this section and 27-18-405, a debt is property which may be attached, and a levy upon it operates to impound it and in effect to place it in the custody of the law and beyond the control of its owner; hence where a debt due plaintiff was wrongfully attached in an action against another, the seizure amounted to a conversion. Englehart v. Sage, 73 M 139, 235 P 767, 40 ALR 590 (1925).

"All debts due such defendant" does not include judgments and promissory notes not due. Perkins v. Guy, 2 M 15 (1873).

Contract for Sale of Property: Where an owner sold his land, to be paid for in installments to run through a number of years and placed a deed in escrow to be delivered to the purchaser when all of the payments should have been made, but such land was attached before the last payment was made, the title still remained in the vendor and the land was, under this section, 27-18-402, and 25-13-501, subject to attachment at the time of the levy. Knapp v. Andrus, 56 M 37, 180 P 908 (1919), distinguished in Christie v. Morris, 119 M 383, 176 P2d 660 (1946).

Collateral References

Attachment *key* 56.

7 C.J.S. Attachment §64, et seq.

6 Am. Jur. 2d Attachment and Garnishment §91, et seq.

Liquor license as subject to execution or attachment. 40 ALR 4th 927.

Special bank deposits as subject of attachment or garnishment to satisfy depositor's general obligations. 8 ALR 4th 998.

What constitutes a fraudulently contracted debt or fraudulently incurred liability obligation within purview of statute authorizing attachment on such grounds. 39 ALR 2d 1265.

Attachment in action on note or bond not resulting in sale of mortgaged property, as precluding foreclosure of real estate mortgage. 37 ALR 2d 960.

27-18-112. Attachment book to be kept by county clerk.

Case Notes

Unconstitutional Application: The Writ of Attachment statute, as applied, was violative of the requirements of notice and opportunity to be heard guaranteed by the Due Process Clause of the United States Constitution. Williams v. Matovich, 172 M 109, 560 P2d 1338 (1977).

Collateral References

Attachment *key* 144.

7 C.J.S. Attachment §180.

Part 2
Procedure for Obtaining Writ

Part Attorney General's Opinions

Writs of Attachment to Be Issued Under Judicial Supervision: Montana recognizes the existence of common law, but only insofar as it does not conflict with specific statutory enactments. Montana has established statutory procedures for attaching property. The petition must be supported by an affidavit of the person seeking attachment. The petitioner must furnish a written undertaking to be approved by a court. Finally, a judge, not the petitioner, issues the Writ of Attachment. Prejudgment common-law Writs of Attachment are not issued under judicial supervision. This directly conflicts with the statutory requirements of Montana's prejudgment attachment laws. Thus, common-law Writs of Attachment issued without judicial supervision are of no effect in Montana. 38 A.G. Op. 115 (1980).

27-18-201. Time for attaching property.

Case Notes

Writ of Attachment on Concert Proceeds — Pleading Prior Security Interest in Proceeds: Respondent obtained a Writ of Attachment in the proceeds of a rock concert to the extent of the appellant's alleged indebtedness to him. Appellant attempted to assert a third party's prior

perfected security interest in the attached proceeds. The Supreme Court held that the third party must assert his own interest. The appellant lacked standing to raise the third party's interest as a defense to the attachment. The District Court's continuance of the Writ of Attachment over any liens which may possibly have been superior to the respondent's interest in the concert proceeds was proper. N. Dak. v. Newberger, d.b.a. Amusement Conspiracy, 188 M 323, 613 P2d 1002, 37 St. Rep. 1119 (1980).

Unconstitutional Application: The Writ of Attachment statute, as applied, was violative of the requirements of notice and opportunity to be heard guaranteed by the Due Process Clause of the United States Constitution. Williams v. Matovich, 172 M 109, 560 P2d 1338 (1977).

Writ of Attachment Issued Before Summons:

The Writ of Attachment may issue at the time of issuing summons or thereafter but not before. Am. Sur. Co. v. Kartowitz, 54 M 92, 166 P 685 (1917).

A Writ of Attachment which is issued before a valid summons is absolutely void and not merely voidable. Duluth Brewing & Malting Co. v. Allen, 51 M 89, 149 P 494 (1915); Burke v. Inter-State S & L Ass'n, 25 M 315, 64 P 879 (1901), distinguished in Jenkins v. Carroll, 42 M 302, 112 P 1064 (1910); Sharman v. Huot, 20 M 555, 52 P 558 (1898), distinguished in Kipp v. Burton, 29 M 96, 74 P 85 (1903).

Where the original summons was void because entitled in the wrong county, a so-called "alias summons" was not such in fact but was the first valid summons issued in the action and could not give legal effect to a Writ of Attachment issued and served before it was issued. Duluth Brewing & Malting Co. v. Allen, 51 M 89, 149 P 494 (1915).

Collateral References

Attachment *key* 1 through 14.

7 C.J.S. Attachment §18, et seq.

27-18-202. Plaintiff's affidavit.

Case Notes

No Contract for Direct Payment of Money — Lack of Justice Court Jurisdiction for Attachment: Plaintiff attended a party in a motel room. A fight erupted, and the room was damaged. The next day the owner of the motel brought an action in Justice Court against all persons present in the room. The complaint alleged liability on an implied contract basis. At the time the complaint was filed, the Justice Court issued an ex parte prejudgment attachment of plaintiff's pickup, which was impounded. At the hearing, plaintiff argued against the attachment, alleging it was not properly issued under the statute. The Justice Court upheld the attachment. Plaintiff filed a Writ of Certiorari in District Court, which was denied. On appeal, the Supreme Court held that the Justice Court's authority to issue a Writ of Prejudgment Attachment is subject to certain conditions precedent. Under 27-18-101 and 27-18-202, plaintiffs must show defendant is indebted to the plaintiff under a contract for the direct payment of money. The court found that the implied contract not to damage the room was not one for the direct payment of money, therefore, the Justice Court was without jurisdiction to order the attachment. Buffalo v. Thiel, 213 M 280, 691 P2d 1343, 41 St. Rep. 2116 (1984).

Writ of Attachment Improperly Issued — Failure to Prove Debt and Disposition of Sale Proceeds: Where the plaintiff real estate brokers obtained a Writ of Attachment directed at tying up proceeds of a house sale in order to assure sufficient funds to pay their commission should they prevail in an action against the defendants for that commission, the court committed reversible error in refusing to dissolve the Writ. At trial the plaintiffs contended that no debt was owed until the property was sold. No evidence was presented that the sale had actually closed nor was any evidence, as opposed to conclusory statements, presented in the plaintiffs' affidavit, from which the court could reasonably conclude that the sellers or buyers intended to defraud the plaintiffs of their commission. Mather v. Dunstan, 191 M 147, 622 P2d 677, 38 St. Rep. 97 (1981).

Collateral References

6 Am. Jur. 2d Attachment and Garnishment §§254 through 257.

27-18-203. Affidavit requirements when debt not yet due.

Case Notes

Writ of Attachment Improperly Issued — Failure to Prove Debt and Disposition of Sale Proceeds: Where the plaintiff real estate brokers obtained a Writ of Attachment directed at tying up proceeds of a house sale in order to assure sufficient funds to pay their commission should they prevail in an action against the defendants for that commission, the court committed reversible error in refusing to dissolve the Writ. At trial the plaintiffs contended that no debt was owed until the property was sold. No evidence was presented that the sale had actually closed

nor was any evidence, as opposed to conclusory statements, presented in the plaintiffs' affidavit, from which the court could reasonably conclude that the sellers or buyers intended to defraud the plaintiffs of their commission. Mather v. Dunstan, 191 M 147, 622 P2d 677, 38 St. Rep. 97 (1981).

Scope of Section: This section relates only to actions for the recovery of debts not due when the defendant is leaving or is about to leave the state, taking his property with him, or is disposing or about to dispose of it for the purpose of defrauding his creditors. Union Bank & Trust Co. v. Himmelbauer, 56 M 82, 181 P 332 (1919).

Collateral References

Attachment *key* 21, et seq.

7 C.J.S. Attachment §§117 through 123.

6 Am. Jur. 2d Attachment and Garnishment §56.

What amounts to a "debt" within statute providing for attachment before debt is due. 58 ALR 2d 1451; 65 ALR 1439.

27-18-204. Plaintiff's undertaking.

Case Notes

Evidence of Malicious Attachment — Motion to Dismiss Properly Denied: In Spooner Constr. & Tree Serv., Inc. v. Maner, 2000 MT 161, 300 M 268, 3 P3d 641 (2000), it was held that plaintiff admitted no entitlement to any money from a logging agreement or any rental fees associated with defendant's use of a logging skidder. Nevertheless, plaintiff made no attempt to contact defendant to submit a bill, request payment, or discuss the logging contract, but instead, after disabling the skidder, plaintiff filed a lien against and later attached the skidder, with the intent to bid on it at a Sheriff's sale. Defendant presented both direct and circumstantial evidence that, without probable cause, plaintiff wrongfully attached the skidder with an improper motive and with reckless disregard for the facts, constituting a prima facie case of malicious wrongful attachment. Plaintiff's motion to dismiss was properly denied. Spooner Constr. & Tree Serv., Inc. v. Maner, 2003 MT 43, 314 M 268, 66 P3d 263 (2003).

Counterclaim Premised on Malicious Prosecution or Abuse of Process as Suit in Tort — Necessary Elements: A counterclaim alleging damages for breach of fiduciary duty, constructive fraud, creditor overreaching, and wrongful attachment did not meet the conditions of a counterclaim and third-party complaint on an attachment bond as provided in 27-18-204. The counterclaim was then premised upon the common-law notions of malicious prosecution or abuse of process, which is a suit in tort. To recover on such a suit, the elements of malice and want of probable cause must be present and proved. Absent evidence of these elements, the counterclaim was properly dismissed. Montgomery v. Hunt, 227 M 279, 738 P2d 887, 44 St. Rep. 1081 (1987).

Award of Costs and Attorney Fees — Use of Contingency Agreement: Defendants defaulted on a promissory note. The bank and defendants negotiated a new note and executed a security agreement. This note provided the debtor would be liable for collection costs, including reasonable attorney fees, upon default. Defendants defaulted, and the bank repossessed and sold the security. A deficiency remained. The bank retained an attorney under a contingency fee agreement to collect the deficiency, and suit was filed. Defendants' answer raised defenses necessitating research and investigation. The attorney discovered defendants owned unmortgaged land, which they were attempting to transfer. The bank attached the land and acted as its own surety and purchased a separate surety bond. The trial court included the bond in allowable costs and awarded $5,000 in attorney fees to the bank. The bond was required under 27-18-204, and under the note was clearly a cost of collection. The attorney estimated 50 hours of work. The trial court followed the guidelines of Crncevich v. Georgetown Recreation Corp., 168 M 113, 541 P2d 56 (1975), for awarding attorney fees and found that since he would be entitled to more under the contingency agreement, which was not binding on the court, the award was reasonable. The Supreme Court found that the trial court's findings and conclusions adequately supported the award. First Nat'l Bank v. Beckstrom, 200 M 323, 651 P2d 45, 39 St. Rep. 1778 (1982).

Writ of Attachment on Concert Proceeds — Pleading Prior Security Interest in Proceeds: Respondent obtained a Writ of Attachment in the proceeds of a rock concert to the extent of the appellant's alleged indebtedness to him. Appellant attempted to assert a third party's prior perfected security interest in the attached proceeds. The Supreme Court held that the third party must assert his own interest. The appellant lacked standing to raise the third party's interest as a defense to the attachment. The District Court's continuance of the Writ of Attachment over any liens which may possibly have been superior to the respondent's interest in the concert proceeds was proper. N. Dak. v. Newberger, d.b.a. Amusement Conspiracy, 188 M 323, 613 P2d 1002, 37 St. Rep. 1119 (1980).

Wrongful Attachment Action Improperly Dismissed: The District Court erred in dismissing defendant's complaint for wrongful attachment with prejudice since the court clearly decided that plaintiff was not entitled to the attachment and its order dissolving the attachment had become final. Audit Serv., Inc. v. Haugen, 181 M 9, 591 P2d 1105 (1979).

Unconstitutional Application: The Writ of Attachment statute, as applied, was violative of the requirements of notice and opportunity to be heard guaranteed by the Due Process Clause of the United States Constitution. Williams v. Matovich, 172 M 109, 560 P2d 1338 (1977).

Action on Bond: A defendant's cause of action under an attachment bond accrues only when judgment for him in the attachment action has been made, entered, and filed, so his recovery must be by a separate action on the bond rather than being included in the judgment in the original action. Yellowstone Livestock Comm'n v. Dupuis, 133 M 454, 325 P2d 691 (1958).

Estoppel of Surety: In an action on a bond given to procure an attachment, the obligor is estopped to deny the validity of the attachment proceeding, and on the Sheriff's return of an attachment levy, the obligor will not be heard to question the legality of the levy. Williard v. Fed. Sur. Co., 91 M 465, 8 P2d 633 (1932).

Judgment Dissolving Attachment: A judgment on the merits dissolving an attachment is conclusive that the writ was wrongfully issued, in a subsequent action on the attachment bond to recover the damages flowing from its levy. Williard v. Fed. Sur. Co., 91 M 465, 8 P2d 633 (1932).

Legal Expense in Defending:

Plaintiff in an action on an attachment bond may recover as damages the amount paid or contracted to be paid by him in bringing about a dissolution of the attachment. Williard v. Fed. Sur. Co., 91 M 465, 8 P2d 633 (1932).

Attorney's fees, paid or agreed to be paid for services rendered in having an attachment dissolved, fall within the purview of this section. Plymouth Gold Min. Co. v. USF&G Co., 35 M 23, 88 P 565 (1907).

Public Officers Attaching: Under 25-1-402, a County Treasurer is not required to furnish an undertaking on attachment in an action brought in his official capacity for the benefit of the county to recover on an indemnity bond against loss of county funds in a bank. Jenkins v. First Nat'l Bank, 73 M 110, 236 P 1085 (1925).

Signature of Undertaking: An undertaking in attachment need not be signed by the plaintiff. The statute is complied with if two sufficient sureties sign the undertaking on behalf of the plaintiff. If such undertaking is defective, a new one may be filed. Woodman v. Calkins, 13 M 363, 34 P 187 (1893); Hoskins v. White, 13 M 70, 32 P 163 (1893); McIntosh v. Hurst, 6 M 287, 12 P 647 (1887); Pierse v. Miles, 5 M 549, 6 P 347 (1885), distinguished in Deer Lodge County v. USF&G Co., 42 M 315, 112 P 1060 (1910).

Terms of Undertaking: An undertaking in attachment, in which the sureties contract to answer for the wrongful suing out of the attachment, is not a sufficient compliance with a statute requiring such undertaking to be conditioned for the payment of all damages that the defendant may sustain, if it is finally decided that the plaintiff was not entitled to the attachment. Pierse v. Miles, 5 M 549, 6 P 347 (1885).

Law Review Articles

". . . And Attorney Fees to the Prevailing Party": Recovering Attorney Fees Under Montana Statutory Law, Williams, 46 Mont. L. Rev. 119 (1985).

Collateral References

Attachment *key* 128, et seq.

7 C.J.S. Attachment §138, et seq.

6 Am. Jur. 2d Attachment and Garnishment §518.

27-18-206. Issuance of several writs to different counties.

Case Notes

Unconstitutional Application: The Writ of Attachment statute, as applied, was violative of the requirements of notice and opportunity to be heard guaranteed by the Due Process Clause of the United States Constitution. Williams v. Matovich, 172 M 109, 560 P2d 1338 (1977).

Collateral References

Attachment *key* 140 through 158, 192.

7 C.J.S. Attachment §179.

6 Am. Jur. 2d Attachment and Garnishment §§276, 523.

27-18-207. Alias writs.

Case Notes

Unconstitutional Application: The Writ of Attachment statute, as applied, was violative of the requirements of notice and opportunity to be heard guaranteed by the Due Process Clause of the United States Constitution. Williams v. Matovich, 172 M 109, 560 P2d 1338 (1977).

Collateral References

Attachment *key* 155.

Part 3
Writ of Attachment — Execution

27-18-301. Form and content of writ — defendant's undertaking to prevent levy.

Case Notes

Storage Costs Reasonable: County Sheriff, in seizing and storing a motorcycle pursuant to a writ of prejudgment attachment, incurred costs that greatly exceeded the amount the judgment creditor obtained upon execution sale. When the creditor questioned the reasonableness of the storage costs, the court properly determined the Sheriff acted reasonably to fulfill his duty to attach and safely keep the property pursuant to the writ of attachment. Carl Weissman & Sons, Inc. v. Paulson, 227 M 459, 739 P2d 494, 44 St. Rep. 1232 (1987).

Writ of Attachment on Concert Proceeds — Pleading Prior Security Interest in Proceeds: Respondent obtained a Writ of Attachment in the proceeds of a rock concert to the extent of the appellant's alleged indebtedness to him. Appellant attempted to assert a third party's prior perfected security interest in the attached proceeds. The Supreme Court held that the third party must assert his own interest. The appellant lacked standing to raise the third party's interest as a defense to the attachment. The District Court's continuance of the Writ of Attachment over any liens which may possibly have been superior to the respondent's interest in the concert proceeds was proper. N. Dak. v. Newberger, d.b.a. Amusement Conspiracy, 188 M 323, 613 P2d 1002, 37 St. Rep. 1119 (1980).

Unconstitutional Application: The Writ of Attachment statute, as applied, was violative of the requirements of notice and opportunity to be heard guaranteed by the Due Process Clause of the United States Constitution. Williams v. Matovich, 172 M 109, 560 P2d 1338 (1977).

Simulation of Legal Process: The practice of a collection agency of addressing to debtors, on regular legal paper used in court proceedings bearing the names of the parties as plaintiff and defendant, what was designated "final notice" containing the legend "original to the defendant, and duplicate to the clerk of the court", before any action was commenced, thus simulating legal process, was condemned in a proceeding in contempt for practicing law without a license. State ex rel. Freebourn v. Merchants' Credit Serv., Inc., 104 M 76, 66 P2d 337 (1937).

Contents of Writ:

Where the complaint on which a Writ of Attachment is issued demands different amounts from several defendants, the Writ must conform to the complaint in that respect and direct the attachment of so much property of the respective defendants as will secure the amount alleged to be due from each one. State ex rel. Nauman v. Pondera Valley St. Bank, 77 M 1, 248 P 207 (1926).

The clerk is required to insert in the writ the amount of the plaintiff's demand or demands, in conformity with that cause of action or those causes of action, set out in the complaint, on which, as shown by the affidavit, plaintiff is entitled to attach. When the writ so states, the ministerial duty of the clerk is performed. Wilson v. Barbour, 21 M 176, 53 P 315 (1898).

Exempt Property: Authority is given to attach or levy upon property not exempt. When exempt personal property is mortgaged, it is still exempt as to all the world except the mortgagee. Cheney v. Caldwell, 20 M 77, 49 P 397 (1897).

Collateral References

Attachment *key* 140 through 158, 192.

7 C.J.S. Attachment §345, et seq.

6 Am. Jur. 2d Attachment and Garnishment §§276, 523.

27-18-302. Filing of undertaking — sheriff's liability.

Collateral References

Attachment *key* 140 through 158, 192.

6 Am. Jur. 2d Attachment and Garnishment §§276, 523.

27-18-303. Order of execution when several writs against same defendant.

Case Notes

Writ of Attachment on Concert Proceeds — Pleading Prior Security Interest in Proceeds: Respondent obtained a Writ of Attachment in the proceeds of a rock concert to the extent of the appellant's alleged indebtedness to him. Appellant attempted to assert a third party's prior perfected security interest in the attached proceeds. The Supreme Court held that the third party must assert his own interest. The appellant lacked standing to raise the third party's interest as a defense to the attachment. The District Court's continuance of the Writ of Attachment over any liens which may possibly have been superior to the respondent's interest in the concert proceeds was proper. N. Dak. v. Newberger, d.b.a. Amusement Conspiracy, 188 M 323, 613 P2d 1002, 37 St. Rep. 1119 (1980).

Conflicting Attachments: Since, for purposes of garnishment, a debt has no fixed situs but may be reached in any jurisdiction where the person found owing it can be located, Wyoming court was bound to give full faith and credit to Montana court in determining which garnisher had prior claim where Writs of Attachment had been issued by different parties on the same garnishee in both states. Great Falls Transfer & Storage Co. v. Pan Am. Petroleum Corp., 353 F2d 348 (10th Cir. 1965).

27-18-304. When sheriff may require written specification of property to be levied upon.

Case Notes

Unconstitutional Application: The Writ of Attachment statute, as applied, was violative of the requirements of notice and opportunity to be heard guaranteed by the Due Process Clause of the United States Constitution. Williams v. Matovich, 172 M 109, 560 P2d 1338 (1977).

27-18-305. Security for sheriff's costs.

Collateral References

Sheriffs and Constables *key* 101.

80 C.J.S. Sheriffs and Constables §56.

27-18-306. Sheriff's duty to execute.

Case Notes

Unconstitutional Application: The Writ of Attachment statute, as applied, was violative of the requirements of notice and opportunity to be heard guaranteed by the Due Process Clause of the United States Constitution. Williams v. Matovich, 172 M 109, 560 P2d 1338 (1977).

Collateral References

Attachment *key* 162, et seq.

7 C.J.S. Attachment §§204, 205.

6 Am. Jur. 2d Attachment and Garnishment §§276, 288.

27-18-307. Lien of attachment.

Case Notes

Writ of Attachment on Concert Proceeds — Pleading Prior Security Interest in Proceeds: Respondent obtained a Writ of Attachment in the proceeds of a rock concert to the extent of the appellant's alleged indebtedness to him. Appellant attempted to assert a third party's prior perfected security interest in the attached proceeds. The Supreme Court held that the third party must assert his own interest. The appellant lacked standing to raise the third party's interest as a defense to the attachment. The District Court's continuance of the Writ of Attachment over any liens which may possibly have been superior to the respondent's interest in the concert proceeds was proper. N. Dak. v. Newberger, d.b.a. Amusement Conspiracy, 188 M 323, 613 P2d 1002, 37 St. Rep. 1119 (1980).

Sufficiency of Writ — Third Person Subject of Attachment: This section, together with 27-18-401 and 25-13-501, establishes that service of a Writ of Attachment or Execution is not alone sufficient to create a lien when a debt owed by a third person is the subject of the attachment; also required is service of a notice that the debt owing is attached in pursuance of the Writ. If the Writ and notice are not served, the debt is not properly attached and no lien is created. It necessarily follows that if the property is not properly attached, the Writ of Attachment is a nullity. Phillips v. Loberg, 186 M 331, 607 P2d 561 (1980).

Time of Attachment of Lien: Property seized under a Writ of Attachment is impressed with a lien from the date on which the Writ was levied, and this lien continues in force until judgment. Moreland v. Monarch Min. Co., 55 M 419, 178 P 175 (1919).

Collateral References

Attachment *key* 179, et seq.

7 C.J.S. Attachment §263, et seq.

27-18-308. Attachment not released by defendant's death.

Case Notes

Unconstitutional Application: The Writ of Attachment statute, as applied, was violative of the requirements of notice and opportunity to be heard guaranteed by the Due Process Clause of the United States Constitution. Williams v. Matovich, 172 M 109, 560 P2d 1338 (1977).

Execution to Enforce Attachment:

The levy of an attachment on real property made at the commencement of an action on a promissory note creates a lien which may be enforced by execution where the levy was made and judgment obtained prior to the judgment debtor's death. Andrews v. Smithson, 114 M 360, 136 P2d 531 (1943).

In the absence of a statute so providing, the death of the defendant in an action in which his real property was attached, occurring after levy and before judgment, does not dissolve the attachment or render it nonenforceable. In re Stevenson's Estate, 87 M 486, 289 P 566 (1930), explained in Andrews v. Smithson, 114 M 360, 136 P2d 531 (1943).

Quaere: Does this section authorize the enforcement of the attachment lien by execution? Davis v. Claxton, 82 M 574, 268 P 787 (1928). See Andrews v. Smithson, 114 M 360, 136 P2d 531 (1943).

Collateral References

Attachment *key* 184, 272.

7 C.J.S. Attachment §283.

6 Am. Jur. 2d Attachment and Garnishment §413.

Death of principal defendant as abating or dissolving attachment. 131 ALR 1146; 21 ALR 272.

Discharge of attachment or bond for its dissolution by subsequent amendment of pleadings or the writ. 74 ALR 912.

Part 4
Manner of Attaching Property

27-18-401. Sheriff to take custody of books and evidences of title.

Case Notes

Unconstitutional Application: The Writ of Attachment statute, as applied, was violative of the requirements of notice and opportunity to be heard guaranteed by the Due Process Clause of the United States Constitution. Williams v. Matovich, 172 M 109, 560 P2d 1338 (1977).

Collateral References

Attachment *key* 162, et seq.

7 C.J.S. Attachment §§210, 225 through 236.

27-18-402. Real property in defendant's name.

Case Notes

Oil and Gas Rights: The right to search for oil or gas under a lease granting the lessee the right to appropriate them as personal property when found, upon yielding to the lessor an agreed royalty, is a right to take a profit from the land of another—the common-law profit a prendre; it is an interest in real property and attachable as such in the manner prescribed by this section for attaching real property. Williard v. Fed. Sur. Co., 91 M 465, 8 P2d 633 (1932).

Collateral References

Attachment *key* 159, et seq.

7 C.J.S. Attachment §234, et seq.

6 Am. Jur. 2d Attachment and Garnishment §288, et seq.

27-18-403. Real property in another's name.

Collateral References

Attachment *key* 159, et seq.

7 C.J.S. Attachment §234, et seq.

6 Am. Jur. 2d Attachment and Garnishment §288, et seq.

27-18-404. Personal property capable of manual delivery.

Case Notes

Abandonment of Attached Property: Where personal property capable of manual delivery is abandoned by the keeper placed in charge of it and the Sheriff does not retake or attempt to retake possession, the abandonment is equivalent to a surrender of the property and the attachment is dissolved. Keith v. Ramage, 66 M 578, 214 P 326 (1923).

Substantial Compliance Required: The requirements that personal property capable of manual delivery must be attached by taking it into custody and that property of that description incapable of such delivery must be attached by leaving a copy of the writ with the owner or the person in control of it as his agent, together with a notice that it is attached in pursuance of the writ, must be substantially followed, the statute recognizing no equivalent or evasion; otherwise, the attaching creditor acquires no lien upon the property in satisfaction of any judgment he may thereafter obtain. Keith v. Ramage, 66 M 578, 214 P 326 (1923).

27-18-405. Debts, credits, and personal property in control of third person or not capable of manual delivery.

Case Notes

Notice Together With Writ Required for Valid Attachment: Service of a Writ of Attachment alone is not sufficient to create a lien under 27-18-307 when the debt owed by a third person is the subject of attachment; also required is service of a notice that the debt owing is attached in pursuance of the Writ. Phillips v. Loberg, 186 M 331, 607 P2d 561 (1980).

Unconstitutional Application: The Writ of Attachment statute, as applied, was violative of the requirements of notice and opportunity to be heard guaranteed by the Due Process Clause of the United States Constitution. Williams v. Matovich, 172 M 109, 560 P2d 1338 (1977).

Equitable Rights: In garnishment the equitable title to the property sought to be reached will prevail over the bare legal title. Notice or knowledge by a county of the assignment by its Sheriff to a Deputy of his claim for mileage was not necessary unless it acted to the county's prejudice before notice. A judgment creditor who levies execution on all money due from a county to his debtor (here a Deputy Sheriff) acquires all the rights which the debtor had at the time of the levy to the extent of the creditor's claim. DeForest v. Cascade County, 112 M 599, 120 P2d 425 (1941).

Third Party Holding Property:

Where an attachment is made upon personal property in the possession of a third person (a garnishment), the property is in custodia legis irrespective of the answer made by the garnishee in the return, and thereby the garnisher acquires such a lien or interest in the property as will enable him to hold the garnishee liable for the property or its value. Fousek v. DeForest, 90 M 448, 4 P2d 472 (1931).

Where property of a defendant is held by one whose possession the plaintiff has no right to disturb, garnishment is the only method by which it may be attached. Noel v. Cowan, 80 M 258, 260 P 116 (1927).

Evidences of Indebtedness: The "credits" referred to in (1) of this section, providing the manner in which debts, credits, and personal property not capable of manual delivery must be attached, are something belonging to the defendant but in possession and under the control of the garnishee, such as promissory notes or other evidences of indebtedness which may be delivered to the Sheriff. Davis v. Claxton, 82 M 574, 268 P 787 (1928).

Levy on Cause of Action: A cause of action being personal property not capable of manual delivery, levy of execution upon it must, under 25-13-501, be made in like manner as upon a Writ of Attachment, which is, under subsection (1) of this section, by leaving a copy of the Writ and a notice that the cause of action is levied upon with the owner; hence where the copy and notice were delivered to the Clerk of the District Court and not to the owner, the levy was ineffective. State ex rel. Coffey v. District Court, 74 M 355, 240 P 667 (1925).

Debts Due Defendant: Under 27-18-102 and this section, a debt is "property" which may be attached, and a levy upon it operates to impound it and in effect to place it in the custody of the law and beyond the control of its owner; hence where a debt due plaintiff was wrongfully attached in an action against another, the seizure amounted to a conversion. Englehart v. Sage, 73 M 139, 235 P 767, 40 ALR 590 (1925).

Bulk Transfers: Under this section and 25-13-501, where plaintiff, after recovery of judgment against a mercantile corporation which had theretofore transferred its entire stock of merchandise in bulk to defendant without complying with the provisions of the bulk sales law, had served a copy of a Writ of Execution on defendant, together with a notice that any property in his possession or under his control belonging to the judgment debtor was attached pursuant to the Writ, a specific lien was created and fastened upon the property in favor of plaintiff sufficient

to enable it to prosecute a creditor's bill against the purchaser. Wheeler & Motter Mercantile Co. v. Moon, 49 M 307, 141 P 665 (1914).

Dismissal of Attachment: Under this section and 27-18-902, on the dismissal of an attachment, the Sheriff is bound to account to the successful defendant for money collected under the attachment from such defendant's debtor. Michener v. Fransham, 33 M 108, 81 P 953 (1905).

Debts Shown by Books of Account: It is the duty of a Sheriff who has levied an attachment upon a stock of goods and has in his possession thereunder the books of account of the defendant to garnish those who appear therein as debtors, without first receiving a written notice from the plaintiff or his attorney. Mont. Mill. Co. v. Jeffries, 14 M 143, 35 P 908 (1894).

Attorney General's Opinions

Sheriff's Protection From Liability for Attaching Exempt Property: To protect himself from liability when attaching property, as required by this section, which may be rightfully claimed as exempt by the attachment debtor, a Sheriff may require an indemnity bond from the attachment creditor or may request the attachment debtor to file his exemption affidavit in the Justice Court issuing the Writ of Attachment for a determination of the exempt status of the property attached. 28 A.G. Op. 38 1959.

Collateral References

Attachment *key* 159, et seq.

7 C.J.S. Attachment §227.

6 Am. Jur. 2d Attachment and Garnishment §288, et seq.

27-18-406. Money, credits, or other property in control of public officer or board.

Case Notes

Unconstitutional Application: The Writ of Attachment statute, as applied, was violative of the requirements of notice and opportunity to be heard guaranteed by the Due Process Clause of the United States Constitution. Williams v. Matovich, 172 M 109, 560 P2d 1338 (1977).

Equitable Rights Attached: In garnishment the equitable title to the property sought to be reached will prevail over the bare legal title. Notice or knowledge by a county of the assignment by its Sheriff to a Deputy of his claim for mileage was not necessary unless it acted to the county's prejudice before notice. A judgment creditor who levies execution on all money due from a county to his debtor (here a Deputy Sheriff) acquires all the rights which the debtor had at the time of the levy to the extent of the creditor's claim. DeForest v. Cascade County, 112 M 599, 120 P2d 425 (1941).

Collateral References

Garnishment *key* 18.

38 C.J.S. Garnishment §§38 through 45, 90, 121.

Constitutionality of statute authorizing garnishment of salary or wages of public officials or employees. 123 ALR 903; 22 ALR 760.

Redemption money in hands of officer as subject to garnishment. 94 ALR 1049.

Garnishment of salaries, wages, or commissions of public officials or employees not expressly exempted by statute. 56 ALR 602.

27-18-407. Liability of third persons controlling property or debts and served by sheriff.

Case Notes

Tort Causes of Action: A cause of action for personal injuries is not a "chose in action" such as may be classed as personal property, within the meaning of 25-13-501 and 27-18-407, does not constitute a "debt" as the term is used in 27-18-407, and is not subject to attachment before judgment. Coty v. Cogswell, 100 M 496, 50 P2d 249 (1935).

Bulk Transfers: Where a merchant has transferred his stock in violation of the bulk sales law and the buyer, at the time of the levy of an execution upon him, accompanied by a notice of garnishment, has the identical property in his possession, he is liable, under this section, to the plaintiff creditor who sues him as garnishee. Wheeler & Motter Mercantile Co. v. Moon, 49 M 307, 141 P 665 (1914).

Amount of Debt Uncertain: If the liability of the garnishee is certain and the only uncertainty which exists is as to the amount of such liability, then the debt, whatever it may be, is subject to garnishment. Dolenty v. Rocky Mtn. Bell Tel. Co., 41 M 105, 108 P 921 (1910), explained in Coty v. Cogswell, 100 M 496, 50 P2d 249 (1935).

Conditional Obligation: In order to charge a garnishee, there must be, at the time of the service, a debt due or to become due and not a contingent liability or a conditional contract. Cowell v. May, 26 M 163, 66 P 843 (1901), explained in Coty v. Cogswell, 100 M 496, 50 P2d 249 (1935).

Collateral References

Garnishment *key* 229 through 231.

38 C.J.S. Garnishment §§192 through 198.

6 Am. Jur. 2d Attachment and Garnishment §331.

Joint bank account as subject to attachment, garnishment, or execution by creditor of one joint depositor. 86 ALR 5th 527.

Wrongful discharge: employer's liability under state law for discharge of employee based on garnishment order against wages. 41 ALR 5th 31.

Garnishment of funds payable under building and construction contract. 16 ALR 5th 548.

Options or other benefits available to insured in his lifetime as subject to garnishment by his creditors. 37 ALR 2d 268.

Garnishment as remedy in case of violation of bulk sales law. 155 ALR 1061.

Issuance and return of execution as necessary condition of garnishment after judgment. 128 ALR 1153.

Judgment in tort action as subject of garnishment pending appeal. 121 ALR 420.

Resident or foreign corporation doing business within state as subject to garnishment because of indebtedness to nonresident who in turn is indebted to nonresident principal defendant. 116 ALR 387.

Garnishment as suit within rule that state may not be sued without its consent. 114 ALR 261.

Tenant's obligation in respect of rent as subject to garnishment by landlord's creditor. 100 ALR 307.

Redemption money in hands of officer as subject to garnishment. 94 ALR 1049.

Property of incompetent or infant under guardianship as subject to garnishment. 92 ALR 919.

Judgment for conversion of property as subject of garnishment by creditor of the owner. 91 ALR 1340.

Interest of mortgagor or pledgor in property in possession of mortgagee or pledgee as subject of garnishment. 83 ALR 1383.

Indebtedness to partnership as subject of attachment or garnishment by creditor of individual partner. 71 ALR 77.

Right of one to summon or charge himself as garnishee. 61 ALR 1458; 31 ALR 711.

Vendee's interest under conditional sales contract as subject to garnishment. 61 ALR 781.

Accounts in one's hands for collection as subject of garnishment. 60 ALR 884.

County as subject to garnishment process. 60 ALR 823.

Garnishment of salaries, wages, or commissions not expressly exempted by statute. 56 ALR 601.

Liability of alimony for wife's debts. 55 ALR 361, superseded in part by 10 ALR Fed. 881.

Garnishment of fire insurer. 53 ALR 724; 38 ALR 1072.

Garnishment of deposit in branch bank. 50 ALR 1354, supplemented by 136 ALR 471.

Proceeds of voluntary sale of homestead as subject of garnishment. 46 ALR 814; 1 ALR 483.

Judgment as subject to garnishment in another court of the state in which it was rendered. 43 ALR 190.

Note or check itself as subject of garnishment. 41 ALR 1003.

Assignment by principal defendant to nonresident served constructively as affecting jurisdiction to garnish debt. 39 ALR 1465.

Jurisdiction to garnish a debt due from a foreign corporation doing business within the state to a nonresident, arising from business outside the state. 27 ALR 1396.

Garnishment of money in escrow. 10 ALR 741.

27-18-408. Judgments.

Collateral References

Attachment *key* 159, et seq.

7 C.J.S. Attachment §§284 through 290.

6 Am. Jur. 2d Attachment and Garnishment §288, et seq.

27-18-409. Investment securities and stocks.

Case Notes

Unconstitutional Application: The Writ of Attachment statute, as applied, was violative of the requirements of notice and opportunity to be heard guaranteed by the Due Process Clause of the United States Constitution. Williams v. Matovich, 172 M 109, 560 P2d 1338 (1977).

Collateral References

Attachment *key* 159, et seq.
7 C.J.S. Attachment §§231, 232.
6 Am. Jur. 2d Attachment and Garnishment §288, et seq.

27-18-410. Corporate stock — service on secretary of state.

Case Notes

Unconstitutional Application: The Writ of Attachment statute, as applied, was violative of the requirements of notice and opportunity to be heard guaranteed by the Due Process Clause of the United States Constitution. Williams v. Matovich, 172 M 109, 560 P2d 1338 (1977).

Collateral References

Attachment *key* 165.
7 C.J.S. Attachment §§231, 232.

27-18-411. Duty of secretary of state — fees.

Compiler's Comments

2001 Amendment: Chapter 396 in (1) in last sentence substituted "specified assets" for "said stock or shares or the interest therein"; substituted (2) concerning charging and collecting a fee set and deposited in accordance with 2-15-405 for former text that read: "At the time of the service of said writ, there shall be paid to the secretary of state a fee of $2, which shall be by him paid into the state treasury and which may be taxed as cost by the plaintiff"; and made minor changes in style. Amendment effective July 1, 2001.

Case Notes

Unconstitutional Application: The Writ of Attachment statute, as applied, was violative of the requirements of notice and opportunity to be heard guaranteed by the Due Process Clause of the United States Constitution. Williams v. Matovich, 172 M 109, 560 P2d 1338 (1977).

Part 5
Proceedings in Aid of Attachment

27-18-501. Examination under oath of defendant or person controlling property or debts — order that property be delivered.

Case Notes

Unconstitutional Application: The Writ of Attachment statute, as applied, was violative of the requirements of notice and opportunity to be heard guaranteed by the Due Process Clause of the United States Constitution. Williams v. Matovich, 172 M 109, 560 P2d 1338 (1977).

Collateral References

Garnishment *key* 117, et seq.
38 C.J.S. Garnishment §228.

27-18-502. Person holding property to give sheriff certificate of defendant's interest.

Case Notes

Unconstitutional Application: The Writ of Attachment statute, as applied, was violative of the requirements of notice and opportunity to be heard guaranteed by the Due Process Clause of the United States Constitution. Williams v. Matovich, 172 M 109, 560 P2d 1338 (1977).

Collateral References

Attachment *key* 165, 218 through 222.
7 C.J.S. Attachment §227.

27-18-503. Order to person holding property to submit to examination under oath.

Case Notes

Unconstitutional Application: The Writ of Attachment statute, as applied, was violative of the requirements of notice and opportunity to be heard guaranteed by the Due Process Clause of the United States Constitution. Williams v. Matovich, 172 M 109, 560 P2d 1338 (1977).

Part 6
Procedure Following Attachment — Return of Writ

27-18-601. Sheriff to retain nonperishable attached property and proceeds of sales.

Collateral References

Attachment *key* 194, et seq.; Garnishment *key* 112, 156, 157.

7 C.J.S. Attachment §319; 38 C.J.S. Garnishment §§61, 186, 189, 225.

27-18-602. Claim of attached property by third person — plaintiff to indemnify sheriff.

Case Notes

Unconstitutional Application: The Writ of Attachment statute, as applied, was violative of the requirements of notice and opportunity to be heard guaranteed by the Due Process Clause of the United States Constitution. Williams v. Matovich, 172 M 109, 560 P2d 1338 (1977).

Mandamus to Compel Delivery: Where an attachment creditor failed for 10 days after notice and affidavit that horses attached at his instance were claimed by a third party to give the Sheriff a good and sufficient bond to indemnify him against any loss or damage by his retaining, the Sheriff must deliver them to the claimant, and failing to do so, mandamus lies to compel delivery. The question of ownership should not be litigated unless and until the requirement is complied with. State ex rel. Fiebrantz v. Armstrong, 114 M 212, 133 P2d 768 (1943).

Sureties' Liability: The liability of a surety is fixed by the terms and conditions of the contract made by him and may not be extended to matters not covered by the contract; therefore, sureties on an indemnity bond given to the Sheriff on refusal of a demand for the release of attached property to a third-party claimant pursuant to the provisions of this section were liable only for damages resulting from the attachment, seizing, levying, taking, or retention of the property under attachment and could not be held responsible for the wrongful conversion by the Sheriff of some of the property attached. McGinley v. Md. Cas. Co., 85 M 1, 277 P 414 (1929).

Action Against Sheriff:

The duty of a Sheriff who is sued in conversion for property attached and retained by him is to deliver the paper served on him to the plaintiff and pay no further attention to the matter. Gehlert v. Quinn, 38 M 1, 98 P 369 (1908).

Where the answer in an action against a Sheriff for damages for the illegal seizure of saloon fixtures and stock in trade denied plaintiff's claim of ownership, it was not necessary for the latter to show that he made a third-party claim, under this section, as a condition precedent to maintaining his action. O'Brien v. Quinn, 35 M 441, 90 P 166 (1907). See also Englehart v. Sage, 73 M 139, 235 P 767, 40 ALR 590 (1925).

Collateral References

Attachment *key* 280, et seq.

7 C.J.S. Attachment §§66, 409, et seq.

Nature and extent of relief to successful intervenor or interpleader in attachment. 66 ALR 908.

Right of successful claimant of property to attorneys' fees for wrongful attachment. 25 ALR 604, supplemented by 65 ALR 2d 1426.

27-18-603. Sheriff's inventory of attached property — cooperation of persons controlling credits or debts.

Case Notes

Unconstitutional Application: The Writ of Attachment statute, as applied, was violative of the requirements of notice and opportunity to be heard guaranteed by the Due Process Clause of the United States Constitution. Williams v. Matovich, 172 M 109, 560 P2d 1338 (1977).

Waiver of Defects by Garnishee: A garnishee did not waive defects in the process by answering. There is no relation between the return made to the writ and the general appearance in court of a party to an action. Only a general appearance in court in a regular action waives defects in process. Merchants Credit Serv., Inc. v. Chouteau County Bank, 112 M 229, 114 P2d 1074 (1941), distinguished in Stokke v. Graham, 129 M 96, 281 P2d 1025 (1955).

Collateral References

Attachment *key* 172, 318, et seq.; Garnishment *key* 96, 97.

7 C.J.S. Attachment §§217, 218; 38 C.J.S. Garnishment §§162 through 179.

27-18-604. Sheriff's return of writ.

Case Notes

Irregularities in Levy and Return: The recitals of the Sheriff's return on a Writ of Attachment are not made conclusive by statute, and the facts may be shown by other competent evidence, such as by affidavit of plaintiff filed at time an order of publication of summons was made. The attaching creditor's lien is dependent upon the levy, not the return, and the date of levy may be shown by other evidence. Failure to file return on Writ within the time prescribed by this section does not destroy its legal effect where no rights of third persons have intervened. Issuance of summons for publication may be shown by facts other than the record, and mailing of a copy to defendant may be shown by clerk's affidavit. Smith v. Hamill, 111 M 585, 112 P2d 195 (1941).

Collateral References

Attachment *key* 318, et seq.
7 C.J.S. Attachment §244, et seq.

Part 7
Methods of Defending Against Attachment

27-18-701. Right to hearing following seizure without notice — notice of right.

Case Notes

Specific Methods of Service as Governing Over General Methods: Where specific statutes such as 27-18-701 provide for the method of service, those specifics govern over the general rules set out in the Montana Rules of Civil Procedure. Taylor, Thon, Thompson & Peterson v. Cannaday, 230 M 151, 749 P2d 63, 45 St. Rep. 102 (1988).

27-18-711. Motion to discharge writ improperly issued.

Case Notes

Unconstitutional Application: The Writ of Attachment statute, as applied, was violative of the requirements of notice and opportunity to be heard guaranteed by the Due Process Clause of the United States Constitution. Williams v. Matovich, 172 M 109, 560 P2d 1338 (1977).

Constitutionality of Attachment — Effect: The procedures of this statute do not operate to save the Writ of Attachment statutes from being violative of due process requirements as applied. Williams v. Matovich, 172 M 109, 560 P2d 1338 (1977).

Exempt Property:

Since the discharge of a Writ of Attachment involves a judicial determination that the Writ should not have been issued and since direction by plaintiff as to how and on what property levy shall be made does not amount to a discharge as to property not levied upon, it is immaterial on motion to discharge that he did not intend that levy should be made upon property not subject to attachment or in excess of defendant's liability as authorized by the Writ. Jenkins v. First Nat'l Bank, 73 M 110, 236 P 1085 (1925).

This section does not authorize discharge of an attachment on the ground that the proceeds of sale of homestead lands were exempt from seizure. Davis v. Bryant, 62 M 352, 205 P 209 (1922).

General Appearance by Defendant: Defendant's general appearance in an action does not defeat the right to move thereafter to discharge the attachment on the ground that it had been issued prior to the issuance of a valid summons. Duluth Brewing & Malting Co. v. Allen, 51 M 89, 149 P 494 (1915).

Partial Sufficiency of Affidavit: Where a Writ of Attachment has been issued upon an affidavit which is sufficient as to five of seven causes of action but insufficient as to the remaining two, a motion to discharge the whole Writ is properly denied. Wilson v. Barbour, 21 M 176, 53 P 315 (1898).

Grounds Stated in Motion: The notice of motion and motion provided for by this section should state the grounds upon which the motion is based. Omaha Upholstering Co. v. Chauvin-Fant Furniture Co., 18 M 468, 45 P 1087 (1896).

Merits Not Tried on Motion: An attachment may be dissolved for irregularities or imperfections in its issuance, not only apparent upon the face of the papers but upon other grounds, wherein it is made to appear that the issuance of the writ was improper, but it is not within the scope of the inquiry under a motion to dissolve to try the merits of the main action. Newell v. Whitwell, 16 M 243, 40 P 866 (1895).

Collateral References

Attachment *key* 230, et seq.
7 C.J.S. Attachment §498.

27-18-712. Use of affidavits to support or oppose motion.

Case Notes

Unconstitutional Application: The Writ of Attachment statute, as applied, was violative of the requirements of notice and opportunity to be heard guaranteed by the Due Process Clause of the United States Constitution. Williams v. Matovich, 172 M 109, 560 P2d 1338 (1977).

Deficient Oath on Affidavit of Attachment: Where an affidavit for attachment does not purport to have been made under oath or before an officer authorized to administer an oath, and a motion is made to discharge the attachment on the ground that no affidavit was presented at the time the writ was issued, it is not proper practice to present, in opposition to the motion, affidavits to the effect that the declarations contained in the writing were made under oath and that by inadvertence the officer omitted his signature, though such affidavits would be proper in support of an application, made under 27-18-713, to amend. Cont. Oil Co. v. Jameson, 53 M 466, 164 P 727 (1917).

Collateral References

Attachment *key* 247.

7 C.J.S. Attachment §505.

27-18-713. Decision of court.

Case Notes

Unconstitutional Application: The Writ of Attachment statute, as applied, was violative of the requirements of notice and opportunity to be heard guaranteed by the Due Process Clause of the United States Constitution. Williams v. Matovich, 172 M 109, 560 P2d 1338 (1977).

False Affidavit of Attachment: A Writ of Attachment based upon a fatally defective or erroneous affidavit is improper and irregular. Such Writ will be dissolved or discharged when the affidavit on which it is issued states that the obligation is unsecured, whereas it is in fact secured. First Nat'l Bank of Plains v. Green Mtn. Soil Conservation District, 130 M 1, 293 P2d 289 (1956).

Amendment of Affidavit or Undertaking:

The District Court may and should, on motion to discharge a Writ of Attachment because of a defective affidavit, in furtherance of justice permit amendment of the affidavit and deny the motion where the defect is readily amendable. Jenkins v. First Nat'l Bank, 73 M 110, 236 P 1085 (1925).

The procuring of an attachment is a proceeding within the spirit of the code, and, if such proceeding is defective, the same may be amended in furtherance of justice, like any other proceeding. Wilson v. Barbour, 21 M 176, 53 P 315 (1898); Herbst Importing Co. v. Hogan, 16 M 384, 41 P 135 (1895); Newell v. Whitwell, 16 M 243, 40 P 866 (1895); Muth v. Erwin, 14 M 227, 36 P 43 (1894); Josephi v. Mady Clothing Co., 13 M 195, 33 P 1 (1893); Magee v. Fogerty, 6 M 237, 11 P 668 (1886); Langstaff v. Miles, 5 M 554, 6 P 356 (1885); Pierse v. Miles, 5 M 549, 6 P 347 (1885).

Security Statement in Affidavit:

Where the affidavit for a Writ of Attachment originally recited that the debt sued on had not been secured, the court properly permitted the affiant to amend to the effect that while the debt had originally been secured, the security had become valueless without any fault of his and refusal to dissolve the attachment was proper. Hetrick v. Renwald, 73 M 426, 236 P 1089 (1925).

An affidavit on attachment stating that the debt "is not secured" instead of "has not been secured", as required by statute, though defective, was not void but subject to amendment under this section. Am. Sur. Co. v. Kartowitz, 59 M 1, 195 P 99 (1920).

Release and Discharge Distinguished: The "release" of an attachment authorized under the attachment statute refers exclusively to the levy of the writ, involves a ministerial duty on the part of the officer directed to make the release, and may be ordered by the party who caused the levy to be made. The "discharge" refers to the writ itself. It involves a judicial function that the party securing the writ cannot perform or procure to have performed by an officer for him. Nat'l Bank v. First Nat'l Bank, 71 M 242, 228 P 80 (1924).

Complaint Deficient:

If the attachment was improperly issued, it should have been discharged, and it was issued improperly if this action does not belong to the class of actions in which an attachment is authorized. Butler v. Peters, 62 M 381, 205 P 247, 26 ALR 560 (1922); State ex rel. Malin-Yates Co. v. Justice of the Peace Court, 51 M 133, 149 P 709 (1915).

An attachment is properly discharged where the complaint does not state a cause of action, though the affidavit for attachment does do so; the court must look to the complaint to ascertain whether a cause of action in contract, express or implied, is stated. Kyle v. Chester, 42 M 522, 113

P 749 (1911), distinguished in Am. Sur. Co. v. Kartowitz, 54 M 92, 166 P 685 (1917), and in Union Bank & Trust Co. v. Himmelbauer, 56 M 82, 181 P 332 (1919).

Amendment of Complaint: In view of the statutory liberality in permitting amendments to be made, the sustaining of a general demurrer (demurrer abolished, Rule 7(c), M.R.Civ.P.) to the complaint in a case where an attachment has issued, and granting the plaintiff time to amend, does not dissolve the attachment if the complaint can be amended so as to state a proper cause of action. Am. Sur. Co. v. Kartowitz, 54 M 92, 166 P 685 (1917).

Alternative Cases Covered: This section considers two classes of cases, one in which an attachment has been issued in an action which does not fall within the class of actions mentioned in 27-18-101, and the other, one in which the writ has been issued in a proper action but in which the proceedings to secure it have been irregular. State ex rel. Malin-Yates Co. v. Justice of the Peace Court, 51 M 133, 149 P 709 (1915).

Justice of the Peace: A Justice of the Peace must discharge an attachment if it appears that the writ was improperly or irregularly issued. State ex rel. Malin-Yates Co. v. Justice of the Peace Court, 51 M 133, 149 P 709 (1915).

Collateral References

Attachment *key* 246, 251.
7 C.J.S. Attachment §525, et seq.
Amendment of attachment bond. 47 ALR 2d 971.

27-18-715. Exception to plaintiff's sureties.

Collateral References

Attachment *key* 128, et seq.
7 C.J.S. Attachment §138, et seq.

27-18-716. Justification of sureties.

Collateral References

Attachment *key* 128, et seq.
7 C.J.S. Attachment §138, et seq.

27-18-721. Proceedings to release attachment.

Case Notes

Unconstitutional Application: The Writ of Attachment statute, as applied, was violative of the requirements of notice and opportunity to be heard guaranteed by the Due Process Clause of the United States Constitution. Williams v. Matovich, 172 M 109, 560 P2d 1338 (1977).

Constitutionality of Attachment — Effect: The procedures of this statute do not operate to save the Writ of Attachment statutes from being violative of due process requirements as applied. Williams v. Matovich, 172 M 109, 560 P2d 1338 (1977).

Collateral References

Attachment *key* 191, 192.
7 C.J.S. Attachment §345, et seq.

27-18-722. Defendant's undertaking — justification of sureties.

Case Notes

Constitutionality of Attachment — Effect: The procedures of this statute do not operate to save the Writ of Attachment statutes from being violative of due process requirements as applied. Williams v. Matovich, 172 M 109, 560 P2d 1338 (1977).

Unconstitutional Application: The Writ of Attachment statute, as applied, was violative of the requirements of notice and opportunity to be heard guaranteed by the Due Process Clause of the United States Constitution. Williams v. Matovich, 172 M 109, 560 P2d 1338 (1977).

Constitutionality — Prior Notice and Hearing: The nonpossessory attachment of a defendant's interest in real property does not deprive him of the use, possession, or alienation of his property, and there is not such a significant taking of a property interest as to require prior notice and a hearing prior to attachment. Bustell v. Bustell, 170 M 457, 555 P2d 722 (1976).

Appealable Order: Fact that motion was to vacate or release attachment rather than to dissolve the attachment would not prevent the order from being appealable. Stallinger v. Goss, 121 M 437, 193 P2d 810 (1948).

Common-Law Bond: If an undertaking places a greater burden on the surety than contemplated by this section and may therefore not be good as a statutory undertaking, it will nevertheless be sustained as a common-law bond. Sloan v. Young, 86 M 414, 284 P 131 (1930).

Surety's Liability: An undertaking for the release of attached personalty providing unqualifiedly that if plaintiff in the action in which the writ was issued shall recover judgment, the obligor will pay the amount thereof fixes an unconditional obligation upon the surety to pay the judgment irrespective of any defects or irregularities in the issuance or levying of the attachment. Sloan v. Young, 86 M 414, 284 P 131 (1930).

Officer to Demand Redelivery: The officer to whom the undertaking is given is the proper person to make the demand for the redelivery of the property. Driggs v. Harrington, 2 M 30 (1874).

Removal of Property From State: In an action brought against the sureties upon a statutory undertaking for the redelivery of attached property, no demand is required for the redelivery of the property when the property has been removed from the state by the defendant in the attachment suit and said defendant is insolvent and has left the state and has not place of residence or business therein and the sureties have been notified that the judgment, which was obtained in the attachment suit, remains unpaid. Driggs v. Harrington, 2 M 30 (1874).

Collateral References

6 Am. Jur. 2d Attachment and Garnishment §523, et seq.

27-18-725. Motion to vacate or modify writ or increase security.

Case Notes

Unconstitutional Application: The Writ of Attachment statute, as applied, was violative of the requirements of notice and opportunity to be heard guaranteed by the Due Process Clause of the United States Constitution. Williams v. Matovich, 172 M 109, 560 P2d 1338 (1977).

Constitutionality of Attachment — Effect: The procedures of this statute do not operate to save the Writ of Attachment statutes from being violative of due process requirements as applied. Williams v. Matovich, 172 M 109, 560 P2d 1338 (1977).

Collateral References

Attachment *key* 136, 137, 225, et seq.

7 C.J.S. Attachment §332, et seq.

27-18-726. Proceedings on motion.

Case Notes

Unconstitutional Application: The Writ of Attachment statute, as applied, was violative of the requirements of notice and opportunity to be heard guaranteed by the Due Process Clause of the United States Constitution. Williams v. Matovich, 172 M 109, 560 P2d 1338 (1977).

Constitutionality of Attachment — Effect: The procedures of this statute do not operate to save the Writ of Attachment statutes from being violative of due process requirements as applied. Williams v. Matovich, 172 M 109, 560 P2d 1338 (1977).

27-18-731. Filing of order discharging or releasing attachment of real property.

Case Notes

Unconstitutional Application: The Writ of Attachment statute, as applied, was violative of the requirements of notice and opportunity to be heard guaranteed by the Due Process Clause of the United States Constitution. Williams v. Matovich, 172 M 109, 560 P2d 1338 (1977).

Collateral References

Attachment *key* 318, et seq.

7 C.J.S. Attachment §345, et seq.

Part 8
Sale of Attached Property

27-18-801. Sheriff to sell perishable property.

Case Notes

Discretion of Sheriff: A sale of perishable property under attachment is made, before judgment, by the Sheriff on his own responsibility, under the authority conferred by this section; no showing is necessary, and no order of court need be made. State ex rel. Myersick v. District Court, 53 M 450, 164 P 546 (1917).

Collateral References

Attachment *key* 194, et seq.

7 C.J.S. Attachment §396.

27-18-802. Authority of court to order sale of property.

Case Notes

Unconstitutional Application: The Writ of Attachment statute, as applied, was violative of the requirements of notice and opportunity to be heard guaranteed by the Due Process Clause of the United States Constitution. Williams v. Matovich, 172 M 109, 560 P2d 1338 (1977).

Depreciation in Value: Attached property that is depreciating in value may be sold before judgment, under an order of court, upon a proper showing made. State ex rel. Myersick v. District Court, 53 M 450, 164 P 546 (1917).

Interest of Parties Shown: It is only when attached property is sought to be sold, before judgment, under this section, that a showing as to subserving "the interests of the parties" is necessary; in such a case the authority to sell is dependent upon an order of court. State ex rel. Myersick v. District Court, 53 M 450, 164 P 546 (1917).

Title of Defendant: A court's authority to order a sale of attached property before judgment is not affected by the fact that the defendants have no title; the court has power to order a sale of whatever interest they have. State ex rel. Myersick v. District Court, 53 M 450, 164 P 546 (1917).

Collateral References

Attachment *key* 194, et seq.

7 C.J.S. Attachment §399.

27-18-803. Notice of application for order to sell.

Case Notes

Unconstitutional Application: The Writ of Attachment statute, as applied, was violative of the requirements of notice and opportunity to be heard guaranteed by the Due Process Clause of the United States Constitution. Williams v. Matovich, 172 M 109, 560 P2d 1338 (1977).

Collateral References

Attachment *key* 198.

7 C.J.S. Attachment §397, et seq.

Part 9
Judgment and Subsequent Procedure

27-18-901. Judgment when debt not yet due.

Case Notes

Scope of Section: This section relates only to actions for the recovery of debts not due when the defendant is leaving or is about to leave the state, taking his property with him, or is disposing or about to dispose of it for the purpose of defrauding his creditors. Union Bank & Trust Co. v. Himmelbauer, 56 M 82, 181 P 332 (1919).

Collateral References

Attachment *key* 21, et seq.

7 C.J.S. Attachment §28.

6 Am. Jur. 2d Attachment and Garnishment §56.

What amounts to a "debt" within statute providing for attachment before debt is due. 58 ALR 2d 1451; 65 ALR 1439.

27-18-902. Procedure when defendant recovers judgment.

Collateral References

Attachment *key* 270, 278.

7 C.J.S. Attachment §§374, 375.

27-18-903. Judgment for plaintiff — disposition of attached property and proceeds of sales.

Case Notes

Unconstitutional Application: The Writ of Attachment statute, as applied, was violative of the requirements of notice and opportunity to be heard guaranteed by the Due Process Clause of the United States Constitution. Williams v. Matovich, 172 M 109, 560 P2d 1338 (1977).

Sale of Property Held in Another County: Where the Sheriff of one county held property under a valid Writ of Attachment and the judgment was rendered and Writ of Execution directed to the Sheriff of another county, the sale of property by the Sheriff of the former county to satisfy the judgment rendered in the latter county was proper. Stokke v. Graham, 129 M 96, 281 P2d 1025 (1955).

Subjection of Property to Judgment: If judgment is rendered for the party who procured a Writ of Attachment, the property is automatically subjected to sale in satisfaction of the judgment. Moreland v. Monarch Min. Co., 55 M 419, 178 P 175 (1919).

Collateral References

Attachment *key* 194, et seq.
7 C.J.S. Attachment §392, et seq.
6 Am. Jur. 2d Attachment and Garnishment §565, et seq.

27-18-904. Delivery of excess property and proceeds to defendant.

Case Notes

Unconstitutional Application: The Writ of Attachment statute, as applied, was violative of the requirements of notice and opportunity to be heard guaranteed by the Due Process Clause of the United States Constitution. Williams v. Matovich, 172 M 109, 560 P2d 1338 (1977).

Collateral References

Attachment *key* 203.
7 C.J.S. Attachment §406.

27-18-905. Execution of balance due on judgment.

Case Notes

Priority of Sale: Under this section where property has been attached, the source of satisfaction of the judgment therefrom must first be exhausted before any other property of the judgment debtor can be taken, and it is only for the satisfaction of any deficiency therein that the Sheriff may proceed generally under the execution; where only real property was levied upon under Writ of Attachment and there was no purpose to sell any other property under execution, recital in the latter directing the Sheriff to sell personal property and if insufficient then the real property, the reference to personalty was mere surplusage. Andrews v. Smithson, 114 M 360, 136 P2d 531 (1943).

Collateral References

Attachment *key* 203.

27-18-906. Procedure when execution returned unsatisfied.

Case Notes

Unconstitutional Application: The Writ of Attachment statute, as applied, was violative of the requirements of notice and opportunity to be heard guaranteed by the Due Process Clause of the United States Constitution. Williams v. Matovich, 172 M 109, 560 P2d 1338 (1977).

Collateral References

Attachment *key* 330, et seq.
7 C.J.S. Attachment §§453 through 456.

Part 15
Attachment in Justice's Court

27-18-1501. Justice's authority to issue writ.

Case Notes

Certiorari — Proper Remedy — Lack of Justice Court Jurisdiction for Attachment: Plaintiff attended a party in a motel room. A fight erupted, and the room was damaged. The next day the owner of the motel brought an action in Justice Court against all persons present in the room. The complaint alleged liability on an implied contract basis. At the time the complaint was filed, the Justice Court issued an ex parte prejudgment attachment of plaintiff's pickup, which was impounded. At the hearing, plaintiff argued against the attachment, alleging it was not properly issued under the statute. The Justice Court upheld the attachment. Plaintiff filed a Writ of Certiorari in District Court, which was denied. On appeal, the Supreme Court held that the Justice Court's authority to issue a Writ of Prejudgment Attachment is subject to certain conditions precedent. Under 27-18-101 and 27-18-202, plaintiffs must show defendant is indebted to the plaintiff under a contract for the direct payment of money. The court found that the implied contract not to damage the room was not one for the direct payment of money, therefore, the Justice Court was without jurisdiction to order the attachment. A Writ of Certiorari may not be used to correct errors in a lower court's jurisdiction but to determine whether the lower court had and was acting within its jurisdiction. In a case such as this where there are conditions precedent to jurisdiction, a Writ of Certiorari is the proper remedy for reviewing jurisdictional facts such as whether the case involved a contract for the direct payment

of money. The District Court erred in dismissing the petition. Buffalo v. Thiel, 213 M 280, 691 P2d 1343, 41 St. Rep. 2116 (1984).

Collateral References

Justices of the Peace *key* 86, et seq.
51 C.J.S. Justices of the Peace §§24 through 31.
6 Am. Jur. 2d Attachment and Garnishment §1; 47 Am. Jur. 2d Justices of the Peace §39.

27-18-1504. Form and content of writ — defendant's undertaking to prevent levy.

Attorney General's Opinions

Constitutionality: This section violated Art. VIII, sec. 20, 1889 Mont. Const. (similar to Art. VII, sec. 5, 1972 Mont. Const.), to the extent that it authorized a Writ of Attachment issued out of a Justice of the Peace Court to be directed to the Sheriff of any other county than that of the Justice. 16 A.G. Op. 165 (1935).

27-18-1505. Security for sheriff's costs.

Collateral References

Sheriffs and Constables *key* 101.
80 C.J.S. Sheriffs and Constables §56.

CHAPTER 19
INJUNCTIONS

Chapter Case Notes

Not Within Scope of Preliminary Injunction to Determine Merits of Case: Defendants sought to subdivide their property. Plaintiffs filed for a preliminary injunction on grounds that if defendants were not immediately enjoined from proceeding with a boundary realignment, plaintiffs would suffer irreparable injury through loss of access. The District Court issued a temporary restraining order prohibiting defendants from pursuing the boundary realignment and from using a road to transport heavy equipment pending a show cause hearing. At the hearing, defendants informed the court that they had withdrawn their subdivision exemption application, rendering the boundary realignment issue moot. The court then denied plaintiffs' motion for a preliminary injunction and dissolved the temporary restraining order. However, the court went on to address and resolve many of the issues that plaintiffs had raised in their complaint. The Supreme Court affirmed the denial of the preliminary injunction because plaintiffs failed to meet the burden under 27-19-201 but noted that the limited function of a preliminary injunction is to preserve the status quo and minimize the harm to all parties pending full trial, rather than to determine the merits of the case. Therefore, the District Court erred in making sweeping and final factual legal determinations following the hearing on the propriety of issuing a preliminary injunction, and the Supreme Court reversed and remanded for trial on the issues. Yockey v. Kearns Properties, LLC, 2005 MT 27, 326 M 28, 106 P3d 1185 (2005).

Supervision and Enforcement of Pre-1973 Water Decree by District Court — No Due Process Violation: Plaintiff brought a contempt and injunction action in District Court to prevent defendant from interfering with plaintiff's appropriation rights under a 1940 water decree. Following a bench trial in District Court, plaintiff's petition was dismissed and plaintiff was enjoined from interfering with defendant's diversion works and conveyance system. Following a determination of the source and flow of the water, the District Court also ordered that defendant allow a specific amount of water through the diversion system to plaintiff. On appeal, plaintiff contended that the permanent modification of the 1940 decree by the District Court in a contempt and injunction action violated plaintiff's due process rights. The Supreme Court held that the District Court did not exceed its jurisdiction by supervising the distribution of previously adjudicated water, enforcing the 1940 decree, and filling in the pre-1973 decree with further delineations. Because the District Court did not permanently modify the 1940 decree, plaintiff's due process rights were not violated. Hidden Hollow Ranch v. Field, 2004 MT 153, 321 M 505, 92 P3d 1185 (2004).

Standard of Review of Grant or Denial of Injunction — Manifest Abuse of Discretion: For more than 100 years, the Supreme Court has applied two different standards of review when an injunction has been granted or denied. The first standard, applied in Nelson v. O'Neal, 1 M 284 (1871), was an abuse of discretion standard. Later, in Craver v. Stapp, 26 M 314, 67 P 937 (1902),

a manifest abuse of discretion standard was introduced. To rectify the disparity, the Supreme Court decided that the high degree of discretion vested in District Courts to maintain the status quo through injunctive relief warranted application of the more appropriate deferential manifest abuse of discretion standard. A manifest abuse of discretion is one that is obvious, evident, or unmistakable. Nelson and any other cases that did not apply the manifest abuse standard were overruled to the extent of their inconsistency with this holding. Shammel v. Canyon Resources Corp., 2003 MT 372, 319 M 132, 82 P3d 912 (2003).

Failure to Follow Injunctive Order Regarding Use of Spotlights — Personal Representative Responsible for Compliance With Injunction: The District Court issued an order enjoining Robert Hanley from displaying blinking spotlights on his residence and from directing the lights toward the Laniers' residence because the act unreasonably interfered with the Laniers' peaceable enjoyment of their property. Following a bench trial, the court found that the lights no longer blinked, but noted that Hanley had not redirected the spotlights as directed and so held Hanley in contempt and awarded damages to the Laniers. Robert subsequently died, and his wife Joanne was substituted as personal representative of Robert's estate for any allegations in the Laniers' counterclaims. Joanne appealed the injunctive relief granted to the Laniers, contending that she was exempt from the provisions of the injunction because the injunction was directed only at Robert. The Supreme Court disagreed. As personal representative, Joanne was subject to the injunction. She participated and acted with Robert in failing to follow the directives regarding the spotlights and was not exempt from the order prohibiting the spotlights from being directed toward the Laniers' residence. Morton v. Lanier, 2002 MT 214, 311 M 301, 55 P3d 380 (2002).

Injunction in Arbitration Award Not Restrictive of Constitutional Right to Access Courts: The Langemeiers and Kuehls became involved in a dispute over a county road easement between their adjoining lands, and the dispute eventually was submitted to arbitration. The final arbitration award provided injunctive relief to the Langemeiers by prohibiting the Kuehls from commencing or prosecuting any further action or proceeding regarding the property or challenging the ownership of the parcel. The Kuehls complained that the injunctive language was so overbroad that it took property from them without due process of law and improperly restricted their constitutional right to access courts. However, the initial memorandum of understanding, the settlement agreement, and the final arbitration award all established that the Kuehls had no property interest in the disputed roadway, so they could not complain that they were deprived of the use of property that was not theirs to use. Further, the injunctive language only sought to restrain the Kuehls from contesting matters already decided and from pursuing repetitive claims previously resolved by the settlement agreement concerning property in which they had no interest. The Kuehls had already enjoyed access to the courts as the dispute wound its way through two arbitrations, approval by the District Court, and a Supreme Court appeal. Although the constitution guarantees every person access to the courts, it does not grant a license to relitigate a cause or to burden the resources of the courts with successive claims. Therefore, the injunction did not deny the Kuehls of the use of property or access to the courts, and the arbitration award was affirmed. Langemeier v. Kuehl, 2001 MT 306, 307 M 499, 40 P3d 343 (2001).

Cause of Action for Erection of Spite Fence Solely Intended to Injure Neighbor — Availability of Injunctive Relief or Nuisance Claim — Bordeaux Overruled: Kottas built a 200-foot long, 7 feet 3 inches to 7 feet 9 inches high wooden fence that obstructed Haugen's view. Haugen sought injunctive relief for removal of the fence, alleging that it was a spite fence. The District Court concluded that it was indeed a spite fence, but declined to issue an injunction or recognize any remedy under Montana law, citing Bordeaux v. Greene, 22 M 254, 56 P 218 (1899), in holding that a person with a legal right can enforce the enjoyment of that right without inquiry into motive. The Supreme Court noted the many changes in property law since 1899 and overruled Bordeaux, adopting instead the rationale in Sundowner, Inc. v. King, 509 P2d 785 (Idaho 1973). Sundowner rejected the older rule that erection of a spite fence is not an actionable wrong and held that a property owner cannot erect a structure for the sole purpose of injuring a neighbor, such as a spite fence, which is of no beneficial use to the owner but is erected and maintained for the purpose of annoying a neighbor. A spite fence gives rise to an action for both injunctive relief and damages and may also be addressed through a nuisance claim. The Supreme Court reversed for a determination of the proper remedy. Haugen v. Kottas, 2001 MT 274, 307 M 301, 37 P3d 672 (2001).

Failure to Enjoin Against Interference With Secondary Easement Rights Not Error: Engel asserted District Court error in failing to enjoin Gampps from interfering with Engel's use of a secondary easement to maintain an irrigation ditch running across the property of both parties.

However, there was substantial evidence that Engel's access for routine inspections and maintenance was, and always had been, free and uninterrupted. Although failing to enjoin Gampps, the District Court nevertheless fashioned an order balancing Engel's reserved right for occasional access with Gampps' right not to be unreasonably burdened by Engel's secondary easement, so the District Court was affirmed. Engel v. Gampp, 2000 MT 17, 298 M 116, 993 P2d 701, 57 St. Rep. 96 (2000).

Attorney Fees Improperly Granted — Injunction Held Unlike Mandamus for Purposes of Fees: Wittmers purchased a manufactured home and moved it to a subdivision in Gallatin County. Newmans and others brought an action to restrain Wittmers from maintaining the home in the subdivision in violation of a restrictive covenant prohibiting mobile homes. The District Court issued the injunction and also awarded Newmans their fees and costs. The Supreme Court held that attorney fees were improperly granted because even though fees are awardable in a mandamus action, the remedy of injunction is unlike the remedy of mandamus. For that reason, no analogy can be made to mandamus cases awarding fees. Newman v. Wittmer, 277 M 1, 917 P2d 926, 53 St. Rep. 516 (1996).

Claim of Wrongful Injunction Invalid When No Injunction Issued: Defendant's counterclaim alleging wrongful injunction was properly dismissed by summary judgment absent the issuance of an injunction. St. v. Kandarian, 268 M 408, 886 P2d 954, 51 St. Rep. 1381 (1994), distinguishing Interstate Nat'l Bank v. McCormick, 67 M 80, 214 P 949 (1923).

No Showing of Irreparable Injury — Mandatory Injunction Inappropriate: The Department of Highways reconstructed the highway across Curran's property, including removing a bridge across Flat Creek and replacing it with twin culverts. During a flood the following spring, the culverts were blocked by ice and debris and the creek overflowed, covering 17 acres of Curran's grazing land, causing erosion, and leaving debris and gravel on the land that rendered the property unusable for its ordinary purposes. Curran's amended complaint waived damages, seeking only a mandatory injunction requiring the Department to replace the stream crossing in a manner that would abate the nuisance. The District Court denied the injunction and dismissed Curran's complaint, finding no act that would produce irreparable injury to justify a mandatory injunction. Relying on Riddock v. Helena, 212 M 390, 687 P2d 1386 (1984), the Supreme Court stated the theory that to allow a landowner injunctive relief would defeat a public entity's power of eminent domain. As a matter of public policy, the better alternative is to ensure compensation to a damaged landowner by requiring the state to purchase any property it takes for a public purpose. Citing Wilhite v. Billings, 39 M 1, 101 P 168 (1909), the court found no basis for an order compelling the Department to reconstruct the stream crossing. If Curran could show that the crossing caused the inundation of his land, he might be entitled to compensation in an inverse condemnation action. However, if his loss could be compensated, it is not an irreparable injury, nor did the voluntary waiver of damages create an irreparable injury. Absent a showing of irreparable injury, Curran was not entitled to a mandatory injunction, the proper remedy being an action for condemnation or damages. Curran v. Dept. of Highways, 258 M 105, 852 P2d 544, 50 St. Rep. 450 (1993). See also Gabriel v. Wood, 261 M 170, 862 P2d 42, 50 St. Rep. 1246 (1993).

Real Estate Cases — General Rule: The general rule is that title to or right of possession of real estate may not be litigated in an action for an injunction. Erickson v. Hart, 231 M 7, 750 P2d 1089, 45 St. Rep. 388 (1988).

Used Poker Machine Licensing — Temporary Restraining Order and Preliminary Injunction Proper: It was reasonable for the District Court to issue a temporary restraining order and a preliminary injunction when the court found that plaintiffs risked losing their used, unmodified video poker machines unless they could buy modification kits or new machines within 3 days and kits were not available. Under these circumstances, plaintiffs would suffer irreparable injury if they lost use of the used machines or had to buy more expensive new machines. As none of the criteria of the court orders changed or contravened the Video Draw Poker Machine Control Law of 1985, the Department of Revenue was not prevented under 27-19-103 from executing its duties. Further, it was also proper for the court to structure terms of the final order to protect licensees and limit the time for them to come into compliance with the new law. Mont. Tavern Ass'n v. St., 224 M 258, 729 P2d 1310, 43 St. Rep. 2180 (1986).

Injunction Not Plain, Speedy, and Adequate Remedy in Ordinary Course of Law: In an appeal of the District Court's issuance of a Writ of Prohibition prohibiting the County Commission and the County Recorder from placing on an election ballot the question of retaining the charter form of county government, appellants claimed that prohibition did not lie because there were other plain, speedy, and adequate remedies available to petitioners. The Supreme Court affirmed the Writ's issuance, ruling that a plain, speedy, and adequate remedy was not afforded by: (1) the judicial review procedure set forth in 7-3-154; (2) the injunction procedure set forth in Title 27,

ch. 19; or (3) the declaratory judgment procedure set forth in Title 27, ch. 8. Allen v. Madison County Comm'n, 211 M 79, 684 P2d 1095, 41 St. Rep. 1226 (1984).

Refusal to Enjoin Installation of Sewage System Held Proper: The District Court denied the Smiths' motion for a preliminary injunction restraining their neighbor, Sacks, from placing a new septic system into operation and restraining the Board of Health from issuing permits for any septic systems in the area of the Smiths' property. The Supreme Court affirmed the denial. The granting of a preliminary injunction is vested in the discretion of the District Court, and the Supreme Court will not interfere in the exercise of this discretion unless manifest abuse is shown. In this case, no abuse was shown since the evidence presented to the District Court did not clearly show that the Smiths' water well would be damaged if the sewage system were installed. Smith v. Ravalli County Bd. of Health, 209 M 292, 679 P2d 1249, 41 St. Rep. 716 (1984).

Master Zoning Plan (now Growth Policy) — Failure to Comply — Injunction Proper: A joint city-county master zoning plan (now growth policy) was adopted, recommending that the Cameron tract be zoned residential. The tract, located adjacent to the city, remained unzoned despite the master plan (now growth policy). Because the city-county master plan (now growth policy) had been adopted, the city could not extend its municipal zoning regulations beyond its boundaries. The owners of the tract planned to build a shopping center and requested the county to zone the tract commercial. The owners also sought a building permit from the city as provided by 50-60-106. Adjacent landowners sought to enjoin the county from zoning the tract as commercial and to enjoin the city from issuing the building permit. The Supreme Court held that the injunctions were properly granted because the plaintiff had no statutory basis to contest the county's proposed action to zone the tract commercial and it would have been inequitable to allow the builders to begin construction and then later deny them the right to build. Little v. Bd. of County Comm'rs, 193 M 334, 631 P2d 1282, 38 St. Rep. 1124 (1981).

Attorney Fees Not Allowed Unless Final Judgment: The award of attorney fees in this case is premature as no final judgment has been entered on the merits of the underlying controversy in favor of respondents. No permanent injunction was awarded. No Writ of Mandate was issued. All other considerations aside, respondents are not entitled to a judgment for attorney fees without a final determination of the underlying controversy in their favor. Dreyer v. Bd. of Trustees of Mid-Rivers Tel. Co-op, Inc., 193 M 95, 630 P2d 226, 38 St. Rep. 972 (1981). See also Dreyer v. Bd. of Trustees of Mid-Rivers Tel. Co-op, Inc., 204 M 75, 666 P2d 1214, 40 St. Rep. 673 (1983).

Determination of Water Rights: Water rights should not be determined in a preliminary proceeding for injunctive relief. Eliason v. Evans, 178 M 212, 583 P2d 398 (1978).

Injunction Not Refused Because Corporate Defendant Offers Bond: An injunction pendente lite to restrain majority stockholders of a corporation from ratifying an illegal transfer of the corporate property and one that is ultra vires, made by the officers and directors, will not be refused because the corporation offers a bond. Forrester v. Boston & Mont. Consol. Copper & Silver Min. Co., 21 M 544, 55 P 229 (1898).

Chapter Law Review Articles

Defining Appropriate Criteria for the Public Employee Strike Injunction in Montana, Thiel, 53 Mont. L. Rev. 317 (1992).

Part 1
General Provisions

27-19-101. Definition of injunction — by whom granted.

Case Notes

Recall Act — When Attorney Fees Available: Section 2-16-615 of the Montana Recall Act provides two procedural remedies, depending on the relief sought. If an official refuses to accept a proper recall petition, relief is by mandamus and attorney fees may be recoverable. If a legally insufficient recall petition has been accepted for filing, relief is by injunction and attorney fees are not available. Thus, the right to attorney fees depends on the underlying action and is not reciprocal. Further, the statute does not provide for relief by writ of prohibition. Braach v. Graybeal, 1999 MT 234, 296 M 138, 988 P2d 761, 56 St. Rep. 919 (1999), affirming Sheehy v. Ferda, 235 M 63, 765 P2d 722, 45 St. Rep. 2162 (1988).

Preliminary Injunction Denied Based on Mootness: A citizens' group applied for a preliminary injunction to prohibit a school district Board of Trustees from purchasing property without submitting the purchase to the voters. The District Court properly dismissed the application based on mootness because the property had already been purchased at the time of

hearing, forestalling the prospect for meaningful relief. Awareness Group v. Bd. of Trustees, 243 M 469, 795 P2d 447, 47 St. Rep. 1333 (1990).

Parties Bound by Injunction: An injunction operates only in personam and affects only the parties to the action, and a party occupying the relation of privy who was not a party to the suit at the time of the rendition of the judgment cannot be held to obey the mandate of the injunction. Big Four v. Bisson, 132 M 87, 314 P2d 863 (1957).

Temporary Restraining Order:

An order which requires a person to refrain from a particular act for any period of time, no matter what its purpose, is an injunction, and this applies to a "restraining order". Sheridan County Elec. Co-op v. Ferguson, 124 M 543, 227 P2d 597 (1951).

A temporary restraining order is an injunction, the purpose of which is to keep matters in status quo until upon a trial of the merits the rights of the parties may be determined. Labbitt v. Bunston, 80 M 293, 260 P 727 (1927).

Affirmative Acts Ordered:

Though this section, defining an injunction, makes no provision for an order commanding affirmative action, a mandatory injunction may be issued in a proper case, such as involves nuisances or continuing trespasses of an irreparable nature or even where the act causing the injury has been completed before suit brought, for the purpose of putting complainant in status quo. Grosfield v. Johnson, 98 M 412, 39 P2d 660 (1935).

Where defendant, who had been enjoined from removing an old fence and erecting a new one on a dividing line claimed by him to be the proper one, nevertheless completed the new fence after the proceeding had been brought, the District Court had jurisdiction to order removal of part of the fence and replacement of it on the true line found by the court. Grosfield v. Johnson, 98 M 412, 39 P2d 660 (1935).

While it is only in rare instances that a court of equity will decree the mandatory form of injunction for any other purpose than to restore and maintain a condition which has been wrongfully changed, it will relax the rule in order to attain the ends of justice. Grosfield v. Johnson, 98 M 412, 39 P2d 660 (1935).

Collateral References

Injunction *key* 1, 110.

43A C.J.S. Injunctions §§1, 2, 6; 43A C.J.S. Injunctions §§175 through 177, 250.

42 Am. Jur. 2d Injunctions §1.

Decree granting or refusing injunction as res judicata in action for damages in relation to matter concerning which injunction was asked in first suit. 26 ALR 2d 446.

Injunctive relief against submission of constitutional amendment, statute, municipal charter, or municipal ordinance, on ground that proposed action would be unconstitutional. 19 ALR 2d 519.

27-19-102. When final injunction may be granted to prevent breach of obligation.

Case Notes

Award of Injunction and Damages in Same Case — No Error: A subdivision developer was found to have been negligent and in breach of contract with the purchaser of two subdivision lots for failing to record a restrictive covenant prohibiting commercial use and for the resulting diminution in property value when another subdivision tenant operated an auto body shop in the subdivision. The jury held the developer liable for damages, and a permanent injunction was issued against the auto body shop operator, who complained that the award of both damages and an injunction resulted in double recovery. The Supreme Court disagreed. Montana law does not prohibit awarding money damages and an injunction in the same case. Both were justified here, and the award of both was affirmed. Rice v. C.I. Lanning, 2004 MT 237, 322 M 487, 97 P3d 580 (2004).

Permanent Injunction Inappropriate Limitation of Lawful Irrigation Practices: The Wellses built a home on property adjacent to land that had been flood irrigated by the Youngs for generations. Between 1994 and 1998, the Youngs' land was irrigated three times, and on each occasion, the Wellses experienced flooding in the crawl space of their home. The Wellses sought damages in excess of $80,000 based on tort theories of negligence, nuisance, and trespass. The District Court reasoned that because the irrigation practices predated the construction of the Wellses' home, they could not recover damages or recover on their trespass claim under 85-7-2212. The court also concluded that the nuisance claim was barred by 27-30-101. The court held that the Youngs breached the general obligation imposed by 28-1-201 because their irrigation practices caused immediate, irreparable, and substantial harm to the Wellses' home, but the negligence claim was disposed of because the Wellses failed to establish that the

irrigation practiced breached the standard of care of a reasonable farm irrigator engaged in flood irrigation. Nevertheless, the District Court permanently enjoined the Youngs from irrigating their property because future irrigation without modification of the head ditch would result in an unreasonable and substantial risk of continuing harm and irreparable injury to the Wellses' property. The Youngs moved to vacate the injunction based on the determination that their irrigation practices were lawful, but the motion was denied, so the Youngs appealed. The Supreme Court examined the record for abuse of discretion, noting that a District Court must find a breach of an obligation by the party sought to be enjoined before imposing a permanent injunction. The District Court's general finding that the Youngs breached the duty imposed under 28-1-201 conflicted with the specific findings that the Youngs did not trespass or create a nuisance and conformed to the applicable standard of care. Absent a specific breach of obligation, the District Court abused its discretion in issuing a permanent injunction enjoining the Youngs from engaging in lawful flood irrigation practices. Wells v. Young, 2002 MT 102, 309 M 419, 47 P3d 809 (2002), distinguishing Madison Fork Ranch v. L&B Lodge Pole Timber Prod., 189 M 292, 615 P2d 900 (1980).

Interpleader Purporting to Release Potentially Liable Individuals Remanded for Clarification That Only Insurer Released Upon Payment of Policy Limits: The District Court granted an insurer's request in a prayer for interpleader for an order "enjoining and restraining each and all of the defendants from instituting or prosecuting further any proceeding on account of the incident or the insurance policy". Defendants claimed that the order infringed on their right to seek further relief from other potentially liable persons individually after the maximum policy limits were distributed. The Supreme Court noted that the measure of damages for negligence, notwithstanding available insurance proceeds, is the amount that will compensate the injured for all detriment proximately caused, but in this instance, it was not clear whether the insurer specifically requested additional relief for other parties or intended such a comprehensive exclusion of remedies. Pursuant to the principles of subject matter jurisdiction, the District Court should have released only the insurer from further claims, not the other potentially liable individuals involved. The case was remanded for a clarification of the order. Infinity Ins. Co. v. Dodson, 2000 MT 287, 302 M 209, 14 P3d 487, 57 St. Rep. 1196 (2000).

Damage to Irrigation Ditch: Under the provisions of 70-17-112, defendants, owners of adjoining land, owed plaintiffs an obligation to refrain from impairing an irrigation ditch easement. The District Court did not err in granting plaintiffs a permanent injunction and in awarding damages, costs, and attorney fees. Butler v. Germann, 251 M 107, 822 P2d 1067, 48 St. Rep. 1083 (1991).

Improper to Issue Injunction if Contract Obligation Cannot Be Specifically Enforced: Contract between the parties dealt with present and future obligations concerning the construction of a sewage treatment facility and the handling of wastes. On appeal, the Supreme Court reversed the lower court's granting of an injunction on the grounds that the performance required under the contract was not clear enough to allow for specific performance. Therefore, it was not sufficiently certain to warrant the issuing of an injunction. Westland Enterprises, Inc. v. Boyne USA, Inc., 237 M 186, 772 P2d 309, 46 St. Rep. 724 (1989).

Refusal to Enjoin Installation of Sewage System Held Proper: The District Court denied the Smiths' motion for a preliminary injunction restraining their neighbor, Sacks, from placing a new septic system into operation and restraining the Board of Health from issuing permits for any septic systems in the area of the Smiths' property. The Supreme Court affirmed the denial. The granting of a preliminary injunction is vested in the discretion of the District Court, and the Supreme Court will not interfere in the exercise of this discretion unless manifest abuse is shown. In this case, no abuse was shown since the evidence presented to the District Court did not clearly show that the Smiths' water well would be damaged if the sewage system were installed. Smith v. Ravalli County Bd. of Health, 209 M 292, 679 P2d 1249, 41 St. Rep. 716 (1984).

Injunction to Enforce Agreement Improper When Agreement Contained Remedy for Breach: A tender of stock containing an agreement not to compete contained a clear provision setting forth an appropriate remedy upon breach, which was a reduction of one-third in the stock price. Injunction was not a proper remedy to enforce the agreement because the agreement provided an adequate remedy in law. Although the agreement didn't expressly limit available remedies to those in the agreement, the court held that such limitation was not necessary because allowing injunctive relief would have nullified the remedy agreement agreed to by the parties, contrary to the intentions of the parties. Foster v. Realty Title Co., Inc., 209 M 183, 680 P2d 323, 41 St. Rep. 630 (1984).

Injunction Not Allowed When Adequate Remedy Available: Injunction was not allowed employees of defendant railroad when the latter attempted to move a home terminal because there was no convincing showing of any unlawful act and, if there were, a remedy in damages was plain, speedy, and adequate. Hamblin v. Chicago, Milwaukee, St. Paul & Pac. RR., 34 St. Rep. 1048 (1977) (apparently not reported in Montana Reports).

Exhaustion of Statutory Administrative Remedies: When the Department of Revenue was outside its statutory authority in attempting to implement a nonuniform and discriminatory appraisal, taxpayers were not required to exhaust statutory administrative remedies. Larson v. Dept. of Revenue, 166 M 449, 534 P2d 854 (1975).

Collateral References

Injunction *key* 9, et seq., 134, et seq.

43A C.J.S. Injunctions §6, et seq.

42 Am. Jur. 2d Injunctions §§92 through 95.

Enforceability of covenant not to compete involving radio or television personality. 36 ALR 4th 1139.

Propriety of injunctive relief against diversion of water by municipal corporation or public utility. 42 ALR 3d 426.

Institution for the punishment or rehabilitation of criminals, delinquents, or alcoholics as enjoinable nuisance. 21 ALR 3d 1058.

Anticipatory relief in federal courts against state criminal prosecutions growing out of civil rights activities. 8 ALR 3d 301.

Preconviction procedure for raising contention that enforcement of penal statute or law is unconstitutionally discriminatory. 4 ALR 3d 404.

Injunctive relief as to contract between grower of vegetable or fruit crops and purchasing processor, packer, or canner. 87 ALR 2d 779.

Injunction to prevent interference with operations under standing timber contract providing that trees to be cut and order of cutting shall be selected by seller. 79 ALR 2d 1243.

Injunction against suit in another state or country for divorce or separation to avoid multiplicity of suits. 54 ALR 2d 1243.

Injunction to prevent insured from settling suit against wrongdoer to detriment of insurer. 51 ALR 2d 726.

Minority stockholders' right to enjoin further or additional issuance of stock. 38 ALR 2d 1366.

Injunction against pollution of subterranean waters. 38 ALR 2d 1277.

Injunction against parking vehicles on private way. 37 ALR 2d 944.

Injunction to restrain interference with plaintiff in possession of public office. 34 ALR 2d 560.

Injunction as available to tenant upon landlord's breach of covenant to repair. 28 ALR 2d 473.

Right of third party in area picketed during labor dispute, who has no connection with the dispute, to an injunction against such picketing. 15 ALR 2d 1396.

Remedy of tenant against stranger for interference with passageway. 12 ALR 2d 1233.

Injunction as remedy of tenant against stranger wrongfully interfering with his possession. 12 ALR 2d 1201, 1208.

Injunction against peaceful picketing as affected by employer's lack of opportunity to negotiate with union or employees. 11 ALR 2d 1069.

Injunction against use by municipality or public of subsurface of street or highway for purposes other than sewers, pipes, conduit wires, and the like. 11 ALR 2d 189, 196, 203, 211, 214.

Injunctive relief against breach of contract, other than lease or agreement therefor or contract for services, terminable by one party but not the other. 8 ALR 2d 1208.

Adequacy, as regards right to injunction, of the remedy for review of order fixing public utility rates. 8 ALR 2d 839.

Injunction against breach of contract for will or conveyance of property at death in consideration of support or service. 7 ALR 2d 1178.

Capacity of taxpayers to maintain suit to enjoin submission of initiative, referendum, or recall measure to voters. 6 ALR 2d 557.

Right to injunction against flood protection measures as affected by adequacy of remedy at law. 5 ALR 2d 82.

Injunction by owner or lessee of oil or gas land, or mineral or royalty interest therein, in respect of waste. 4 ALR 2d 201.

Continued value of restrictive covenant to dominant owner in protection of his property from competition as basis for its enforcement notwithstanding changes in neighborhood conditions. 2 ALR 2d 601.

27-19-103. When injunction may not be granted.

Case Notes

Prohibition on Use of Injunction to Enforce Negative Covenants in Personal Services Contracts: Plaintiff broadcasting company had exclusive rights to broadcast Montana State University-Bozeman (MSU) athletic contests, and at the request of the university, plaintiff entered an exclusive contract with the MSU football coach for broadcast rights for a 1-hour program during football season, in addition to several commercials. The university subsequently sought bids for a new broadcast contract, and plaintiff notified the university that there was a potential conflict concerning the contract with the coach. The university ultimately contracted with another broadcasting company and notified the coach that he was expected to provide interviews with the new company. Plaintiff then sought a temporary restraining order restricting the coach from performing services elsewhere during the term of the contract. The request was denied, and plaintiff appealed, but the Supreme Court affirmed. Subsection (5) of this section, coupled with the specific contract enforcement prohibition in 27-1-412(1), prohibits the use of injunctive relief to enforce negative covenants contained in personal services contracts that prevent a party from performing services elsewhere during the life of the contract, and Montana courts may not enjoin the violation of a contract when specific performance is barred by Montana law. Reier Broadcasting Co., Inc. v. Kramer, 2003 MT 165, 316 M 301, 72 P3d 944 (2003). See also Anderson v. Neal Institutes Co., 173 P 779 (Calif. App. 1918), and Titus v. Superior Court, 368 P2d 874 (Ariz. 1962).

Enforcement of Fee Shooting Ban Improperly Enjoined — No Challenge to Constitutionality of Initiative Measure No. 143: In November 2000, voters enacted Initiative Measure No. 143, which included a ban on fee shooting of animals on alternative livestock ranches. Spoklie was granted a preliminary injunction prohibiting the state from interfering with the sale of alternative livestock to third persons, even if the third persons subsequently shot the animals at the alternative livestock ranch. The state and intervenors moved to dissolve the injunction, but the motion was denied. On appeal, the Supreme Court reversed. Spoklie clearly considered the right of third persons to harvest elk at an alternative livestock ranch to be an important part of the consideration received in exchange for fees paid, but the fee shooting arrangement is exactly what is prohibited by 87-4-414, as amended by the initiative. The preliminary injunction interfered with the state's enforcement of 87-4-414, a statute enacted for the public benefit, and was therefore prohibited under this section. Further, Spoklie's argument that an injunction was proper upon a showing of irreparable harm, as stated in dicta in The New Club Carlin, Inc. v. Billings, 237 M 194, 772 P2d 303 (1989), was also misplaced. As set out in State ex rel. Freebourn v. District Court, 85 M 439, 279 P 234 (1929), courts are prohibited from issuing injunctions to prevent the execution of a public statute by officers of the law for the public benefit. The only exception is when a statute or ordinance is unconstitutional or otherwise invalid and when, in the attempt to enforce it, there is a direct invasion of property rights resulting in irreparable injury. Spoklie neither alleged nor demonstrated that Initiative Measure No. 143 or 87-4-414 was unconstitutional; therefore, the District Court erred as a matter of law when it enjoined the state's execution of 87-4-414. The order denying the motion to dissolve the injunction was reversed. Spoklie v. Dept. of Fish, Wildlife, and Parks, 2002 MT 228, 311 M 427, 56 P3d 349 (2002).

Right as Corporate Director Unsubstantiated — Injunction Properly Denied: Plaintiff, once the sole shareholder and director of Electronic Parts, Inc. (EPI), sold all interest in the corporation pursuant to a stock redemption agreement. When the director of EPI died, plaintiff sought two injunctions, alleging that as the sole remaining director of EPI, plaintiff was entitled to terminate EPI's legal counsel, to prohibit officers, agents, and employees from altering EPI documents, to inspect and review corporate records, and to prevent a shareholders' meeting. When the District Court denied both injunctions, plaintiff appealed, alleging that the court abused its discretion. The Supreme Court affirmed, ruling that the lower court's finding that the evidence did not support plaintiff's claim of directorship was not clearly erroneous. As a result, plaintiff had no right to terminate EPI's legal counsel, to inspect records, or to enjoin a shareholders' meeting. Smith v. Electronic Parts, Inc., 274 M 252, 907 P2d 958, 52 St. Rep. 1215 (1995). See Shammel v. Canyon Resources Corp., 2003 MT 372, 319 M 132, 82 P3d 912 (2003), in which a manifest abuse of discretion standard was adopted for review of granting or denying an injunction.

No Property Interest or Right to Teacher Tenure — Denial of Injunction Proper: Because Talley did not have a property interest in his position as a part-time community college instructor or a right to tenure under Montana law, the District Court did not abuse its discretion in denying a request for both injunctive relief and rehire after Talley's term contract was not

renewed. Talley v. Flathead Valley Community College, 259 M 479, 857 P2d 701, 50 St. Rep. 889 (1993). See Shammel v. Canyon Resources Corp., 2003 MT 372, 319 M 132, 82 P3d 912 (2003), in which a manifest abuse of discretion standard was adopted for review of granting or denying an injunction.

No Showing of Irreparable Injury — Mandatory Injunction Inappropriate: The Department of Highways reconstructed the highway across Curran's property, including removing a bridge across Flat Creek and replacing it with twin culverts. During a flood the following spring, the culverts were blocked by ice and debris and the creek overflowed, covering 17 acres of Curran's grazing land, causing erosion, and leaving debris and gravel on the land that rendered the property unusable for its ordinary purposes. Curran's amended complaint waived damages, seeking only a mandatory injunction requiring the Department to replace the stream crossing in a manner that would abate the nuisance. The District Court denied the injunction and dismissed Curran's complaint, finding no act that would produce irreparable injury to justify a mandatory injunction. Relying on Riddock v. Helena, 212 M 390, 687 P2d 1386 (1984), the Supreme Court stated the theory that to allow a landowner injunctive relief would defeat a public entity's power of eminent domain. As a matter of public policy, the better alternative is to ensure compensation to a damaged landowner by requiring the state to purchase any property it takes for a public purpose. Citing Wilhite v. Billings, 39 M 1, 101 P 168 (1909), the court found no basis for an order compelling the Department to reconstruct the stream crossing. If Curran could show that the crossing caused the inundation of his land, he might be entitled to compensation in an inverse condemnation action. However, if his loss could be compensated, it is not an irreparable injury, nor did the voluntary waiver of damages create an irreparable injury. Absent a showing of irreparable injury, Curran was not entitled to a mandatory injunction, the proper remedy being an action for condemnation or damages. Curran v. Dept. of Highways, 258 M 105, 852 P2d 544, 50 St. Rep. 450 (1993). See also Gabriel v. Wood, 261 M 170, 862 P2d 42, 50 St. Rep. 1246 (1993).

Construction Contracts Generally Not Subject to Specific Enforcement: Kenneys, a contractor, obtained a permanent injunction against Park County enjoining the county from interfering with Kenneys' contract for sludge removal. The Supreme Court dissolved the injunction on the basis that construction contracts generally cannot be specifically enforced because performance would constitute a personal service approximating involuntary servitude. Monetary damages provide an adequate remedy. State ex rel. Park County v. District Court, 253 M 331, 833 P2d 210, 49 St. Rep. 575 (1992).

Money Damages Not Irreparable Harm — Injunction Denied: Employees of a bar were arrested for violating a city ordinance that prohibits nude dancing in establishments selling alcoholic beverages. The bar owners sought a preliminary injunction that was denied by the trial court. The Supreme Court held that under this section, an injunction cannot be granted to prevent the execution of a public statute for the public benefit without a showing of irreparable harm or a violation of a constitutional right as required by 27-19-201. Money damages are not considered to be irreparable harm because recovery of money damages is available in an action at law without resort to equity. New Club Carlin, Inc. v. Billings, 237 M 194, 772 P2d 303, 46 St. Rep. 731 (1989), followed in Dicken v. Shaw, 255 M 231, 841 P2d 1126, 49 St. Rep. 914 (1992), and clarified in Spoklie v. Dept. of Fish, Wildlife, and Parks, 2002 MT 228, 311 M 427, 56 P3d 349 (2002), to the extent that a mere showing of irreparable injury is not sufficient to overcome subsection (4) of this section, and the only exception to the general rule that courts are prohibited from issuing injunctions to prevent the execution of a public statute by officers of the law for the public benefit is when a statute or ordinance is unconstitutional or otherwise invalid and when, in the attempt to enforce it, there is a direct invasion of property rights resulting in irreparable injury.

Improper to Issue Injunction if Contract Obligation Cannot Be Specifically Enforced: Contract between the parties dealt with present and future obligations concerning the construction of a sewage treatment facility and the handling of wastes. On appeal, the Supreme Court reversed the lower court's granting of an injunction on the grounds that the performance required under the contract was not clear enough to allow for specific performance. Therefore, it was not sufficiently certain to warrant the issuing of an injunction. Westland Enterprises, Inc. v. Boyne USA, Inc., 237 M 186, 772 P2d 309, 46 St. Rep. 724 (1989).

Used Poker Machine Licensing — Temporary Restraining Order and Preliminary Injunction Proper: It was reasonable for the District Court to issue a temporary restraining order and a preliminary injunction when the court found that plaintiffs risked losing their used, unmodified video poker machines unless they could buy modification kits or new machines within 3 days and kits were not available. Under these circumstances, plaintiffs would suffer irreparable injury if they lost use of the used machines or had to buy more expensive new machines. As none of the

criteria of the court orders changed or contravened the Video Draw Poker Machine Control Law of 1985, the Department of Revenue was not prevented under 27-19-103 from executing its duties. Further, it was also proper for the court to structure terms of the final order to protect licensees and limit the time for them to come into compliance with the new law. Mont. Tavern Ass'n v. St., 224 M 258, 729 P2d 1310, 43 St. Rep. 2180 (1986).

Department Actions Not Arbitrary and Capricious — Injunction Not Proper: In 1950, the Department of State Lands (now Department of Natural Resources and Conservation) leased a parcel of grazing land to Jeppeson's father. The lease was renewed to the father's estate in 1960. In 1970, the lease was changed to Jeppeson's name. Jeppeson paid his lease rent late in 1973 and not at all in 1974. The lease was canceled for nonpayment, and the land remained unleased for 2 years. In 1976, the Department leased to someone who assigned the lease to Jeppeson. Jeppeson was late in his payment in 1977 and in 1978 lost the lease temporarily for paying late. In 1980, no rent was paid and the lease was canceled. The parcel was not re-leased until 1981 when Hawks leased it. Hawks agreed with Jeppeson to assign the lease to him. Application for approval of the assignment was made to the Department on January 29, 1982. The Department wrote to Jeppeson in late March stating that it was hesitant to approve the assignment due to Jeppeson's poor paying record. No one paid the 1982 payment that was due on April 1, 1982, and on April 22, 1982, the Department notified Hawks that the lease was canceled. The Supreme Court ruled that there was no evidence of arbitrary and capricious action on the part of the Department so as to justify injunctive relief, and the restrictions on issuance of injunctions contained in this section would not allow a court to enjoin the Department from re-leasing the land. Jeppeson v. St., 205 M 282, 667 P2d 428, 40 St. Rep. 1272 (1983).

Standing: Injunctive relief to enjoin violations of the Montana Environmental Policy Act, Title 75, ch. 1, by the Department of Health and Environmental Sciences (now Department of Environmental Quality) in the approval of a development was proper where injury to individual rights and public rights was shown. Mont. Wilderness Ass'n v. Bd. of Health & Environmental Sciences, 171 M 477, 559 P2d 1157 (1976).

Application to Cases Where There Is Illegal Tax Appraisal: This section does not apply to cases where an unconstitutional and illegal tax appraisal is being used since it was the intent of the Legislature to provide for the retention of equitable remedies in taxation cases where statutory remedies prove inadequate. Larson v. Dept. of Revenue, 166 M 449, 534 P2d 854 (1975).

Enforcement of Public Statute:

Subsection (4) does not prohibit injunctive relief against implementation of an appraisal where such implementation would be illegal and unauthorized. Larson v. Dept. of Revenue, 166 M 449, 534 P2d 854 (1975), overruling State ex rel. Keast v. Krieg, 145 M 521, 402 P2d 405 (1965).

District Court acted beyond its jurisdiction by issuing injunction to prevent Board of Equalization (now the Department of Revenue) from revising grading and valuation of nonirrigated farmland pursuant to Title 15, ch. 7. State ex rel. Lord v. District Court, 154 M 269, 463 P2d 323 (1969).

Where the Industrial Accident Board (now Division of Workers' Compensation) issued an order directing a coal mine to erect a washhouse for its employees in compliance with section 50-435, R.C.M. 1947 (now repealed), the coal mine cannot obtain an injunction to enjoin enforcement of the order based on facts that they can assert as a defense to any proceeding brought by the Board. Jeffries Coal Co. v. Indus. Accident Bd., 126 M 411, 252 P2d 1046 (1952).

An injunction may not be granted to prevent the enforcement of the criminal law. State ex rel. Olsen v. Horsky, 122 M 547, 206 P2d 1157 (1949).

The fact that a County Attorney, alleged to be threatening to institute a criminal proceeding, is insolvent and therefore cannot respond in damages for the injury done by the prosecution does not authorize injunctive relief; nor does the writ lie to restrain proceedings for the seizure or forfeiture of property used in violation of law or to enjoin one from applying for an injunction. Under this section courts are prohibited from issuing injunctions to prevent the execution of a public statute by officers of the law for the public benefit. State ex rel. Freebourn v. District Court, 85 M 439, 279 P 234 (1929).

Discretionary Appointment: Taxpayer was not entitled to an injunction in action questioning the qualifications of supervisor appointed by Board of Railroad Commissioners (now the Public Service Commission) in the proper exercise of its discretion. Steel v. Bd. of Railroad Comm'rs, 144 M 432, 397 P2d 101 (1964).

Political Questions: A private citizen who does not show that he will be injured in any property or civil right cannot invoke equitable cognizance of a purely political question; and

where plaintiff's complaint, in an action seeking an injunction preventing the Secretary of State from certifying nominees for a vacancy in the Board of Railroad Commissioners (now the Public Service Commission), shows that his only interest is as a taxpaying, private citizen and prospective absentee voter, he is without standing or capacity to maintain the suit. State ex rel. Mitchell v. District Court, 128 M 325, 275 P2d 642 (1954).

Real Estate Cases: Title or right to possession to real estate may not be litigated in a suit for an injunction. Where there was a lease which was allegedly breached, the plaintiff is not entitled to a restraining order preventing the defendants from occupying the land pending a determination of the case on its merits since it was found that the relationship of the parties was one of landlord and tenant and was not a cropping agreement. Davis v. Burton, 126 M 137, 246 P2d 236 (1952), followed in Erickson v. Hart, 231 M 7, 750 P2d 1089, 45 St. Rep. 388 (1988). See also Jeppeson v. St., 205 M 282, 667 P2d 428, 40 St. Rep. 1272 (1983).

Judicial Proceedings: A court of equity will not enjoin the prosecution of an action at law where another court has already acquired jurisdiction of the subject matter unless such restraint is necessary to prevent a multiplicity of such proceedings or unless there is some equitable circumstance in which a party cannot avail himself at law. Lutey Bros. v. Jackson, 55 M 556, 179 P 459 (1919).

Labor Disputes: Subsection (8) adds nothing to the preexisting law, since there never has been, in theory at least, one rule for the wage earner and another for the rest of the community; yet it must be taken as an expression by the Legislature of the belief that injunctions have been granted in labor disputes when, under exactly similar conditions, they would not have been granted in controversies of a different character, and of an intention to forestall this possibility in this state. Empire Theatre Co. v. Cloke, 53 M 183, 163 P 107 (1917).

Bond Issues: Since there pertains to every citizen and taxpayer the right to sue to enjoin the issue of bonds by the state under legislation which he alleges to be invalid, it is idle for the state to oppose such a suit on the ground that to grant the injunction will prevent the execution by officers of the law of a statute made for the public good. Hill v. Rae, 52 M 378, 158 P 826 (1916).

Condemnation Proceedings: Under subsection (1), injunction does not lie to restrain condemnation proceedings, in the absence of a showing that the restraint is necessary to prevent a multiplicity of proceedings. Spratt v. Helena Power Transmission Co., 37 M 60, 94 P 631 (1908).

Collateral References

Courts *key* 480, 507; Injunction *key* 25, et seq., 57, et seq., 74, et seq., 101(1) through (4); 136, 137.

21 C.J.S. Courts §§191, et seq., 215; 43A C.J.S. Injunctions §§41, 50, 54, 84 through 86, 104, 114, 121, 122.

Extraterritorial recognition of, and propriety of counterinjunction against, injunction against actions in courts of other states. 74 ALR 2d 828.

Injunction against suit in another state for divorce or separation. 54 ALR 2d 1240.

Injunction against picketing, by employees of a plant where labor dispute exists, at another plant of employer where there is no labor dispute. 37 ALR 2d 687.

Injunction as remedy against removal of public officer. 34 ALR 2d 554.

Injunction against coercive action by labor unions in jurisdictional disputes. 33 ALR 2d 343.

State's power to enjoin violation of collective labor contract as affected by federal labor relations acts. 32 ALR 2d 829.

Right of third party in area picketed during labor dispute, who has no connection with the dispute, to an injunction against such picketing. 15 ALR 2d 1396.

Compelling reinstatement to nonpublic office for employment by mandatory injunction prior to hearing of case. 15 ALR 2d 328.

Injunction against peaceful picketing as affected by employer's lack of opportunity to negotiate with union or employees. 11 ALR 2d 1069.

Injunction by state court against action in court of another state. 6 ALR 2d 896.

Power to enjoin canvassing votes and declaring result of election. 1 ALR 2d 588.

27-19-104. Contents of complaint — action for injunction by an association.

Case Notes

Failure to Follow Injunctive Order Regarding Use of Spotlights — Personal Representative Responsible for Compliance With Injunction: The District Court issued an order enjoining Robert Hanley from displaying blinking spotlights on his residence and from directing the lights toward the Laniers' residence because the act unreasonably interfered with the Laniers' peaceable enjoyment of their property. Following a bench trial, the court found that the lights no longer blinked, but noted that Hanley had not redirected the spotlights as directed and so held

Hanley in contempt and awarded damages to the Laniers. Robert subsequently died, and his wife Joanne was substituted as personal representative of Robert's estate for any allegations in the Laniers' counterclaims. Joanne appealed the injunctive relief granted to the Laniers, contending that she was exempt from the provisions of the injunction because the injunction was directed only at Robert. The Supreme Court disagreed. As personal representative, Joanne was subject to the injunction. She participated and acted with Robert in failing to follow the directives regarding the spotlights and was not exempt from the order prohibiting the spotlights from being directed toward the Laniers' residence. Morton v. Lanier, 2002 MT 214, 311 M 301, 55 P3d 380 (2002).

Standing to Sue Based on Denial of Individual Right to Vote: A citizens' group sought to get the issues of site and construction approval for a middle school on the general ballot by alleging that the school district Board of Trustees violated the group's civil right to vote by denying its members their individual right to vote. The Supreme Court found that if the Board was statutorily required to submit the issues to the voters, failure to do so significantly affected the constitutionally protected right to vote of each member of the group. The court held that although the general public right to vote was coextensive with that of the group, the group had standing to sue because the individual members had standing to sue based on their individual right to vote. The court noted that the group was not required to provide the names, addresses, and a statement of the respective injuries of the individual members because the group sought no damages in the complaint. Awareness Group v. Bd. of Trustees, 243 M 469, 795 P2d 447, 47 St. Rep. 1333 (1990).

Injunctive Relief Granted to Persons Not Specifically Named as Plaintiffs — Representative Capacity Not Challenged: The District Court did not exceed its personal jurisdiction by granting injunctive relief to persons other than those specifically named as plaintiffs in the complaint when the voluntary trade organization, as plaintiff, alleged that it was representing persons holding liquor licenses in Montana and the state, as defendant, did not challenge the adequacy of the association's representative capacity under Rule 9(a), M.R.Civ.P. (see Title 25, ch. 20). Mont. Tavern Ass'n v. St., 224 M 258, 729 P2d 1310, 43 St. Rep. 2180 (1986).

Standing of Association to Sue Over Planning and Zoning District Adoption: County Commissioners adopted a planning and zoning district. In response, plaintiff public interest groups filed an action for a declaratory judgment. The County Commissioners on appeal contended that it was the plaintiffs' duty to allege in their complaint an injury to the property or to a civil right of the individuals of the association, distinguishable from an injury to the public generally, and to set forth names and addresses of the injured members and a statement of the injury in order to obtain injunctive relief. The District Court found that the plaintiffs did in fact have standing to file the complaint without supplying all of the above information. Noting that the plaintiffs had alleged injury in fact which was similar to injuries suffered by other members of the public generally, the Supreme Court said the plaintiffs therefore brought themselves within this section and declined to hold on constitutional issues of equal access to the courts and freedom of association under this section. Mont. Wildlife Fed'n v. Sager, 190 M 247, 620 P2d 1189, 37 St. Rep. 1897 (1980).

Collateral References

Maintainability in state court of class action for relief against air or water pollution. 47 ALR 3d 769.

27-19-105. Form and scope of injunction or restraining order.

Case Notes

Nonparty in Concert With Joined Party Properly Enjoined When Notice Received: The District Court granted a permanent injunction against a subdivision lot owner who was operating an auto body shop in the subdivision in violation of a restrictive covenant against commercial activity. The shop operator's mother formed a sham corporation in an attempt to get around the injunction by allowing her son to continue to operate the shop on the adjacent lot, which she owned. The District Court extended the injunction to include the mother, and she appealed, but the Supreme Court affirmed. Under Morton v. Lanier, 2002 MT 214, 311 M 301, 55 P3d 380 (2002), and this section, a nonparty to an injunction may be enjoined if the nonparty is in active concert or participation with the enjoined party, as long as the nonparty receives actual notice of the injunction by personal service or otherwise. The mother received actual notice of the original injunction through the attorney who represented both her and her son in the present action, so extending the injunction to the mother was not an abuse of discretion. Rice v. C.I. Lanning, 2004 MT 237, 322 M 487, 97 P3d 580 (2004).

Injunction in Arbitration Award Not Restrictive of Constitutional Right to Access Courts: The Langemeiers and Kuehls became involved in a dispute over a county road easement between their adjoining lands, and the dispute eventually was submitted to arbitration. The final arbitration award provided injunctive relief to the Langemeiers by prohibiting the Kuehls from commencing or prosecuting any further action or proceeding regarding the property or challenging the ownership of the parcel. The Kuehls complained that the injunctive language was so overbroad that it took property from them without due process of law and improperly restricted their constitutional right to access courts. However, the initial memorandum of understanding, the settlement agreement, and the final arbitration award all established that the Kuehls had no property interest in the disputed roadway, so they could not complain that they were deprived of the use of property that was not theirs to use. Further, the injunctive language only sought to restrain the Kuehls from contesting matters already decided and from pursuing repetitive claims previously resolved by the settlement agreement concerning property in which they had no interest. The Kuehls had already enjoyed access to the courts as the dispute wound its way through two arbitrations, approval by the District Court, and a Supreme Court appeal. Although the constitution guarantees every person access to the courts, it does not grant a license to relitigate a cause or to burden the resources of the courts with successive claims. Therefore, the injunction did not deny the Kuehls of the use of property or access to the courts, and the arbitration award was affirmed. Langemeier v. Kuehl, 2001 MT 306, 307 M 499, 40 P3d 343 (2001).

Cause of Action for Erection of Spite Fence Solely Intended to Injure Neighbor — Availability of Injunctive Relief or Nuisance Claim — Bordeaux Overruled: Kottas built a 200-foot long, 7 feet 3 inches to 7 feet 9 inches high wooden fence that obstructed Haugen's view. Haugen sought injunctive relief for removal of the fence, alleging that it was a spite fence. The District Court concluded that it was indeed a spite fence, but declined to issue an injunction or recognize any remedy under Montana law, citing Bordeaux v. Greene, 22 M 254, 56 P 218 (1899), in holding that a person with a legal right can enforce the enjoyment of that right without inquiry into motive. The Supreme Court noted the many changes in property law since 1899 and overruled Bordeaux, adopting instead the rationale in Sundowner, Inc. v. King, 509 P2d 785 (Idaho 1973). Sundowner rejected the older rule that erection of a spite fence is not an actionable wrong and held that a property owner cannot erect a structure for the sole purpose of injuring a neighbor, such as a spite fence, which is of no beneficial use to the owner but is erected and maintained for the purpose of annoying a neighbor. A spite fence gives rise to an action for both injunctive relief and damages and may also be addressed through a nuisance claim. The Supreme Court reversed for a determination of the proper remedy. Haugen v. Kottas, 2001 MT 274, 307 M 301, 37 P3d 672 (2001).

Equitable Estoppel Defense Defeated — Failure of Counterclaim to State Claim for Which Relief May Be Granted: The city of Whitefish sought and obtained a permanent injunction against Troy Town Pump, Inc. (Town Pump), requiring removal of a sign that violated the city's ordinance. Town Pump's defense was that the city's approval of the original building plan equitably estopped the city's claim. Alternatively, Town Pump counterclaimed for the costs of remodeling the building. In order for the city to obtain a permanent injunction, it first had to overcome Town Pump's counterclaim that it was equitably estopped from doing so. The city successfully defeated the counterclaim. Absent a legal theory upon which to base damages, the city could not be held liable, so the District Court did not err in dismissing Town Pump's counterclaim for damages on grounds that it failed to state a claim for which relief could be granted. Whitefish v. Troy Town Pump, Inc., 2001 MT 58, 304 M 346, 21 P3d 1026 (2001).

Revocation of Prior City Approval of Building Plan Based on Incorrect Conclusion That Proposed Fascia Did Not Constitute Sign — Equitable Estoppel Inapplicable — Jurisdiction Properly Retained: The city of Whitefish adopted a master plan that included a policy providing that commercial signs are a blighting factor and that contained strict limits on the size and character of signs. Troy Town Pump, Inc. (Town Pump), submitted blueprints to the city for a new exterior, referred to as a fascia, that included lettering above an awning. The city manager reviewed the blueprints for the design before it was installed and, believing that only the written words but not the entire awning constituted a sign, approved the design and issued a building permit. When installed, the awning consisted of a band of translucent, raspberry-colored material 4 feet 11 inches high, extending about 162 feet across the entire length of the front of the building. Four rows of white fluorescent light tubes located behind the awning extended the entire length of the material and lit it from behind, and four neon lights were placed in front of the awning, which ran horizontally the entire length of the front of the building and approximately 42 feet along the rear of the building. The City Council concluded that the entire

awning constituted a sign that violated the city ordinance because it was too big and directed Town Pump to remove the lighting. When Town Pump refused, the city sought an injunction prohibiting Town Pump from operating the lighting. Town Pump's defense was that the city's claims were barred under the doctrine of equitable estoppel, because the design had already been reviewed and the building permit issued. During a bench trial, the city manager testified that if he had realized that the fascia would create a lighting scheme that dwarfed the lettering and far exceeded general lighting needs, he would not have approved the building permit. The District Court issued a permanent injunction requiring removal of all lighting and reserved jurisdiction to determine whether the entire awning constituted a sign within the meaning of the ordinance, thereby justifying further injunctive relief. In a subsequent order, the court granted the city's motion for judgment on the pleadings on the counterclaim on grounds that the counterclaim failed to state a claim upon which relief could be granted. Town Pump appealed. The Supreme Court held that original approval of the building permit was based on an incorrect misrepresentation of law, not fact, that the fascia did not constitute a sign. Thus, Town Pump failed to establish the first element of equitable estoppel, which requires a misrepresentation of fact. Further examination revealed that Town Pump failed to establish even one element of equitable estoppel, dooming its defense to the city's request for an injunction. The city's broad definition of sign was intended to include not only traditional signs, but also embellishments intended to draw attention to a traditional sign or to the business itself, so the District Court did not abuse its discretion in ordering removal of the lighting. Further, under the city's broad request for relief, the court did not err in retaining jurisdiction to allow the city to return to court after the lighting was removed to consider an order requiring removal of the awning. The court simply exercised its discretion in a manner that allowed it to grant all relief necessary in the matter. Whitefish v. Troy Town Pump, Inc., 2001 MT 58, 304 M 346, 21 P3d 1026 (2001).

Discharge of Water as Continuing Invasion of Property Rights Within Scope of Injunction: Tumas constructed a trout pond that continuously discharged water downstream across Ducham's property, impeding or prohibiting Ducham's historical use of the property and constituting a continuing invasion of property rights and irreparable injury. Absent injunctive relief, Ducham would have been forced to bring a multiplicity of actions at law in order to be compensated for the ongoing injury. Issuance of a permanent injunction is precisely the relief anticipated under these kinds of ongoing injuries, and failure by the trial court to issue a permanent injunction in this case constituted reversible error. Ducham v. Tuma, 265 M 436, 877 P2d 1002, 51 St. Rep. 595 (1994), followed in Engel v. Gampp, 2000 MT 17, 298 M 116, 993 P2d 701, 57 St. Rep. 96 (2000).

Injunctive Relief Granted to Persons Not Specifically Named as Plaintiffs — Representative Capacity Not Challenged: The District Court did not exceed its personal jurisdiction by granting injunctive relief to persons other than those specifically named as plaintiffs in the complaint when the voluntary trade organization, as plaintiff, alleged that it was representing persons holding liquor licenses in Montana and the state, as defendant, did not challenge the adequacy of the association's representative capacity under Rule 9(a), M.R.Civ.P. (see Title 25, ch. 20). Mont. Tavern Ass'n v. St., 224 M 258, 729 P2d 1310, 43 St. Rep. 2180 (1986).

Scope of Injunction — Cutting of Timber: The District Court enjoined defendant from cutting all timber instead of merely enjoining the cutting of timber not included in the contract. Defendant contended that this falls within the role that an injunction should be limited to enjoining the wrong and should not extend to preventing lawful activity under the contract. The court considered the character and use of the property as well as the conduct of the appellant. The District Court did not abuse its discretion or grant an overbroad injunction. On the basis of appellant's conduct in reentering the land after a notification of termination, the District Court was warranted in enjoining all future cutting to prevent future irreparable injury to the land. Madison Fork Ranch v. L & B Lodge Pole Timber Prod., 189 M 292, 615 P2d 900, 37 St. Rep. 1468 (1980). See Shammel v. Canyon Resources Corp., 2003 MT 372, 319 M 132, 82 P3d 912 (2003), in which a manifest abuse of discretion standard was adopted for review of granting or denying an injunction.

Collateral References

Appealability of order refusing to grant or dissolving temporary restraining order. 19 ALR 3d 459.

Appealability of order granting, extending, or refusing to dissolve temporary restraining order. 19 ALR 3d 403.

Part 2
Availability of Preliminary Injunction

Part Case Notes

Not Within Scope of Preliminary Injunction to Determine Merits of Case: Defendants sought to subdivide their property. Plaintiffs filed for a preliminary injunction on grounds that if defendants were not immediately enjoined from proceeding with a boundary realignment, plaintiffs would suffer irreparable injury through loss of access. The District Court issued a temporary restraining order prohibiting defendants from pursuing the boundary realignment and from using a road to transport heavy equipment pending a show cause hearing. At the hearing, defendants informed the court that they had withdrawn their subdivision exemption application, rendering the boundary realignment issue moot. The court then denied plaintiffs' motion for a preliminary injunction and dissolved the temporary restraining order. However, the court went on to address and resolve many of the issues that plaintiffs had raised in their complaint. The Supreme Court affirmed the denial of the preliminary injunction because plaintiffs failed to meet the burden under 27-19-201 but noted that the limited function of a preliminary injunction is to preserve the status quo and minimize the harm to all parties pending full trial, rather than to determine the merits of the case. Therefore, the District Court erred in making sweeping and final factual legal determinations following the hearing on the propriety of issuing a preliminary injunction, and the Supreme Court reversed and remanded for trial on the issues. Yockey v. Kearns Properties, LLC, 2005 MT 27, 326 M 28, 106 P3d 1185 (2005).

Disjunctive Rules — Single Subsection Improperly Used as Basis for Denial of Preliminary Injunction: Sweet Grass Farms, Ltd. (Sweet Grass), sought a preliminary injunction to halt building of a subdivision on land adjacent to Sweet Grass property. An applicant for a preliminary injunction must establish a prima facie case or show that it is at least doubtful whether or not irreparable injury will be suffered before the applicant's rights can be fully litigated. Here, the District Court denied the motion on the sole basis that it did not satisfy 27-19-201(2), without considering any of the other subsections of this section, finding that the hardships that would be suffered by the developer outweighed those that would be suffered by Sweet Grass and that Sweet Grass would not be irreparably harmed if the subdivision were allowed to proceed during the pendency of the action. However, sale of any lots during the litigation would tend to render a judgment in favor of Sweet Grass ineffectual. The Supreme Court noted that the subsections of 27-19-201 are disjunctive, meaning that only one subsection need be met for an injunction to issue. The District Court abused its discretion when it denied Sweet Grass's motion for a preliminary injunction based solely on subsection (2). The Supreme Court remanded with instructions to issue injunctive relief pursuant to subsection (3). Sweet Grass Farms, Ltd. v. Bd. of County Comm'rs, 2000 MT 147, 300 M 66, 2 P3d 825, 57 St. Rep. 576 (2000), following Stark v. Borner, 226 M 356, 735 P2d 314 (1987). See Shammel v. Canyon Resources Corp., 2003 MT 372, 319 M 132, 82 P3d 912 (2003), in which a manifest abuse of discretion standard was adopted for review of granting or denying an injunction.

Reversal of Denial of Preliminary Injunction — Consideration of Underlying Issues Precluded: On appeal of the merits of a preliminary injunction, plaintiff requested that the Supreme Court provide substantive guidance by addressing several underlying issues regarding interaction between injunction laws and subdivision statutes, as well as the likelihood of plaintiff to prevail on issues still pending in District Court. In determining the merits of a preliminary injunction on appeal, it is not the province of either the District Court or the Supreme Court to make final determinations on matters that might arise upon a trial on the merits. The request for substantive guidance was declined. Sweet Grass Farms, Ltd. v. Bd. of County Comm'rs, 2000 MT 147, 300 M 66, 2 P3d 825, 57 St. Rep. 576 (2000). See also Porter v. K&S Partnership, 192 M 175, 627 P2d 836 (1981), and Dreyer v. Bd. of Trustees of Mid-Rivers Tel. Co-op, Inc., 193 M 95, 630 P2d 226 (1981).

Preliminary Injunction Dissolved — Three Bases — Restrictive Covenants: In an action by subdivision property owners for a preliminary injunction enjoining the use of a building as an apartment building as opposed to use as a single-family dwelling contrary to restrictive covenants, the Supreme Court held that the injunction should be dissolved for the following reasons: plaintiff's case was rebutted, the status quo would not be preserved, and injury to both parties would not be minimized by granting the injunction. Porter v. K & S Partnership, 192 M 175, 627 P2d 836, 38 St. Rep. 648 (1981), followed in Dicken v. Shaw, 255 M 231, 841 P2d 1126, 49 St. Rep. 914 (1992), and M.H. v. Mont. High School Ass'n, 280 M 123, 929 P2d 239, 53 St. Rep. 1328 (1996).

27-19-201. When preliminary injunction may be granted.

Compiler's Comments

1995 Amendment: Chapter 350 in (5), after "applicant has", substituted "applied for an order" for "suffered or may suffer physical abuse" and after "40-4-121" inserted "or an order of protection under Title 40, chapter 15"; and made minor changes in style.

Severability: Section 31, Ch. 350, L. 1995, was a severability clause.

1985 Amendment: In (5) after "suffer physical abuse", deleted "by a spouse" and changed "40-4-106" to "40-4-121".

1981 Amendment: Inserted subsection (5) relating to physical abuse by a spouse.

Case Notes

Not Within Scope of Preliminary Injunction to Determine Merits of Case: Defendants sought to subdivide their property. Plaintiffs filed for a preliminary injunction on grounds that if defendants were not immediately enjoined from proceeding with a boundary realignment, plaintiffs would suffer irreparable injury through loss of access. The District Court issued a temporary restraining order prohibiting defendants from pursuing the boundary realignment and from using a road to transport heavy equipment pending a show cause hearing. At the hearing, defendants informed the court that they had withdrawn their subdivision exemption application, rendering the boundary realignment issue moot. The court then denied plaintiffs' motion for a preliminary injunction and dissolved the temporary restraining order. However, the court went on to address and resolve many of the issues that plaintiffs had raised in their complaint. The Supreme Court affirmed the denial of the preliminary injunction because plaintiffs failed to meet the burden under this section but noted that the limited function of a preliminary injunction is to preserve the status quo and minimize the harm to all parties pending full trial, rather than to determine the merits of the case. Therefore, the District Court erred in making sweeping and final factual legal determinations following the hearing on the propriety of issuing a preliminary injunction, and the Supreme Court reversed and remanded for trial on the issues. Yockey v. Kearns Properties, LLC, 2005 MT 27, 326 M 28, 106 P3d 1185 (2005).

High School Association Requirement That Member Schools Hire Certified Teachers Not Violative of Freedom of Religion: As a condition of membership and participation in interscholastic competitions with other member schools, defendant, a private and voluntary association of public and private schools, required that schools in the association be accredited by the state. When plaintiff, a private religious school, hired an uncertified teacher who nevertheless met its philosophical criteria, the school lost its state accreditation, its membership in the association, and the ability to compete in certain interscholastic competitions. The school moved for a preliminary injunction preventing the association from enforcing its rules on grounds that the association bylaws constituted an impermissible burden on the school's free exercise of religion. The motion was denied, and the school appealed, but the Supreme Court affirmed. The court applied the test in Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 US 707 (1981), to determine whether a burden on religion existed. The first part of the test involves whether an important benefit is at issue, and the court concluded that association membership and participation were important benefits. The next part of the test focuses on conduct proscribed by religious faith and conduct mandated by religious belief. Here, rather than attempting to preserve a unique religious culture and a right to live apart from the predations and vices of modern society, the school sought to fully integrate itself and allow its students to exemplify their Christian ideals in competition with students from other schools. Thus, the school failed to show that its religious belief was incompatible with teacher certification, and the court found no constitutional basis for the school's claim that the association should have to yield to the school's wish to employ a teacher who was devoted to the school's principles but not certified by the state. Valley Christian School v. Mont. High School Ass'n, 2004 MT 41, 320 M 81, 86 P3d 554 (2004), distinguishing Wis. v. Yoder, 406 US 205 (1972).

Preliminary Injunction Against Seed Potato Sale in Violation of Contract — Injury to Reputation, Investment, and Montana Farming: Plaintiffs contracted to sell generation two seed potatoes to defendants, which defendants would grow, with plaintiffs having the sole right to market the resulting generation three seed potatoes. Defendants replanted some of the generation three seed potatoes in order to grow their own generation four certified seed potatoes. Generation four is the point at which farmers can plant the potatoes for wholesale or retail sales. Plaintiffs were entitled to a preliminary injunction enjoining defendants from certifying their generation four seed potatoes. The potatoes of this variety are vulnerable to fusereum dry rot, and plaintiffs believed that it would take several more years for them to become acceptable.

Plaintiffs were worried about the spread of fusereum dry rot in this variety of potato if defendants sold the potatoes. Plaintiffs had a good reputation in the field and were worried about the danger to Montana and their reputation and about the loss of their investment. If the potatoes were certified before plaintiffs' case against defendants was concluded, plaintiffs would likely lose the ability to keep generation four seed potatoes out of the market and would lose control over them. The lower court properly waived plaintiffs' posting of a bond to protect defendants, ruling that the interests of justice allowed waiver. Defendants could sell the potatoes; they just could not sell them as certified seed potatoes. Furthermore, defendants admitted that they had violated the contract. The statute allowing waiver of bond "in the interest of justice" is not limited to protection of the person against whom the injunction is sought, as claimed by defendants. Four Rivers Seed Co. v. Circle K Farms, Inc., 2000 MT 360, 303 M 342, 16 P3d 342, 57 Mt. Rep. 1533 (2000).

Mootness — No Appeal Absent District Court Ruling on Declaratory Judgment: The high school sports association decided that Grabow was ineligible to play basketball because his eligibility pursuant to the semester rule had elapsed while Grabow was an exchange student in Germany. Grabow filed a complaint in District Court asking for a declaratory ruling that the association lacked rulemaking and adjudicatory authority and requested a hearing on whether a preliminary injunction should be issued precluding enforcement of the association rule until the case could be adjudicated on its merits. After deciding that it was unlikely that Grabow would ultimately prevail, the District Court denied the injunction. Grabow appealed. The Supreme Court granted the injunction pending final disposition of the appeal, and Grabow played basketball during his senior year. The Supreme Court found that the 1999-2000 season was the only one in which Grabow claimed that he had a right to participate and that because the season was completed, the initial grounds for application of the mootness doctrine to the preliminary injunction issue were met. The declaratory judgment issue was not one capable of repetition, but was one that would evade review, so the Supreme Court remanded for further consideration of Grabow's complaint for declaratory judgment, which would then be subject to appeal following final judgment by the District Court. Grabow v. Mont. High School Assn., 2000 MT 159, 300 M 227, 3 P3d 650, 57 St. Rep. 654 (2000). See also Shamrock Motors, Inc. v. Ford Motor Co., 1999 MT 21, 293 M 188, 974 P2d 1150 (1999).

Disjunctive Rules — Single Subsection Improperly Used as Basis for Denial of Preliminary Injunction: Sweet Grass Farms, Ltd. (Sweet Grass), sought a preliminary injunction to halt building of a subdivision on land adjacent to Sweet Grass property. An applicant for a preliminary injunction must establish a prima facie case or show that it is at least doubtful whether or not irreparable injury will be suffered before the applicant's rights can be fully litigated. Here, the District Court denied the motion on the sole basis that it did not satisfy subsection (2) of this section, without considering any of the other subsections of this section, finding that the hardships that would be suffered by the developer outweighed those that would be suffered by Sweet Grass and that Sweet Grass would not be irreparably harmed if the subdivision were allowed to proceed during the pendency of the action. However, sale of any lots during the litigation would tend to render a judgment in favor of Sweet Grass ineffectual. The Supreme Court noted that the subsections of this section are disjunctive, meaning that only one subsection need be met for an injunction to issue. The District Court abused its discretion when it denied Sweet Grass's motion for a preliminary injunction based solely on subsection (2). The Supreme Court remanded with instructions to issue injunctive relief pursuant to subsection (3). Sweet Grass Farms, Ltd. v. Bd. of County Comm'rs, 2000 MT 147, 300 M 66, 2 P3d 825, 57 St. Rep. 576 (2000), following Stark v. Borner, 226 M 356, 735 P2d 314 (1987). See Shammel v. Canyon Resources Corp., 2003 MT 372, 319 M 132, 82 P3d 912 (2003), in which a manifest abuse of discretion standard was adopted for review of granting or denying an injunction.

Reversal of Denial of Preliminary Injunction — Consideration of Underlying Issues Precluded: On appeal of the merits of a preliminary injunction, plaintiff requested that the Supreme Court provide substantive guidance by addressing several underlying issues regarding interaction between injunction laws and subdivision statutes, as well as the likelihood of plaintiff to prevail on issues still pending in District Court. In determining the merits of a preliminary injunction on appeal, it is not the province of either the District Court or the Supreme Court to make final determinations on matters that might arise upon a trial on the merits. The request for substantive guidance was declined. Sweet Grass Farms, Ltd. v. Bd. of County Comm'rs, 2000 MT 147, 300 M 66, 2 P3d 825, 57 St. Rep. 576 (2000). See also Porter v. K&S Partnership, 192 M 175, 627 P2d 836 (1981), and Dreyer v. Bd. of Trustees of Mid-Rivers Tel. Co-op, Inc., 193 M 95, 630 P2d 226 (1981).

What Constitutes Prima Facie Case —- Status Quo Clarified: An applicant for a preliminary injunction must establish a prima facie case or show that it is at least doubtful whether or not irreparable injury will be suffered before the applicant's rights can be fully litigated. In deciding whether an applicant has established a prima facie case, a court should determine whether a sufficient case has been made out to warrant the preservation of the property or rights in the status quo until trial without expressing a final opinion as to the rights. Status quo has been defined as the last actual, peaceable, noncontested condition that preceded the pending controversy. Here, the District Court denied a preliminary injunction solely on the basis of subsection (2) of this section, without considering any of the other subsections of this section, which in effect would allow development of a subdivision before the injunction applicant's concerns with the County Commission's conditional approval of the development could be addressed, including the fact that the Commission stated that the subdivision plat conformed to the master plan primary land use goals despite recommendations and findings of the planning board and staff to the contrary. In maintaining the status quo, the court should have granted the preliminary injunction pursuant to subsection (3) of this section. Final approval of the subdivision before resolution of the appeal of the conditional approval would allow sale of the lots, tending to render a judgment in favor of the applicant ineffectual. The case was remanded with instructions to issue injunctive relief. Sweet Grass Farms, Ltd. v. Bd. of County Comm'rs, 2000 MT 147, 300 M 66, 2 P3d 825, 57 St. Rep. 576 (2000). See also Porter v. K&S Partnership, 192 M 175, 627 P2d 836 (1981), and Fox Farms Estates Landowners Ass'n v. Kreisch, 285 M 264, 947 P2d 79 (1997).

Question of Whether Preliminary Injunction Properly Granted — Appeal Moot: A student filed a complaint concerning her freshman eligibility to play college sports and requested a preliminary injunction to allow her to play. The injunction was granted. On appeal, the question was raised as to whether the injunction was properly granted. However, by the time the appeal was considered, the student had finished her freshman year. The Supreme Court held that the injunction issuance question was moot but remanded to allow the underlying claim to proceed. Van Troba v. Mont. St. Univ., 1998 MT 292, 291 M 522, 970 P2d 1029, 55 St. Rep. 1196 (1998), distinguishing J.M. v. Mont. High School Ass'n, 265 M 230, 875 P2d 1026 (1994), and followed in Skinner Enterprises, Inc. v. Lewis & Clark City-County Health Dept., 1999 MT 106, 294 M 310, 980 P2d 1049, 56 St. Rep. 438 (1999). See also Grabow v. Mont. High School Ass'n., 2000 MT 159, 300 M 227, 3 P3d 650, 57 St. Rep. 654 (2000).

Party May Choose to Breach Contract and Pay Damages: American Music Co. (AMC) sued Higbee and requested a preliminary injunction for Higbee's not honoring the parties' contract by replacing AMC's gambling machines with other machines. The Supreme Court stated that an injunction was not available because a party has a right to breach a contract if the party is willing to pay the damages caused by the breach and, in the present case, the amount of damages could be determined. Am. Music Co. v. Higbee, 1998 MT 150, 289 M 278, 961 P2d 109, 55 St. Rep. 586 (1998).

Answer Pleading Insufficient Knowledge Creates Factual Dispute Subject to Trial — Disposition of Trial Issues by TRO Prohibited — Verified Complaint Not Basis for Agreed Facts — Denial of Due Process: After a writ of execution was issued against certain property belonging to her husband, Nancy filed a verified complaint against the Sheriff who would execute on the property. She also filed a petition for a temporary restraining order (TRO), claiming to be a tenant by the entirety in the property subject to execution. The District Court issued the TRO and, at a later show cause hearing, discussed the underlying law with counsel but took no testimony. The Sheriff then filed his answer, pleading insufficient knowledge to admit or deny. A creditor was later allowed to intervene. The creditor's answer also pleaded insufficient knowledge, but his brief took a position opposing Nancy's view of the law applicable to ownership of the property. Nancy then responded with a brief in which she asked the District Court to allow oral argument and reiterated her view of the law. The District Court issued findings and conclusions and quashed the writ of execution, relying upon the "undisputed" facts alleged in Nancy's verified complaint. The Supreme Court reversed, noting that under Rule 8(b), M.R.Civ.P. (Title 25, ch. 20), the effect of pleading insufficient knowledge is to deny a plaintiff's allegations. The Sheriff's and intervenor's answers pleading insufficient knowledge put into issue the allegations in Nancy's complaint. The only way that those issues of fact could be resolved, short of a trial on the merits, was by a motion for summary judgment or judgment on the pleadings, neither of which was made. The Supreme Court also noted that there was no discovery and no hearing at which facts were determined because there was no testimony taken by the District Court. Citing Porter v. K&S Partnership, 192 M 175, 627 P2d 836 (1981), and Knudson v. McDunn, 271 M 61, 894 P2d 295 (1995), the Supreme Court held that a District

Court may not determine, in proceedings on a preliminary injunction or a temporary restraining order, those issues that may arise in a trial on the merits. In this case, the District Court negated Nancy's burden of proof and, without notice, precluded discovery and deprived the Sheriff and the intervenor of the opportunity to disprove Nancy's allegations concerning her right of ownership in the property, thereby depriving the Sheriff and intervenor of their right to procedural due process under the Montana Constitution. For these reasons, the Supreme Court reversed the District Court and remanded for proceedings consistent with the Supreme Court's opinion. Lurie v. Sheriff, 284 M 207, 944 P2d 205, 54 St. Rep. 847 (1997).

No Finding of Great or Irreparable Injury — Injunction Improperly Granted: The District Court granted a preliminary injunction in favor of First Interstate Bank of Commerce, as holder of a perfected security interest in a cattle herd, prohibiting the removal of the cattle from the family ranch as part of a marriage dissolution. Reversing the judgment, the Supreme Court held that the District Court abused its discretion when it granted the injunction without first specifically finding that the bank would suffer a great or irreparable injury, as required in this section. First Interstate Bank of Commerce v. Ward, 282 M 266, 937 P2d 470, 54 St. Rep. 343 (1997). See Shammel v. Canyon Resources Corp., 2003 MT 372, 319 M 132, 82 P3d 912 (2003), in which a manifest abuse of discretion standard was adopted for review of granting or denying an injunction.

Grant of Preliminary Injunction — Prima Facie Showing of Violation of Constitutional and Contract Rights: A 1963 contract between the city of Billings and the Billings Heights County Water District fixed water rate charges and limited any subsequent rate increase charged the district unless the same percentage increase was applied to all city water users. Needing to raise additional revenue, in 1993, the city raised average water rates by 9.2% and the district rates by 32%. The district relied on the contract and increased its payments by 9.2%. In 1994, the city initiated an action to recover from the district the difference between the 1993 rate and the rate that the district paid from that time. In 1996, the city raised rates again, resulting in a 123% increase to the district and no such dramatic increase to any other city water customer. The district applied for a preliminary injunction to prevent the city from imposing the 1996 rate until the 1994 action had been addressed, but the application was denied and the district appealed. The Supreme Court found that the district made: (1) a sufficient showing that application of 69-7-101, granting the city control over utility rates, substantially impaired the district's rights under the 1963 contract; and (2) a prima facie case that application of 69-7-101 violated its rights under contract clauses of the U.S. and Montana Constitutions. Without ruling on the merits of the case, the court held that the district was thus entitled to the temporary injunction. Billings v. County Water District of Billings Heights, 281 M 219, 935 P2d 246, 54 St. Rep. 144 (1997).

Propriety of Preliminary Injunction in Context of Claim for Monetary Damages: The elements constituting the test to determine whether a preliminary injunction should issue when a party's monetary judgment may be made ineffectual by the actions of the adverse party, thereby irreparably injuring the applicant, are: (1) the likelihood that the movant will succeed on the merits of the action; (2) the likelihood that the movant will suffer irreparable injury absent the issuance of a preliminary injunction; (3) the threatened injury to the movant outweighs whatever damage that the proposed injunction may cause the opposing party; and (4) the injunction, if issued, would not be adverse to the public interest. The moving party has the burden of proving the elements. This analysis is to be narrowly interpreted because courts cannot countenance routine, meritless, or vindictive petitions for injunctions of this sort. An injunction is to be issued pursuant to subsection (2) or (3) of this section under only the most clear facts that fully satisfy the four-part test. This holding and the test apply only in cases in which a party seeking money damages alleges that the defendant is hiding or dissipating the assets in such a manner that a money judgment will be ineffectual or the plaintiff will be irreparably injured. Van Loan v. Van Loan, 271 M 176, 895 P2d 614, 52 St. Rep. 390 (1995). The four-part Van Loan test was applied in Shammel v. Canyon Resources Corp., 2003 MT 372, 319 M 132, 82 P3d 912 (2003).

Determination of Merits at Hearing Requesting Injunctive Relief — Reversible Error — Award of Attorney Fees Improper: Plaintiffs filed a complaint seeking an injunction pendente lite prohibiting defendants from completing construction of their home for alleged violations of subdivision building covenants. At a hearing, the District Court resolved the substantive issues of the complaint, deciding that the building covenants were ambiguous and unenforceable and that defendants had not violated the covenants, and awarded attorney fees and costs to defendants. It was error for the court to determine matters at the show cause hearing that should have been determined at a trial on the merits and to finally determine the merits before obtaining responsive pleadings and without allowing discovery. The court should have restricted

itself to determining whether plaintiffs made a sufficient case to warrant preserving a right in status quo until a trial on the merits could be held. The case was remanded for further proceedings, and the award of fees and costs was reversed. Knudson v. McDunn, 271 M 61, 894 P2d 295, 52 St. Rep. 336 (1995), following Boyer v. Karagacin, 178 M 26, 582 P2d 1173 (1978), and Porter v. K&S Partnership, 192 M 175, 627 P2d 836 (1981), and followed in Billings v. County Water District of Billings Heights, 281 M 219, 935 P2d 246, 54 St. Rep. 144 (1997). Knudson was followed in Lurie v. Sheriff, 284 M 207, 944 P2d 205, 54 St. Rep. 847 (1997).

Vacation of Injunction for Failure to Support It With Findings of Fact and Conclusions of Law: Because the District Court improperly failed to make supporting findings of fact and conclusions of law when it issued its injunction, the Supreme Court had no basis to decide whether the injunction itself was proper. Therefore, the Supreme Court vacated the injunction and remanded for reconsideration and issuance of findings of fact and conclusions of law. Traders St. Bank of Poplar v. Mann, 258 M 226, 852 P2d 604, 50 St. Rep. 509 (1993). Knudson was followed in Lurie v. Sheriff, 284 M 207, 944 P2d 205, 54 St. Rep. 847 (1997).

Money Damages Not Irreparable Harm — Injunction Denied: Employees of a bar were arrested for violating a city ordinance that prohibits nude dancing in establishments selling alcoholic beverages. The bar owners sought a preliminary injunction that was denied by the trial court. The Supreme Court held that under 27-19-103, an injunction cannot be granted to prevent the execution of a public statute for the public benefit without a showing of irreparable harm or a violation of a constitutional right as required by this section. Money damages are not considered to be irreparable harm because recovery of money damages is available in an action at law without resort to equity. New Club Carlin, Inc. v. Billings, 237 M 194, 772 P2d 303, 46 St. Rep. 731 (1989), followed in Dicken v. Shaw, 255 M 231, 841 P2d 1126, 49 St. Rep. 914 (1992), distinguished in Van Loan v. Van Loan, 271 M 176, 895 P2d 614, 52 St. Rep. 390 (1995), and clarified in Spoklie v. Dept. of Fish, Wildlife, and Parks, 2002 MT 228, 311 M 427, 56 P3d 349 (2002), to the extent that a mere showing of irreparable injury is not sufficient to overcome 27-19-103(4), and the only exception to the general rule that courts are prohibited from issuing injunctions to prevent the execution of a public statute by officers of the law for the public benefit is when a statute or ordinance is unconstitutional or otherwise invalid and when, in the attempt to enforce it, there is a direct invasion of property rights resulting in irreparable injury.

Partition Proceeding — Injunction May Be Granted: A court of equity may, in a partition proceeding, grant an injunction to preserve the property pending the proceeding. Granting a preliminary injunction is within the discretion of the trial court and will not be interfered with unless a manifest abuse of discretion is shown. Frame v. Frame, 227 M 439, 740 P2d 655, 44 St. Rep. 1216 (1987), followed in Tillett v. Lippert, 275 M 1, 909 P2d 1158, 53 St. Rep. 1 (1996).

Buyers in Default: The court properly found that buyers of ranch property were in default under their contract for deed before granting the sellers' application for injunctive relief to restrain the buyers from interfering with the sellers' repossession of the property. Stark v. Borner, 226 M 356, 735 P2d 314, 44 St. Rep. 717 (1987), affirmed in Stark v. Borner, 234 M 254, 762 P2d 857, 45 St. Rep. 1885 (1988).

Findings to Satisfy One Subsection Sufficient: The subsections of this statute are disjunctive, and findings to satisfy all subsections are not required for issuance of injunction. Stark v. Borner, 226 M 356, 735 P2d 314, 44 St. Rep. 717 (1987), affirmed in Stark v. Borner, 234 M 254, 762 P2d 857, 45 St. Rep. 1885 (1988), and followed in Sweet Grass Farms, Ltd. v. Bd. of County Comm'rs, 2000 MT 147, 300 M 66, 2 P3d 825, 57 St. Rep. 576 (2000).

Seizure of Legally Licensed Poker Machines — Injunction Proper: Issuance of a temporary restraining order and injunction to prevent Department of Revenue seizure of used poker machines entitled to legal licensure was proper. Buelow v. Willems, 225 M 225, 731 P2d 1309, 44 St. Rep. 189 (1987).

Injunction Pending Outcome of Agency Investigation: The Montana Power Company proposed a corporate reorganization. The Public Service Commission instituted an investigation of the reorganization plan and ordered Montana Power to take no further steps toward establishment of the holding company until the investigation was complete. Section 27-19-201(3) indicates legislative intent that an injunction might be issued in this fact situation where the Commission contends that permitting Montana Power to reorganize would render the Commission's final determination ineffective. Mont. Power Co. v. P.S.C., 206 M 359, 671 P2d 604, 40 St. Rep. 1712 (1983).

Findings and Conclusions Required With Injunction: The parties entered an oral agreement for plaintiff to loan money to defendant to purchase a semitruck, subject to an oral security interest and repayment schedule. Plaintiff later located defendant and the truck in Missoula and filed a complaint alleging breach of contract and replevin. An injunction was also requested.

Following a show cause hearing, plaintiff was given immediate temporary custody of the truck and allowed to operate it to mitigate his damages. Defendant appealed the ruling under Rule 1(b), M.R.App.Civ.P. (now M.R.App.P.). The Supreme Court vacated the injunction, holding that the court's order failed to preserve the status quo. It determined substantive property rights and did not set forth findings of fact and conclusions of law at the time the injunction was issued. Ensley v. Murphy, 202 M 406, 658 P2d 418, 40 St. Rep. 173 (1983).

Injunctive Relief Improper to Remedy Past Wrong: Injunctive relief was improper to compel appellants to comply with a state permit requirement that was in effect from 1975 through 1977. Injunctive relief cannot remedy a past wrong, and since all of the harm occurred in 1975 through 1977, there is no continuing nuisance subject to injunctive relief. Billings Assoc. Plumbing, Heating & Cooling Contractors v. Bd. of Plumbers, 184 M 249, 602 P2d 597 (1979).

Showing of Need for Temporary Restraining Order: The District Court did not abuse its discretion in initially issuing and subsequently refusing to quash a temporary restraining order when plaintiffs offered proof that they had suffered and would continue to suffer a loss of business unless defendant was restrained from parking in such manner as to prevent visibility of and proper ingress to plaintiffs' business. This showing was sufficient since there was no means of determining the precise number of potential patrons who passed by the drive-in due to defendant's vehicle or how much each would have spent upon entering. Boyer v. Karagacin, 178 M 26, 582 P2d 1173 (1978), distinguished in Van Loan v. Van Loan, 271 M 176, 895 P2d 614, 52 St. Rep. 390 (1995). See Shammel v. Canyon Resources Corp., 2003 MT 372, 319 M 132, 82 P3d 912 (2003), in which a manifest abuse of discretion standard was adopted for review of granting or denying an injunction.

Temporary Restraining Order — Jurisdiction to Continue: A temporary restraining order did not expire after a reasonable time without notice and hearing when it was due to the delays of defendant in changing counsel and disqualifying the judges called in. Thus, the court had jurisdiction to order a continuance of the temporary restraining order. Boyer v. Karagacin, 178 M 26, 582 P2d 1173 (1978).

Minority Business Enterprise Requirements — Public Effect: The court denied an application for a preliminary injunction to prevent defendants' enforcement of minority business enterprise requirements because a restraining order would have frustrated the congressional policy to immediately reduce unemployment and would have jeopardized the entire program in Montana. Mont. Contractors' Ass'n v. Secretary of Commerce, 439 F. Supp. 1331 (D.C. Mont. 1977).

Real Estate Cases:

An order enjoining landowner from proceeding with mobile home subdivision on his land until zoning regulations were adopted was improper because it was impossible to predict whether landowner's plans would conflict with zoning regulations finally adopted. State ex rel. Corning v. District Court, 156 M 81, 474 P2d 701 (1970).

Where, in action to quiet title and for injunction to prevent trespass on land in which plaintiff claimed title and defendants in answer claimed title by adverse possession which plaintiff denied, the pleadings presented the issues of title and ownership which the court had power to determine. Tiffany v. Uhde, 123 M 507, 216 P2d 375 (1950).

A wife may not obtain injunction to restrain her husband from selling property when her title to the property is not clear. Emery v. Emery, 122 M 201, 200 P2d 251 (1948), distinguished in Johnson v. Johnson, 137 M 11, 349 P2d 310 (1960).

Title to or right of possession of real estate is not triable by injunction. Emery v. Emery, 122 M 201, 200 P2d 251 (1948).

Where the house of plaintiff stood on the line of an alley which lay between her lots and those of defendant, the alley never having been dedicated to public use and being owned in equal portions by the litigants, and defendant commenced the erection of a fence on plaintiff's portion of the alley, which would have closed up certain windows in said house, injunction was properly granted as defendant's action was likely to produce an irreparable injury to plaintiff. Sankey v. St. Mary's Female Academy, 8 M 265, 21 P 23 (1889).

Clean Hands: To entitle an applicant to an injunction he must show not only that he is in danger of losing a substantial right but also that he is in no fault. Emery v. Emery, 122 M 201, 200 P2d 251 (1948), distinguished in Johnson v. Johnson, 137 M 11, 349 P2d 310 (1960).

Imminence of Injury: In addition to having a clear right there must also be an apparent and pressing necessity for an injunction, and the injury threatened must be imminent and such as can only be avoided by an injunction. Emery v. Emery, 122 M 201, 200 P2d 251 (1948), distinguished in Johnson v. Johnson, 137 M 11, 349 P2d 310 (1960).

Water Drainage: Complaint in an action by the owner of agricultural land to enjoin a neighboring owner from conducting drainage water onto the former's property until such time as

defendant should provide an outlet for such water other than plaintiff's land, alleging that defendant by the course pursued would flood, destroy the productivity, and permanently injure plaintiff's property, stated a cause of action as against a general demurrer (demurrer abolished, Rule 7(c), M.R.Civ.P.), and findings for plaintiff were sustained by evidence. O'Hare v. Johnson, 116 M 410, 153 P2d 888 (1944).

Insolvent Defendant:

Where the trespass is continuous or where acts of wrong are repeated or threatened and the defendant is insolvent, injunction may issue pending suit by a lessor seeking restitution of the property from the lessee. Gibbons v. Huntsinger, 105 M 562, 74 P2d 443 (1937), distinguished in Davis v. Burton, 126 M 137, 246 P2d 236 (1952).

When it appears from the decisions in prior litigation that a mining company, in a pending suit, will probably recover a large judgment against another company for the value of ore extracted from veins owned by plaintiff, a court is authorized to grant an injunction restraining the defendant from extracting and selling the ore from its mine, where it is shown by affidavit that the result would be that it would not have sufficient property remaining to respond to the judgment. Mont. Min. Co. v. St. Louis Min. & Mill. Co., 168 F 514 (9th Cir. 1909).

Utility Rate Regulation: Citing Title 69, ch. 3, part 4, federal court did not have jurisdiction of suit to enjoin rate order issued by state Public Service Commission on ground that statute denied supersedeas or stay in state court, where United States Supreme Court has held a similar statute of state void as denying due process and this section would permit state court to grant stay on proper showing. Mont. Power Co. v. P.S.C., 12 F. Supp. 946 (D.C. Mont. 1935).

Relation of Injunction to Main Action: An injunction may be granted only with relation to something connected with the subject matter of the action in which it is sought; hence where the holder of a mortgage covering two adjoining tracts of land separately owned by husband and wife proceeded to foreclose as to the land owned by the latter only, he having purchased the husband's land at bankruptcy sale, the District Court properly denied defendant an injunction pendente lite to restrain plaintiff from interfering with the wife's possession of land formerly owned by the husband; such land not having been involved in the suit, the matter of its possession was foreign to it and injunction did not lie. Nat'l Bank of Mont. v. Bingham, 83 M 21, 269 P 162 (1928).

Water Rights: Where in a water right suit, plaintiffs had filed their complaint, positively verified, and introduced uncontradicted oral proof in support of their application for a temporary restraining order, defendants appearing by general demurrer (demurrer abolished, Rule 7(c), M.R.Civ.P.) and neither filing verified answer nor submitting evidence, the court did not abuse its discretion in granting a temporary injunction. Parsons v. Mussigbrod, 59 M 336, 196 P 528 (1921). See Shammel v. Canyon Resources Corp., 2003 MT 372, 319 M 132, 82 P3d 912 (2003), in which a manifest abuse of discretion standard was adopted for review of granting or denying an injunction.

Taxpayer's Action: The complaint of a city taxpayer which omitted to show that he was a police officer or that he would suffer a special injury by a resolution of the council authorizing the appointment of a commission to make a physical examination of the members of the police force for the purpose of ascertaining whether any one of them had, by reason of old age or disease, become permanently incapacitated to discharge the duties of his office was, under this section, insufficient as a basis for an injunction to restrain the examination or the incurring of the expense incident to it. Larkin v. Butte, 52 M 410, 158 P 316 (1916).

Prima Facie Case Required:

If, upon the hearing for a preliminary injunction, a prima facie case as to the truth of the charges of wrongful conduct by the defendant is not shown, the restraining order should be set aside and the injunction refused. Rea Bros. Sheep Co. v. Rudi, 46 M 149, 127 P 85 (1912).

If the plaintiff for a preliminary injunction makes out a prima facie case, or if, upon the showing made, it is left doubtful whether he will suffer irreparable injury before his rights can be fully investigated and determined, the court ought to incline to issue the injunction and preserve the status quo. Rea Bros. Sheep Co. v. Rudi, 46 M 149, 127 P 85 (1912).

Temporary Restraining Order: The purpose and office of a restraining order is merely to prevent such injury as may occur before the hearing for an injunction can be had and inquiry be made as to the truth of the preliminary showing made by the plaintiff. This is its only office. When the hearing has been had, its office is accomplished and it is without further efficiency. Rea Bros. Sheep Co. v. Rudi, 46 M 149, 127 P 85 (1912).

Attorney General's Opinions

Allegations Necessary for Petition for Injunctive Relief: A petition for injunctive relief under subsection (3) of 40-4-121 must allege physical abuse, harm, or bodily injury. 43 A.G. Op. 50 (1989).

Law Review Articles

Defining Appropriate Criteria for the Public Employee Strike Injunction in Montana, Thiel, 53 Mont. L. Rev. 317 (1992).

Collateral References

Injunction *key* 9, et seq., 136, 137.

43A C.J.S. Injunctions §6, et seq.

42 Am. Jur. 2d Injunctions §§13 through 15.

Encroachment of trees, shrubbery, or other vegetation across boundary line. 65 ALR 4th 603.

Right of private sewerage system owner to enjoin trespass by unauthorized use of facilities. 76 ALR 2d 1329.

Injunction against repeated or continuing trespasses on real property. 60 ALR 2d 310.

Injunction as remedy with respect to rights of fishing, boating, bathing, or the like in inland lakes. 57 ALR 2d 590.

Injunction as affected by relative riparian or littoral rights respecting the removal of waters from a natural private, nonnavigable lake. 54 ALR 2d 1450.

Mandatory injunction to compel removal of encroachment by adjoining landowner. 28 ALR 2d 679, §28 superseded by 65 ALR 4th 603.

27-19-202. Preliminary injunction pending action for restraint of trade.

Collateral References

Injunction *key* 132, et seq.

43 C.J.S. Injunctions §5; 43A C.J.S. Injunctions §163, et seq.

27-19-203. Preliminary injunction pending action by public service commission.

Case Notes

Public Service Commission — Power to Issue Summary Injunction-Type Order: The Public Service Commission issued an order prohibiting Montana Power from proceeding with a proposed corporate reorganization until the P.S.C. could investigate the reorganization. The order was issued without notice or hearing. Section 69-3-110 shows the clear legislative intent that the Commission use the court system to seek enforcement by injunction, as distinguished from issuing the injunction-type order on its own part. Summary issuance of an injunction-type order without notice or hearing should be limited to situations where the public risk to be avoided outweighs the limitations placed on the constitutional rights of the parties. In this case the Commission has advanced no justification for its disregard of the due process rights of Montana Power. Mont. Power Co. v. P.S.C., 206 M 359, 671 P2d 604, 40 St. Rep. 1712 (1983).

Collateral References

Injunction *key* 132, et seq.

43A C.J.S. Injunctions §§85 through 87, 166.

27-19-204. Issuance without bond.

Collateral References

Injunction *key* 148(1).

43A C.J.S. Injunctions §§169 through 174, 286 through 290.

Part 3
Procedure for Obtaining Preliminary Injunction

27-19-301. Notice of application — hearing.

Case Notes

County Right-of-Way Considered Easement — Injunction Proper Remedy to Ensure Access to Right-of-Way: Jefferson County filed a complaint for a temporary injunction, an order allowing entry upon land to survey McCarty Creek Road, which passed through McCauley's land to public land beyond, and an order setting a show cause hearing. The District Court issued the injunction allowing the survey and set a date for hearing. At the hearing, the court found extensive documentary evidence, dating back to 1883, confirming the existence of McCarty Creek Road and, in its final order, determined that the road, as it crossed McCauley's property, was a dedicated and established county road. The court further enjoined McCauley from interfering with access or obstructing ingress and egress on the road. The Supreme Court affirmed, finding substantial credible evidence to support the District Court's determination and finding no abuse of discretion in enjoining McCauley from interfering with the public use of McCarty Creek Road. Jefferson County v. McCauley Ranches, 1999 MT 333, 297 M 392, 994 P2d 11, 56 St. Rep. 1329

(1999), following Bolinger v. Bozeman, 158 M 507, 493 P2d 1062 (1972), Reid v. Park County, 192 M 231, 627 P2d 1210, 38 St. Rep. 631 (1981), and Bailey v. Ravalli County, 201 M 138, 653 P2d 139, 39 St. Rep. 2010 (1982), and distinguishing Porter v. K&S Partnership, 192 M 175, 627 P2d 836 (1981), Knudson v. McDunn, 271 M 61, 894 P2d 295 (1995), and Lurie v. Sheriff, 284 M 207, 944 P2d 205, 54 St. Rep. 847 (1997). See Shammel v. Canyon Resources Corp., 2003 MT 372, 319 M 132, 82 P3d 912 (2003), in which a manifest abuse of discretion standard was adopted for review of granting or denying an injunction.

No Formal, Written Application Required for Injunction: Although reasonable notice of the time and place of making an application for a preliminary injunction is required under this section, there is no Montana statute that requires a party to submit a formal, written application or petition for an injunction. Buelow v. Willems, 225 M 225, 731 P2d 1309, 44 St. Rep. 189 (1987).

No Error in Issuance of Preliminary Injunction — Defendant Silent: The court held that the District Court did not err in issuing plaintiffs' preliminary injunction without defendants presenting evidence at the show cause hearing. The defendants remained silent at the hearing and did not raise an objection then or request plaintiffs to provide an offer of proof at the close of the hearing. This issue cannot be raised for the first time on appeal. Bowman v. Prater, 213 M 459, 692 P2d 9, 41 St. Rep. 2236 (1984).

Injunction Without Notice: Petition by female minor for injunction prohibiting rodeo from refusing to allow her to participate as a bareback bronc rider was not such an emergency as to invoke the extraordinary remedies of the court without notice, bond, or plenary hearing. State ex rel. Reno v. District Court, 165 M 289, 529 P2d 1407 (1974).

Service of Affidavit: The provision of 27-19-304 (now repealed), that where an injunction order is granted upon the complaint accompanied by affidavit in support thereof, a copy of the affidavit shall be served with the injunction order, is mandatory, and failure to serve the affidavit constitutes a jurisdictional defect fatal to the subsequent issuance of an injunction pendente lite, the rule applying also under this section, the two sections being construable together. State ex rel. McKenzie v. District Court, 111 M 241, 107 P2d 885 (1940).

Judicial Proceedings Restrained: While the District Court has jurisdiction to grant a temporary restraining order to preserve conditions in status quo for a reasonable time until a hearing may be had on notice for an injunction pendente lite, it is without jurisdiction, in the absence of notice, to restrain pending suit, where the rights of the parties depend upon disputed title and ownership of the property in question. State ex rel. Cook v. District Court, 105 M 72, 69 P2d 746 (1937), distinguished in State ex rel. McKenzie v. District Court, 111 M 241, 107 P2d 885 (1940).

Restraining Order Distinguished: This section and 27-19-314 clearly make a distinction between an injunction and a restraining order. A restraining order is distinguishable from an injunction in that a restraining order is intended only as a restraint upon the defendant until the propriety of the granting of an injunction, temporary or perpetual, can be determined, and it does no more than restrain the proceedings until such determination. Such an order is limited in its operation and extends only to such reasonable time as may be necessary to have a hearing on an order to show cause why an injunction should not issue. Wetzstein v. Boston & Mont. Consol. Copper & Silver Min. Co., 25 M 135, 63 P 1043 (1901), distinguished in Jordan v. Andrus, 26 M 37, 66 P 502 (1901).

Time of Hearing on Injunction: Where a temporary restraining order, pending the hearing of an order to show cause why an injunction should not issue, was against a mining company and suspended the operation of valuable property, it was an abuse of discretion to stay the hearing on the order to show cause 6 weeks from the issuance of the temporary restraining order, as it was unreasonable to suspend the operation of the mine for so long a period. Wetzstein v. Boston & Mont. Consol. Copper & Silver Min. Co., 25 M 135, 63 P 1043 (1901).

Collateral References

Injunction *key* 143.

43A C.J.S. Injunctions §298, et seq.

27-19-303. Time of granting injunction, evidence required.

Case Notes

County Right-of-Way Considered Easement — Injunction Proper Remedy to Ensure Access to Right-of-Way: Jefferson County filed a complaint for a temporary injunction, an order allowing entry upon land to survey McCarty Creek Road, which passed through McCauley's land to public land beyond, and an order setting a show cause hearing. The District Court issued the injunction allowing the survey and set a date for hearing. At the hearing, the court found extensive documentary evidence, dating back to 1883, confirming the existence of McCarty Creek Road

and, in its final order, determined that the road, as it crossed McCauley's property, was a dedicated and established county road. The court further enjoined McCauley from interfering with access or obstructing ingress and egress on the road. The Supreme Court affirmed, finding substantial credible evidence to support the District Court's determination and finding no abuse of discretion in enjoining McCauley from interfering with the public use of McCarty Creek Road. Jefferson County v. McCauley Ranches, 1999 MT 333, 297 M 392, 994 P2d 11, 56 St. Rep. 1329 (1999), following Bolinger v. Bozeman, 158 M 507, 493 P2d 1062 (1972), Reid v. Park County, 192 M 231, 627 P2d 1210, 38 St. Rep. 631 (1981), and Bailey v. Ravalli County, 201 M 138, 653 P2d 139, 39 St. Rep. 2010 (1982), and distinguishing Porter v. K&S Partnership, 192 M 175, 627 P2d 836 (1981), Knudson v. McDunn, 271 M 61, 894 P2d 295 (1995), and Lurie v. Sheriff, 284 M 207, 944 P2d 205, 54 St. Rep. 847 (1997). See Shammel v. Canyon Resources Corp., 2003 MT 372, 319 M 132, 82 P3d 912 (2003), in which a manifest abuse of discretion standard was adopted for review of granting or denying an injunction.

No Error in Issuance of Preliminary Injunction — Defendant Silent: The court held that the District Court did not err in issuing plaintiffs' preliminary injunction without defendants presenting evidence at the show cause hearing. The defendants remained silent at the hearing and did not raise an objection then or request plaintiffs to provide an offer of proof at the close of the hearing. This issue cannot be raised for the first time on appeal. Bowman v. Prater, 213 M 459, 692 P2d 9, 41 St. Rep. 2236 (1984). See Shammel v. Canyon Resources Corp., 2003 MT 372, 319 M 132, 82 P3d 912 (2003), in which a manifest abuse of discretion standard was adopted for review of granting or denying an injunction.

Verification of Complaint:

The purpose of the requirement under this section that a complaint be verified is to ensure good faith and truthfulness on the part of the complainant; where the requirement was not met, but at the trial complainant testified under oath as to matters found in the complaint, the issue of noncompliance was rendered moot. DeLaurentis v. Vainio, 169 M 520, 549 P2d 461 (1976).

On the hearing of an order to show cause why an injunction pendente lite should not issue, the proposed answer of defendant to the suit and the proposed answer of defendant to another suit concerning the same property, the complaint of which had been made a part of the present complaint, were properly rejected where the verifications of the same were on information and belief, as in such case positive verifications are required. Wetzstein v. Boston & Mont. Consol. Copper & Silver Min. Co., 26 M 193, 66 P 943 (1901).

A restraining order cannot be granted on a complaint by a corporation verified only on information and belief; the affidavit of verification must be made positively. Butte & Boston Consol. Min. Co. v. Mont. Ore Purchasing Co., 24 M 125, 60 P 1039 (1900).

Insufficient Facts: Where petition or complaint fails to state any facts entitling plaintiff to injunctive relief, it was proper for District Court to dismiss. Gehring v. Warner, 169 M 275, 546 P2d 260 (1976).

Injunction Granted After Hearing: Portion of statute pertaining to affidavits does not apply to injunction issued on basis of hearing on order to show cause. State ex rel. Martin v. District Court, 151 M 41, 438 P2d 563 (1968).

Oral Answer: There cannot be a final joining of the issues based on an answer in the form of a general denial orally interposed by counsel upon a hearing to show cause why an abatement order should not issue under the provision of section 94-1002, R.C.M. 1947 (now repealed), and a permanent injunction and order of abatement cannot be ordered. State ex rel. Harrison v. Baker, 135 M 180, 340 P2d 142 (1959).

Service of Affidavit:

An order to show cause why a divorce decree should not be modified was not sufficiently served where nothing at all was served on the wife and where the wife's mother was served with the first order but without supporting affidavit. Hand v. Hand, 131 M 571, 312 P2d 990 (1957).

Where a temporary restraining order and an order to show cause why an injunction pendente lite should not issue were based upon the complaint and an affidavit in support thereof and the affidavit had not been served upon the defendant as required by this section, the trial court was without jurisdiction to order the injunction to issue and should have dissolved the temporary order and dismissed the proceeding upon motion of defendant. State ex rel. McKenzie v. District Court, 111 M 241, 107 P2d 885 (1940).

Contents of Affidavit:

In affidavit for restraining order to prevent defendant in divorce action from molesting plaintiff or entering their home, it was necessary to state facts showing specific improper acts or conduct. Emery v. Emery, 122 M 201, 200 P2d 251 (1948), distinguished in Johnson v. Johnson, 137 M 11, 349 P2d 310 (1960).

In affidavit for restraining order to restrain withdrawal of bank funds, statement that "the defendant is addicted to spendthrift and profligate habits" is a bare conclusion, and where there are no specific acts alleged, it is insufficient. Emery v. Emery, 122 M 201, 200 P2d 251 (1948), distinguished in Johnson v. Johnson, 137 M 11, 349 P2d 310 (1960).

The requirement that the affidavit should show that sufficient grounds exist for the restraining order is not met by statements of the legal conclusions of the pleader or of mere matters of opinion unsupported by sufficient facts. Emery v. Emery, 122 M 201, 200 P2d 251 (1948), distinguished in Johnson v. Johnson, 137 M 11, 349 P2d 310 (1960).

Where restraining order is granted on affidavits, they must contain a statement of the material facts essential to establish the applicant's right to the relief sought. Emery v. Emery, 122 M 201, 200 P2d 251 (1948), distinguished in Johnson v. Johnson, 137 M 11, 349 P2d 310 (1960).

Temporary Restraining Order: A temporary restraining order, a species of injunction, is designed to maintain conditions in status quo until a hearing can be had to determine whether an injunction pendente lite should be issued; it is auxiliary to the order to show cause why such an injunction should not be granted, and when hearing and decision on the show cause order have been had, the temporary order becomes functus officio and is ineffective for any purpose. State ex rel. McKenzie v. District Court, 111 M 241, 107 P2d 885 (1940).

Complaint as Basis for Order:

An injunction may be granted on the complaint alone where its material allegations setting forth the grounds for the relief asked are made positively and not upon information and belief. Peterson v. Fugle, 96 M 537, 31 P2d 1030 (1934).

In exigent cases, a preliminary injunction may be granted without notice, either upon the verified complaint alone or upon affidavits, if, in the opinion of the court, irreparable injury will result from the delay required by giving notice. Lowery v. Cole, 47 M 64, 130 P 410 (1913).

An injunction order may be made upon the complaint alone or upon the complaint with affidavits; in either case it must satisfactorily appear that sufficient grounds exist for granting it. Rea Bros. Sheep Co. v. Rudi, 46 M 149, 127 P 85 (1912).

Order Before Filing of Complaint: A temporary restraining order issued upon a reading of the complaint by the District Judge, which complaint was not filed until 2 days thereafter, was void and was not rendered valid by a modification thereof, after such filing, on a hearing of defendant's motion to dissolve the injunctive order, since then such an order could be made only upon affidavits filed. Labbitt v. Bunston, 80 M 293, 260 P 727 (1927).

Amendment of Affidavit: Where after motion to dissolve a temporary injunction but before hearing thereon, the court properly permitted plaintiff to substitute his affidavit made positively for one made on information and belief, the amendment related back to the commencement of the action, and it was error to dissolve the injunction after hearing on the ground that the complaint originally did not have a positive verification attached to it. Claussen v. Chapin, 69 M 205, 221 P 1073 (1923).

Insolvency of Defendant: The fact that the complaint seeking specific performance of a contract, under the terms of which defendant agreed, among other things, to take over certain lots owned by plaintiffs in discharge of a judgment held by her, and asking a preliminary injunction restraining conduct on defendant's part which would result in a condition rendering a final decree in favor of plaintiffs ineffective, failed to allege that defendant was insolvent did not render the court's action in granting the injunction erroneous; the pleading having been verified upon knowledge, the requirements of this section were met. Lowery v. Cole, 47 M 64, 130 P 410 (1913).

Affidavits as Evidence: Ex parte affidavits may be used by the plaintiff as evidence in support of an application for an injunction. Wetzstein v. Boston & Mont. Consol. Copper & Silver Min. Co., 26 M 193, 66 P 943 (1901).

Collateral References

Injunction *key* 132, et seq., 144, 145.

43A C.J.S. Injunctions §§329, 330.

27-19-306. Security for damages.

Compiler's Comments

1995 Amendment: Chapter 575 at beginning of first sentence in (1) inserted "Subject to 25-1-402", before "judge" deleted "court or", and after "applicant" deleted "in such sum as the court considers proper" and at beginning of second sentence inserted exception clause; inserted (1)(a) requiring undertaking to be fixed at a sum that the judge considers proper; in (1)(b) substituted language authorizing undertaking to the waived for language providing that

undertaking may not be required; in (1)(b)(i), after "or", deleted "when the state or a state agency, a county or subdivision thereof, or a municipal corporation is the party seeking the injunction or restraining order. In any case, the court in its discretion may waive the undertaking"; inserted (2)(a) requiring judge to require filing of written undertaking if party seeks injunction or restraining order against industrial operation or activity and providing criteria for written undertaking; inserted (2)(b) defining industrial operation or activity; in (3) increased from 5 days to 30 days the time following service of injunction for enjoined party to object to sureties sufficiency; inserted (4) providing that section does not prohibit person wrongfully enjoined from filing action without limit on recovery; and made minor changes in style.

Case Notes

Motion for Written Undertaking Properly Denied Absent Active Industrial Operation or Activity: Defendant mining company moved for a written undertaking pursuant to this section based on its reclamation activities, even though the company was no longer engaged in mining. The motion was denied, and on appeal, the Supreme Court affirmed. The express purpose of an undertaking is to protect employees of the party enjoined from loss of wages, salaries, and benefits during the period that operations are enjoined. The injunction at issue in this case did not restrain the company from engaging in an industrial operation or activity, but rather required sequestration of proceeds from the sale of company assets. Therefore, this section was inapplicable, and a written undertaking was not required. Shammel v. Canyon Resources Corp., 2003 MT 372, 319 M 132, 82 P3d 912 (2003).

Voluntary Dismissal of Injunction Not Per Se Equivalent to Wrongful Issue of Injunction: The Osmolaks were granted a temporary restraining order against the Olsons in connection with a land deal, but before the show cause hearing, the Osmolaks were assured that the Olsons intended to perform as agreed in the buy-sell agreement, so the Osmolaks, convinced that there was no need to continue litigation, dismissed the action. The Olsons then sought attorney fees and costs for wrongful injunction, arguing that the voluntary dismissal had the same effect as a court decision finding that the Osmolaks were not entitled to the injunction. In defense, the Osmolaks sought to introduce into evidence the reasons why they had voluntarily dismissed the suit, but the District Court disallowed the evidence, holding that dismissal prior to an adjudication on the propriety of the injunction was an admission that the restraining order was without merit, entitling the Olsons to summary judgment and damages. The Osmolaks appealed, and the Supreme Court reversed. An order of dissolution in such cases is not per se equivalent to a court determination of wrongful injunction, but is only prima facie evidence that the injunction was improperly issued and may be rebutted by the party against whom damages are sought. The District Court erred in resolving the case on summary judgment because the Osmolaks should have been allowed to introduce evidence that their voluntary dismissal was justified, so the case was remanded for further proceedings. Olson v. Osmolak, 2003 MT 151, 316 M 216, 70 P3d 1242 (2003), following Stewart v. Miller, 1 M 301 (1871), and distinguishing Hatch v. Nat'l Sur. Corp., 105 M 245, 72 P2d 107 (1937), and Sheridan County Elec. Co-op, Inc. v. Ferguson, 124 M 543, 227 P2d 597 (1951).

Preliminary Injunction Against Seed Potato Sale in Violation of Contract — Injury to Reputation, Investment, and Montana Farming: Plaintiffs contracted to sell generation two seed potatoes to defendants, which defendants would grow, with plaintiffs having the sole right to market the resulting generation three seed potatoes. Defendants replanted some of the generation three seed potatoes in order to grow their own generation four certified seed potatoes. Generation four is the point at which farmers can plant the potatoes for wholesale or retail sales. Plaintiffs were entitled to a preliminary injunction enjoining defendants from certifying their generation four seed potatoes. The potatoes of this variety are vulnerable to fusereum dry rot, and plaintiffs believed that it would take several more years for them to become acceptable. Plaintiffs were worried about the spread of fusereum dry rot in this variety of potato if defendants sold the potatoes. Plaintiffs had a good reputation in the field and were worried about the danger to Montana and their reputation and about the loss of their investment. If the potatoes were certified before plaintiffs' case against defendants was concluded, plaintiffs would likely lose the ability to keep generation four seed potatoes out of the market and would lose control over them. The lower court properly waived plaintiffs' posting of a bond to protect defendants, ruling that the interests of justice allowed waiver. Defendants could sell the potatoes; they just could not sell them as certified seed potatoes. Furthermore, defendants admitted that they had violated the contract. The statute allowing waiver of bond "in the interest of justice" is not limited to protection of the person against whom the injunction is sought, as claimed by defendants. Four Rivers Seed Co. v. Circle K Farms, Inc., 2000 MT 360, 303 M 342, 16 P3d 342, 57 Mt. Rep. 1533 (2000).

Determination of Merits at Hearing Requesting Injunctive Relief — Reversible Error — Award of Attorney Fees Improper: Plaintiffs filed a complaint seeking an injunction pendente lite prohibiting defendants from completing construction of their home for alleged violations of subdivision building covenants. At a hearing, the District Court resolved the substantive issues of the complaint, deciding that the building covenants were ambiguous and unenforceable and that defendants had not violated the covenants, and awarded attorney fees and costs to defendants. It was error for the court to determine matters at the show cause hearing that should have been determined at a trial on the merits and to finally determine the merits before obtaining responsive pleadings and without allowing discovery. The court should have restricted itself to determining whether plaintiffs made a sufficient case to warrant preserving a right in status quo until a trial on the merits could be held. The case was remanded for further proceedings, and the award of fees and costs was reversed. Knudson v. McDunn, 271 M 61, 894 P2d 295, 52 St. Rep. 336 (1995), following Boyer v. Karagacin, 178 M 26, 582 P2d 1173 (1978), and Porter v. K&S Partnership, 192 M 175, 627 P2d 836 (1981), and followed in Billings v. County Water District of Billings Heights, 281 M 219, 935 P2d 246, 54 St. Rep. 144 (1997). Knudson was followed in Lurie v. Sheriff, 284 M 207, 944 P2d 205, 54 St. Rep. 847 (1997).

Attorney Fees Denied to Governmental Agencies: Several state agencies were successful in securing the dissolution of an injunctive order and sought attorney fees from the other party, a private company. The agencies sought attorney fees on the basis that the attorneys involved could have been working on other projects and therefore reasonable fees were due the agencies as an element of damages. The Supreme Court ruled that since the agencies' attorneys were salaried employees, attorney fees were not incurred because no additional financial burden was placed on the taxpayers. N. Border Pipeline Co. v. St., 237 M 133, 772 P2d 839, 46 St. Rep. 681 (1989).

Waive Undertaking: On granting an injunction, the court may waive the undertaking in the interest of justice. In this case, the court protected the property buyers' interest by ordering the sellers and buyers to perform or refrain from performing certain acts. Stark v. Borner, 226 M 356, 735 P2d 314, 44 St. Rep. 717 (1987), affirmed in Stark v. Borner, 234 M 254, 762 P2d 857, 45 St. Rep. 1885 (1988).

Bond Inappropriate When No Order in Effect: In an action by a corporation for interference with a contract, the trial court, after dissolving a temporary restraining order that had been wrongfully issued, ordered the plaintiff corporation to post a bond under the authority of 27-19-306. This section is inapplicable because it provides for the posting of a bond by the party who obtained the order. In this instance, there was no order in effect at the time the court ordered posting of the bond. The purpose of 27-19-306, requiring a party who is granted a temporary restraining order or injunction to post bond, is to cover the cost of damages that may be suffered by a party who is wrongfully enjoined or restrained. Mktg. Specialists, Inc. v. Serv. Mktg. of Mont., Inc., 214 M 377, 693 P2d 540, 42 St. Rep. 32 (1985).

Recovery of Attorney's Fees According to a Reasonable Standard When No Bond Involved: Attorney fees and costs are recoverable under 27-19-306 as elements of the damages sustained by reason of an injunction which is later dissolved. Despite the fact that 27-19-306 provides for recovery by an action on an injunction bond, the Supreme Court may apply the same reasonable standard to those actions for attorney fees in which a bond is not involved. In making attorney fees an element of damages under 27-19-306, the Legislature did not intend to make the recovery depend on the judge's discretion in demanding an injunction bond. First Am. Ins. Agency v. Gould, 203 M 217, 661 P2d 451, 40 St. Rep. 402 (1983); Marta v. Smith, 191 M 179, 622 P2d 1011, 38 St. Rep. 28 (1981).

Consecutive Restraining Orders: Where bond was executed in connection with granting of temporary restraining order which was thereafter dissolved but on the same day the judge continued the restraint by another restraining order and continued the bond, the sureties on the original bond were liable for damages sustained through the period of restraint imposed by the second order. Sheridan County Elec. Co-op v. Ferguson, 124 M 543, 227 P2d 597 (1951).

Consideration for Bond: A bond executed pursuant to and in substantial compliance with this section needs no consideration. Sheridan County Elec. Co-op v. Ferguson, 124 M 543, 227 P2d 597 (1951).

Legal Expenses as Damages:

Fact that person suing on bond became obligated for attorney's fees in injunction is sufficiently shown by proof that he employed an attorney who procured a dissolution of the injunction and of the reasonable value of his services. Sheridan County Elec. Co-op v. Ferguson, 124 M 543, 227 P2d 597 (1951).

Where there was evidence as to expenses and attorney's fees in a sum in excess of the amount of the bond, it was error to grant motion for nonsuit but case should have gone to jury. Sheridan County Elec. Co-op v. Ferguson, 124 M 543, 227 P2d 597 (1951).

Under a bond given in accordance with this section, reasonable expenses are recoverable, including attorney's fees and costs of procuring the dissolution of the restraint from the time such restraint was imposed to the final determination thereof. Sheridan County Elec. Co-op v. Ferguson, 124 M 543, 227 P2d 597 (1951).

Plaintiffs in an action to recover on an injunction bond were entitled to an attorney's fee notwithstanding the party securing the injunction order voluntarily dismissed the proceeding before hearing of the order to show cause, where the evidence showed that some legal work was done in preparation of a motion for change of venue and to meet the order to show cause. Hatch v. Nat'l Sur. Corp., 105 M 245, 72 P2d 107 (1937).

The word "damages" as used in this section embraces the reasonable expenses and costs of procuring the dissolution of the injunction when wrongfully issued, including attorneys' fees. Foster v. Royal Indem. Co., 83 M 170, 271 P 609 (1928).

Attorney's fees paid or contracted to be paid in securing the dissolution of an injunction, recoverable as damages in an action on the injunction bond, are to be limited to compensation for services rendered before a hearing of the cause on the merits, except where a trial of the merits is the only available means of testing plaintiff's right to the injunction or where timely motion to dissolve has been made but decision withheld until trial upon the merits. McDermott v. Am. Bonding Co., 56 M 1, 179 P 828 (1919).

Court costs and witness fees necessarily incurred in procuring the dissolution of an injunction wrongfully issued are properly recoverable in an action on the bond. McDermott v. Am. Bonding Co., 56 M 1, 179 P 828 (1919).

If counsel fees come within the provisions of this section, then by the same rule of construction they fall within the purview of 27-18-204 and may be recovered as an element of damages on the contract of a surety. Plymouth Gold Min. Co. v. USF&G Co., 35 M 23, 88 P 565 (1907).

Measure of Damages: The measure of damages in an action on the injunction bond is the amount which will compensate for all the detriment proximately caused by the injunction during the time it is operative or which in the ordinary course of things would be likely to result therefrom. Sheridan County Elec. Co-op v. Ferguson, 124 M 543, 227 P2d 597 (1951).

Voluntary Dismissal:

Where appeal was taken from action dissolving temporary restraining order and thereafter appellant dismissed his appeal, such dismissal constituted a final adjudication that appellant was not entitled to injunction, thereby making the sureties liable. Sheridan County Elec. Co-op v. Ferguson, 124 M 543, 227 P2d 597 (1951), distinguished in Olson v. Osmolak, 2003 MT 151, 316 M 216, 70 P3d 1242 (2003).

The voluntary dismissal or discontinuance by plaintiff of the action in which an injunction was issued has the same effect as a decision of the District Court that he was not entitled thereto and gives rise to a cause of action on the bond. Hatch v. Nat'l Sur. Corp., 105 M 245, 72 P2d 107 (1937), distinguished in Olson v. Osmolak, 2003 MT 151, 316 M 216, 70 P3d 1242 (2003).

Surety's Liability:

In an action on an injunction bond, the provisions of this section, with reference to what the party securing the injunction shall pay as damages to the party enjoined in case it be decided that the former was not entitled thereto, together with the terms of the bond, determine the contractual liability of the surety. Hatch v. Nat'l Sur. Corp., 105 M 245, 72 P2d 107 (1937).

A surety on an injunction bond contracts with reference to the provisions of this section, and his contractual liability is determinable by its terms and those of the bond. Foster v. Royal Indem. Co., 83 M 170, 271 P 609 (1928).

Plaintiff Not Entitled to Injunction: A finding of the District Court in its order of dissolution of a temporary injunction that "the court should not have granted the injunction in the first instance" was tantamount to saying that plaintiff "was not entitled thereto" and therefore sufficient to show a breach of the condition of the bond and to support judgment in favor of plaintiff in his action on the injunction bond to recover damages sustained by him incident to procuring dissolution of the injunction. Foster v. Royal Indem. Co., 83 M 170, 271 P 609 (1928).

Final Decision: Where a motion to dissolve an injunction pendente lite was not made because not authorized by law, the decision made by the District Court when the trial of the case on the merits was concluded and the injunction dissolved was the final decision, upon the making of which the sureties on the injunction bond had bound themselves to pay damages flowing from the wrongful issuance of the writ. McDermott v. Am. Bonding Co., 56 M 1, 179 P 828 (1919).

Interest as Damages: Whenever the direct and proximate effect of an injunction wrongfully issued is to deprive the party enjoined of the use of money which belongs to him, interest thereon at the legal rate for the time the money was impounded may be recovered by way of damages in an action on the injunction bond. McDermott v. Am. Bonding Co., 56 M 1, 179 P 828 (1919).

Collateral References

Injunction *key* 148(1) through (4); 163(1).

43A C.J.S. Injunctions §§286 through 290.

42 Am. Jur. 2d Injunctions §258.

Court's lack of jurisdiction of subject matter in granting injunction as defense in action on injunction bond. 82 ALR 2d 1064.

Furnishing of bond as prerequisite to issuance of temporary restraining order. 73 ALR 2d 854.

Duty to minimize damages for wrongful injunction. 66 ALR 2d 1131.

Dismissal of suit for injunction as conclusively establishing that temporary injunction had been improvidently granted. 54 ALR 2d 505.

Partial dissolution of injunction as breach of injunction bond. 40 ALR 990.

27-19-307. New undertaking for security following hearing.

Compiler's Comments

1995 Amendment: Chapter 575 in first sentence, near beginning before "judge", deleted "court or", before "sureties" substituted "similar" for "like", and before "effect" substituted "same" for "like"; inserted fourth sentence requiring new undertaking to comply with 27-19-306; and made minor changes in style.

Case Notes

Bond Inappropriate When No Order in Effect: In an action by a corporation for interference with a contract, the trial court, after dissolving a temporary restraining order that had been wrongfully issued, ordered the plaintiff corporation to post a bond under the authority of 27-19-307. This section is inapplicable because it provides for the posting of a bond by the party who obtained the order. In this instance, there was no order in effect at the time the court ordered posting of the bond. The purpose of 27-19-307, requiring a party who is granted a temporary restraining order or injunction to post bond, is to cover the cost of damages that may be suffered by a party who is wrongfully enjoined or restrained. Mktg. Specialists, Inc. v. Serv. Mktg. of Mont., Inc., 214 M 377, 693 P2d 540, 42 St. Rep. 32 (1985).

27-19-314. Temporary restraining order.

Case Notes

Injunction Granted Without Hearing — Grant of Relief Beyond Court Discretion: Without a hearing, a District Court granted an injunction enjoining a trustee from logging trust property, stating in its order and accompanying memorandum that it was granting the injunction regardless of whether the order strictly complied with injunction statutes. An injunction issued without a hearing is a temporary restraining order subject to expiration in 10 days. Because the court acted beyond its discretion and contrary to statutory mandates regarding injunctive relief, the Supreme Court dissolved the injunction. In re George Trust, 253 M 341, 834 P2d 1378, 49 St. Rep. 424 (1992).

Sworn Statement Concerning Mother's Threat Sufficient for Temporary Restraining Order: The sworn statement of the natural father that the mother had threatened to remove their children from the court's jurisdiction pending a determination of custody modification was sufficient grounds for issuing a temporary restraining order to prevent their removal. In re Marriage of Morazan, 237 M 294, 772 P2d 872, 46 St. Rep. 814 (1989).

Used Poker Machine Licensing — Temporary Restraining Order and Preliminary Injunction Proper: It was reasonable for the District Court to issue a temporary restraining order and a preliminary injunction when the court found that plaintiffs risked losing their used, unmodified video poker machines unless they could buy modification kits or new machines within 3 days and kits were not available. Under these circumstances, plaintiffs would suffer irreparable injury if they lost use of the used machines or had to buy more expensive new machines. As none of the criteria of the court orders changed or contravened the Video Draw Poker Machine Control Law of 1985, the Department of Revenue was not prevented under 27-19-103 from executing its duties. Further, it was also proper for the court to structure terms of the final order to protect licensees and limit the time for them to come into compliance with the new law. Mont. Tavern Ass'n v. St., 224 M 258, 729 P2d 1310, 43 St. Rep. 2180 (1986).

Department of Labor Not Limited to Investigation — "State" Claims No Justification for Restraining Order: The Supreme Court held incorrect the District Court's finding that the Department of Labor and Industry had only investigatory wage enforcement powers. The alleged but unproven harm incurred by an employer's having to defend "state" wage claims did not alone threaten the employer's rights sufficiently to justify court-ordered restraint of the Department. Further, the Department is required not only to inquire diligently into the validity of wage claims but also to determine their validity in a hearing. Intermountain Deaconess Home v. St., 191 M 309, 623 P2d 1384, 38 St. Rep. 272 (1981).

Order Only Effective for a Reasonable Time — Water Right Claim: A temporary restraining order is effective only for the reasonable time necessary to give notice and schedule a hearing to determine the appropriateness of an injunction pendente lite. The show cause hearing on the temporary restraining order did not produce a final determination on the merits of the plaintiff's water right claim. Eliason v. Evans, 178 M 212, 583 P2d 398 (1978).

Judicial Proceedings Restrained: While the District Court has jurisdiction to grant a temporary restraining order to preserve conditions in status quo for a reasonable time until a hearing may be had on notice for an injunction pendente lite, it is without jurisdiction, in the absence of notice, to restrain pending suit, where the rights of the parties depend upon disputed title and ownership of the property in question. State ex rel. Cook v. District Court, 105 M 72, 69 P2d 746 (1937), distinguished in State ex rel. McKenzie v. District Court, 111 M 241, 107 P2d 885 (1940).

Restraining Order Distinguished: This section and 27-19-301 clearly make a distinction between an injunction and a restraining order. A restraining order is distinguishable from an injunction in that a restraining order is intended only as a restraint upon the defendant until the propriety of the granting of an injunction, temporary or perpetual, can be determined, and it does no more than restrain the proceedings until such determination. Such an order is limited in its operation and extends only to such reasonable time as may be necessary to have a hearing on an order to show cause why an injunction should not issue. Wetzstein v. Boston & Mont. Consol. Copper & Silver Min. Co., 25 M 135, 63 P 1043 (1901), distinguished in Jordan v. Andrus, 26 M 37, 66 P 502 (1901).

Time of Hearing on Injunction: Where a temporary restraining order, pending the hearing of an order to show cause why an injunction should not issue, was against a mining company and suspended the operation of valuable property, it was an abuse of discretion to stay the hearing on the order to show cause 6 weeks from the issuance of the temporary restraining order, as it was unreasonable to suspend the operation of the mine for so long a period. Wetzstein v. Boston & Mont. Consol. Copper & Silver Min. Co., 25 M 135, 63 P 1043 (1901).

Collateral References

Injunction *key* 143.

43A C.J.S. Injunctions §§8 through 10.

42 Am. Jur. 2d Injunctions §14.

27-19-315. When restraining order may be granted without notice.

Compiler's Comments

1985 Amendment: In (2) inserted "the applicant or" before "the applicant's attorney".

Law Review Articles

Montana's New Domestic Abuse Statutes: A New Response to an Old Problem, D. Obtaining a Self-Help Temporary Restraining Order, Women's Law Caucus, 47 Mont. L. Rev. 416 (1986).

27-19-316. Contents and filing of restraining order granted without notice.

Compiler's Comments

1995 Amendment: Chapter 350 in (4), after "40-4-121", inserted "or Title 40, chapter 15"; and made minor changes in style.

Severability: Section 31, Ch. 350, L. 1995, was a severability clause.

1985 Amendment: In (4) inserted "except as provided in 40-4-121".

Part 4
Dissolution or Modification of Preliminary Injunction

27-19-401. Application to dissolve or modify injunction.

Case Notes

Taxation of Tribal Lands Allowed by Change in Federal Law — Inherent Court Power to Dissolve Injunction When Law Upon Which Injunction Based Changed by Subsequent Judicial Interpretation: In 1989, Jefferson, a member of the Crow Tribe, challenged Big Horn County's authority to impose and collect real property taxes on reservation land owned in fee simple by enrolled tribal members and requested that the District Court permanently enjoin Big Horn County from assessing and collecting taxes on Crow Reservation lands in the county. In 1990, while Jefferson's complaint was pending, the Ninth Circuit Court decided Confederated Tribes & Bands of the Yakima Nation v. County of Yakima, 903 F2d 1207 (9th Cir. 1990) (Yakima), which concluded that the Indian General Allotment Act of 1887 (GAA), 25 U.S.C. 349, manifested Congress's unmistakably clear intent to permit states to tax land allotted under the GAA. The District Court then applied Yakima later in 1990 and ruled in favor of Jefferson, holding that because Jefferson's land was never subject to the GAA, it was not taxable by the county. The court required Big Horn County to refund taxes paid under protest and remove Crow Tribe members from the tax rolls, stating that the declaratory ruling established a future tax-exempt status for land located within the Crow Reservation that was owned by Crow tribal members and not subject to the GAA. About 7 years later, the county moved to dissolve the 1990 decision on grounds that subsequent federal cases had established that alienable land owned by enrolled tribal members was subject to state ad valorem taxes even if it had not been patented in fee subject to the GAA. The county cited Cass County, Minn. v. Leech Lake Band of Chippewa Indians, 524 US 103, 141 L Ed 2d 90, 118 S Ct 1904 (1998) (Leech Lake), in which the U.S. Supreme Court rejected the Yakima rationale and held that when Congress made reservation lands freely alienable, it was unmistakably clear that Congress intended that land to be taxable by state and local governments unless a contrary intent was clearly manifested. The District Court then dissolved that portion of its 1990 decision that had granted a future tax-exempt status to tribal members, who appealed to the Montana Supreme Court on grounds that the doctrine of res judicata barred the District Court from vacating its decision. The state responded that the 1990 decision was a form of injunctive relief that the District Court could modify or dissolve pursuant to Santa Rita Oil & Gas Co. v. St. Bd. of Equalization, 112 M 224, 114 P2d 521 (1941) (Santa Rita). The Supreme Court found that the 1990 order was not strictly a declaratory judgment, but rather an injunction containing both retrospective and prospective relief, that 15-1-404 did not preclude the District Court from ordering injunctive relief, and that the court's declaratory judgment could not exempt Jefferson's property from future taxation without a further order of injunctive relief. Under Santa Rita, a court has inherent power to modify or dissolve perpetual injunctive relief based on a subsequent change in the judicial interpretation of a law. The judicial interpretation of the law upon which the 1990 relief was based was changed by Leech Lake; thus, the District Court did not err when it vacated the injunctive portion of its 1990 judgment. Jefferson v. Big Horn County, 2000 MT 163, 300 M 284, 4 P3d 26, 57 St. Rep. 682 (2000).

Pleading and Motion Distinguished: Affidavit to set aside temporary injunction granted without notice was not a responsive pleading in answer to complaint in original action to enjoin construction and operation of stock car racetrack as a nuisance. State ex rel. Thompson v. District Court, 132 M 53, 313 P2d 1034 (1957), distinguished in Guardian Life Ins. v. Bd. of Equalization, 134 M 526, 335 P2d 310 (1959).

Abatement of Nuisance: Where complaint and affidavits showed prima facie that premises constituted a nuisance per se under section 94-1002, R.C.M. 1947 (now repealed), it was error to quash the temporary injunction issued thereunder when defendant filed affidavit under this section and before any hearing on the complaint was had. State ex rel. Olsen v. 30 Club, 124 M 91, 219 P2d 307 (1950).

Affidavits and Testimony of Plaintiff: Plaintiff, in an abatement proceeding in which a temporary injunction was issued without notice, has the right to present affidavits and oral testimony at a hearing to dissolve the injunction in opposition to the motion to dissolve; since defendant knew of the time the hearing would be had and was advised by this section of plaintiff's right, service of notice of plaintiff's intention to ask leave of court to file affidavits and offer oral testimony was not required under 25-3-401. State ex rel. Bottomly v. District Court, 115 M 400, 143 P2d 559 (1943).

Burden of Proof: Where a temporary restraining order was issued upon the filing of the complaint to recover possession of lands in the hands of a cropper and order to show cause why an injunction pendente lite should not issue, and defendant moved to dissolve the temporary order while court erred in placing the burden of proof upon defendant, the error, in absence of showing of prejudice, will be deemed immaterial because order of proof is discretionary and on final analysis determination is dependent on where preponderance of the evidence lay. Gibbons v. Huntsinger, 105 M 562, 74 P2d 443 (1937).

Voluntary Dismissal: The voluntary dismissal or discontinuance by plaintiff of the action in which an injunction was issued has the same effect as a decision of the District Court that he was not entitled thereto and gives rise to a cause of action on the bond. Hatch v. Nat'l Sur. Corp., 105 M 245, 72 P2d 107 (1937).

Order Granted on Notice:

A temporary restraining order granted upon notice and after a hearing may not, in the absence of a showing of inadvertence, mistake, or change in existing circumstances or of a provision in the order preserving to the party enjoined the privilege of moving for a modification, be modified thereafter pending trial of the cause on its merits. Winnett Pac. Oil Co. v. Wilson, 71 M 250, 229 P 850 (1924).

Where an injunction pendente lite was issued after notice and a hearing, a motion to dissolve prior to trial upon the merits was unauthorized; it is only where the injunction issues without notice that the party enjoined may move for dissolution before a trial on the merits. McDermott v. Am. Bonding Co., 56 M 1, 179 P 828 (1919).

The manifest implication of this section and 27-19-404 is that, unless authority therefor exists elsewhere in the law, an application for the dissolution or modification of an injunction granted upon notice will not lie and that an injunction order so granted must stand, so far as the power of the District Court is concerned, until the cause in which it was granted is tried. Butte Consol. Min. Co. v. Frank, 24 M 506, 62 P 922 (1900).

Complaint as Basis for Motion: Where defendant's motion to dissolve a temporary injunction is based on the complaint alone, plaintiff has no right to file an affidavit in support of the complaint. Campbell v. Flannery, 29 M 246, 74 P 450 (1903).

Mandamus to Compel Hearing: Mandamus will not issue to compel a court to hear a motion to dissolve or modify an interlocutory injunction granted on order to show cause, based on the discovery of additional evidence tending to establish facts alleged in opposition to the injunction, where the motion to modify is based upon the same facts and rests upon the same grounds as those which had been presented in opposition to the granting of the injunction and where the privilege of applying for such dissolution or modification was not reserved in the order granting the injunction. Such hearing is in the discretion of the court. State ex rel. Hickey v. District Court, 23 M 564, 59 P 917 (1900).

Collateral References

Injunction *key* 163, et seq.

43A C.J.S. Injunctions §368, et seq.

42 Am. Jur. 2d Injunctions §332.

27-19-403. New undertaking for security following hearing.

Compiler's Comments

1995 Amendment: Chapter 575 in first sentence, before "judge", deleted "court or", before "sureties" substituted "similar" for "like", and before "effect" substituted "same" for "like"; inserted fourth sentence requiring new undertaking to comply with 27-19-306; and made minor changes in style.

27-19-404. When injunction dissolved or modified.

Collateral References

42 Am. Jur. 2d Injunctions §332.

Recovery of damages resulting from wrongful issuance of injunction as limited to amount of bond. 30 ALR 4th 273.

Dismissal, discontinuance, or nonsuit as nullifying previous temporary injunction. 11 ALR 2d 1411.

27-19-405. Enjoined party's undertaking for security upon dissolution.

Case Notes

Codification — Proper Statement of Law — No Practical Difference Between Two Versions: In an action by an out-of-state corporation against Montana parties for interference with a contract,

it was discovered that the codified version of 27-19-405, a statute central to the case, differed from the corresponding official enrolled bill passed by the Legislature. The difference arose because the section was amended in two separate bills by the 1979 Legislature. The version as codified by the Code Commissioner is a hybrid of the two legislative enactments; there is no practical difference between the different versions of the section. The Legislature has given the Code Commissioner the power to change the language of a law without changing its substance or intent. The codification of 27-19-405 contained in the 1983 Montana Code Annotated is a proper statement of the law as intended by the Legislature. Mktg. Specialists, Inc. v. Serv. Mktg. of Mont., Inc., 214 M 377, 693 P2d 540, 42 St. Rep. 32 (1985).

Section Not Applicable to Dissolution of Temporary Restraining Order: This section applies to a case in which an injunction has been issued and presently is being dissolved. It does not apply to a case in which a temporary restraining order was issued but later was dissolved, such as occurred in this case. Mktg. Specialists, Inc. v. Serv. Mktg. of Mont., Inc., 214 M 377, 693 P2d 540, 42 St. Rep. 32 (1985).

Collateral References

Recovery of damages resulting from wrongful issuance of injunction as limited to amount of bond. 30 ALR 4th 273.

27-19-406. Costs upon dissolution.

Case Notes

Statute Applicable Only Upon Dissolution of Injunction: A party obtained an injunction to keep a road open in a prescriptive easement case and then sought attorney fees. However, under this section, the grant of fees applies only to a party who obtains a dissolution of an injunctive order. Rasmussen v. Fowler, 245 M 308, 800 P2d 1053, 47 St. Rep. 2134 (1990).

Injunction Dissolved: Defendants requested and were entitled to costs and attorney fees in action where plaintiffs received an injunction pendente lite ordering defendants to remove a fence from the road and to allow plaintiffs to use the road, but the evidence later showed that plaintiffs had no easement rights in the defendant's land. Godfrey v. Pilon, 165 M 439, 529 P2d 1372 (1974). See also Parker v. Elder, 254 M 270, 836 P2d 1236, 49 St. Rep. 805 (1992).

Habeas Corpus: Where mother brought habeas corpus proceedings to enforce court order awarding custody of child in divorce proceedings, she was entitled to damages under the provisions of this section. Benson v. Benson, 121 M 439, 193 P2d 827 (1948).

Alternative Remedy:

This section is permissive only, and the court may therefore award such costs or leave the party enjoined to an action at law on the bond, if that instrument is so conditioned as to permit of such an action. Foster v. Royal Indem. Co., 83 M 170, 271 P 609 (1928).

Plaintiff in an action on an injunction bond after dissolution of the injunction, issued without notice, to recover expenses incident to procuring its dissolution, was not required to allege in his complaint that the court had awarded him costs in its order of dissolution and that he had served and filed a memorandum of costs and disbursements. Foster v. Royal Indem. Co., 83 M 170, 271 P 609 (1928).

Statutory Basis for Costs: The power to allow costs is purely statutory, and unless some statutory authority exists for their allowance, an allowance thereof is erroneous. Colusa-Parrot Min. & Smelting Co. v. Barnard, 28 M 11, 72 P 45 (1903).

Collateral References

Injunction *key* 188.

43A C.J.S. Injunctions §390.

CHAPTER 20
RECEIVERS

Chapter Case Notes

Farm Credit Administration Not Empowered to Abate Existing Lawsuits in Cases of Liquidation: Although 12 U.S.C. 2183(b) gives the Farm Credit Administration (FCA) power to provide for liquidation of a production credit association (PCA), it does not expressly empower the FCA to abate existing lawsuits; therefore, a motion by PCA to dismiss on the ground that the proceedings were barred or stayed due to PCA liquidation was denied. Jacobson v. W. Mont. Prod. Credit Ass'n, 643 F. Supp. 391, 43 St. Rep. 1598 (D.C. Mont. 1986).

Part 1
General Provisions

27-20-102. When and by whom receiver appointed.

Case Notes

Plaintiff Not Required to Show Conclusively Entitled to Relief to Have Receiver Appointed so Long as Major Asset in Danger of Being Lost: Valley West appealed the lower court's appointment of a receiver, arguing that Crowley had not demonstrated that he was incontrovertibly entitled to relief in the trial that would follow. The Supreme Court held that a plaintiff only has to demonstrate a reasonable probability of success, particularly when the plaintiff has a lien on or an interest in the property in the hands of the defendant. The Supreme Court further held that the defendant's attempt to avoid execution on assets by judgment creditors, when Crowley was the only creditor, demonstrated that the major asset in the parties' transactions was in danger of loss, removal, or material injury. Crowley v. Valley W. Water Co., 267 M 144, 882 P2d 1022, 51 St. Rep. 976 (1994).

Receivership Denied — Sale of Stock to Corporation Ordered — Value of Stock: Brother and sister, each owning 75 shares of family ranch incorporated into 1,000 shares, sued brother (owning 849 shares) and mother (owning 1 share) who lived on the ranch for receivership and sale of the ranch. Plaintiff brother settled for $20,000 and 20 acres of the ranch land in return for his shares. The court ordered sister to settle on the same terms. On remand for valuation of the corporation and its land, the lower court computed the net worth of the corporation, found the sister's shares worth $49,326.38, and ordered her to transfer her shares to the corporation for $9,326.38 and 20 acres of the ranch that would be worth $40,000. This was also overturned on appeal, the Supreme Court ordering that sister be paid $20,000 and 20 acres. Maddox v. Norman, 215 M 458, 697 P2d 1368, 42 St. Rep. 539 (1985).

Debt as Basis for Appointment:

Where bank held stock as security on loans made by farming corporation but it appeared that stockholders were, in good faith, planning to meet their obligation and the corporation was solvent, appointment of receiver at instance of bank merely to protect the price of the stock was erroneous. State ex rel. Larry C. Iverson, Inc. v. District Court, 146 M 362, 406 P2d 828 (1965).

In the absence of a statute so providing, a receiver of a corporation may not be appointed on petition of a general creditor. Mieyr v. Fed. Sur. Co., 94 M 508, 23 P2d 959 (1933), reversed on other grounds, 292 US 112, 78 L Ed 1160, 54 S Ct 615 (1934). See also Mieyr v. Fed. Sur. Co., 97 M 503, 34 P2d 982 (1934), affirmed in 294 US 211, 79 L Ed 865, 55 S Ct 356 (1935).

While a receiver pendente lite may be appointed, upon a proper showing, in an action involving conflicting rights to the subject matter of the action, to husband the property for the benefit of the party who may be ultimately found entitled thereto, this section contains no authority for the appointment of such an officer in a bare action for debt. Scholefield v. Merrill Mortuaries,Inc., 93 M 192, 17 P2d 1081 (1932).

Extraordinary Remedy:

Appointment of a receiver being a "drastic" remedy, which deprives the lawful owner of property the right to manage and control his own interests, the power to appoint a receiver should be exercised sparingly only upon a strong showing and not as of course. If the desired outcome may be achieved in any other way, then this course should be followed. State ex rel. Larry C. Iverson, Inc. v. District Court, 146 M 362, 406 P2d 828 (1965). See also Crowley v. Valley W. Water Co., 267 M 144, 882 P2d 1022, 51 St. Rep. 976 (1994).

Receivership is an extraordinary provisional remedy of ancillary character, allowable only in an action pending for some other purpose; the power of appointment should be exercised with unusual caution and only to prevent manifest wrong imminently impending or where the case shows clearly that the complaining party is in danger of suffering irreparable loss and there is no other plain, speedy, or adequate remedy. Doggett v. Johnson, 72 M 443, 234 P 252 (1925).

Receivership is an extraordinary remedy, never to be allowed except upon a showing that it is necessary. Masterson v. Hubbert, 54 M 613, 173 P 421 (1918); Mont. Ranches Co. v. Dolan, 53 M 397, 164 P 306 (1917); Prudential Sec. Co. v. Three Forks, Helena & Madison Valley R.R., 49 M 567, 144 P 158 (1914); Brown v. Erb-Harper-Rigney Co., 48 M 17, 133 P 691 (1913); Berryman v. Billings Mut. Heating Co., 44 M 517, 121 P 280 (1912).

This section is to be read in connection with the recognized principle that receivership is an extraordinary remedy, never to be allowed except upon a showing that it is necessary; no such showing is made by mere insolvency, nor, by a parity of reasoning, because the conduct of the corporation has been such that its corporate rights are subject to forfeiture. Prudential Sec. Co. v. Three Forks, Helena & Madison Valley R.R., 49 M 567, 144 P 158 (1914).

Judgment as Basis for Appointment:

Plaintiff wife's joint interest in a house trailer was merged in a Washington divorce decree ordering sale of the trailer or, in the alternative, awarding plaintiff lump-sum alimony. In a suit in Montana, the suit is on the debt created by the judgment, and for the collection of a judgment debt the relief by receiver does not lie. Little v. Little, 125 M 278, 234 P2d 832 (1951).

This section does not authorize the appointment of a receiver when a money judgment has been recovered in a simple action at law, as the creditor can himself take the necessary steps to enforce the judgment. Forsell v. Pittsburg & Mont. Copper Co., 42 M 412, 113 P 479 (1911).

Trusts: In an action to quiet title to mining property owned by a common-law trust of five trustees, the interest of one of whom had allegedly been transferred to cross complainant who had never received his stock, resulting in a hopeless deadlock of the remaining four in business matters by a vote of two to two, the remedies provided by the trust agreement should have been exhausted before the appointment of a receiver, and under 72-23-507 (now repealed) the court could appoint a successor to fill the vacancy if the agreement does not provide a method. Demos v. Doepker, 116 M 264, 149 P2d 544 (1944).

Partnership Property:

The purpose of appointing a receiver in an action for the dissolution of a partnership is to prevent the partner at fault from dissipating the common property; it is not the province of the court, through its receiver, to become the general manager of a private enterprise or conduct the business of a partnership; the power to appoint is to be exercised sparingly and with extreme caution; it should be resorted to only in cases of emergency because of the harshness of the remedy, particularly where both parties have equal rights of possession and management of the property and neither has excluded the other from enjoyment of his possession or rents and profits. Stoner v. Hannan, 113 M 210, 127 P2d 233 (1942), followed in Crowley v. Valley W. Water Co., 267 M 144, 882 P2d 1022, 51 St. Rep. 976 (1994).

Under the rules of subsections (1) and (5), the discretion in granting or denying an application for appointment of a receiver is limited. The following reasons are insufficient grounds for appointments unless partnership assets or operation are endangered: mortgage, with complainant's consent; withdrawals in proportion to partner's interest or profits out of collections for personal obligations evidenced by tabs left in the till; the fact that the partnership is losing money or is considerably in debt; or mere disagreement between partners preventing their speaking to each other. Stoner v. Hannan, 113 M 210, 127 P2d 233 (1942).

A proper case for the appointment of a receiver is not shown where it appeared from the complaint that all the joint operations in respect to the partnership property had been consummated except the collection of the balance of the price for which it had been sold and there remained simply a dispute between plaintiff and defendant as to the proper apportionment of the fund arising from the sale of the property, there being no averment that the defendant was insolvent or that the partnership fund was in danger of being lost, squandered, or removed from the jurisdiction. McIntosh v. Perkins, 13 M 143, 32 P 653 (1893).

Pending Action Required:

Under this section, a receiver for a dissolved or insolvent corporation may be appointed only in an action pending. Mieyr v. Fed. Sur. Co., 97 M 503, 34 P2d 982 (1934), affirmed in 294 US 211, 79 L Ed 865, 55 S Ct 356 (1935).

The power to appoint a receiver should be exercised sparingly and with extreme caution and only to prevent manifest wrong immediately impending or irreparable injury; to invoke the power there must be an action pending in which the right asserted can be litigated and a judgment rendered. Scholefield v. Merrill Mortuaries, Inc., 93 M 192, 17 P2d 1081 (1932).

The action which, under this section, is required to be pending before ancillary relief by way of receivership may be granted must be one for relief that could be litigated even though the application for the appointment of a receiver be denied and presupposes a sufficient complaint. Hartnett v. St. Louis Min. & Mill. Co., 51 M 395, 153 P 437 (1915).

There is no such thing in this state as an action for the appointment of a receiver. Hartnett v. St. Louis Min. & Mill. Co., 51 M 395, 153 P 437 (1915).

Receivership is a provisional remedy of ancillary character, allowable only in an action pending for some other purpose. Hartnett v. St. Louis Min. & Mill. Co., 51 M 395, 153 P 437 (1915); State ex rel. First Trust & Sav. Bank v. District Court, 50 M 259, 146 P 539 (1915); Lyon v. USF&G Co., 48 M 591, 140 P 86 (1914).

An action may not be brought for the appointment of a receiver; to justify such appointment, there must be an action pending, as provided in this section. State ex rel. First Trust & Sav. Bank v. District Court, 50 M 259, 146 P 539 (1915).

Mortgage Foreclosure:

A mortgage on farm lands contained an acceleration clause and provided that on breach of the contract the rents and profits should at once accrue to the benefit of the mortgagee; it did not authorize the latter to take possession. At the time suit to foreclose was brought no part of the principal ($31,000) had been paid, and interest amounting to $10,000 remained unpaid. Showing was made that the property was worth no more than $25,000. Unpaid taxes amounted to about $2,000. The court did not err in appointing a receiver pendente lite. Hastings v. Wise, 89 M 325, 297 P 482 (1931).

The rule that a receiver will not be appointed in a mortgage foreclosure action unless it is probable that the mortgagee will succeed in his action was met by the showing made by plaintiff justifying the conclusion of his ultimate success. Hastings v. Wise, 89 M 325, 297 P 482 (1931).

In an action for the foreclosure of a mortgage on residence property and other relief in which it appeared that for failure to file a renewal affidavit, the mortgage lien had expired prior to the commencement of the action and that plaintiff was in possession of the property, etc., there was no manifest abuse of the trial court's discretion in refusing to appoint a receiver. Pereira v. Wulf, 83 M 343, 272 P 532 (1928).

Rents and Profits:

Where rents and profits are pledged for the payment of a debt secured by mortgage on lands from which they flow, they with the lands are primarily liable for each payment, and an application for the appointment of a receiver to take possession of such rents and profits pending determination of foreclosure proceedings should ordinarily be granted, regardless of the solvency or insolvency of the mortgagor, unless the court be satisfied that the mortgaged land, exclusive of rents and profits, is ample security for the payment of the debt. Hastings v. Wise, 89 M 325, 297 P 482 (1931).

If a mortgagee desires to avail himself of his right to rents and profits pledged by a mortgage which does not give him the right of immediate possession, he must invoke the aid of a court of equity for the appointment of a receiver to take possession of the rents and profits under this section; if he forecloses without asking for such appointment he waives his right to the rents and profits accruing before foreclosure, since foreclosure may not be had by piecemeal, and the mortgagor is entitled to them. Long v. W. P. Devereux Co., 87 M 198, 286 P 402 (1930).

Burden of Proof: A party seeking the appointment of a receiver has the burden of showing to the trial court that his case falls within this section, and on appeal from an order denying relief he must be able to show that the court manifestly abused its discretion. Pereira v. Wulf, 83 M 343, 272 P 532 (1928).

Discretion of Trial Court:

Receivership is an extraordinary remedy of an ancillary character, its purpose being to husband the property in litigation for the benefit of the person who may ultimately be found entitled thereto; it is never a matter of right, but the application is addressed to the sound legal discretion of the court, which discretion must be exercised sparingly and with unusual caution and only to prevent manifest wrong immediately impending or where it is made to appear clearly that plaintiff is in danger of suffering irreparable injury and there is no other plain, speedy, and adequate remedy available. Pereira v. Wulf, 83 M 343, 272 P 532 (1928).

An application for the appointment of a receiver is addressed to the sound legal discretion of the trial court. Mont. Ranches Co. v. Dolan, 53 M 397, 164 P 306 (1917); Hartnett v. St. Louis Min. & Mill. Co., 51 M 395, 153 P 437 (1915); Brown v. Erb-Harper-Rigney Co., 48 M 17, 133 P 691 (1913); Hickey v. Parrot Silver & Copper Co., 25 M 164, 64 P 330 (1901).

The power to appoint a receiver is to be exercised sparingly and not as of course. A strong showing should be made, and even then the authority must be exercised with conservatism and caution. Hartnett v. St. Louis Min. & Mill. Co., 51 M 395, 153 P 437 (1915); Brown v. Erb-Harper-Rigney Co., 48 M 17, 133 P 691 (1913); Jacobs v. Jacobs Mercantile Co., 37 M 321, 96 P 723 (1908); Hickey v. Parrot Silver & Copper Co., 25 M 164, 64 P 330 (1901).

Quiet Title Actions: Quaere: May a receiver be appointed in an action to quiet title, under subsection (5)? Doggett v. Johnson, 77 M 461, 251 P 145 (1926).

Landlord and Tenant:

An action in unlawful detainer itself afforded plaintiff landlord speedy and adequate relief against the unlawful holding over by his tenant, and the appointment of a receiver therein was unwarranted. Doggett v. Johnson, 72 M 443, 234 P 252 (1925).

A lessee is no more entitled to have a receiver appointed than is his landlord. Hickey v. Parrot Silver & Copper Co., 25 M 164, 64 P 330 (1901).

Danger of Loss or Injury:

The power to appoint a receiver is to be exercised sparingly and with unusual caution and only to prevent manifest wrong imminently impending or where there is no other plain, speedy, or adequate remedy. Masterson v. Hubbert, 54 M 613, 173 P 421 (1918); Mont. Ranches Co. v. Dolan, 53 M 397, 164 P 306 (1917). See also Pac. Coast Pipe Co. v. Conrad City Water Co., 245 F 846 (9th Cir. 1917).

To justify the appointment of a receiver, it must appear that the property is in danger of being lost, removed, or materially injured. Brown v. Erb-Harper-Rigney Co., 48 M 17, 133 P 691 (1913).

The provision of (1) of this section, that "on the application of the plaintiff or of any party whose right or interest in the property is probable, and where the property is in danger of being lost or materially injured", cannot be construed as creating new cases for a receiver but merely provides on whose application and under what circumstances the appointment may be made in the cases already enumerated. State ex rel. N.Y. Sheep Co. v. District Court, 14 M 577, 37 P 969 (1894).

Purpose of Remedy: Receivership is an extraordinary remedy of ancillary character, the chief reason for its allowance being to husband the property in litigation for the benefit of the person who may ultimately be found entitled thereto. Lyon v. USF&G Co., 48 M 591, 140 P 86 (1914).

Attached Property:

Neither (1) nor (5) of this section authorizes the appointment of a receiver in an attachment suit. Berryman v. Billings Mut. Heating Co., 44 M 517, 121 P 280 (1912).

An action for debt in which defendant's property has been attached is not an action by a creditor to subject any property or fund to his claim, nor is it an action between persons jointly interested in any property or fund and is not within subsection (1). State ex rel. N.Y. Sheep Co. v. District Court, 14 M 577, 37 P 969 (1894), distinguished in Merchants' Nat'l Bank v. Greenhood, 16 M 395, 41 P 250 (1895).

The District Court has no jurisdiction, under either subsection (1) or (5), in actions for debt in which the debtor's property has been attached, to appoint a receiver of the property so attached, on the application of a junior attaching creditor, though it appears that the property may be lost or materially injured if left in the hands of the Sheriff. State ex rel. N.Y. Sheep Co. v. District Court, 14 M 577, 37 P 969 (1894), distinguished in Merchants' Nat'l Bank v. Greenhood, 16 M 395, 41 P 250 (1895).

Execution as Basis for Appointment: A receiver cannot be appointed in aid of execution where no proceedings in aid of execution have been had and no property has been found. Forsell v. Pittsburg & Mont. Copper Co., 42 M 412, 113 P 479 (1911).

Injunction Proceedings: Under subsection (5), a receiver will not be appointed in an action for an injunction against trespasses, with power to take away the substance of the estate, on the ground that the defendant will enjoin or has enjoined the plaintiff in possession from extracting ore from the property. Hickey v. Parrot Silver & Copper Co., 25 M 164, 64 P 330 (1901).

Mining Leases: Under subsection (5), the lessee in possession of a certain mine, the operation of which was enjoined pending the settlement of a dispute as to title between the lessor and others, was not entitled to the appointment of a receiver, with power to remove ore, on the ground that his lease would expire before final adjudication and hence be rendered valueless by the injunction. Hickey v. Parrot Silver & Copper Co., 25 M 164, 64 P 330 (1901).

Assignee of Insolvent: Neither an original assignee nor his successor, as such, is a receiver, and the successor of the assignee of an insolvent may be sued without leave of court. Babcock v. Maxwell, 21 M 507, 54 P 943 (1898). See Aetna Accident & Liab. Co. v. Miller, 54 M 377, 170 P 760 (1918).

Collateral References

Corporations *key* 551, et seq., 621, et seq.; Fraudulent Conveyances *key* 305; Mortgages *key* 466, et seq.; Receivers *key* 29, et seq.

19 C.J.S. Corporations §756, et seq.; 37 C.J.S. Fraudulent Conveyances §465; 59A C.J.S. Mortgages §768; 75 C.J.S. Receivers §§32 through 36.

65 Am. Jur. 2d Receivers §§3, 27 through 41.

Propriety of appointing receiver, at behest of mortgagee, to manage or operate property during foreclosure action. 82 ALR 2d 1075.

Appointment of receiver in proceedings arising out of dissolution of partnership or joint adventure, otherwise than by death of partner or at instance of creditor. 23 ALR 2d 583.

27-20-103. Appointment of receiver upon dissolution of corporation.

Case Notes

Statutory Authority Required: In the absence of a statute so providing, a receiver of a corporation may not be appointed on petition of a general creditor. Mieyr v. Fed. Sur. Co., 97 M 503, 34 P2d 982 (1934), affirmed in 294 US 211, 79 L Ed 865, 55 S Ct 356 (1935); Mieyr v. Fed. Sur. Co., 94 M 508, 23 P2d 959 (1933), reversed on other grounds, 292 US 112, 78 L Ed 1160, 54 S Ct 615 (1934).

Trust of Assets: Under this section the directors of a corporation, on dissolution of the same, become trustees, with power to settle its affairs and to sell property but without title, which, subject to the trust, vests in the stockholders, who, as to its real estate, become tenants in common. Barker v. Edwards, 259 F 484 (9th Cir. 1919).

Collateral References

Corporations *key* 621, et seq.

19 C.J.S. Corporations §756, et seq.

65 Am. Jur. 2d Receivers §§59 through 78.

Appointment of receiver after dissolution, or expiration of charter, of corporation. 109 ALR 1526; 54 ALR 1127.

Personal liability on contract made by "trustees" or others in closing affairs of dissolved corporation. 76 ALR 1478.

Inherent power of equity, at instance of a stockholder, to appoint receiver for, or to wind up, a solvent, going corporation, on ground of fraud, mismanagement, or dissensions. 43 ALR 244, supplemented by 61 ALR 1212 and 91 ALR 665.

Enforcement during liquidation or receivership of unpaid stock subscriptions to equalize loss among stockholders. 35 ALR 493.

Part 2
Appointment Procedure

27-20-201. Notice of application for appointment before judgment.

Case Notes

Waiver of Notice:

Where one of counsel for defendant mortgagor, though present in court when the mortgagee asked for the appointment of a receiver, did not object to taking up the matter at that time or protest because of lack of statutory notice, but he and cocounsel had anticipated the application and concluded not to do anything because the complaint was insufficient, and thereafter for a number of years knew of the appointment of the officer, defendant waived formal notice of the application. Burgess v. Lasby, 94 M 534, 24 P2d 147 (1933).

While notice of application for the appointment of a receiver to defendant is necessary where he has appeared in the action, notice may be waived, and recognition of the receivership and efforts to obtain benefits thereunder estop him from attacking the validity of the appointment. Burgess v. Lasby, 94 M 534, 24 P2d 147 (1933).

Litigated Rights in Danger: To justify the appointment of a receiver without notice, it must be made to appear that the delay resulting from giving notice would defeat the very right which plaintiff seeks to protect or imperil the property involved in the litigation. Masterson v. Hubbert, 54 M 613, 173 P 421 (1918).

Immediate Danger:

Under this section, the burden is on the applicant to show that there is immediate danger of the removal, loss, or destruction of the property or fund so as to authorize the appointment ex parte, and when the case is brought before a court of review, such showing must affirmatively appear from the record. Benepe-Owenhouse Co. v. Scheidegger, 32 M 424, 80 P 1024 (1905).

A showing that there was imminent danger that property in the possession of defendant would be removed beyond the jurisdiction of the District Court and unlawfully disposed of unless a receiver were appointed ex parte is sufficient to give the court jurisdiction to appoint such receiver without notice of the application therefor. State ex rel. Boston & Mont. Consol. Copper & Silver Min. Co. v. District Court, 22 M 241, 56 P 281 (1899); State ex rel. Boston & Mont. Consol. Copper & Silver Min. Co. v. District Court, 22 M 376, 56 P 687 (1899).

An order appointing a receiver, made before judgment is entered in the action, will be vacated when it is made without notice to the adverse party, whose time to appear in the action has not expired, unless it is made to appear to the District Court that there is immediate danger that the property or fund for which a receiver is sought will be removed from the jurisdiction of the court

or lost, materially injured, destroyed, or unlawfully disposed of. State ex rel. Thornton-Thomas Mercantile Co. v. Clancy, 20 M 284, 50 P 852 (1897).

Corporate Dissolution: A complaint which merely alleges mismanagement of the business of a corporation, a resolution of the stockholders to wind up the business of the company because it was losing money, the refusal of the officers to comply with the resolution, and that they were wrongfully, fraudulently, and willfully carrying on and continuing the same in violation of the resolution in order that they might convert the proceeds of the business to their own benefit does not state facts sufficient to justify the granting of an order appointing a receiver, when the application is made before judgment and without notice to the adverse party who is not in default. State ex rel. Thornton-Thomas Mercantile Co. v. Clancy, 20 M 284, 50 P 852 (1897). See also State ex rel. Johnston v. District Court, 21 M 155, 53 P 272 (1898).

Collateral References

Receivers *key* 35(1) through (3).

75 C.J.S. Receivers §§49 through 53.

65 Am. Jur. 2d Receivers §§97 through 101.

27-20-203. Security to cover damages caused by appointment upon ex parte application.

Case Notes

Property Not Returned: In an action on an undertaking, conditioned as prescribed in this section, the value of property delivered to the receiver but not returned by him may be recovered even though it is not shown that the loss was due to his fault or that it could not have occurred without his fault. Lyon v. USF&G Co., 48 M 591, 140 P 86 (1914), distinguished in St. John v. Taintor, 56 M 204, 182 P 129 (1919).

Wrongful and Malicious Appointment:

In an action on an undertaking given pursuant to the provisions of this section, an adjudication that the appointment of the receivership was procured wrongfully, maliciously, and without sufficient cause may be implied from the final decree in the primary suit, adjudging the ownership of the property to be in the defendant. Lyon v. USF&G Co., 48 M 591, 140 P 86 (1914), distinguished in St. John v. Taintor, 56 M 204, 182 P 129 (1919).

In an action on an undertaking given pursuant to the provisions of this section, it is not necessary for the plaintiff to allege and prove a specific adjudication, in the primary suit, that the appointment of the receiver was procured wrongfully, maliciously, or without sufficient cause; or that the receivership has been vacated in response to a motion for that purpose. Lyon v. USF&G Co., 48 M 591, 140 P 86 (1914), distinguished in St. John v. Taintor, 56 M 204, 182 P 129 (1919).

Responsibility for Ex Parte Appointment: Where the appointment of a receiver in an action rests solely upon an ex parte showing which upon trial has been found wanting in proof to sustain it, the appointment ought not to be allowed to stand where the proceedings virtually destroy the business and result in great and unjust damage, if the action is not well founded, unless the plaintiff assumes effectually a position of responsibility to answer for such damage in case the action is found to be without sufficient cause. Arnold v. Sinclair, 12 M 248, 29 P 1124 (1892).

Collateral References

Receivers *key* 42, 48.

75 C.J.S. Receivers §§43 through 48.

65 Am. Jur. 2d Receivers §§102 through 106.

Part 3
Action by Receivers — Removal

27-20-301. Oath and undertaking to faithfully discharge duties.

Collateral References

65 Am. Jur. 2d Receivers §107.

27-20-302. Powers of receiver.

Case Notes

Borrowing Power of Receiver: Under this section the court has broad discretion, which may not be said, on application of a general unsecured creditor for Writ of Supervisory Control, to have been abused by authorizing the receiver of a mining corporation appointed in a mortgage foreclosure suit to borrow the sum of $3,000 per month for exploration and development work, the money to be advanced by the mortgagee at whose instance the receiver was appointed and

added to the face of the mortgage. State ex rel. Perry v. District Court, 110 M 533, 104 P2d 1 (1940).

Actions by Receiver:

The appointment of a receiver for a corporation invests the receiver with the right to the possession and control of the corporation's assets and to the same extent suspends the functions of the corporation. Suits with reference to the trust estate must thereafter be prosecuted by the receiver, and, to the same extent that this power is lodged in the receiver, it is withdrawn from the corporation. State ex rel. First Trust & Sav. Bank v. District Court, 50 M 259, 146 P 539 (1915).

The appointment of a receiver for a corporation, when coupled with his due qualification, invests him with the right to sue in behalf of the corporation and suspends the capacity of the corporation to sue for the time being; if the receiver refuses to bring a necessary action, the proper practice requires an application to the court for an order directing him to institute the action. Boston & Mont. Consol. Copper & Silver Min. Co. v. Mont. Ore Purchasing Co., 24 M 142, 60 P 990 (1900).

Title to Property: Where a receiver was appointed for a corporation, the property still belongs to the corporation, though it is in the hands of the receiver to be administered under the law. State ex rel. First Trust & Sav. Bank v. District Court, 50 M 259, 146 P 539 (1915).

Stay of Appointment: The appointment of a receiver for a corporation does not operate to dissolve the corporation or to transfer the ownership of the property involved in the receivership. The property still belongs to the corporation, but where a stay was granted pending a hearing in the Supreme Court, the corporation had full power to bring suit until the receiver took possession and after his discharge to prosecute to completion an action so commenced during the stay. Boston & Mont. Consol. Copper & Silver Min. Co. v. Mont. Ore Purchasing Co., 27 M 431, 71 P 471 (1903).

Collateral References

Receivers *key* 81, et seq.

75 C.J.S. Receivers §§147 through 152.

66 Am. Jur. 2d Receivers §184, et seq.

Receiver as succeeding to rights under "shop right rule" or license giving employer limited rights in employees' inventions and discoveries. 61 ALR 2d 408.

Allowance of wage claims of employees of operating receiver. 27 ALR 2d 720.

Succession of receiver to statutory right of action for recovery of money lost at gambling. 18 ALR 2d 1002.

27-20-303. Investment of funds.

Collateral References

Receivers *key* 100.

75 C.J.S. Receivers §172.

CHAPTER 25
CERTIORARI — WRIT OF REVIEW

Part 1
General Provisions

27-25-101. Name of writ.

Case Notes

Time Bar on Writ of Certiorari to Review Contempt Proceedings: In a case of first impression, the Supreme Court was asked to establish a timeframe within which a petition for review of a contempt order must be filed. The issue was whether the time limitation should come from Title 25, which includes the Montana Rules of Civil Procedure and the Montana Rules of Appellate Procedure, or from Title 27, which prescribes the various statutes of limitation for the commencement of actions. The court noted that there is no appeal, as such, from an order of contempt in a civil proceeding and that the exclusive method of review of civil contempt orders (with certain exceptions) is through a writ of certiorari or writ of review. That review is generally limited to jurisdictional questions and whether evidence supports the contempt. Therefore, the issue of timeliness for filing a petition for a writ of certiorari or review is not a statute of limitations issue, and to mechanically characterize those writs for the review of contempt

proceedings as original proceedings governed by the 5-year statute of limitations in 27-2-231 would be to deny the basic nature of appellate review. Further, petitions for writs of certiorari to review contempt proceedings are fundamentally different from other original proceedings commenced in the Supreme Court and from petitions for writs of supervisory control, which do not so much involve appellate review of and a decision on the underlying proceedings as they involve the court dealing with discreet questions of law during the pendency of the underlying proceedings. Because the timeframe in which to file petitions for writs of certiorari to review contempt proceedings is a procedural issue analogous to the procedure for filing a notice of appeal, the Supreme Court held that Rule 72, M.R.Civ.P. (Title 25, ch. 20), Rule 1, M.R.App.P. (Title 25, ch. 21), Rule 17, M.R.App.P., and 27-25-103 require that the timeframe for those petitions be determined by the Montana Rules of Appellate Procedure. Specifically, pursuant to Rule 5, M.R.App.P., a petition for a writ of certiorari to review contempt proceedings must be filed with the Clerk of the District Court within 30 days of the date on which the District Court enters the contempt finding, unless the state is a party, in which case the petition must be filed within 60 days of the date on which the District Court enters the contempt finding. This may not be construed to limit the Supreme Court's power to grant writs of supervisory control or to consider applications for other types of original proceedings. The Supreme Court chose not to establish a precedent that allows contempt proceedings to be delayed until the underlying cause is resolved. Jones v. District Court, 2001 MT 276, 307 M 305, 37 P3d 682 (2001), overruling Shaffroth v. Lamere, 104 M 175, 65 P2d 610 (1937), to the extent that Shaffroth holds that the general 5-year statute of limitations in 27-2-231 applies to all writs of review authorized in 27-25-102.

Clarification of Family Law Exception to Supreme Court Review of District Court Contempt Orders — When Writ of Certiorari Required — Ancillary Order Exception: Seeking to narrow and clarify the judicially created family law exception to the writ of certiorari requirement of 3-1-523 that was expressly extended to dissolution of marriage contempt proceedings in In re Marriage of Smith, 212 M 223, 686 P2d 912 (1984), and In re Marriage of Sessions, 231 M 437, 753 P2d 1306, 45 St. Rep. 744 (1988), and to balance the exception with the statute and longstanding Montana case law generally allowing no direct appeal from a contempt order unless the writ is granted, the Supreme Court concluded that it would be poor public policy to create circumstances whereby a District Court's contempt powers are diminished in any manner by one party's ability to file a direct appeal that in turn frivolously and needlessly delays that party's compliance with the lower court's judgments and orders. To cover contentious disputes that arise in family law, the court created the ancillary order exception, establishing that the family law direct appeal exception applies only when the judgment appealed from includes an ancillary order, meaning an order that determines the rights of the parties as a result of the contemptuous conduct—all under one judgment, that affects the substantial rights of the parties. The ancillary order may result from the proper exercise of the court's jurisdiction, in which case a writ of certiorari would necessarily be denied. However, a lone contempt order, regardless of the underlying law of the case, cannot be reviewed by the Supreme Court on direct appeal. Lee v. Lee, 2000 MT 67, 299 M 78, 996 P2d 389, 57 St. Rep. 308 (2000), followed in In re Marriage of DeLude, 2000 MT 75, 299 M 123, 999 P2d 306, 57 St. Rep. 331 (2000). See also State ex rel. Zosel v. District Court, 56 M 578, 185 P 1112 (1919), and Milanovich v. Milanovich, 200 M 83, 655 P2d 959, 39 St. Rep. 1554 (1982).

Contempt Conviction: The only method to review an adjudication for contempt is by Writ of Certiorari. State ex rel. Porter v. District Court, 123 M 447, 215 P2d 279 (1950).

Special Proceeding: Certiorari is an extraordinary remedy, and the proceeding under the writ is a special proceeding. State ex rel. Lay v. District Court, 122 M 61, 198 P2d 761 (1948).

Collateral References

Certiorari *key* 1.

14 C.J.S. Certiorari §§2 through 4.

14 Am. Jur. 2d Certiorari §1.

27-25-102. When and by whom granted.

Compiler's Comments

1993 Amendment: Chapter 10 in (2) substituted "lower tribunal" for "inferior tribunal"; and made minor changes in style.

Case Notes

General 1099
Contempt 1100
Requirements for Writ — Writ Proper Remedy 1102

Requirements for Writ — Writ Not Proper Remedy 1103
Nonappealable Orders — Writ Proper Remedy 1104
Appealable Errors — Writ Denied 1104
Quasi-Judicial Bodies 1106

GENERAL

Planned Unit Development — Certiorari Inappropriate: Writ of certiorari was an inappropriate remedy for review of a zoning commission's approval of planned unit development because petitioner had an adequate appeal remedy under 76-2-110. Bridger Canyon Property Owners' Ass'n, Inc. v. Planning & Zoning Comm'n, 270 M 160, 890 P2d 1268, 52 St. Rep. 125 (1995).

De Novo Appeal From City Court to District Court as Adequate Remedy: Maloney was convicted in City Court of speeding and driving under the influence of alcohol. Maloney appealed his conviction de novo for a trial in District Court and, at the same time, filed a petition for a writ of review, mandamus, and supervisory control, asking the District Court to direct the City Court to dismiss the charges. The District Court denied the petition. The Supreme Court held that the de novo appeal to the District Court constituted an adequate legal remedy. Maloney v. Gordon, 254 M 314, 837 P2d 1341, 49 St. Rep. 834 (1992).

Writ of Certiorari Not Available — Appropriation of In-Lieu Funds: When the County Commission appropriated in-lieu park funds to a project not specifically authorized in the county outdoor recreation and open space plan, a Writ of Certiorari did not lie because the Commission, in appropriating money, was acting in a legislative, not judicial, capacity. There is no action more clearly legislative than that of appropriation of public funds. Burgess v. Gallatin County Comm'n, 215 M 503, 698 P2d 862, 42 St. Rep. 585 (1985).

When Writ of Certiorari May Be Granted by District Court: All three requirements of 27-25-102(2) must be met before certiorari can be granted by the District Court. St. v. Crane, 196 M 305, 639 P2d 514, 39 St. Rep. 126 (1982).

Availability of Writ of Prohibition — Drunk Driving: Plaintiff was cited for driving while intoxicated. The Justice's Court did not hear the case although a trial had been scheduled. The defendant then sought a Writ of Prohibition against the Justice's Court to stop further proceedings in the prosecution of the D.W.I. charge. On appeal, the sole issue was whether the District Court judgment for the defendant Justice's Court, denying relief to the plaintiff and granting the motion to quash the Writ of Prohibition, was justified under the state of the record. The Supreme Court held that a Writ of Prohibition was not the appropriate remedy in the case. A Writ of Prohibition is available only when there is not a plain, speedy, and adequate remedy in the ordinary course of law. It is not issued as a matter of right but only in the exercise of sound judicial discretion when there is no other remedy. In this case, the plaintiff did not show why he could not assert his jurisdictional defense in the Justice's Court directly or by Writ of Certiorari in the District Court. State ex rel. Morse v. Justice Court, 192 M 95, 626 P2d 836, 38 St. Rep. 542 (1981).

Zoning Resolution: Although scope of review upon Writ of Certiorari is ordinarily limited to whether the inferior tribunal has exceeded its jurisdiction, further inquiry is permitted by the provisions of 76-2-227, which grant the District Courts a broader scope of review than the general Montana statutes pertaining to certiorari. Bryant Dev. Ass'n v. Dagel, 166 M 252, 531 P2d 1320 (1975).

Motion to Quash Writ: On motion to quash a writ the court must accept the allegations of the petition as stating the facts. Application of Banschbach, 133 M 312, 323 P2d 1112 (1958).

Harmless Error: The writ will not be granted for the correction of merely harmless, technical, or formal errors which are not shown to have resulted prejudicially or to have caused substantial injustice to the relator. State ex rel. Lay v. District Court, 122 M 61, 198 P2d 761 (1948).

Requirements for Writ:

So that the Writ of Certiorari may be successfully invoked under this section, it is indispensable that it appear: (1) that the inferior court, tribunal, board, or officer, the validity of whose action is questioned, has exceeded its or his jurisdiction; (2) that there is no appeal; and (3) that there is no plain, speedy, or adequate remedy other than certiorari. State ex rel. Lay v. District Court, 122 M 61, 198 P2d 761 (1948); White v. Corbett, 101 M 1, 52 P2d 156 (1931); State ex rel. Hahn v. District Court, 83 M 400, 272 P 525 (1928); State ex rel. Mahood v. Bd. of Railroad Comm'rs, 73 M 1, 234 P 834 (1925); State ex rel. Prato v. District Court, 55 M 560, 179 P 497 (1919); State ex rel. Furnish v. Mullendore, 53 M 109, 161 P 949 (1916); State ex rel. Grissom v. Justice Court, 31 M 258, 78 P 498 (1904); State ex rel. Davis v. District Court, 29 M 153, 74 P 200 (1903); State ex rel. Weinstein Co. v. District Court, 28 M 445, 72 P 867 (1903); State ex rel.

Whiteside v. District Court, 24 M 539, 63 P 395 (1900); State ex rel. King v. District Court, 24 M 494, 62 P 820 (1900).

The office of the Writ of Certiorari is merely to annul acts of an inferior tribunal, board, or officer that are clearly without or in excess of jurisdiction and not to prevent, in advance, threatened wrongs; nor will it be granted for the correction of merely harmless, technical, or formal errors which are not shown to have resulted prejudicially or caused substantial injustice to relator. State ex rel. Pereira v. District Court, 83 M 349, 272 P 242 (1928).

Court Requesting Writ: Where respondent court in a proceeding in certiorari to set aside an order allegedly made without jurisdiction relating to costs, in its return to the alternative writ, by "cross-petition" prayed that if the order complained of be annulled the Supreme Court also annul another order made in the same cause relating to the same subject to enable the lower court to reconsider the propriety of the latter order also, such request could not be granted without proper record, and lower court could not request against its own order. State ex rel. Vaughn v. District Court, 111 M 552, 111 P2d 810 (1941).

Limitation of Actions: While the statutes relating to the Writ of Review or Certiorari make no provision as to the limitation of time within which such proceeding must be brought, the limitation of 5 years provided by 27-2-215 (renumbered 27-2-231), in an "action" not otherwise provided for, is controlling under 27-2-101, including special proceedings of a civil nature. Shaffroth v. Lamere, 104 M 175, 65 P2d 610 (1937), overruled in Jones v. District Court, 2001 MT 276, 307 M 305, 37 P3d 682 (2001), to the extent that Shaffroth holds that the general 5-year statute of limitations in 27-2-231 applies to all writs of review authorized in this section because pursuant to Rule 5, M.R.App.P. (Title 25, ch. 21), a petition for a writ of certiorari to review contempt proceedings must be filed with the Clerk of the District Court within 30 days of the date on which the District Court enters the contempt finding, unless the state is a party, in which case the petition must be filed within 60 days of the date on which the District Court enters the contempt finding.

Nonjudicial Act: Certiorari does not lie to annul an order of the District Judge filling a vacancy considered to exist because of the alleged unconstitutionality of the act under which the office was filled and because the incumbent was holding two offices regarded as incompatible; the order was ministerial and not judicial. State ex rel. Dowen v. District Court, 50 M 249, 146 P 467 (1915).

Extraordinary Remedy: The remedy upon certiorari is one uniformly classed as an extraordinary remedy and can only be resorted to in the class of cases to which it is applicable—when there is no appeal, or any plain, speedy, or adequate remedy in the ordinary course at law. State ex rel. Reynolds v. Laurendeau, 27 M 522, 71 P 754 (1903).

Peace Bond Proceedings: The only way open to a party to have reviewed an order of a Justice of the Peace committing him to jail, in default of security to keep the peace, is by means of the review allowed under the Writ of Certiorari. State ex rel. Jackson v. Kennie, 24 M 45, 60 P 589 (1900).

Receivership Proceeding: On certiorari to determine the propriety of the appointment of a receiver, the court cannot consider the weight of the evidence and the propriety of such appointment, but the review is limited to determining whether the lower court has regularly pursued its authority. State ex rel. Boston & Mont. Consol. Copper & Silver Min. Co. v. District Court, 22 M 241, 56 P 281 (1899).

CONTEMPT

Failure to Show That Justice's Court Exceeded Its Jurisdiction in Holding Defendant in Contempt in DUI Case — Writ of Review Properly Denied: Schaefer was charged in Justice's Court with repeat misdemeanor DUI per se and sentenced to a chemical dependency course, but he did not complete all conditions of the course, so the court held him in contempt. Schaefer then filed a writ of review in District Court, but the writ was dismissed because the court concluded that a petition for postconviction relief provided Schaefer with a plain, speedy, and adequate remedy, so the court lacked jurisdiction. On appeal, the Supreme Court affirmed denial of the writ, but not because a petition for postconviction relief was more appropriate, but rather because the Justice's Court properly exercised its jurisdiction and because the conflicting evidence issue of aftercare remained in the exclusive jurisdiction of the Justice's Court. Although the District Court incorrectly found that a writ of review was not appropriate, denial of the petition was nevertheless affirmed because Schaefer failed to satisfy the first prong of the test in this section by showing that the Justice's Court exceeded its jurisdiction by holding him in contempt. Schaefer v. Egeland, 2004 MT 199, 322 M 274, 95 P3d 724 (2004).

Time Bar on Writ of Certiorari to Review Contempt Proceedings: In a case of first impression, the Supreme Court was asked to establish a timeframe within which a petition for review of a contempt order must be filed. The issue was whether the time limitation should come from Title 25, which includes the Montana Rules of Civil Procedure and the Montana Rules of Appellate Procedure, or from Title 27, which prescribes the various statutes of limitation for the commencement of actions. The court noted that there is no appeal, as such, from an order of contempt in a civil proceeding and that the exclusive method of review of civil contempt orders (with certain exceptions) is through a writ of certiorari or writ of review. That review is generally limited to jurisdictional questions and whether evidence supports the contempt. Therefore, the issue of timeliness for filing a petition for a writ of certiorari or review is not a statute of limitations issue, and to mechanically characterize those writs for the review of contempt proceedings as original proceedings governed by the 5-year statute of limitations in 27-2-231 would be to deny the basic nature of appellate review. Further, petitions for writs of certiorari to review contempt proceedings are fundamentally different from other original proceedings commenced in the Supreme Court and from petitions for writs of supervisory control, which do not so much involve appellate review of and a decision on the underlying proceedings as they involve the court dealing with discreet questions of law during the pendency of the underlying proceedings. Because the timeframe in which to file petitions for writs of certiorari to review contempt proceedings is a procedural issue analogous to the procedure for filing a notice of appeal, the Supreme Court held that Rule 72, M.R.Civ.P. (Title 25, ch. 20), Rule 1, M.R.App.P. (Title 25, ch. 21), Rule 17, M.R.App.P., and 27-25-103 require that the timeframe for those petitions be determined by the Montana Rules of Appellate Procedure. Specifically, pursuant to Rule 5, M.R.App.P., a petition for a writ of certiorari to review contempt proceedings must be filed with the Clerk of the District Court within 30 days of the date on which the District Court enters the contempt finding, unless the state is a party, in which case the petition must be filed within 60 days of the date on which the District Court enters the contempt finding. This may not be construed to limit the Supreme Court's power to grant writs of supervisory control or to consider applications for other types of original proceedings. The Supreme Court chose not to establish a precedent that allows contempt proceedings to be delayed until the underlying cause is resolved. Jones v. District Court, 2001 MT 276, 307 M 305, 37 P3d 682 (2001), overruling Shaffroth v. Lamere, 104 M 175, 65 P2d 610 (1937), to the extent that Shaffroth holds that the general 5-year statute of limitations in 27-2-231 applies to all writs of review authorized in this section.

Clarification of Family Law Exception to Supreme Court Review of District Court Contempt Orders — When Writ of Certiorari Required — Ancillary Order Exception: Seeking to narrow and clarify the judicially created family law exception to the writ of certiorari requirement of 3-1-523 that was expressly extended to dissolution of marriage contempt proceedings in In re Marriage of Smith, 212 M 223, 686 P2d 912 (1984), and In re Marriage of Sessions, 231 M 437, 753 P2d 1306, 45 St. Rep. 744 (1988), and to balance the exception with the statute and longstanding Montana case law generally allowing no direct appeal from a contempt order unless the writ is granted, the Supreme Court concluded that it would be poor public policy to create circumstances whereby a District Court's contempt powers are diminished in any manner by one party's ability to file a direct appeal that in turn frivolously and needlessly delays that party's compliance with the lower court's judgments and orders. To cover contentious disputes that arise in family law, the court created the ancillary order exception, establishing that the family law direct appeal exception applies only when the judgment appealed from includes an ancillary order, meaning an order that determines the rights of the parties as a result of the contemptuous conduct—all under one judgment, that affects the substantial rights of the parties. The ancillary order may result from the proper exercise of the court's jurisdiction, in which case a writ of certiorari would necessarily be denied. However, a lone contempt order, regardless of the underlying law of the case, cannot be reviewed by the Supreme Court on direct appeal. Lee v. Lee, 2000 MT 67, 299 M 78, 996 P2d 389, 57 St. Rep. 308 (2000), followed in In re Marriage of DeLude, 2000 MT 75, 299 M 123, 999 P2d 306, 57 St. Rep. 331 (2000). See also State ex rel. Zosel v. District Court, 56 M 578, 185 P 1112 (1919), and Milanovich v. Milanovich, 200 M 83, 655 P2d 959, 39 St. Rep. 1554 (1982).

Standard for Review of Family Law Contempt Orders — Jurisdiction and Evidence — Family Law Exception Clarified: The standard for review of contempt orders, pursuant to the granting of a writ of certiorari, is, first, to determine whether the court that found contempt acted within its jurisdiction. For a court to have acted within its jurisdiction: (1) it must have cognizance of the subject matter; (2) it must have presence of the proper parties; and (3) its action must be invoked by proper pleadings and the judgment must be within the issues raised. A court lacks or exceeds jurisdiction by any act that exceeds the defined power of the court, whether that power is defined

by constitutional provision, statute, or court rule or under the doctrine of stare decisis. The second part of the standard for review of contempt orders is to determine whether substantial evidence exists to support the court's findings. The family law exception relevant to review on direct appeal of a District Court judgment and orders made in cases of contempt is subject to the same standard of review. Lee v. Lee, 2000 MT 67, 299 M 78, 996 P2d 389, 57 St. Rep. 308 (2000), following State ex rel. Porter v. First Judicial District, 123 M 447, 215 P2d 279 (1950), and Kauffman v. District Court, 1998 MT 239, 291 M 122, 966 P2d 715, 55 St. Rep. 1001 (1998), and followed in In re Marriage of Coward, 2000 MT 128, 300 M 1, 2 P3d 822, 57 St. Rep. 531 (2000). See also In re Marriage of Sullivan, 258 M 531, 853 P2d 1194, 50 St. Rep. 648 (1993).

Review of Contempt Order: The judgment and orders of the District Court in contempt cases are "final and conclusive", and no appeal may be taken from them. The Supreme Court will not consider matters of contempt on direct appeal. The proper avenue to use to gain review of a contempt order is a Writ of Certiorari. Milanovich v. Milanovich, 200 M 83, 655 P2d 959, 39 St. Rep. 1554 (1982). However, see Lee v. Lee, 2000 MT 67, 299 M 78, 996 P2d 389, 57 St. Rep. 308 (2000), in which it was held that a lone contempt order, regardless of the underlying law of the case, cannot be reviewed by the Supreme Court on direct appeal; however, direct appeal is allowed under the family law exception when the judgment includes an ancillary order that affects the substantial rights of the parties.

Contempt — Divorce Proceedings — Jurisdiction Exceeded:

The relator sought a Writ of Supervisory Control in a contempt proceeding arising out of a divorce suit. The relator challenged the jurisdiction of the trial court upon the ground that the provision he is accused of violating has no valid existence. The relator's remedy is not supervisory control, which concedes the jurisdiction of the court, but certiorari is the remedy where the jurisdiction has been exceeded. State ex rel. Enochs v. District Court, 113 M 227, 123 P2d 971 (1942).

An order for payment of counsel fees and alimony in an action for divorce being an appealable order, certiorari will not lie to review the action of the lower court in committing defendant for contempt in refusing to obey such order. In re Finkelstein, 13 M 425, 34 P 847 (1893).

Contempt Proceedings: An appeal does not lie from a judgment of contempt, and neither may the Writ of Certiorari run in such a proceeding where the trial court has not acted in excess of jurisdiction. State ex rel. Middleton v. District Court, 85 M 215, 278 P 122 (1929).

REQUIREMENTS FOR WRIT
WRIT PROPER REMEDY

Trespass Charge Properly in Justice's Court — Motion to Dismiss and Writ for Review Denied: Shiplet was charged in Justice's Court with criminal misdemeanor trespass. He moved to dismiss for lack of jurisdiction, claiming that subsequent to the filing of the charge, he filed a civil action in District Court seeking to enjoin the people claiming trespass from interfering with his purported ditch easement. Shiplet argued that the District Court, as opposed to the Justice's Court, was a better forum to determine whether he was legally exercising his ditch rights because it had jurisdiction over his civil suit and concurrent jurisdiction over the trespass charge. Shiplet's motion was denied, and his District Court petition for writ of review was denied. The Supreme Court stated that a writ of review can be granted only if the petitioner establishes both that: (1) the Justice's Court exceeded its jurisdiction; and (2) there is no appeal or there is no plain, speedy, and adequate remedy. The Supreme Court held that Shiplet could not meet the two-pronged test because a Justice's Court clearly has jurisdiction over a misdemeanor trespass charge and that he had the right to appeal a Justice's Court decision. The Supreme Court also stated that the District Court did not have concurrent jurisdiction over the criminal charge under the requirements for concurrent jurisdiction delineated in 3-5-302. Shiplet v. Egeland, 2001 MT 21, 304 M 141, 18 P3d 1001 (2001).

Court Acting Without Personal Jurisdiction — No Need to Appeal From Void Judgment: Heinle, a resident of California, petitioned for a writ of certiorari to challenge the jurisdiction of a Montana District Court that increased his child support payments and entered a default judgment against him when there was no basis for the District Court's jurisdiction. The Supreme Court held that because there was no basis upon which the District Court could have had constitutional jurisdiction over Heinle, the District Court's judgment was void. The Supreme Court said that under these circumstances, the District Court cannot compel Heinle to use the method of appeal from its judgments because there is no need to appeal from a void judgment. Certiorari was therefore properly used. Heinle v. District Court, 260 M 489, 861 P2d 171, 50 St. Rep. 1141 (1993).

Excess of Trial Court Jurisdiction — Writ of Certiorari Proper: The procedural requirements of 27-25-201 provide that an application for a writ must be made on affidavit by the party beneficially interested. There is no requirement that the application be filed within 30 days of judgment. The District Court improperly dismissed an appeal as untimely, based on a decision made at a show cause hearing, even though no order or final judgment issued out of the hearing. Under this section, a writ of certiorari was appropriate when the lower court exceeded its jurisdiction and there was no remedy of appeal. Helena v. Buck, 247 M 313, 806 P2d 27, 48 St. Rep. 213 (1991).

Lack of Justice Court Jurisdiction for Attachment — Certiorari as Proper Remedy: Plaintiff attended a party in a motel room. A fight erupted, and the room was damaged. The next day the owner of the motel brought an action in Justice Court against all persons present in the room. The complaint alleged liability on an implied contract basis. At the time the complaint was filed, the Justice Court issued an ex parte prejudgment attachment of plaintiff's pickup, which was impounded. At the hearing, plaintiff argued against the attachment, alleging it was not properly issued under the statute. The Justice Court upheld the attachment. Plaintiff filed a Writ of Certiorari in District Court, which was denied. On appeal, the Supreme Court held that the Justice Court's authority to issue a Writ of Prejudgment Attachment is subject to certain conditions precedent. Under 27-18-101 and 27-18-202, plaintiffs must show defendant is indebted to the plaintiff under a contract for the direct payment of money. The court found that the implied contract not to damage the room was not one for the direct payment of money, therefore, the Justice Court was without jurisdiction to order the attachment. A Writ of Certiorari may not be used to correct errors in a lower court's jurisdiction but to determine whether the lower court had and was acting within its jurisdiction. In a case such as this where there are conditions precedent to jurisdiction, a Writ of Certiorari is the proper remedy for reviewing jurisdictional facts such as whether the case involved a contract for the direct payment of money. The District Court erred in dismissing the petition. Buffalo v. Thiel, 213 M 280, 691 P2d 1343, 41 St. Rep. 2116 (1984).

REQUIREMENTS FOR WRIT
WRIT NOT PROPER REMEDY

Writ Not Properly Granted When Defendant Failed to Invoke Plain, Speedy, and Adequate Remedy: Marks obtained a writ of certiorari from the District Court remanding his case with Marcher to Justice's Court with instructions to set aside Marcher's default judgment against Marks on the grounds that the damages and treble damages awarded to Marcher in the landlord-tenant dispute exceeded the $5,000 jurisdictional limit of the Justice's Court. The Supreme Court held that the writ had been improperly granted because Marks did not appear in the original case in Justice's Court and did not appeal the default judgment that was entered against him, which was a plain, speedy, and adequate remedy available to him. By not taking advantage of an available remedy, Marks failed to meet the statutory requirement for a writ through a showing that no plain, speedy, and adequate remedy was available to him. Marcher v. Bonzell, 2004 MT 294, 323 M 364, 104 P3d 436 (2004).

Jurisdiction of Contempt Case Not Lost Despite Bankruptcy Filing: A bankruptcy proceeding does not divest a state court of jurisdiction over a contempt matter; it only stays or suspends the contempt proceedings. A writ of certiorari seeking review of a contempt order was denied upon a finding that despite petitioner's bankruptcy filing, the District Court had not lacked or exceeded its jurisdiction. Valley Unit Corp. v. Bozeman, 232 M 52, 754 P2d 822, 45 St. Rep. 860 (1988).

Jurisdictional Defect Required:

The District Court properly denied defendant's application for a Writ of Certiorari to review his Justice's Court criminal contempt conviction. The Justice's Court clearly had jurisdiction under 3-10-303 of a misdemeanor criminal contempt action. Thus, one of the three indispensable requisites to the granting of a Writ, that an inferior board has exceeded its jurisdiction, is absent. St. v. McAllister, 218 M 196, 708 P2d 239, 42 St. Rep. 1515 (1985).

A Writ of Review or Certiorari may be granted only when a trial court has exceeded its jurisdiction. The trial court's issuance of an order to show cause rather than a warrant in civil contempt proceeding against petitioner did not constitute jurisdictional defect. In re Graveley & Hammerbacker, 188 M 546, 614 P2d 1033 (1980), followed in Rose v. District Court, 192 M 341, 628 P2d 662, 38 St. Rep. 830 (1981).

The writ cannot be used to correct errors within jurisdiction. Application of Banschbach, 133 M 312, 323 P2d 1112 (1958).

The power of a court of review to issue a Writ of Certiorari is limited, and the Writ may be granted only when there has been an excess of jurisdiction. State ex rel. Lay v. District Court, 122 M 61, 198 P2d 761 (1948).

The Writ of Certiorari cannot be employed to correct errors committed in the exercise of jurisdiction. State ex rel. Lay v. District Court, 122 M 61, 198 P2d 761 (1948).

The function of a Writ of Review (Certiorari) is to determine whether an inferior tribunal, board, or officer exercising judicial functions has exceeded his jurisdiction, and the Writ cannot be used to correct errors committed in the exercise of jurisdiction. State ex rel. Mercer v. Woods, 116 M 533, 155 P2d 197 (1945).

On application for a Writ of Certiorari directed to the District Court, the question for determination is whether the court exceeded its jurisdiction in rendering the judgment complained of; the Writ cannot be used to correct errors within jurisdiction. State ex rel. Cheadle v. District Court, 92 M 94, 10 P2d 586 (1932).

Certiorari lies when jurisdiction has been exceeded and there is no appeal or other plain, speedy, and adequate remedy. State ex rel. Weisz v. District Court, 61 M 427, 202 P 387 (1921).

Error committed by a Board of Commissioners appointed to adjust the indebtedness between an old and a newly created county, though a function judicial in character, constitutes error within jurisdiction not correctable by certiorari, even though provision is not made for an appeal or some other mode of review of the Board's action. State ex rel. Furnish v. Mullendore, 53 M 109, 161 P 949 (1916).

Where the lower court had jurisdiction of the subject matter and of the parties, its action in refusing an injunction and dismissing the action cannot be reviewed by certiorari, since the remedy can only be employed to determine whether a tribunal has exceeded its authority. The writ cannot be used for the purpose of correcting errors committed in the exercise of jurisdiction. State ex rel. King v. District Court, 24 M 494, 62 P 820 (1900).

District Court Writ of Certiorari: Certiorari is never properly granted where the matters over which review is sought are pending or undetermined; thus, District Court could not properly issue Writ of Certiorari to determine, in a case pending before the Police Commission, whether the Commission could compel a witness's testimony. In re Dewar, 169 M 437, 548 P2d 149 (1976).

Police Commission Hearing in Progress — Writ of Certiorari Not Available: A Writ of Certiorari is not proper where the proceedings to be reviewed are pending or undetermined because before a Writ of Certiorari will lie, there must be an absence of the right of appeal, which cannot arise while proceeding is in progress but only after a decision or judgment is rendered. In re Dewar, 169 M 437, 548 P2d 149 (1976).

Habeas Corpus: Where a witness committed by a notary public was discharged under a Writ of Habeas Corpus issued by the District Court, the Supreme Court has no power under a Writ of Certiorari to review the action of the District Court, since the District Court had authority to make the discharge and was acting within the bounds of its appropriate jurisdiction. State ex rel. Whiteside v. District Court, 24 M 539, 63 P 395 (1900).

NONAPPEALABLE ORDERS
WRIT PROPER REMEDY

Adoption Order: Since an order of adoption is not appealable and the Writ of Habeas Corpus is inadequate for the purpose of setting aside such an order made without jurisdiction, the Writ of Certiorari is the proper remedy, within the rule permitting the issuance of the latter Writ only where there is no appeal or any other plain, speedy, and adequate remedy. State ex rel. Thompson v. District Court, 75 M 147, 242 P 959 (1926).

Bail Bond Proceedings: Inasmuch as an appeal does not lie from a judgment summarily entered against the sureties on a bail bond and there is not any other plain, speedy, and adequate remedy, certiorari lies to annul it. State ex rel. Van v. District Court, 54 M 577, 172 P 540 (1918).

APPEALABLE ERRORS
WRIT DENIED

Appealable Error:

A Writ of Certiorari is not available in Montana to review question of alleged violations of federal constitutional rights of petitioner concerning voluntariness of guilty plea, where he had not moved to withdraw the plea. Brown v. St., 202 F. Supp. 29 (D.C. Mont. 1962).

Writ of Review is not available where the plaintiff simply did not take his appeal within the statutory time of 60 days under section 93-8004, R.C.M. 1947 (now repealed). McVay v. McVay, 128 M 31, 270 P2d 393 (1954).

District Court exceeded its jurisdiction by issuing a Writ of Review and making orders against the Justice of the Peace when the record shows that: (1) the Justice of the Peace was acting within his jurisdiction; (2) the defendants may appeal to the District Court from any judgment entered against them in the Justice's Court; (3) on such appeal the cause will be tried

anew in the District Court; and (4) such remedies so available to defendants are plain, speedy, and adequate. State ex rel. Borberg v. District Court, 125 M 481, 240 P2d 854 (1952), distinguished in St. v. Porter, 130 M 299, 300 P2d 952 (1956).

Where intermediate judgment requiring the payment of alimony pendente lite in action for divorce was not appealed, it cannot be reviewed and annulled on Writ of Certiorari after judgment for contempt. State ex rel. Houtchens v. District Court, 122 M 76, 199 P2d 272 (1948).

The aggrieved party may not permit the time for taking an appeal to lapse and then have the judgment or order against him reviewed and annulled on Writ of Certiorari. State ex rel. Lay v. District Court, 122 M 61, 198 P2d 761 (1948).

Where the remedy by appeal is available, the Writ of Certiorari does not lie, even though such remedy is not speedy or adequate. State ex rel. N. Am. Life Ins. Co. v. District Court, 97 M 523, 37 P2d 329 (1934); State ex rel. Deck v. District Court, 64 M 110, 207 P 1004 (1922).

The Writ of Certiorari may not be granted where the party aggrieved has an appeal, even though the remedy by appeal may not be speedy or adequate; hence the Writ was not available to defendant in a divorce proceeding to have an order for the payment of alimony pendente lite reviewed. State ex rel. McGrath v. District Court, 82 M 463, 267 P 803 (1928).

The fact that either the State or the claimant could appeal from the judgment rendered in a proceeding under the Enforcement Act of 1917, relative to searches, seizures, and forfeitures of intoxicating liquors, precluded relief under this section by certiorari. State ex rel. Prato v. District Court, 55 M 560, 179 P 497 (1919).

If there is either an appeal or a plain, speedy, and adequate remedy, certiorari does not lie; if the order of judgment is not appealable but there is any plain, speedy, and adequate remedy other than certiorari, the writ does not lie; the remedy by appeal need not be speedy or adequate. State ex rel. Davis v. District Court, 29 M 153, 74 P 200 (1903); State ex rel. King v. District Court, 24 M 494, 62 P 820 (1900).

Prior to the decision in State ex rel. King v. District Court, 24 M 494, 62 P 820 (1900), Writs of Certiorari were issued by the Supreme Court, though the party had an appeal, where it was apparent that the appeal was not wholly adequate, or where the proceeding by certiorari was more expeditious or convenient. The construction thus given to this section was clearly erroneous and was changed by the decision in that case. Subsequent to that decision the doctrine announced therein has been adhered to. State ex rel. Davis v. District Court, 29 M 153, 74 P 200 (1903).

The Writ of Certiorari is peculiarly inapplicable to use in aid of appellate jurisdiction and cannot be lawfully issued in cases where error may be reached by appeal. In re MacKnight, 11 M 126, 27 P 336 (1891).

District Court Writ of Certiorari:

Where one adjudged guilty of contempt before a Justice of the Peace sought relief by Writ of Certiorari in the District Court, where a peremptory Writ was denied, since the District Court acted within its jurisdiction, the remedy of petitioner was by appeal to the Supreme Court and not by certiorari. State ex rel. Mercer v. District Court, 115 M 385, 145 P2d 527 (1943).

Where it appears by the return to a Writ of Certiorari issued by the Supreme Court to a Justice of the Peace that the relator had applied to the District Court for a similar Writ and that the case had been heard and a judgment entered quashing the Writ, the Writ issued from the Supreme Court will be dismissed since the relator's proper remedy is by appeal from the judgment of the District Court. State ex rel. Shing v. Lenahan, 17 M 518, 43 P 712 (1896).

Order After Judgment:

An order vacating an order setting aside a default judgment is a special order made after final judgment and as such appealable, and therefore the Writ of Certiorari does not lie to review the action of the court in making the order. State ex rel. N. Am. Life Ins. Co. v. District Court, 97 M 523, 37 P2d 329 (1934); State ex rel. Deck v. District Court, 64 M 110, 207 P 1004 (1922).

An order so modifying a decree of divorce as to suspend payment of alimony and awarding the custody of a minor child to the father upon remarriage of the mother was a special order made after final judgment and appealable under section 93-8003, R.C.M. 1947 (now repealed), and therefore the Writ of Review was not available to review the correctness of the order. State ex rel. Gates v. District Court, 69 M 322, 221 P 543 (1923).

Where a Justice of the Peace overruled a motion to vacate a default judgment, the judgment could not be reviewed by certiorari. State ex rel. Reynolds v. Laurendeau, 27 M 522, 71 P 754 (1903).

Quasi-Judicial Bodies:

A proceeding under this section seeking a Writ of Review of the action of the state Livestock Sanitary Board (now Board of Livestock) is proper. State ex rel. Lee v. St. Livestock Sanitary Bd., 138 M 536, 357 P2d 685 (1960).

After an order of the Board of Railroad Commissioners (now the Public Service Commission) directing the station facilities at a certain town to be removed to another town, relator had a sufficient remedy under 69-14-402, by an action in the District Court, to determine whether the order was just and reasonable, and therefore certiorari did not lie. State ex rel. Mahood v. Bd. of Railroad Comm'rs, 73 M 1, 234 P 834 (1925).

Certiorari lies to review the actions of Boards of County Commissioners taken with reference to the creation of new counties, since they act in such proceedings as quasi-judicial tribunals. State ex rel. Jacobson v. Bd. of County Comm'rs, 47 M 531, 134 P 291 (1913).

This section applies to quasi-judicial bodies as well as to courts and judicial officers strictly so called. State ex rel. Jacobson v. Bd. of County Comm'rs, 47 M 531, 134 P 291 (1913).

Where a Board of County Commissioners decides whether a petition, presented to them for the submission of the removal of the county seat to the electors of the county, is signed by a sufficient number to require them to submit the question to an election, it exercises judicial functions within the meaning of this section. State ex rel. Buck v. Bd. of County Comm'rs, 21 M 469, 54 P 939 (1898).

Collateral References

Certiorari *key* 1 through 29; Contempt *key* 67.

14 C.J.S. Certiorari §2, et seq.; 17 C.J.S. Contempt §117.

14 Am. Jur. 2d Certiorari §§5, 6.

Right of prosecution to Writ of Certiorari in criminal case. 91 ALR 2d 1095.

Certiorari as remedy to determine rights of noncivil service public employee, with respect to discharge, under state veterans' tenure statute. 58 ALR 2d 1007.

Plea of guilty in Justice of the Peace or similar court as precluding certiorari. 42 ALR 2d 1014.

Relief by certiorari from expulsion from professional association. 20 ALR 2d 572.

Existence of jurisdictional facts found by inferior tribunal as subject of inquiry on certiorari. 5 ALR 2d 675.

27-25-103. Application of rules of procedure.

Case Notes

Time Bar on Writ of Certiorari to Review Contempt Proceedings: In a case of first impression, the Supreme Court was asked to establish a timeframe within which a petition for review of a contempt order must be filed. The issue was whether the time limitation should come from Title 25, which includes the Montana Rules of Civil Procedure and the Montana Rules of Appellate Procedure, or from Title 27, which prescribes the various statutes of limitation for the commencement of actions. The court noted that there is no appeal, as such, from an order of contempt in a civil proceeding and that the exclusive method of review of civil contempt orders (with certain exceptions) is through a writ of certiorari or writ of review. That review is generally limited to jurisdictional questions and whether evidence supports the contempt. Therefore, the issue of timeliness for filing a petition for a writ of certiorari or review is not a statute of limitations issue, and to mechanically characterize those writs for the review of contempt proceedings as original proceedings governed by the 5-year statute of limitations in 27-2-231 would be to deny the basic nature of appellate review. Further, petitions for writs of certiorari to review contempt proceedings are fundamentally different from other original proceedings commenced in the Supreme Court and from petitions for writs of supervisory control, which do not so much involve appellate review of and a decision on the underlying proceedings as they involve the court dealing with discreet questions of law during the pendency of the underlying proceedings. Because the timeframe in which to file petitions for writs of certiorari to review contempt proceedings is a procedural issue analogous to the procedure for filing a notice of appeal, the Supreme Court held that Rule 72, M.R.Civ.P. (Title 25, ch. 20), Rule 1, M.R.App.P. (Title 25, ch. 21), Rule 17, M.R.App.P., and this section require that the timeframe for those petitions be determined by the Montana Rules of Appellate Procedure. Specifically, pursuant to Rule 5, M.R.App.P., a petition for a writ of certiorari to review contempt proceedings must be filed with the Clerk of the District Court within 30 days of the date on which the District Court enters the contempt finding, unless the state is a party, in which case the petition must be filed within 60 days of the date on which the District Court enters the contempt finding. This may not

be construed to limit the Supreme Court's power to grant writs of supervisory control or to consider applications for other types of original proceedings. The Supreme Court chose not to establish a precedent that allows contempt proceedings to be delayed until the underlying cause is resolved. Jones v. District Court, 2001 MT 276, 307 M 305, 37 P3d 682 (2001), overruling Shaffroth v. Lamere, 104 M 175, 65 P2d 610 (1937), to the extent that Shaffroth holds that the general 5-year statute of limitations in 27-2-231 applies to all writs of review authorized in 27-25-102.

Part 2
Procedure for Obtaining and Serving Writ

27-25-201. Application for writ — notice.

Case Notes

Excess of Trial Court Jurisdiction — Writ of Certiorari Proper: The procedural requirements of this section provide that an application for a writ must be made on affidavit by the party beneficially interested. There is no requirement that the application be filed within 30 days of judgment. The District Court improperly dismissed an appeal as untimely, based on a decision made at a show cause hearing, even though no order or final judgment issued out of the hearing. Under 27-25-102, a writ of certiorari was appropriate when the lower court exceeded its jurisdiction and there was no remedy of appeal. Helena v. Buck, 247 M 313, 806 P2d 27, 48 St. Rep. 213 (1991).

Party Beneficially Interested:

Petition for a Writ of Certiorari presented to the Supreme Court by a bank and verified positively by its president is sufficient to meet the requirement of this section that it must be made by a party beneficially interested, and whether the party is so interested must be determined from the return made. State ex rel. Union Bank & Trust Co. v. District Court, 108 M 151, 91 P2d 403 (1939).

The provision that the Writ of Certiorari will only issue at the instance of a party beneficially interested does not require that the applicant be a party to the action or proceeding in which the court is alleged to have acted without jurisdiction, but if he is able to show that he is interested because of some special or peculiar injury to himself in person or property, the court may in its discretion issue the Writ. State ex rel. Johnston v. District Court, 93 M 439, 19 P2d 220 (1933).

The fact that one is an agent or attorney of a party beneficially interested in an application for certiorari does not attract to him the beneficial interest of his principal, so as to enable him to make the application. State ex rel. Allen v. Napton, 24 M 450, 62 P 686 (1900).

This section should be construed as meaning that the application for certiorari should be made by the party beneficially interested but that the affidavit in support thereof might be made by anyone conversant with the facts. State ex rel. Allen v. Napton, 24 M 450, 62 P 686 (1900).

This section does not require that affiant's interest shall be distinguishable from the mass of the community when the matter sought to be reviewed affects the people generally and the object of the writ is to inquire into the performance of a duty owing to the public. State ex rel. Buck v. Bd. of County Comm'rs, 21 M 469, 54 P 939 (1898). See also Buck v. Fitzgerald, 21 M 482, 54 P 942 (1898); Milligan v. Miles City, 51 M 374, 153 P 276 (1915); Poe v. Sheridan County, 52 M 279, 157 P 185 (1916).

Allegations in Affidavit:

Where the petition or affidavit contains only statements of conclusions and does not allege the facts from which those conclusions are drawn, the court is without jurisdiction to issue the writ. State ex rel. Examining & Trial Bd. v. Jackson, 58 M 90, 190 P 295 (1920).

The affidavit for a Writ of Review becomes functus officio when the Writ is issued. It is not a pleading, and its averments cannot be traversed by any other pleading. State ex rel. First Trust & Sav. Bank v. District Court, 50 M 259, 146 P 539 (1915).

Motion to Quash: Motion to quash or demurrer (demurrer abolished, Rule 7(c), M.R.Civ.P.) is the proper method to determine the sufficiency of a petition or affidavit for a Writ of Certiorari. State ex rel. Examining & Trial Bd. v. Jackson, 58 M 90, 190 P 295 (1920).

Collateral References

Certiorari *key* 42 through 46.

14 C.J.S. Certiorari §37, et seq.

14 Am. Jur. 2d Certiorari §§29, 30.

27-25-202. Contents of writ.

Case Notes

Record Required for Contempt Review: Defendant was held in contempt of court for failure to comply with a judgment entered against him. Contempt of a District Court is reviewable only by application for a Writ of Certiorari to the Supreme Court. Where an indirect contempt is involved, as here, the Writ would command the District Court to transmit its record of the contempt proceedings. The Supreme Court's review would be limited to an examination of the record to determine whether the District Court acted within its jurisdiction and whether the evidence supported the finding and order of contempt. In this case, no transcript of the contempt proceeding was made. The Supreme Court set aside the contempt order for lack of a record. Schneider v. Ostwald, 190 M 29, 617 P2d 1293, 37 St. Rep. 1728 (1980).

Writ of Certiorari Not Proper — Writ of Supervisory Control Proper: Because the Supreme Court did not have a fully certified transcript of the record and proceedings pursuant to 27-25-202, a Writ of Certiorari was not a proper remedy to review a contempt order. But under Art. VII, sec. 2, Mont. Const., the Supreme Court may exercise supervisory power since the relator is barred from using a Writ of Certiorari. State ex rel. Anderson v. District Court, 188 M 77, 610 P2d 1183 (1980). See also Jones v. District Court, 2001 MT 276, 307 M 305, 37 P3d 682 (2001).

Record Certified:

Where a Writ of Certiorari is issued by the Supreme Court accompanied by an order staying proceedings in the matter in which issued, it is the duty of the court to which directed to certify the record as it was at the time the Writ was served, and thereafter it is without power materially to alter or add to the record as made, and if it does so, so much of its return as is altered or added to will be disregarded by the Supreme Court. Ex parte Burns, 83 M 200, 271 P 439 (1928).

Upon certiorari, the judgment for a direct contempt is the only record, and a certified copy of it constitutes the full return to be made to the appellate court in obedience to the writ, and it cannot be supplemented by evidence or by facts certified up in the return by the judge. State ex rel. Rankin v. District Court, 58 M 276, 191 P 772 (1920), distinguished in State ex rel. Cheadle v. District Court, 92 M 94, 10 P2d 586 (1932).

By its terms, the Writ of Review commands the party to whom it is directed to certify to the court issuing the Writ "a transcript of the records and proceedings", so far as necessary to obtain the review sought. Recitals, denials, affirmative allegations, or matters not copied from the records or matters copied from the records but not called for by the Writ are out of place in the return and do not constitute any part of it. State ex rel. Sell v. District Court, 52 M 457, 158 P 1018 (1916).

It is the duty of a court upon whom a Writ of Certiorari has been duly served to certify up the record without alteration as it is at the time that the Writ was served, otherwise, without reference to any express stay, there may be contempt in not obeying the Writ. In re Harney, 29 M 370, 74 P 1080 (1904).

Review of District Court Writ: An appeal from a judgment of the District Court on a Writ of Review to a Justice of the Peace brings up for review only such questions as appear on the judgment roll, and other papers are not before the court. State ex rel. Grissom v. Justice Court, 31 M 258, 78 P 498 (1904).

Collateral References

14 Am. Jur. 2d Certiorari §43.

27-25-203. Stay of proceedings.

Compiler's Comments

1993 Amendment: Chapter 10 in third sentence substituted "lower tribunal" for "inferior tribunal"; and made minor changes in style.

1981 Amendment: Substituted "tribunal, board" for "court".

Case Notes

Alteration of Order by Judge: A Judge of a District Court is not guilty of contempt in altering an order after he has been served with a Writ of Review from the Supreme Court directing that "all proceedings under said order be stayed", the stay being by its terms limited to the enforcement of the order. In re Harney, 29 M 370, 74 P 1080 (1904).

Collateral References

Certiorari *key* 47.

14 C.J.S. Certiorari §§60, 62.

14 Am. Jur. 2d Certiorari §46.

27-25-204. Service of writ.

Collateral References

Certiorari *key* 46.
14 C.J.S. Certiorari §§46, 59.
14 Am. Jur. 2d Certiorari §45.

27-25-205. To whom writ directed — return.

Case Notes

Direction of Writ Proper but Adverse Party Not Properly Designated Defendant: Although Writ of Certiorari was properly directed to the Board of Adjustment, the Board is not the defendant and certain procedural difficulties could have been avoided if the adverse party had been properly designated as defendant. Bryant Dev. Ass'n v. Dagel, 166 M 252, 531 P2d 1320 (1975).

Transcript of Lower Court Proceedings:

Although under this section it is the duty of the Clerk of the District Court to prepare the return required by the Supreme Court on issuance of a Writ of Certiorari, the court to which the Writ is directed has the power to order the court stenographer to prepare not only a transcript of the evidence but the entire transcript, as one of his implied duties, without extra compensation. Pelletier v. Glacier County, 107 M 221, 82 P2d 595 (1938).

Since this section makes it the duty of the Clerk of the Court to return the transcript required by the writ to the court out of which the writ is issued, the outlay incident to the carriage of the return, maps, etc., should be ultimately borne by the party whose fault occasioned the expense. State ex rel. King v. District Court, 25 M 1, 63 P 402 (1901).

Return by Clerk: As the return in certiorari running to a court must be made by its clerk, as provided in this section, an answer to the averments of relator's affidavit, filed by the judge of the court as his "return", was not such and had no place in the proceedings. State ex rel. First Trust & Sav. Bank v. District Court, 50 M 259, 146 P 539 (1915). See also State ex rel. USF&G Co. v. District Court, 77 M 214, 250 P 609 (1926).

Writ Directed to District Judge: Where the order sought to be annulled by certiorari was made by the District Court and not by its judge, a writ directed to the judge will be quashed upon motion. State ex rel. Healy v. District Court, 26 M 224, 68 P 470 (1902). See also State ex rel. Grissom v. Justice Court, 31 M 258, 78 P 498 (1904).

Collateral References

Certiorari *key* 45 through 50.
14 C.J.S. Certiorari §56.
14 Am. Jur. 2d Certiorari §§47 through 51.

Part 3
Procedure Upon Return of Writ

27-25-301. Time for return and hearing.

Collateral References

Certiorari *key* 53, 62, et seq.
14 C.J.S. Certiorari §§67, 68, 85, 88.
14 Am. Jur. 2d Certiorari §62.

27-25-303. Scope of review upon writ.

Case Notes

Clarification of Family Law Exception to Supreme Court Review of District Court Contempt Orders — When Writ of Certiorari Required — Ancillary Order Exception: Seeking to narrow and clarify the judicially created family law exception to the writ of certiorari requirement of 3-1-523 that was expressly extended to dissolution of marriage contempt proceedings in In re Marriage of Smith, 212 M 223, 686 P2d 912 (1984), and In re Marriage of Sessions, 231 M 437, 753 P2d 1306, 45 St. Rep. 744 (1988), and to balance the exception with the statute and longstanding Montana case law generally allowing no direct appeal from a contempt order unless the writ is granted, the Supreme Court concluded that it would be poor public policy to create circumstances whereby a District Court's contempt powers are diminished in any manner by one party's ability to file a direct appeal that in turn frivolously and needlessly delays that party's compliance with the lower court's judgments and orders. To cover contentious disputes that arise in family law, the court created the ancillary order exception, establishing that the family law direct appeal exception applies only when the judgment appealed from includes an ancillary order, meaning

an order that determines the rights of the parties as a result of the contemptuous conduct—all under one judgment, that affects the substantial rights of the parties. The ancillary order may result from the proper exercise of the court's jurisdiction, in which case a writ of certiorari would necessarily be denied. However, a lone contempt order, regardless of the underlying law of the case, cannot be reviewed by the Supreme Court on direct appeal. Lee v. Lee, 2000 MT 67, 299 M 78, 996 P2d 389, 57 St. Rep. 308 (2000), followed in In re Marriage of DeLude, 2000 MT 75, 299 M 123, 999 P2d 306, 57 St. Rep. 331 (2000). See also State ex rel. Zosel v. District Court, 56 M 578, 185 P 1112 (1919), and Milanovich v. Milanovich, 200 M 83, 655 P2d 959, 39 St. Rep. 1554 (1982).

Review of Board of Adjustment Decision — Scope Broader Than General: A District Court's scope of review upon a writ of certiorari ordinarily cannot be extended further than to determine whether an inferior tribunal, board, or officer has regularly acted within its authority. However, under 76-2-327, a District Court has a broader scope of review of an appeal from a decision by the Board of Adjustment. The court may hold a hearing and reverse, modify, or affirm a Board decision. In reviewing a District Court decision involving the exercise of the statutory option to take additional evidence, the standard applied by the Supreme Court is whether the District Court abused its discretion and whether the decision was supported by substantial evidence. In re Petition of Sutey Oil Co., Inc. v. Anaconda-Deer Lodge County Planning Bd., 1998 MT 127, 289 M 99, 959 P2d 496, 55 St. Rep. 499 (1998). See also Lambros v. Bd. of Adjustment, 153 M 20, 452 P2d 398 (1969), Cutone v. Anaconda-Deer Lodge County, 187 M 515, 610 P2d 691 (1980), and Whistler v. Burlington N. RR Co., 228 M 150, 741 P2d 422 (1987).

Review of Board of Adjustment Decision: The District Court's review under this section of a zoning decision of the Bozeman Board of Adjustment was proper because the court determined that the Board lawfully granted a zoning variance upon which it properly placed restrictions. Schendel v. Bd. of Adjustment, 237 M 278, 774 P2d 379, 46 St. Rep. 800 (1989).

Contempt Proceedings:

A Writ of Certiorari to review judgment of contempt can only be made when there is a showing that the tribunal acted in excess of jurisdiction. State ex rel. Porter v. District Court, 123 M 447, 215 P2d 279 (1950).

A judgment or order of the District Court made in a contempt proceeding is reviewable by the Supreme Court on Writ of Certiorari, the review going no further than to determine whether the lower court regularly pursued its authority; the Writ cannot be used to correct errors committed in the exercise of jurisdiction. State ex rel. Murphy v. District Court, 99 M 209, 41 P2d 1113 (1935).

On application for Writ of Certiorari to review a judgment of contempt, the Supreme Court may review the evidence introduced in the proceedings to determine whether the charges against contemner are unsupported by the evidence or the findings are contrary to all of the substantial evidence or whether the decision has no evidence to support it, but the court cannot review the evidence to determine the preponderance thereof. State ex rel. Murphy v. District Court, 99 M 209, 41 P2d 1113 (1935).

Jurisdictional Defect Required:

The power of a court of review to issue a Writ of Certiorari is limited, and the Writ may be granted only when there has been an excess of jurisdiction. State ex rel. Lay v. District Court, 122 M 61, 198 P2d 761 (1948).

The writ cannot be used to correct errors committed in the exercise of jurisdiction. State ex rel. Griffiths v. Mayor of Butte, 57 M 368, 188 P 367 (1920).

Questions Determined:

The hearing in a certiorari proceeding is limited to a review of the record of the inferior tribunal, board, or officer for the sole purpose of determining from such record whether the tribunal, board, or officer had jurisdiction to do the act, to make the order, or to render the judgment of which complaint is made. State ex rel. Lay v. District Court, 122 M 61, 198 P2d 761 (1948).

The only questions that can be presented for determination to the reviewing court must appear affirmatively from the face of the record. State ex rel. First Trust & Sav. Bank v. District Court, 50 M 259, 146 P 539 (1915).

Upon an application to review the action of a District Judge, the Supreme Court is limited in its inquiry to the questions as to whether the application is properly made, and if so, whether the District Judge exceeded his jurisdiction. State ex rel. King v. District Court, 24 M 494, 62 P 820 (1900); State ex rel. Independent District Tel. Co. v. District Court, 15 M 324, 39 P 316 (1895); In re Ming, 15 M 79, 38 P 228 (1894); State ex rel. Congdon v. District Court, 10 M 456, 26 P 182 (1891); State ex rel. Murphy v. District Court, 10 M 401, 25 P 1053 (1891).

Harmless Error: The office of the Writ of Certiorari is merely to annul acts of an inferior tribunal, board, or officer that are clearly without or in excess of jurisdiction and not to prevent, in advance, threatened wrongs; nor will it be granted for the correction of merely harmless, technical, or formal errors that are not shown to have resulted prejudicially or cause substantial injustice to relator. State ex rel. Pereira v. District Court, 83 M 349, 272 P 242 (1928).

County Commissioners' Proceedings: The affidavit for a Writ of Certiorari was insufficient where the petition for the removal of a county seat bore the required number of names and recited that the signers were qualified, since in the absence of an objection and of fraud, which did not appear, it indicated that the Board of Commissioners had regularly pursued its authority, and by this section the review on a Writ of Certiorari was to determine whether they had or not. State ex rel. Buck v. Bd. of County Comm'rs, 21 M 469, 54 P 939 (1898).

Collateral References

Certiorari *key* 63 through 68.

14 C.J.S. Certiorari §89, et seq.

14 Am. Jur. 2d Certiorari §§63 through 67.

Existence of jurisdictional facts found by inferior tribunal as subject of inquiry on certiorari. 5 ALR 2d 675.

27-25-304. Hearing and judgment.

Case Notes

Dismissal of Proceeding: Where defendant in a proceeding for a Writ of Certiorari after return filed a motion for judgment on the pleadings, which motion was argued by the parties and submitted for decision, and the court, instead of rendering judgment as required by this section, made an order, nonappealable in character, dismissing the proceeding, the Writ of Mandate compelling it to render judgment is the proper remedy. State ex rel. Altop v. District Court, 72 M 49, 231 P 99 (1924).

Affirmance, Annulment, or Modification Only: The office of the Writ of Certiorari is to annul, modify, or affirm the action of an inferior tribunal; it cannot supply defects or restrain excesses. State ex rel. Furnish v. Mullendore, 53 M 109, 161 P 949 (1916).

Collateral References

Certiorari *key* 54 through 62, 69.

14 C.J.S. Certiorari §§70, 85, 107.

CHAPTER 26
MANDAMUS — WRIT OF MANDATE

Chapter Case Notes

Review of Health Board Decision Not Proper Subject for Declaratory Judgment — Writ of Mandate and Declaratory Relief Properly Denied: Skinner Enterprises, Inc., sought relief in the form of a declaratory judgment stating that the local board of health could not require an intermittent sand filter sewage treatment system on a proposed subdivision, by making an issue of the District Court's failure to evaluate the factual basis for the board's decision, in effect attempting to appeal the board's decision. However, review of the board's decision was not a proper subject for a declaratory judgment, and that form of relief was properly denied. Further, a writ of mandate ordering the board to approve the subdivision was also inappropriate, given the board's discretionary authority to approve or disapprove a subdivision. Skinner Enterprises, Inc. v. Lewis & Clark County Bd. of Health, 286 M 256, 950 P2d 733, 54 St. Rep. 1398 (1997).

Attorney Fees Improperly Granted — Injunction Held Unlike Mandamus for Purposes of Fees: Wittmers purchased a manufactured home and moved it to a subdivision in Gallatin County. Newmans and others brought an action to restrain Wittmers from maintaining the home in the subdivision in violation of a restrictive covenant prohibiting mobile homes. The District Court issued the injunction and also awarded Newmans their fees and costs. The Supreme Court held that attorney fees were improperly granted because even though fees are awardable in a mandamus action, the remedy of injunction is unlike the remedy of mandamus. For that reason, no analogy can be made to mandamus cases awarding fees. Newman v. Wittmer, 277 M 1, 917 P2d 926, 53 St. Rep. 516 (1996).

Attorney Fees Not Allowed Unless Final Judgment: The award of attorney fees in this case is premature as no final judgment has been entered on the merits of the underlying controversy in favor of respondents. No permanent injunction was awarded. No Writ of Mandate was issued. All

other considerations aside, respondents are not entitled to a judgment for attorney fees without a final determination of the underlying controversy in their favor. Dreyer v. Bd. of Trustees of Mid-Rivers Tel. Co-op, Inc., 193 M 95, 630 P2d 226, 38 St. Rep. 972 (1981). See also Dreyer v. Bd. of Trustees of Mid-Rivers Tel. Co-op, Inc., 204 M 75, 666 P2d 1214, 40 St. Rep. 673 (1983).

Correct or Revise Erroneous Action Already Taken — Writ Vacated: The District Court issued a Writ of Mandate compelling the Department of Highways (now Department of Transportation) to offer the property in dispute at a public sale. This essentially requires the Department to correct erroneous action already taken. Requiring this type of action is beyond the scope of a Writ of Mandate. The Supreme Court therefore vacated the Writ. Castles v. State ex rel. Dept. of Highways, 187 M 356, 609 P2d 1223 (1980).

Nature of Action: Mandamus is not a civil action, and the Statute of Anne is not in force in this jurisdiction. State ex rel. Casleton v. Bd. of Prison Comm'rs, 84 M 14, 273 P 1044 (1929); Bailey v. Edwards, 47 M 363, 133 P 1095 (1913); Territory ex rel. Tanner v. Potts, 3 M 364 (1879); Chumasero v. Potts, 2 M 242 (1875).

Pleadings and Practice: The statute assimilates mandamus, in respect of pleading and practice, to the ordinary civil action. Greeley v. Cascade County, 22 M 580, 57 P 274 (1899).

Part 1
General Provisions

Part Case Notes

Admissibility of Evidence From Earlier Related Lawsuit in Mandamus Proceeding: In a proceeding for a Writ of Mandamus compelling county officers to accept for recording a deed and certificate of survey, it was proper for the trial court to admit into evidence exhibits and testimony from an earlier lawsuit concerning similar issues and the same property. The applicant's conduct is a proper consideration in a mandamus action. Further, the evidence is relevant under Rule 401, Montana Rules of Evidence. Withers v. Beaverhead County, 218 M 447, 710 P2d 1339, 42 St. Rep. 1730 (1985).

Writ of Mandamus Improper — No City Commission Duty: It was inappropriate for the District Court to issue a Writ of Mandamus, in essence directing the City Commission to undertake certain procedures that it had no duty to perform. There was no requirement under law that the City Commission, in support of a decision granting or denying a rezoning request, enter written findings of fact, keep a verbatim record of the proceedings, or conduct its proceedings in an adjudicative manner so as to give an applicant full procedural due process rights. Foster v. Bozeman City Comm'n, 189 M 64, 614 P2d 1072 (1980).

27-26-101. Name of writ.

Collateral References

Mandamus *key* 1.
55 C.J.S. Mandamus §2.
52 Am. Jur. 2d Mandamus §1.

27-26-102. When and by whom issued.

Compiler's Comments

1993 Amendment: Chapter 10 in (1), at beginning, substituted "A writ of mandamus" for "It" and in two places substituted "lower tribunal" for "inferior tribunal"; and made minor changes in style.

Case Notes

General 1112
Clear Legal Duty 1117
Clear Legal Right 1120
Mandamus Not to Compel Discretionary Act 1120
Abuse of Discretion 1122
Ministerial Act 1122
Adequacy of Other Remedy 1122
Mandamus Not to Correct Action Taken 1124
Writ Issued at Discretion of Court 1125

GENERAL

No Specified Time Within Which Denial of Concealed Weapon Permit Must Issue — Writ of Mandate Properly Denied: Smith applied for a concealed weapon permit in October 1995, but the Sheriff denied the application in April 1996. Smith reapplied in April 1997, and the second

application was denied in August 1997. Smith applied for a writ of mandate, which was also denied. Smith contended that because he was qualified under 45-8-321(1), the Sheriff had 60 days within which to exercise the discretion, pursuant to 45-8-321(2), or else Smith was entitled to a permit as a matter of law. The District Court concluded that the Sheriff had no legal duty to issue Smith a permit. The Supreme Court agreed because 45-8-321(2) describes the circumstances in which a Sheriff may deny a permit but does not specify a time within which a denial must issue. Further, it was not error for the District Court to deny the writ of mandate or mandamus because there was no clear legal duty by the Sheriff, acting discretionarily, to issue the permit. Smith v. Missoula County, 1999 MT 330, 297 M 368, 992 P2d 834, 56 St. Rep. 1318 (1999), distinguishing Phillips v. Livingston, 268 M 156, 885 P2d 528, 51 St. Rep. 1227 (1994). See also Becky v. Butte-Silver Bow School District No. 1, 274 M 131, 906 P2d 193, 52 St. Rep. 1154 (1995).

Recall Act — When Attorney Fees Available: Section 2-16-615 of the Montana Recall Act provides two procedural remedies, depending on the relief sought. If an official refuses to accept a proper recall petition, relief is by mandamus and attorney fees may be recoverable. If a legally insufficient recall petition has been accepted for filing, relief is by injunction and attorney fees are not available. Thus, the right to attorney fees depends on the underlying action and is not reciprocal. Further, the statute does not provide for relief by writ of prohibition. Braach v. Graybeal, 1999 MT 234, 296 M 138, 988 P2d 761, 56 St. Rep. 919 (1999), affirming Sheehy v. Ferda, 235 M 63, 765 P2d 722, 45 St. Rep. 2162 (1988).

National Honor Society Records Not "Documents of Public Body" — Writ of Mandate Properly Denied: The father of a high school student sought a writ of mandate to obtain names and rankings of teachers who evaluated the student and whose low rankings prevented the student from being admitted into the National Honor Society. The Supreme Court held that because the teachers acted voluntarily and the school did not keep records related to Honor Society membership, the documents sought were not "documents of a public body" as provided in the Montana Constitution. Therefore, the District Court's denial of the writ of mandate was correct. Becky v. Butte-Silver Bow School District No. 1, 274 M 131, 906 P2d 193, 52 St. Rep. 1154 (1995).

No Duty of Clerk and Recorder to Record Invalid Deed — Writ of Mandamus Improper: Under 7-4-2617, a County Clerk and Recorder is obligated to record only an instrument, paper, or notice that is authorized by law to be recorded. Under 76-3-302, a County Clerk and Recorder has a mandatory duty not to accept and record an otherwise proper deed if it fails to comply with the applicable survey requirements. The District Court did not err in refusing to issue a writ of mandamus requiring recording of deeds when a landowner attempted to divide a large parcel of land into smaller parcels by executing a deed in which the landowner was both grantor and grantee, which is not authorized by law, and when the statutorily required plat was not filed. Rocky Mtn. Timberlands, Inc. v. Lund, 265 M 463, 877 P2d 1018, 51 St. Rep. 653 (1994).

Writ Denied Based on Mootness: A citizens' group applied for a writ of mandate to compel a school district Board of Trustees to seek approval for the purchase of property through a vote of district residents. The District Court properly dismissed the application based on mootness because the property had already been purchased at the time of hearing, forestalling the prospect for meaningful relief. Awareness Group v. Bd. of Trustees, 243 M 469, 795 P2d 447, 47 St. Rep. 1333 (1990).

Dismissal of "Friendly Suit" as Nonjusticiable Controversy: Relator applied to the Supreme Court to commence an original proceeding for declaratory judgment, writ of mandate, and other appropriate relief. He sought a court requirement of the Secretary of State to commence the administrative process for inclusion of two constitutional initiatives in the next regular statewide election. The court found no justiciable controversy existed because the Secretary of State had already advised county election officials that he intended to place the initiatives on the ballot, which was essentially the same relief relator sought through the court by his "friendly suit". A declaratory judgment and writ of mandate are inappropriate in the absence of a justiciable controversy; therefore, relator's application for an original proceeding was dismissed. Marbut v. Secretary of St., 231 M 131, 752 P2d 148, 45 St. Rep. 487 (1988).

Petition for Mandamus Premature Remedy:

Applicant who was denied transfer of a liquor license had plain, adequate, and speedy remedy in law under 16-4-411; therefore, the court properly denied his application for alternative Writ of Mandamus or Prohibition. Applicant failed to exhaust his administrative remedies and did not show that the Department of Revenue or State Tax Appeal Board was acting contrary to law. Christopherson v. St., 226 M 350, 735 P2d 524, 44 St. Rep. 712 (1987). See also Roche v. Sabo, 259 M 76, 853 P2d 1258, 50 St. Rep. 689 (1993).

The plaintiffs' petition for mandamus to compel public officers to declare property adjacent to plaintiffs' a public nuisance and abate same was premature, as the plaintiffs failed to show they had asked officers to abate the alleged nuisance before filing petition for a Writ of Mandamus. Generally, before mandamus will issue to a public officer, a demand for performance of the act sought to be compelled is required. Liebman v. Brunell, 212 M 459, 689 P2d 248, 41 St. Rep. 1863 (1984).

Applicability of Writ: A Writ of Mandate is a writ to compel action and is not applicable when relator sought to stop the action of the Judicial Standards Commission. State ex rel. Shea v. Judicial Standards Comm'n, 198 M 15, 643 P2d 210, 39 St. Rep. 521 (1982).

Use of Mandamus to Void Unlawfully Held Public Meeting: Where respondent County Commissioners failed to give public notice of a meeting so that the result was voidable by the court under 2-3-114 and 2-3-213, a Writ of Mandamus would be appropriate in the case to void the illegal meeting. In future cases, the remedy should take the form of a simple petition to void an action or a petition for declaratory judgment. Bd. of Trustees v. County Comm'rs, 186 M 148, 606 P2d 1069 (1980), followed in Goyen v. Troy, 276 M 213, 915 P2d 824, 53 St. Rep. 353 (1996).

Moratorium on Conditional-Use Permits — Zoning — Mandamus — Prohibition — Declaratory Judgment: Diehl requested a conditional-use permit for a planned shopping center. In response, the city of Helena established a 1-year moratorium on the granting of all conditional-use permits. Diehl then filed him complaint and petition for a declaratory judgment, Writ of Mandate, and order to show cause. On appeal, the court found: (1) the city may adopt a reasonable general moratorium, but the procedure required by 76-2-306 must be followed; (2) the discretion of the City Commission to approve, modify, or deny the recommendation of the Zoning Commission cannot be controlled by Writ of Mandate, prohibition, or by declaratory judgment; and (3) a Writ of Mandate requiring the city to act on Diehl's application within a reasonable time is proper under the circumstances in this case. State ex rel. Diehl Co. v. Helena, 181 M 306, 593 P2d 458 (1979).

Agency Regulation Conflicting With Occasional Sale Exemption: Court upheld issuance of a Writ of Mandate to compel the lifting of sanitary restrictions, the filing of a certificate of survey, and an award of relator's attorney fees because the Montana Subdivision and Platting Act (Title 76, ch. 3) clearly and unambiguously exempts occasional sales in resubdivisions, and Department of Consumer Affairs regulations were in direct conflict with the Act and exceeded delegated authority. State ex rel. Swart v. Casne, 172 M 302, 564 P2d 983 (1977).

Claim of Justice's Court for Unbudgeted Actual and Necessary Expenses: Where Justice of Peace filed claim to pay necessary extra clerical assistance and County Commissioners disallowed claim, a Writ of Mandate is an appropriate remedy and not a declaratory judgment action or an appeal of the Commissioners' decision because a declaratory judgment would not get the claim paid, as a declaratory judgment is an inept procedure for recovery of a fee for services performed. State ex rel. Browman v. Wood, 168 M 341, 543 P2d 184 (1975). (Annotator's Comment: In this case Supreme Court exercised supervisory powers to provide a procedure to prevent future actual or potential conflict between the Board of County Commissioners and Justice's Court.)

Public Retirement Administration: Where the Board of Administration of the retirement system had made a determination as to the incapacity of a claimant for retirement compensation but did not provide the hearing as contemplated by statute and required by due process, the relator in a mandamus proceeding is entitled to an order commanding the Board to grant a hearing. State ex rel. Morgan v. White, 136 M 470, 348 P2d 991 (1960).

Criminal Prosecutions:

An original proceeding for a Writ of Mandamus directed to the Judge of a District Court was proper in a case where it was sought to compel the court to allow the filing of a new information in a prosecution against three juvenile defendants for robbery. State ex rel. Keast v. District Court, 136 M 367, 348 P2d 135 (1959).

Where a criminal cause is removed from one county to another for trial, it is the duty of the county to which it is transferred to furnish a prosecuting officer, and mandamus will not issue to compel the county from which the change of venue was had to pay special counsel appointed by the District Court to represent the state. State ex rel. Cascade County v. Lewis & Clark County, 34 M 351, 86 P 419 (1906).

Public Assistance Administration: A peremptory Writ of Mandate was proper to compel the Department of Public Welfare to rescind a general order providing that members of a striking union were to receive less general relief assistance than other general relief recipients in the same class. State ex rel. Int'l Union of Mine, Mill & Smelter Workers v. Dept. of Pub. Welfare, 136 M 283, 347 P2d 727 (1959).

Public Employment:

Where nonunion schoolteachers were offered a salary increase only if they signed a contract which contained a union security clause, they were entitled to bring a mandamus action against the school district to obtain a judgment declaring that they could not be discriminated against, compelling the district to enter into contracts with them, and ruling that the union security provision was void. Benson v. School District, 136 M 77, 344 P2d 117 (1959).

Where an employee of the Fish and Game Commission (now Fish, Wildlife, and Parks Commission) was summarily dismissed by the Commission without sufficient notice, he was entitled to relief by way of mandamus even though, subsequent to the discharge, he was given notice that a hearing on his dismissal would be held. State ex rel. Opheim v. St. Fish & Game Comm'n, 133 M 362, 323 P2d 1116 (1958), distinguished in State ex rel. Hollibaugh v. St. Fish & Game Comm'n, 139 M 384, 365 P2d 942 (1961).

Mandamus lies to reinstate an officer or employee who has been discharged in violation of the civil service laws. State ex rel. Driffill v. Anaconda, 41 M 577, 111 P 345 (1910).

Supreme Court Writ:

Mandamus is properly issued to carry into effect the judgment of the Supreme Court where the District Court fails for any reason to execute its mandate from the Supreme Court. State ex rel. Kitchens v. District Court, 130 M 57, 294 P2d 907 (1956).

Where the Supreme Court in the exercise of its original jurisdiction awards a peremptory Writ of Mandate, the proper method of review thereof is by motion for new trial, not by motion for rehearing. State ex rel. Lynch v. Batani, 103 M 353, 62 P2d 565 (1936).

The Supreme Court may construe its own judgments and orders, and where the District Court has misconstrued its order in remanding a case or has acted beyond its power in construing it, mandamus will issue to review and correct its action. State ex rel. USF&G Co. v. District Court, 77 M 594, 251 P 1061 (1926), distinguished in Hansen v. Hansen, 130 M 496, 304 P2d 1107 (1956).

If it is necessary that two Justices of the Supreme Court concur in the issuance of an alternative Writ of Mandamus, where the application is made to two Justices, and the order directing the clerk to issue the Writ is signed by only one of them, the other concurring, the Writ is properly issued. State ex rel. Lambert v. Coad, 23 M 131, 57 P 1092 (1899).

Motor Vehicle Regulation: Mandamus will lie to compel issuance of license for logging trailer under 61-3-321. State ex rel. Sharp v. Cross, 123 M 261, 211 P2d 760 (1949).

Bias — District Judge's Failure to Call Another Judge: Mandamus is the proper remedy where a District Judge fails to call in another District Judge after an affidavit of bias has been filed under 93-901, R.C.M. 1947 (now repealed). State ex rel. Coleman v. District Court, 120 M 372, 186 P2d 91 (1947).

District Court Action:

Where defendant in a proceeding for a Writ of Certiorari after return filed a motion for judgment on the pleadings, which motion was argued by the parties and submitted for decision, and the court instead of rendering judgment as required by 27-25-304, made an order, nonappealable in character, dismissing the proceeding, the Writ of Mandate compelling it to render judgment is the proper remedy. State ex rel. Altop v. District Court, 72 M 49, 231 P 99 (1924).

Mandamus is the proper remedy to compel the District Court to dismiss a case against a defaulted defendant where a long time has elapsed without the default having been demanded or entered. State ex rel. Stiefel v. District Court, 37 M 298, 96 P 337 (1908).

Where, after defendant's motion for judgment on the pleadings had been argued and submitted, the District Court dismissed the action without prejudice on plaintiff's motion, mandamus will lie to require the court to reinstate the cause and determine defendant's motion. State ex rel. Mont. Cent. Ry. v. District Court, 32 M 37, 79 P 546 (1905), distinguished in St. v. District Court, 102 M 503, 59 P2d 45 (1936).

Tax Levy and Assessment:

A principle of assessment which, as a settled policy, omits the assessment of a large portion of assessable property is fundamentally wrong; hence where the State Board of Equalization (now the Department of Revenue) has adopted such a principle, mandamus lies to compel assessment of the omitted property. State ex rel. Snidow v. St. Bd. of Equalization, 93 M 19, 17 P2d 68 (1932).

There being no provision of law authorizing a county holding city property under tax deed to pay delinquent special assessments against it, mandamus does not lie to compel the County Treasurer, acting as collector of taxes for the city, to collect them. State ex rel. Billings v. Osten, 91 M 76, 5 P2d 562 (1931).

The Writ of Mandate does not lie to compel the State Board of Equalization (now the Department of Revenue) to consent to the transfer of shares of stock on the books of a foreign corporation doing business in the state and to return an inheritance tax paid under protest to the executor of the nonresident owner of the stock, the law not making it the specific duty of the Board to do so. State ex rel. Bankers' Trust Co. v. Walker, 70 M 484, 226 P 894 (1924).

Mandamus was the remedy to compel a city to levy a special tax to pay ascertained water rentals due under a valid contract for a water supply, the city having repudiated the contract. A command in the writ that the city levy sufficient taxes to pay the rentals due and those that will become due for the remaining 6 months of the year is proper. State ex rel. Great Falls Water Works Co. v. Great Falls City Council, 19 M 518, 49 P 15 (1897).

Assume Jurisdiction: While mandamus does not lie to compel a subordinate court to reverse a conclusion once reached or correct an erroneous decision or direct it how it shall decide a question, it does lie to compel it to assume jurisdiction and determine the merits of a cause where it erroneously decides, as a matter of law, that it has no jurisdiction or refuses to proceed, unless there is an adequate remedy by appeal or other method of review. State ex rel. Musselshell County v. District Court, 89 M 531, 300 P 235, 82 ALR 1158 (1931).

Municipal Officers: Upon the resignation of a Town Clerk, the Mayor appointed a successor whom the Council would not confirm; the town books were delivered by the former to the latter and held by her at the Mayor's direction. Members of the Council brought a proceeding in mandamus to compel the Mayor to deliver the books to them for inspection. While the books being held by the appointee under his direction might be said to be in the Mayor's possession under his duty to care for and preserve them, the law did not impose upon him any duty that he may be coerced to perform with relation to them, and therefore the writ does not lie to compel action on his part. State ex rel. Peterson v. Peck, 91 M 5, 4 P2d 1086 (1931).

Payment of Public Funds: While mandamus is a proper remedy to compel the County Treasurer to pay interest coupons upon county bonds if he then has funds out of which to make payment, where there was no showing that the county was in funds at the time the action was commenced, the District Court could properly entertain an action on interest coupons rather than a mandamus proceeding. Kalman v. Treasure County, 84 M 285, 275 P 743 (1929).

Prison Officials: An attorney whose client is imprisoned in the state penitentiary may in his own behalf bring mandamus proceedings to compel the prison authorities to permit him to consult his client in private. State ex rel. Casleton v. Bd. of Prison Comm'rs, 84 M 14, 273 P 1044 (1929).

Franchise Operation:

Failure or neglect of the Railroad Commission (now the Public Service Commission) to act promptly upon an application for permission to operate a bus line is no justification for the applicant to operate without the requisite certificate, his remedy being to compel action by mandamus. N. Pac. Ry. v. Bennett, 83 M 483, 272 P 987 (1928).

An ordinance granting a street railway company the right to construct and operate lines in certain streets and providing that if the company does not construct and operate a certain portion of the line within a certain time, the right shall be forfeited as to the parts where the failure occurs, does not impose on the company the duty to continue the operation of any portion of the line, and mandamus cannot issue to compel it to do so. State ex rel. Knight v. Helena Power & Light Co., 22 M 391, 56 P 685 (1899).

Territorial Operation of Writ: The District Court of one district or county has jurisdiction to issue a Writ of Mandate directed to an officer of another district or county to compel him to perform a ministerial act which the law specially enjoins as a duty resulting from his office. State ex rel. Carroll v. District Court, 69 M 415, 222 P 444 (1924).

Motion to Quash: Since the alternative Writ of Mandate and the affidavit upon which it is issued together constitute the first pleading of the applicant, a motion to quash challenges the sufficiency of both. State ex rel. Duggan v. District Court, 65 M 197, 210 P 1062 (1922).

To Adjust Indebtedness Between New and Old Counties: Mandamus is the proper remedy to compel commissioners appointed to adjust county indebtedness between an old and a new county to reassemble and correctly apportion such indebtedness. State ex rel. Furnish v. Mullendore, 53 M 109, 161 P 949 (1916).

Extent of Relief: The character of the duty measures the extent of the relief which can be afforded by mandamus. State ex rel. Stuewe v. Hindson, 44 M 429, 120 P 485 (1912).

Claim and Delivery — Sheriff's Duty: When it becomes the Sheriff's duty to deliver possession of the property in controversy to the plaintiff, in an action of claim and delivery, the performance of that duty may be compelled by mandamus. State ex rel. Johnson v. Collins, 41 M 526, 110 P 526 (1910).

Highways, Roads, and Bridges: A telephone company, having the absolute right to use the streets of a city for the erection of its poles and construction of its lines, subject only to such reasonable regulations by the city as to where in the streets the poles and other appliances should be placed, cannot compel the city by mandamus to designate the streets, avenues, and alleys upon which to place its necessary appliances. State ex rel. Rocky Mtn. Bell Tel. Co. v. Red Lodge, 33 M 345, 83 P 642 (1905).

Anticipatory Writ: Where an officer's duty is a simple, defined duty, purely ministerial, arising under circumstances admitted or proved to exist and imposed by law, and he refuses performance in advance of the time fixed by law therefor, mandamus will at once lie to compel a performance at the proper time; and the court will not wait to determine whether or not he should perform until some future time when litigation arises and it is too late to require the performance of the defined duty. State ex rel. Lloyd v. Rotwitt, 15 M 29, 37 P 845 (1894).

CLEAR LEGAL DUTY

Writ of Mandate Proper to Compel Arbitration of Collective Bargaining Agreement: Plaintiffs sought a writ of mandate to compel defendants to arbitrate an employee grievance, but the District Court denied the writ. On appeal, the Supreme Court held that plaintiffs established a clear legal duty to arbitrate, and absent a plain, speedy, and adequate remedy to compel arbitration, issuance of the writ of mandate was appropriate. The Supreme Court reversed and remanded for further proceedings. Belgrade Educ. Ass'n v. Belgrade School District No. 44, 2004 MT 318, 324 M 50, 102 P3d 517 (2004).

No Clear Legal Duty of Police Based on District Court Ruling Regarding Search and Seizure Procedures — Writ of Mandate Properly Denied: Best moved to suppress evidence obtained after a vehicle stop on grounds that the evidence was obtained in an unconstitutional search and seizure. The District Court found that the use of a drug-sniffing dog without a particularized suspicion of criminal activity was improper and suppressed the evidence. The day after the ruling, Best was again stopped and the police again used a drug-sniffing dog. Without regard to Best's allegations, another District Court Judge issued a search warrant authorizing the impoundment and search of Best's vehicle without requiring the particularized suspicion discussed in the suppression order of the day before. The police chief stated publicly that he would not direct his officers to change their procedures to conform to the earlier ruling on the motion to suppress. Shortly thereafter, several citizens sought a writ of mandate to compel the police chief to comply with the ruling. The writ was denied, and the citizens appealed, citing Boung Jae Jang v. Brown, 560 NYS 2d 307 (A.D. 2 Dept. 1990), for the proposition that a duty compelled by mandate may be in the form of a judicial determination and contending that the suppression order determined that the police practice of using drug-sniffing dogs without particularized suspicion was unconstitutional and that the police chief had a clear legal duty to discontinue the practice. The Supreme Court noted that whether a particularized suspicion exists depends on the factual nuances of each case, but nothing in the language of the suppression order specifically directed discontinuation of the practice or imposed a clear legal duty on the police chief. Although the citizens might understandably question whether the intended deterrent effect of the ruling would be achieved, their concerns did not transform a fact-specific suppression order into a prospective clear legal duty. Having failed to establish the first prong of the test for issuance of a writ of mandate, the Supreme Court affirmed the denial of the writ. Best v. Billings Police Dept., 2000 MT 97, 299 M 247, 999 P2d 334, 57 St. Rep. 396 (2000).

Statute Requiring "Necessary" Rules Requires Rulemaking Hearing — Mandamus Proper Remedy: Pursuant to 2-4-315 and 5-7-111, Common Cause submitted a petition to the Commissioner of Political Practices requesting the adoption of a definition of "lobbying". When the Commissioner denied the petition, Common Cause brought a petition for mandamus. The District Court dismissed pursuant to Rule 12(b)(6), M.R.Civ.P. (Title 25, ch. 20). The Supreme Court reversed, citing Commonwealth of Pa. v. Nat'l Ass'n of Flood Insurers, 520 F2d 11 (3d Cir. 1975), and holding that the language in 5-7-111 requiring rules "necessary" to implement the statute mandated the Commissioner to hold a hearing to determine whether rules were necessary. The Supreme Court held that the discretionary authority contained in 2-4-315 to adopt or not adopt a particular rule does not give the Commissioner the authority to avoid altogether the rulemaking required by 5-7-111. For this reason, the Supreme Court also held that mandamus was a proper remedy because the Commissioner had a clear legal duty to conduct rulemaking procedures to determine what rules were necessary. Common Cause of Mont. v. Argenbright, 276 M 382, 917 P2d 425, 53 St. Rep. 386 (1996).

No Clear Legal Duty to Issue Gambling Licenses and Permits — Activity Unlawful Under Federal Law — Writ of Mandamus Properly Denied: The Department of Justice, Gambling Control Division, denied gambling licenses and permits to the plaintiffs, business owners who operate within the boundaries of the Flathead Indian Reservation. The denial of licenses was based on the determination of the U.S. Attorney that the operation of video gambling machines would no longer be lawful on Indian lands absent a tribal-state compact. The plaintiffs filed a petition for a writ of mandamus ordering the state to issue the licenses and permits. The writ was denied. The plaintiffs appealed on the grounds that the state had a clear legal duty under state law to issue the licenses and permits. On appeal, the Supreme Court rejected the state's contention that state gambling laws specifically authorize it to refuse to process the plaintiffs' applications. However, because the plaintiffs seek to conduct gambling operations on the Flathead Indian Reservation, federal statutes must be considered in conjunction with state law. State law that conflicts with the purpose and operation of a federal statute, regulation, or policy is preempted by the federal law. State licensure of Class III gaming under the facts of this case would frustrate the federal policy underlying the Indian Gaming Regulatory Act (IGRA). The Supreme Court concluded that absent a ruling of a federal court as to the applicability of IGRA to non-Indians, such as the plaintiffs in this case, and given the apparent conflict between Montana licensing statutes and federal statutes regulating gambling on Indian lands, there is no clear legal duty requiring the state to issue gambling licenses and permits to the plaintiffs. The District Court did not err in denying the petition for a writ of mandamus. Larson v. St., 275 M 314, 912 P2d 783, 53 St. Rep. 158 (1996).

Mandamus Appropriate Remedy to Require City Commission to Hold Employee Discharge Hearing — Employee Entitled to Reinstatement: Phillips was terminated from his employment as a full-time firefighter for the city of Livingston. Before his termination, the city manager held a termination hearing. Phillips argued that the hearing was held in violation of 7-33-4124, requiring the hearing to be held before the City Commission. The Supreme Court found that the hearing should have been held by the City Commission. The court also held that mandamus was the proper remedy to require the City Commission to hold the discharge hearing and that because there was a clear statutory duty for the City Commission to hold the hearing, there was no obligation on Phillips' part to exhaust grievance remedies contained in the firefighters' collective bargaining agreement. Finally, the Supreme Court held that because Phillips did not have a plain, adequate, and speedy remedy at law, under 7-33-4124(2), he was entitled to reinstatement and backpay. Phillips v. Livingston, 268 M 156, 885 P2d 528, 51 St. Rep. 1227 (1994), distinguished in Smith v. Missoula County, 1999 MT 330, 297 M 368, 992 P2d 834, 56 St. Rep. 1318 (1999).

Writ of Mandamus Ordering State Agency to Pay Highway Patrol Benefits to Ex-Wife Improper: The petitioner obtained a writ of mandamus from the lower court directing the Department of Administration to pay one-half of her ex-husband's highway patrol retirement benefits to her as required by the couple's divorce decree. The Supreme Court reversed, holding that the agency had no legal duty to pay the benefits to the petitioner because she was not a beneficiary under the applicable law. State ex rel. Neuhausen v. Nachtsheim, 253 M 296, 833 P2d 201, 49 St. Rep. 559 (1992).

No Duty of County to Collect Delinquent Water and Sewer Charges — Mandamus Denied: A water and sewer district sought a writ of mandamus to compel a county to collect delinquent assessment owed by an individual. Title 7, ch. 13, part 23, does not set forth a clear legal duty on the part of the county to collect the delinquent charges. The county can assess taxes sufficient to cover both bonded indebtedness payments and operating expenses, but only after advance notice required by 7-13-2304 through 7-13-2307. Delinquent water and sewer assessments levied against an individual are different from taxes levied against all district property under 7-13-2302. Absent a clear legal duty, mandamus was properly denied. RAE Subdivision County Water & Sewer District v. Gallatin County, 233 M 456, 760 P2d 755, 45 St. Rep. 1631 (1988).

Clerk Under No Clear Duty to Record Deed — Mandamus Erroneously Granted: Where the plaintiff attempted to record a deed to a 5-acre parcel of land without the removal or approval of sanitary restrictions by the county health department (which the court held was estopped from withholding its approval of a disposal permit) but was refused by the Clerk and Recorder, the District Court erred in granting a Writ of Mandamus ordering the Clerk to file a certificate of survey and record the warranty deed. The Clerk and Recorder was statutorily required to refuse to file the survey and record the deed and lacked any discretion to accept a survey absent compliance with the requirements of 76-4-122. Huttinga v. Pringle, 205 M 482, 668 P2d 1068, 40 St. Rep. 1444 (1983).

Department Under No Clear Legal Duty to Approve Subdivision — Mandamus Erroneously Granted: Where the plaintiff applied to the county health department for a disposal permit and was not informed by the county for a period of 6 years whether the permit would be issued, the District Court erred in granting a Writ of Mandamus directing the Department of Health and Environmental Sciences (now Department of Environmental Quality) to certify that the deeded property was not subject to sanitary restrictions. No application for such certification had ever been submitted to the Department, and it therefore had no official knowledge of the plaintiff's disposal system. Absent an appropriate application to the Department, there is no factual or statutory basis for holding that the Department had violated a clear legal duty. Huttinga v. Pringle, 205 M 482, 668 P2d 1068, 40 St. Rep. 1444 (1983).

Mandate a Proper Remedy — Return of Mining Permit: Writ of Mandate is a proper remedy because the Department of State Lands (now Department of Natural Resources and Conservation) had a clear legal duty to return the permit application as incomplete and inadequate. Because the application was not returned, Permit 41A was void and Anaconda may not continue mining activities on the Permit 41A area until a valid permit is granted by the Department. Kadillak v. The Anaconda Co., 184 M 127, 602 P2d 147 (1979).

County Officers: District Court may issue Writ of Mandate compelling County Commissioners to pay necessary clerical expenses of Justice of the Peace when statute is directed to the financial needs of Justices of the Peace. State ex rel. Browman v. Wood, 168 M 341, 543 P2d 184 (1975).

Accounting to County Commissioners: Board of County Commissioners was properly denied Writ of Mandate requiring Sheriff to provide detailed itemized accounting of county funds received for furnishing board to prisoners of county jail since Sheriff has no clear legal duty to provide such an accounting. State ex rel. Lucier v. Murphy, 156 M 186, 478 P2d 273 (1970). (Decision prior to 1971 amendment of 7-32-2205.)

Must Show Affirmative Duty: On appeal from a mandamus proceeding to force state Water Conservation Board (now the Department of Natural Resources and Conservation) to repair and rebuild bridges over ditch, owned by the Board where it crosses city streets, before the Supreme Court could affirm the judgment of the District Court it had to be shown that some law enjoined upon Board an affirmative duty to repair the bridges in question. State ex rel. Livingston v. St. Water Conservation Bd., 134 M 403, 332 P2d 913 (1958).

Brand Registration: Where the holder of a registered brand died and thereafter the brand expired without being reregistered, the brand was then open to record by anyone; hence, mandamus brought by the administrator of the deceased person at a later date would not lie to require the recorder of marks and brands to record the brand in the administrator's name as there is no clear legal duty upon the recorder to do what the administrator required by his complaint. Benolken v. Miracle, 129 M 495, 289 P2d 953 (1955).

Compel Performance of Clear Legal Duty:

The Writ of Mandate lies only to compel the performance of an act that the law specifically enjoins as a duty resulting from an office, trust, or station and therefore will not issue to do a thing beyond the power or duty of the person sought to be compelled. State ex rel. Judith Basin County v. Poland, 61 M 600, 203 P 352 (1921).

Unless an act, performance of which by a Board of County Commissioners is sought to be compelled by mandamus, is one which the law specifically enjoins upon it as a duty resulting from the office, the writ does not lie. State ex rel. Koefod v. Bd. of Comm'rs, 56 M 355, 185 P 147 (1919).

Mandamus lies only to compel the performance of a clear legal duty. State ex rel. Boulware v. Porter, 55 M 471, 178 P 832 (1919); State ex rel. Donlan v. Bd. of Comm'rs, 49 M 517, 143 P 984 (1914); State ex rel. Breen v. Toole, 32 M 4, 79 P 403 (1905).

Need to Establish Legal Right and Violation of Duty: To obtain the aid of a court by mandamus, relator must establish a clear legal right in himself to the relief prayed for and a violation of duty by the person or officer sought to be coerced. State ex rel. Cutts v. Hart, 56 M 571, 185 P 769 (1919); State ex rel. Beach v. District Court, 29 M 265, 74 P 498 (1903).

Duty Not Disclosed in Affidavit: Where the affidavit for the Writ of Mandamus does not disclose a clear legal duty on the part of a Board of County Commissioners to issue warrants in a certain amount in payment of a bridge voluntarily erected by relator upon a public highway, a demurrer (demurrer abolished, Rule 7(c), M.R.Civ.P.) for want of substance is properly sustained. State ex rel. Donlan v. Bd. of Comm'rs, 49 M 517, 143 P 984 (1914).

Writ Not to Compel Idle or Useless Things: The Writ of Mandate will not issue to compel the doing of an idle or useless thing but only to compel the performance of a clear legal duty. State ex rel. Culbertson Ferry Co. v. District Court, 49 M 595, 144 P 159 (1914).

Petition — Duty of Commissioners to Act: When the petition for the removal of a county seat is signed by a majority of the ad valorem taxpayers of the county, all of the signers being qualified voters, it is the ministerial duty of the Board of Commissioners to act upon the petition and submit the question of removal to a vote; and, if it declines to act, mandamus lies to compel it to act. State ex rel. Stringfellow v. Bd. of Comm'rs, 42 M 62, 111 P 144 (1910). See also State ex rel. Arthurs v. Bd. of County Comm'rs, 44 M 51, 118 P 804 (1911).

Court Stenographer: Mandamus lies to compel the court stenographer to write out and file a list of the objections, rulings, and exceptions occurring on the trial of a cause. State ex rel. Kranich v. Supple, 22 M 184, 56 P 20 (1899), explained in State ex rel. Donovan v. Ledwidge, 27 M 197, 70 P 511 (1902).

CLEAR LEGAL RIGHT

Standing for Mandamus: Petitioner, an engineering survey group seeking a Writ of Mandamus to compel County Commissioners to act on five minor subdivisions, has no stated legal interest in any of the subdivisions. Some form of ownership in the land is necessary to impart standing to bring a mandamus action. St. v. Bd. of County Comm'rs, 181 M 177, 592 P2d 945 (1979).

Right to Have Defendant Perform Duty: A person seeking a Writ of Mandamus must be entitled to have the defendant perform a clear legal duty. Sullivan v. Treasurer, 140 M 609, 370 P2d 762 (1962).

Tax Deed — Quiet Title Action Pending: Writ of Mandamus to require County Treasurer to cancel tax deeds upon certain real property to which petitioners asserted ownership was denied, it being apparent that the County Treasurer had no clear legal duty to cancel the tax deeds since the petitioners were involved in a quiet title action, to which county and tax debtors were parties, touching the gist of their petition for a Writ of Mandamus. Sullivan v. Treasurer, 140 M 609, 370 P2d 762 (1962).

Establishing Right — Violation of Duty: The applicant must establish a clear legal right to the writ in his application therefor and a violation of duty by the person sought to be coerced. Stewart v. St., 135 M 323, 340 P2d 151 (1959).

Other Remedy Available:

The writ lies only when the person seeking it is entitled to have the defendant perform a clear legal duty, and then only when there is no speedy or adequate remedy in the ordinary course of law. State ex rel. Kennedy v. District Court, 121 M 320, 194 P2d 256, 2 ALR 2d 1050 (1948).

To secure the aid of a court by mandamus the relator must establish a clear legal right in himself and a clear violation of a legal duty by the person or officer sought to be coerced into action; if there is any other adequate remedy to which he can resort to enforce his right, the writ does not lie. State ex rel. Peterson v. Peck, 91 M 5, 4 P2d 1086 (1931).

The Writ of Mandate should go whenever there is no speedy or adequate remedy in the ordinary course of law, and the person seeking it is entitled to have the defendant perform a clear legal duty. State ex rel. Furnish v. Mullendore, 53 M 109, 161 P 949 (1916); State ex rel. Stuewe v. Hindson, 44 M 429, 120 P 485 (1912); State ex rel. Bean v. Lyons, 37 M 354, 96 P 922 (1908); Raleigh v. District Court, 24 M 306, 61 P 991 (1900), distinguished in State ex rel. Finlen v. District Court, 26 M 372, 68 P 465 (1902).

Pleadings: Mandamus is an extraordinary remedy to be obtained only in those rare cases wherein there is not any plain, speedy, and adequate remedy in the ordinary course of law, and therefore the applicant must disclose the facts which establish his clear legal right to the relief sought. State ex rel. Duggan v. District Court, 65 M 197, 210 P 1062 (1922).

Payment of Public Funds: In a proceeding by mandamus against the State Treasurer to compel that official to pay a member of the Legislature the compensation due him by law, the petitioner must show a legal right in himself to the relief prayed for and a violation of his duty on the part of the State Treasurer, and the court has nothing to do in such a proceeding with the question of a quantum meruit for the value of the services rendered by the petitioner. State ex rel. Cutts v. Hart, 56 M 571, 185 P 769 (1919).

MANDAMUS NOT TO COMPEL DISCRETIONARY ACT

Refusal to Record Deeds Perceived to Be in Violation of County Subdivision Law — Mandamus Not Proper: In an action to compel county officers to accept for recording a deed and certificate of survey, the trial court properly denied a Writ of Mandamus. The county officers' refusal was based on a belief that appellant was attempting to evade county subdivision regulations. When the act sought to be compelled is discretionary, as in this case, a Writ of Mandamus will be issued only if the failure to act is such an abuse of discretion that it amounts to

no exercise of discretion at all. The evidence in this case indicates no abuse of discretion. Withers v. Beaverhead County, 218 M 447, 710 P2d 1339, 42 St. Rep. 1730 (1985), distinguished in State ex rel. Leach v. Visser, 234 M 438, 767 P2d 858, 45 St. Rep. 2035 (1988), and followed in Smith v. Missoula County, 1999 MT 330, 297 M 368, 992 P2d 834, 56 St. Rep. 1318 (1999).

Writ of Mandate Not Proper to Prevent Appropriation of In-Lieu Funds: When the County Commission appropriated in-lieu park funds to a project not specifically authorized in the county outdoor recreation and open space plan, a Writ of Mandate did not lie because the appropriation of the in-lieu funds is a discretionary act. Burgess v. Gallatin County Comm'n, 215 M 503, 698 P2d 862, 42 St. Rep. 585 (1985).

Variance Decision Not Subject to Mandamus: The District Court did not abuse its discretion in refusing to issue a Writ of Mandamus to compel the city to issue a building permit so plaintiff could remodel its building for a prerelease center. There was no legal duty requiring the City Commission to approve any variance from the urban renewal plan, which prohibited such a land use in a high density business district. The City Commission's refusal of a variance was purely discretionary and cannot be controlled by mandamus. State ex rel. Galloway v. Great Falls, 211 M 354, 684 P2d 495, 41 St. Rep. 1410 (1984).

Mandamus Against Those Determining Qualifications of Public Contract Bidders: The Department of Administration and Board of Examiners, in determining whether bidders for the construction of a public building are qualified and will perform the contract in conformity with the specifications and terms of the solicitation for bids, as required by 18-2-103, are acting in a discretionary manner, and mandamus may not be used to control their discretion. Martel Constr., Inc. v. Bd. of Examiners, 205 M 332, 668 P2d 222, 40 St. Rep. 1340 (1983).

Discretionary Actions:

The Department of State Lands (now Department of Natural Resources and Conservation) is under a fiduciary duty to manage the school lands according to the highest standards. Therefore, the Department's power when administering the trust is discretionary, and a Writ of Mandamus may not be issued to compel the Department to approve an assignment of a lease. Jeppeson v. St., 205 M 282, 667 P2d 428, 40 St. Rep. 1272 (1983), followed in N. Fork Preservation Ass'n v. Dept. of State Lands, 238 M 451, 778 P2d 862, 46 St. Rep. 1409 (1989).

Mandamus lies to compel action where the act sought to be compelled is one which the law specially enjoins as a duty resulting from an office, trust, or station, but not to control discretion. State ex rel. Musselshell County v. District Court, 89 M 531, 300 P 235, 82 ALR 1158 (1931).

Mandamus lies to compel action but not to control discretion. State ex rel. Scollard v. Bd. of Examiners, 52 M 91, 156 P 124 (1916); State ex rel. Stuewe v. Hindson, 44 M 429, 120 P 485 (1912).

The question whether state lands lying within 3 miles of the limits of a city or town shall be leased or sold, being one addressed to the sound discretion of the State Board of Land Commissioners, mandamus does not lie to compel such Board to entertain an application to lease. State ex rel. Gibson v. Stewart, 50 M 404, 147 P 276 (1915).

No Mandamus to Certify Signatures on Petition for Ballot Issue: A Writ of Mandate may not be issued to control discretion, absent an abuse thereof. The function of the County Clerk and Recorder in deciding if signatures on a petition for a ballot issue are "signed in substantially the same manner" as the signatures on the voter registry cards involves the exercise of discretion. Therefore, the District Court properly refused to issue a Writ to compel the certification of certain signatures. St. v. Murray, 183 M 499, 600 P2d 1174 (1979).

Board of Personnel Appeals — Discretionary Power — Decertification Election: When unfair labor practices charges were pending against an employer, it was within statutory discretionary boundaries for the Board of Personnel Appeals (BPA) to refuse to hold a bargaining representative decertification election until the charges were no longer pending. A Writ of Mandamus to conduct a decertification election need not be obeyed by BPA under these conditions. Without a clear legal duty, mandamus does not lie. State ex rel. Bd. of Personnel Appeals v. District Court, 183 M 223, 598 P2d 1117 (1979).

Clear Legal Duty — Exhaustion of Remedies: Mandamus will not lie to compel performance of a discretionary function, and when a private organization was unable to present a statute, regulation, or other evidence of a clear legal duty on the part of a state drug program to apply for a waiver of a federal prohibition against the payment of funds by two federal agencies, mandamus was not a proper remedy. When the petitioner is unable to demonstrate that it does not have an adequate remedy at law and when it appears that it is relying on contractual obligations to establish the clear legal duty necessary for a Writ of Mandate, the petitioner has an adequate remedy at law for breach of contract or in equity for specific performance. State ex rel. Butte Youth Serv. Center v. Murray, 170 M 171, 551 P2d 1017 (1976).

Requiring City to Condemn Private Land: Trial court properly denied Writ of Mandate, sought pursuant to this section, to require city to condemn private lands for use as public streets, since this section provides for performance of ministerial duty and not duty or power that requires exercise of discretion. State ex rel. Wiedman v. Kalispell, 154 M 31, 459 P2d 694 (1969).

Substitution of Court's Judgment: When a Board of County Commissioners has acted in awarding a contract for county printing, its discretion cannot be controlled by mandamus and the court is not authorized to substitute its judgment for that of the Board. State ex rel. Bowler v. Bd. of County Comm'rs, 106 M 251, 76 P2d 648 (1938).

School Administration: Mandamus does not lie to compel school trustees to rescind their action in closing schools, taken on the ground of the unfavorable financial condition of the district and the removal of many families from the vicinity, since the matter of maintaining or closing of any particular schools, as well as the transportation of children to another school, is within the discretion of the Board. State ex rel. Robinson v. Desonia, 67 M 201, 215 P 220 (1923).

ABUSE OF DISCRETION

Department Administration of School Lands — Canceled Lease — No Abuse: In 1950, the Department of State Lands (now Department of Natural Resources and Conservation) leased a parcel of grazing land to Jeppeson's father. The lease was renewed to the father's estate in 1960. In 1970, the lease was changed to Jeppeson's name. Jeppeson paid his lease rent late in 1973 and not at all in 1974. The lease was canceled for nonpayment, and the land remained unleased for 2 years. In 1976, the Department leased to someone who assigned the lease to Jeppeson. Jeppeson was late in his payment in 1977 and in 1978 lost the lease temporarily for paying late. In 1980, no rent was paid and the lease was canceled. The parcel was not re-leased until 1981 when Hawks leased it. Hawks agreed with Jeppeson to assign the lease to him. Application for approval of the assignment was made to the Department on January 29, 1982. The Department wrote to Jeppeson in late March stating that it was hesitant to approve the assignment due to Jeppeson's poor paying record. No one paid the 1982 payment that was due on April 1, 1982, and on April 22, 1982, the Department notified Hawks that the lease was canceled. The Supreme Court ruled that there was no evidence of arbitrary and capricious action on the part of the Department so as to justify mandatory relief. Jeppeson v. St., 205 M 282, 667 P2d 428, 40 St. Rep. 1272 (1983).

License for Mobile Home Court — No Abuse: Action of Town Council in refusing to issue a mobile home court license until petitioner had removed a house which encroached onto a public alley was not an abuse of discretion, and mandamus will not lie to compel the issuance of the license. State ex rel. Barnes v. Belgrade, 164 M 467, 524 P2d 1112 (1974).

County Officers — Fraud: Mandamus does not lie to control the discretion lodged in a Board of County Commissioners in the matter of awarding a public contract, but where fraud has entered into the transaction, it cannot be said that discretion has been exercised, and the writ is available to compel the Board to act. State ex rel. Stuewe v. Hindson, 44 M 429, 120 P 485 (1912); State ex rel. Robert Mitchell Furniture Co. v. Toole, 26 M 22, 66 P 496 (1901).

School Administration: Mandamus is the proper remedy to require the trustees of a school district to determine the location of a site for a schoolhouse, where they arbitrarily remove a school to a site selected by themselves, without consulting the electors. State ex rel. Bean v. Lyons, 37 M 354, 96 P 922 (1908), distinguished in State ex rel. Robinson v. Desonia, 67 M 201, 215 P 220 (1923).

MINISTERIAL ACT

Executors and Administrators: Under 91-3019, R.C.M. 1947 (now repealed), requiring an executor, after the District Court sitting in probate makes an order confirming a sale of estate real property, to execute a conveyance to the purchaser, execution of the conveyance is a mere ministerial act, performance of which may be compelled by mandamus. State ex rel. Brink v. McCracken, 91 M 157, 6 P2d 869 (1931).

Mandamus — Proper Remedy: Mandamus is a proper remedy to compel the performance of a ministerial act or duty. State ex rel. Brink v. McCracken, 91 M 157, 6 P2d 869 (1931).

ADEQUACY OF OTHER REMEDY

De Novo Appeal From City Court to District Court as Adequate Remedy: Maloney was convicted in City Court of speeding and driving under the influence of alcohol. Maloney appealed his conviction de novo for a trial in District Court and, at the same time, filed a petition for a writ of review, mandamus, and supervisory control, asking the District Court to direct the City Court to dismiss the charges. The District Court denied the petition. The Supreme Court held that the de novo appeal to the District Court constituted an adequate legal remedy. Maloney v. Gordon, 254 M 314, 837 P2d 1341, 49 St. Rep. 834 (1992).

Petition for Mandamus Premature Remedy: The plaintiffs' petition for mandamus to compel public officers to declare property adjacent to plaintiffs' a public nuisance and abate same was premature, as the plaintiffs failed to show they had asked officers to abate the alleged nuisance before filing petition for a Writ of Mandamus. Generally, before mandamus will issue to a public officer, a demand for performance of the act sought to be compelled is required. Liebman v. Brunell, 212 M 459, 689 P2d 248, 41 St. Rep. 1863 (1984).

Mandamus Most Adequate Remedy Directed to Public Officer or Body: Defendant filed a mandamus action against Gallatin County to compel the Sheriff to issue licenses to operate keno games. A Writ of Mandamus against a public officer or body is a more adequate remedy than a declaratory judgment because mandamus commands performance, while a declaratory judgment simply pronounces the duty to perform. In this case, mandamus was the most adequate remedy available. Gallatin County v. D & R Music & Vending, Inc., 201 M 409, 654 P2d 998, 39 St. Rep. 2197 (1982).

Lack of Speedy or Adequate Remedy a Prerequisite: A Writ of Mandate can be used to compel the performance of an act that the law requires as a duty resulting from a state office, but the Writ will issue only where there has been a showing that a clear legal duty exists and that there is no speedy or adequate remedy in the ordinary course of law. State ex rel. Intake Water Co. v. Bd. of Natural Resources & Conservation, 197 M 482, 645 P2d 383, 39 St. Rep. 717 (1982), followed in State ex rel. Chisholm v. District Court, 224 M 441, 731 P2d 324, 43 St. Rep. 2317 (1986), and Franchi v. Jefferson County, 274 M 272, 908 P2d 210, 52 St. Rep. 1229 (1995). Chisholm and Franchi were followed in Common Cause of Mont. v. Argenbright, 276 M 382, 917 P2d 425, 53 St. Rep. 386 (1996).

Appeal to Zoning Board of Adjustment Available — Writ of Mandate Improper: Where builders had invested approximately $114,000 and work was one-third completed, city was estopped from revoking building permit, after builders relied on it to their detriment, to meet setback requirements of city zoning ordinance. Writ of Mandate brought by residents to command builders to conform to setback requirements could not lie, as 76-2-326 provides residents with a speedy and adequate remedy at law, since a Writ of Mandate is an extraordinary remedy to be permitted only when no other adequate remedy lies. State ex rel. May v. Hartson, 167 M 441, 539 P2d 376 (1975).

Adequate Remedy at Law: To deny mandamus on the ground of a plain, speedy, and adequate remedy at law available to the petitioner, the remedy must be one that can be pursued to compel the performance of the act imposed as a duty on the respondent and not a remedy to secure other relief. Burgess v. Softich, 167 M 70, 535 P2d 178 (1975).

Labor Standards Division: Petitioner's right to file action at law against employer for nonpayment of wages was not an alternative remedy to a mandamus petition to compel Commissioner of Labor to hold a hearing, since the alternative, plain, speedy, and adequate remedy at law must be one which can be pursued by petitioner to compel the performance of the official duty. Burgess v. Softich, 167 M 70, 535 P2d 178 (1975).

Mandamus to Compel Disqualification of Justice of the Peace: Since 46-17-311, by providing for a trial de novo in the District Court, provided a plain, adequate, and speedy remedy at law, mandamus did not lie to compel Justice of the Peace to honor motion for disqualification. Bailey v. St., 163 M 380, 517 P2d 708 (1974).

No Certain, Plain, Adequate, or Speedy Remedy:

Where subsequent tax sale certificates purchaser gave notice of intention to apply for tax deed on certain date and prior certificates purchaser tendered payment to County Treasurer for redemption of such subsequent certificates but his tender was refused, Writ of Mandate was proper remedy to effect his redemption, since no other available remedies would be certain, plain, adequate, or speedy. State ex rel. Burkhartsmeyer Bros. v. McCormick, 162 M 234, 510 P2d 266 (1973).

Mandamus may be granted when neither appeal nor other proceeding in the ordinary course of law affords a plain, speedy, and adequate remedy. Sullivan v. Treasurer, 140 M 609, 370 P2d 762 (1962); State ex rel. King v. District Court, 24 M 494, 62 P 820 (1900).

A Writ of Mandate will issue only where there is no plain, speedy, and adequate remedy in the ordinary course of law. Moran v. Bd. of County Comm'rs, 139 M 351, 363 P2d 1073 (1961); McConnell v. District Court, 120 M 253, 182 P2d 846 (1947).

The Writ of Mandamus is available only where there is no speedy or adequate remedy in the ordinary course of law. Stewart v. St., 135 M 323, 340 P2d 151 (1959).

Mandamus is a proper remedy where there is not a plain, speedy, and adequate remedy at law, and the writ lies to compel the performance of an act which the law specifically enjoins as a

duty. State ex rel. N. Am. Life Ins. Co. v. District Court, 97 M 523, 37 P2d 329 (1934); State ex rel. Fed. Land Bank v. Hays, 86 M 58, 282 P 32 (1929).

Appealable Matters: Engineer seeking registration from state Board had no right to a Writ of Mandamus where discretion of the Board was subject to review under section 66-2345, R.C.M. 1947 (now repealed). Heldenbrand v. St. Bd. of Registration for Professional Eng'rs & Land Surveyors, 147 M 271, 411 P2d 744 (1966).

Termination of Annexation Proceedings: Where a majority of the resident freeholders of a first-class city validly protested proposed annexation under 7-2-4313 but City Council instead of terminating the annexation proceedings took arbitrary action, mandamus was proper to compel Council to terminate the process. The Uniform Declaratory Judgments Act, Title 27, ch. 8, did not furnish the protestants a plain, speedy, and adequate remedy. State ex rel. Konen v. Butte, 144 M 95, 394 P2d 753 (1964).

County Claims:

District Court properly quashed Writ of Mandate to compel County Commissioners to allow claim of hospital since there existed a plain, speedy, and adequate remedy at law under 7-6-2424, which provides for an appeal to the District Court from a disallowed claim. State ex rel. Mont. Hosp. Ass'n v. Pitch, 140 M 349, 372 P2d 90 (1962).

Judgment of District Court quashing Writ of Mandate was well founded where property owner, who brought action in mandamus to compel County Commissioners to refund sum paid to redeem land on ground that taxes had been erroneously collected, had adequate remedy at law to recover taxes under 15-16-601 (now repealed). Moran v. Bd. of County Comm'rs, 139 M 351, 363 P2d 1073 (1961).

Inadequate Right of Appeal:

The mere existence of a right of appeal, where it is inadequate, does not preclude the issuance of a Writ of Mandate. State ex rel. Penhale v. St. Highway Patrol, 133 M 162, 321 P2d 612 (1958).

The existence of an inadequate right of appeal is not a bar to the issuance of a Writ of Mandamus. State ex rel. Musselshell County v. District Court, 89 M 531, 300 P 235, 82 ALR 1158 (1931).

Other Remedy — Relator Returned to Status Quo: To supersede the remedy by mandamus, the party seeking the writ must not only have a specific, adequate, legal remedy but one competent to afford relief upon the very subject matter of his application; it must be a remedy which will place the relator in status quo, i.e., in the same position he would have been had the duty, performance of which is sought to be compelled, been performed. State ex rel. Brink v. McCracken, 91 M 157, 6 P2d 869 (1931).

Injunction Available: The Writ of Mandate will not issue where the applicant has a plain, speedy, and adequate remedy in equity, as by the issuance of an injunction, and the court in the exercise of its discretion may refuse the Writ. State ex rel. Larsen v. District Court, 78 M 435, 254 P 414 (1927).

License Denial: Mandamus will not lie to compel the Board of Medical Examiners to issue a certificate to practice medicine to an applicant whose demand has been refused, where the statute creating such Board has provided a plain, speedy, and adequate remedy at law in such case in an appeal to the District Court. State ex rel. Narcross v. Bd. of Medical Examiners, 10 M 162, 25 P 440 (1890).

MANDAMUS NOT TO CORRECT ACTION TAKEN

Action by City on Day-Care Center: In the instant case the city has acted. It summarily approved a day-care center as a permissible use. The questions of whether this was an erroneous decision and whether it was accomplished through an erroneous procedure involve past and completed acts not reviewable by a Writ of Mandate. State ex rel. Popham v. Hamilton, 185 M 26, 604 P2d 312 (1979), following Melton v. Oleson, 165 M 424, 530 P2d 466 (1974).

Equitable Relief: Although Writ of Mandamus was not a permissible remedy to correct or undo action already taken, plaintiff who was disqualified from voting because of violation of federal liquor laws was entitled to equitable relief and adjudication of his rights. Melton v. Oleson, 165 M 424, 530 P2d 466 (1974).

State Board of Land Commissioners — Discretionary Actions: Mandamus lies only to compel performance of an act, not to correct action already done, so that where State Board of Land Commissioners exercised discretion in awarding lease of land to lowest bidder, mandamus was not the proper writ to pursue in seeking a remedy. State ex rel. Thompson v. Babcock, 147 M 46, 409 P2d 808 (1966).

District Court Action: While ordinarily mandamus does not lie to correct an error of the District Court, yet where its erroneous action was tantamount to refusal to act (as where, on

motion, it struck a petition for letters of administration from the files without affording an opportunity to petitioner to be heard on the merits, a duty specially enjoined upon it by law) mandamus is the proper remedy to compel restoration of the petition to the files. State ex rel. Peel v. District Court, 59 M 505, 197 P 741 (1921).

No Correction of Judgment of the District Court: Mandamus may not be invoked to correct a judgment entered by the District Court or where the remedy by appeal is plain, speedy, and adequate. State ex rel. Centennial Brewing Co. v. District Court, 47 M 547, 133 P 679 (1913).

WRIT ISSUED AT DISCRETION OF COURT

Delay in Applying for Writ:

The District Court may, in its discretion, deny an application for a Writ of Mandate, notwithstanding the statutory limitation, if there has been long delay in making it, in the absence of excuse or explanation, each case depending on its own facts; but if it is apparent that delay in making application has not resulted in prejudice to the rights of the adverse party and that the relief sought does not depend upon the determination of doubtful and disputed questions of fact, the Writ may run. State ex rel. Phillips v. Ford, 116 M 190, 151 P2d 171 (1944).

Mandamus, like injunction, is an emergency writ, and its purpose is to furnish a speedy remedy for some apparent wrong. The writ will not be issued to compel the performance of an act which would be useless, ineffectual, or unavailing as a remedy and may be refused if long delay or laches in making the application appears and there is no showing to explain or excuse its existence. State ex rel. Beach v. District Court, 29 M 265, 74 P 498 (1903). See also State ex rel. Bailey v. Edwards, 40 M 313, 106 P 703 (1910); State ex rel. Bennetts v. Duncan, 47 M 447, 133 P 109 (1913), distinguished in State ex rel. Boorman v. St. Bd. of Land Comm'rs, 109 M 127, 94 P2d 201 (1939).

Not a Writ of Right: Mandamus is not a writ of right; it issues only in the discretion of the court and will only be allowed in furtherance of justice in a proper case. In determining whether it shall issue or not, the court is not bound to take the case as the applicant presents it; it may consider defendant's rights, the interests of third persons, the importance or unimportance of the case, and the applicant's conduct. State ex rel. Larsen v. District Court, 78 M 435, 254 P 414 (1927).

Law Review Articles

". . . And Attorney Fees to the Prevailing Party": Recovering Attorney Fees Under Montana Statutory Law, Williams, 46 Mont. L. Rev. 119 (1985).

Collateral References

Mandamus *key* 3 through 7, 154, 155.

55 C.J.S. Mandamus §§18 through 31, 292 through 300.

52 Am. Jur. 2d Mandamus §§12, 31.

Student's right to compel school officials to issue degree, diploma, or the like. 11 ALR 4th 1182.

Grant or denial of license to practice architecture. 2 ALR 4th 1103.

Right of charitable or religious association or corporation to protect against use of same or similar name by another. 37 ALR 3d 277.

Scope and extent, and remedy or sanctions for infringement, of accused's right to communicate with his attorney. 5 ALR 3d 1360.

Mandamus to compel admission to membership in professional association or society. 89 ALR 2d 967 through 980.

Mandamus as available remedy to review verdict at Coroner's inquest. 78 ALR 2d 1218.

Availability of mandamus to review order of reference to master or auditor. 76 ALR 2d 1120.

Mandamus as remedy available with respect to change of venue for promotion of convenience of witnesses and ends of justice. 74 ALR 2d 38.

Mandamus to enforce rights of noncivil service public employee, with respect to discharge, under state veterans' tenure statute. 58 ALR 2d 1005.

Right of parents to mandamus against school officials with respect to names of children. 53 ALR 2d 925.

Mandamus to compel holding of stockholders' meetings. 48 ALR 2d 615.

Mandamus as remedy to compel assertedly disqualified judge to recuse self or to certify his disqualification. 45 ALR 2d 937, superseded in part by 56 ALR Fed. 494.

Mandamus as remedy to enforce right to jury trial. 41 ALR 2d 780.

Mandamus to compel municipal officials to enforce zoning regulations. 35 ALR 2d 1136.

Requiring successor judge to journalize finding or decision of predecessor. 4 ALR 2d 884.

Payment of claim in full, mandamus to compel when fund out of which obligation is payable is insufficient to pay all obligations of equal dignity. 171 ALR 1033; 90 ALR 717.

Records, enforceability by mandamus of right to inspect. 169 ALR 653; 60 ALR 1356.

Mandamus as subject to Statute of Limitations. 155 ALR 1144.

Right to Writ of Mandamus as affected by a pending action or proceeding, for existence of injunction, to which relator is not a party. 148 ALR 210.

Right to mandamus as affected by loss of other remedy. 145 ALR 1044.

Labor union, mandamus to compel reinstatement of suspended or expelled members of. 141 ALR 617.

Association or its officers, mandamus against. 137 ALR 311.

Public office title to which is in dispute, mandamus to put one in possession of. 136 ALR 1340; 84 ALR 1114.

Legislature, mandamus to members or officer of. 136 ALR 677.

Bond of public officer, mandamus as proper remedy for approval or refusal to approve. 134 ALR 1361.

Taxation, mandamus as taxpayer's remedy in respect of valuation of property for. 131 ALR 360.

Unconstitutionality of statute as defense to mandamus proceeding. 129 ALR 941; 30 ALR 378.

Pupils, free transportation to and from school, mandamus to compel action regarding. 118 ALR 818, supplemented by 146 ALR 625.

Public officer or board as proper relator in mandamus proceeding to enforce duty owed primarily to individual or to other political unit or public authority. 113 ALR 589.

Court's control over mandamus as means of avoiding the enforcement of strict legal right to the detriment of the public. 113 ALR 209.

Canvassing Board or election official, determination of, as regards counting or exclusion of ballots as subject to review by mandamus. 107 ALR 618.

Ministerial duty, mandamus to compel performance of. 105 ALR 1124.

Governor, mandamus to. 105 ALR 1124.

Public officers; change of incumbent of office or of personnel of board or of other official body as affecting mandamus proceeding previously commenced. 102 ALR 943.

"Civil action" or "civil proceeding", mandamus proceeding as within statute relating to disqualification of judge or change of venue. 102 ALR 397.

Corporation, mandamus by creditor of, to reach fund or securities deposited with state official as security for corporate obligation. 101 ALR 500.

Warrants of state, county, or municipal corporation, mandamus to compel payment as affected by remedy at law. 98 ALR 449.

Revocation of professional right, mandamus to restore right as proper remedy. 95 ALR 1424.

Special assessment against public property, mandamus to enforce payment of. 95 ALR 700, supplemented by 150 ALR 1394.

Tax illegally or erroneously exacted, mandamus as proper remedy for return of. 93 ALR 595.

Bond required in legal proceedings, remedy by way of appeal from a refusal to approve, as affecting right of mandamus to compel court or officials to approve. 92 ALR 1223.

Right of several having similar interests to join as relators in mandamus proceeding. 87 ALR 528.

Public utility, mandamus as proper remedy to compel service by. 83 ALR 947.

Jurisdiction, mandamus to compel a court to assume or exercise where it has erroneously dismissed cause or refused to proceed on ground of the supposed lack of jurisdiction. 82 ALR 1163; 4 ALR 582.

Workmen's Compensation Act, remedy at law as affecting mandamus to compel consideration, allowance, or payment of claim under. 82 ALR 1075.

Public officer or employee, mandamus to compel appropriation for payment of salary to. 81 ALR 1253.

Bids for public contracts, mandamus to compel consideration, acceptance, or rejection of. 80 ALR 1382.

Mandamus to compel general course of conduct or performance of continuing duty or a series of acts. 64 ALR 975.

Delay in bringing accused to trial or to retrial after reversal, mandamus as remedy for. 58 ALR 1510.

Taxes, mandamus to compel collection of. 58 ALR 117.

Execution, remedy by mandamus of creditor against officer who fails to levy under. 57 ALR 836.

Jury list, mandamus as a remedy for exclusion of eligible class or classes of persons from. 52 ALR 928.

Public officer, mandamus to compel institution of proceedings by state's attorney for removal of. 51 ALR 561.

Right-of-way, mandamus as remedy for interference with. 47 ALR 557.

Apportionment of Representatives or election districts, mandamus to compel Legislature to make. 46 ALR 964.

Street or highway, mandamus against municipality to compel improvement or repair of. 46 ALR 257.

Witnesses; mandamus to compel court or judge to require witness to testify or to produce documents. 41 ALR 436.

Pupil, mandamus to compel enrollment of, in state school or university. 39 ALR 1019.

Public officer, unfitness of, as affecting right to restoration by mandamus to office from which illegally removed. 36 ALR 508.

Taxes, mandamus to compel production of corporate books to aid in assessing against holder of stock or his estate. 23 ALR 1351.

Stockholder's right to inspect books and records, mandamus to enforce. 22 ALR 43, 99, supplemented by 43 ALR 783, 59 ALR 1373, 80 ALR 1502, and 174 ALR 262.

Partner's right to maintain mandamus against copartners. 21 ALR 129.

Public officer's liability to penalty, fine, or imprisonment as affecting right to mandamus to enforce performance of public duty by him. 19 ALR 1382.

Public officer, mandamus to compel performance of duties after resignation. 19 ALR 48.

Public officer or employee, mandamus to compel payment of salary of. 5 ALR 572.

Mandamus to compel a court to reinstate or proceed with hearing of appeal erroneously dismissed. 4 ALR 655.

Court, inferior, inadequacy of remedy by appeal or Writ of Error as affecting right of mandamus to. 4 ALR 632.

School building, mandamus to compel construction or repair of. 1 ALR 1559.

Part 2
Procedure for Obtaining, Serving, and Enforcing Writ

27-26-201. Application for writ.

Case Notes

Standing for Mandamus:

Petitioner, an engineering survey group seeking a Writ of Mandamus to compel County Commissioners to act on five minor subdivisions, has no stated legal interest in any of the subdivisions. Some form of ownership in the land is necessary to impart standing to bring a mandamus action. St. v. Bd. of County Comm'rs, 181 M 177, 592 P2d 945 (1979).

An attorney whose client is imprisoned in the state penitentiary may in his own behalf bring mandamus proceedings to compel the prison authorities to permit him to consult his client in private. State ex rel. Casleton v. Bd. of Prison Comm'rs, 84 M 14, 273 P 1044 (1929).

A resident and taxpayer of a school district who sought by mandamus to compel a school board to submit the question of the removal of a school to the electors of the district was a party beneficially interested, within the meaning of this section, and entitled to make the application for the writ. State ex rel. Bean v. Lyons, 37 M 354, 96 P 922 (1908).

An elector of the state is beneficially interested in legal proceedings to compel the state's officers to perform their duties and is the proper party to apply for the Writ of Mandate to secure this result. Chumasero v. Potts, 2 M 242 (1875). See also State ex rel. Buck v. Bd. of County Comm'rs, 21 M 469, 54 P 939 (1898); State ex rel. Stuewe v. Hindson, 44 M 429, 120 P 485 (1912); Milligan v. Miles City, 51 M 374, 153 P 276 (1915); Poe v. Sheridan County, 52 M 279, 157 P 185 (1916); Hill v. Rae, 52 M 378, 158 P 826 (1916).

Claim of Justice's Court for Unbudgeted Actual and Necessary Expenses: Where Justice of Peace filed claim to pay necessary extra clerical assistance and County Commissioners disallowed claim, a Writ of Mandate is an appropriate remedy and not a declaratory judgment action or an appeal of the Commissioners' decision because a declaratory judgment would not get the claim paid, as a declaratory judgment is an inept procedure for recovery of a fee for services performed. State ex rel. Browman v. Wood, 168 M 341, 543 P2d 184 (1975). (Annotator's

Comment: In this case Supreme Court exercised supervisory powers to provide a procedure to prevent future actual or potential conflict between the Board of County Commissioners and Justice's Court.)

County Claims: District Court correctly issued Writ of Mandate to compel County Commissioners to pay necessary clerical expenses of Justice of the Peace, and remedy of appeal from denial of claim was not adequate when secretary had right to appeal. State ex rel. Browman v. Wood, 168 M 341, 543 P2d 184 (1975).

Writ of Mandate Improper Where Other Adequate Remedy Lies:

Where builders had invested approximately $114,000 and the work was one-third completed, city was estopped from revoking building permit, after builders relied on it to their detriment, to meet setback requirements of city zoning ordinance. Writ of Mandate brought by residents to command builders to conform to setback requirements could not lie, as 76-2-326 provides residents with a speedy and adequate remedy at law, since a Writ of Mandate is an extraordinary remedy to be permitted only when no other adequate remedy lies. State ex rel. May v. Hartson, 167 M 441, 539 P2d 376 (1975).

To deny mandamus on the ground of a plain, speedy, and adequate remedy at law available to the petitioner, the remedy must be one which can be pursued to compel the performance of the act imposed as a duty on the respondent and not a remedy to secure other relief. Burgess v. Softich, 167 M 70, 535 P2d 178 (1975).

Collateral References

Mandamus *key* 3 through 7, 154, 155.

55 C.J.S. Mandamus §§18 through 31, 292 through 300.

52 Am. Jur. 2d Mandamus §413.

Allowance of attorneys' fees in mandamus proceedings. 34 ALR 4th 457.

27-26-202. Notice of application.

Collateral References

Mandamus *key* 156 through 174.

55 C.J.S. Mandamus §§337 through 350.

52 Am. Jur. 2d Mandamus §410.

27-26-203. Form and content of writ.

Case Notes

Moot Question After Compliance: Where the Liquor Control Board (now the Department of Revenue) issued a license in compliance with District Court mandate in lieu of applying for supersedeas from Supreme Court, the question whether the mandate was proper did not present a justiciable controversy for the Supreme Court. Gill v. Rafn, 133 M 505, 326 P2d 974 (1958), distinguished in State ex rel. Ronish v. School District, 136 M 453, 348 P2d 797 (1960).

Return to Peremptory Writ: This section contemplates that, after service of a peremptory Writ of Mandate, a return shall be made by the party upon whom the Writ is served; and while the Code does not specify what the return shall contain, the general rule is that it should contain a certificate of compliance, unless something impossible or unlawful is commanded or such a change of conditions has taken place as to make compliance improper, in which case the facts should be stated. State ex rel. Edwards v. District Court, 41 M 369, 109 P 434 (1910).

Motion to Quash: The sufficiency of the affidavit on which an alternative Writ of Mandate is based may be tested by a motion to quash the Writ; and such motion performs the same office as a general demurrer (demurrer abolished, Rule 7(c), M.R.Civ.P.) and brings the law of the case before the court. State ex rel. St. Publishing Co. v. Hogan, 22 M 384, 56 P 818 (1899).

Contents of Alternative Writ: An alternative Writ of Mandate which states generally the acts which the parties have omitted to do and which they are required to perform is sufficient under this section. State ex rel. Leech v. Bd. of Canvassers, 13 M 23, 31 P 879 (1892).

Collateral References

52 Am. Jur. 2d Mandamus §419.

27-26-204. Factors that determine whether writ peremptory or alternative.

Collateral References

Mandamus *key* 156 through 174.

55 C.J.S. Mandamus §§343 through 350, 376 through 386.

27-26-205. Service of writ.

Collateral References

Mandamus *key* 161, 183.
55 C.J.S. Mandamus §§348, 382.
52 Am. Jur. 2d Mandamus §411.

27-26-206. Enforcement of writ — penalty.

Compiler's Comments

1993 Amendment: Chapter 10 near beginning of first sentence substituted "lower tribunal" for "inferior tribunal"; and made minor changes in style.

Collateral References

Mandamus *key* 185, 186.
55 C.J.S. Mandamus §§387 through 393.
52 Am. Jur. 2d Mandamus §482.
Degree of proof necessary in contempt proceedings based on violation. 49 ALR 984.
Contempt for disobedience of mandamus. 30 ALR 148.

Part 3
Procedure Upon Return of Writ

27-26-301. Time for return and hearing.

Collateral References

Mandamus *key* 164(2).
55 C.J.S. Mandamus §§341, 342.

27-26-302. Answer of adverse party.

Case Notes

Nature of Action: This section and 27-26-205 show that a proceeding in mandamus is not regarded by the Legislative Assembly as a civil action. Bailey v. Edwards, 47 M 363, 133 P 1095 (1913); Chumasero v. Potts, 2 M 242 (1875).

Collateral References

52 Am. Jur. 2d Mandamus §432.

27-26-303. Jury trial.

Case Notes

Admissibility of Evidence From Earlier Related Lawsuit in Mandamus Proceeding: In a proceeding for a Writ of Mandamus compelling county officers to accept for recording a deed and certificate of survey, it was proper for the trial court to admit into evidence exhibits and testimony from an earlier lawsuit concerning similar issues and the same property. The applicant's conduct is a proper consideration in a mandamus action. Further, the evidence is relevant under Rule 401, Montana Rules of Evidence. Withers v. Beaverhead County, 218 M 447, 710 P2d 1339, 42 St. Rep. 1730 (1985).

Pleadings: The rule that essential facts constituting a defense in mandamus proceedings and raising questions triable by jury or court must be pleaded by answer applies only when such facts are not disclosed upon the face of the petition or affidavit. State ex rel. Powell v. St. Bank of Moore, 90 M 539, 4 P2d 717, 80 ALR 1494 (1931).

Trial Without Jury: Any and all of the questions arising in a mandamus proceeding, whether of law or of fact, may be tried by the District Court without a jury, with or without a reference. Bailey v. Edwards, 47 M 363, 133 P 1095 (1913); Chumasero v. Potts, 2 M 242 (1875).

Collateral References

Mandamus *key* 170 through 177.
55 C.J.S. Mandamus §§354 through 368.
52 Am. Jur. 2d Mandamus §461.

27-26-304. Applicant's response to answer.

Case Notes

Contradiction of Answer: On application for Writ of Prohibition made in the Supreme Court, the applicant may, under this section, made applicable to such Writs by 27-27-104, contradict the allegations of the answer by proof, and where no such proof is made or offered, the allegations must be taken as true. State ex rel. Fisher v. District Court, 110 M 61, 99 P2d 211 (1940).

27-26-305. Motion for new trial.

Case Notes

Motion Not Required: This section does not require motion for new trial in order to appeal from a grant of mandamus but merely sets out the place of filing for a motion for new trial. State ex rel. Bennett v. Dowdall, 157 M 11, 482 P2d 572 (1971).

27-26-307. Procedure when there is no answer or no material issue of fact.

Case Notes

Questions of Law: It is no ground for the refusal of a Writ of Mandate that certain specific facts alleged in the respondent's answer were not denied in the relator's replication, where the pleadings raised the questions of law only and where relator relied upon the facts alleged in his affidavit and expressly admitted by respondent's answer, as ground for the relief which he prayed for. State ex rel. Thompson v. Kenney, 9 M 223, 23 P 733 (1890).

Part 4
Judgment

27-26-402. Judgment for applicant.

Case Notes

Damages Incidental to Proceeding 1130
Attorney Fees 1131

DAMAGES INCIDENTAL TO PROCEEDING

Mandamus — Litigation Expenses Awardable: In a prior decision, this case was remanded for a hearing on attorney fees. The District Court awarded fees, and plaintiffs appealed. Plaintiffs contended the District Court erred in refusing to award as damages, under 27-26-402, certain out-of-pocket litigation expenses. The District Court concluded that 27-26-402 does not contemplate the awarding of litigation expenses not itemized in 25-10-201. "Damages" is defined in 27-1-202, and "detriment" is defined in 27-1-201. The detriment suffered by plaintiffs with regard to these litigation expenses was caused by the Department of State Lands' (now Department of Environmental Quality) failure to perform a clear legal duty. Plaintiffs are entitled to be compensated for the reasonable litigation expenses related to the mandamus issue regardless of whether those expenses are awardable as "costs" within the meaning of 25-10-201. Kadillak v. Dept. of State Lands, 198 M 70, 643 P2d 1178, 39 St. Rep. 773 (1982).

Failure by County to Follow Procedures: After repeated refusals by county to follow assessment procedures prescribed by State Board of Equalization (now the Department of Revenue) and after other delays and hindrances by the county, including the filing of sham pleadings, Supreme Court will, if there is further delay in complying with Writ of Mandamus, consider assessing costs and damages under this section. State ex rel. St. Bd. of Equalization v. Price, 157 M 134, 483 P2d 284 (1971).

Cost of Travel Inappropriate — Not Allowed: Where counsel for relatrix made several trips to consult with a judge who had been disqualified about calling in another judge and then later instituted mandamus proceedings to compel the appointment of another judge, such expense of travel is not a proper item of costs incident to the institution of the mandamus proceeding. It was a matter that should have been attended to by letter or telephone. State ex rel. O'Sullivan v. District Court, 127 M 32, 256 P2d 1076 (1953).

Order Issued Next Day — Cost Allowed: Where the judge issued the order sought 1 day after the relatrix instituted mandamus proceedings to compel the action, the relatrix could still recover reasonable attorneys' fees, costs, and damages for instituting and prosecuting the mandamus proceedings. State ex rel. O'Sullivan v. District Court, 127 M 32, 256 P2d 1076 (1953).

Damages Not Pleaded: Where the pleadings of plaintiff in a mandamus proceeding contained no claim for damages he had sustained on account of attorneys' fees and incidental expenses paid or to be paid by him in his endeavor to be reinstated on the university faculty and he did not ask leave to amend his petition after objection by defendants to his offered evidence to show such damages, the trial court erred in allowing them. State ex rel. Phillips v. Ford, 116 M 190, 151 P2d 171 (1944), distinguished in Mueller v. Todd, 117 M 80, 158 P2d 299 (1945).

Lost Earnings — Evidence Not Admissible: Evidence of the amount plaintiff would have earned as professor at the state university during the time he was precluded from serving as such by failure of the State Board of Education to reinstate him was inadmissible. State ex rel. Phillips v. Ford, 116 M 190, 151 P2d 171 (1944).

Cost of Printing Briefs: Under this section, the successful relators in a mandamus proceeding against the State Board of Equalization (now the Department of Revenue) to compel reassessment of gross proceeds of mines for taxation purposes were entitled to recover as damages their reasonable attorneys' fees and expenses incurred in bringing and prosecuting the action, including printing of briefs, such sums being a proper charge against the state represented by respondent Board. State ex rel. Snidow v. St. Bd. of Equalization, 93 M 19, 17 P2d 68 (1932).

Defendant Prevailing — Cost Not Allowed: A mining company made a party respondent with the State Board of Equalization (now the Department of Revenue) in a mandamus proceeding to compel reassessment of gross proceeds of mining taxes but dismissed from the action after hearing was not entitled to attorneys' fees or its expense incident to printing briefs, the statutes not so providing. State ex rel. Snidow v. St. Bd. of Equalization, 93 M 49, 17 P2d 68 (1932), distinguished in Smith v. Fergus County, 98 M 377, 39 P2d 193 (1934).

Must Plead Damages:

Damages in a mandamus proceeding resting upon contract, express or implied, should be pleaded in the complaint or petition, otherwise they should not be allowed. State ex rel. Phillips v. Ford, 116 M 190, 151 P2d 171 (1944), overruling State ex rel. Golden Valley County v. District Court, 75 M 122, 242 P 421 (1925), distinguished in Mueller v. Todd, 117 M 80, 158 P2d 299 (1945).

Under this section, where the applicant for a Writ of Mandate claims damages, he must allege them in his application or file a bill of particulars in the proceeding before conclusion of the hearing and submit proof; otherwise, damages are considered waived and the District Court after final judgment entered is without jurisdiction to make award thereof in the proceeding. State ex rel. Golden Valley County v. District Court, 75 M 122, 242 P 421 (1925), overruled in part by Phillips v. Ford, 116 M 190, 151 P2d 171 (1944).

Incidental Damages Defined: The damages allowable under this section, in a mandamus proceeding, are such as are incidental to the proceeding itself and not those arising out of the transaction that the writ was invoked to redress. Bailey v. Edwards, 47 M 363, 133 P 1095 (1913).

ATTORNEY FEES

Partial Attorney Fees: Party allowed to intervene in mandamus action is entitled to award of partial attorney fees and costs because applicant for Writ of Mandamus made an untimely appeal and caused expense and delay to intervenor. Christopherson v. St., 226 M 350, 735 P2d 524, 44 St. Rep. 712 (1987), followed in Roche v. Sabo, 259 M 76, 853 P2d 1258, 50 St. Rep. 689 (1993).

Good Faith Defense by Public Officer: If pleaded, an attorney fee award is allowable as an item of damages in a prohibition case. Further, attorney fees may be awarded against a local government body if the government officers appear and defend the proceeding in good faith. Allen v. Madison County Comm'n, 211 M 79, 684 P2d 1095, 41 St. Rep. 1226 (1984).

Estimate of Fees in Complex Case — Award on One Issue Only: The original trial in this case lasted for 13 days and involved 6 defendants and 14 separate counts. Plaintiffs prevailed only on the mandamus issue. Since the attorney fee award upon remand was to be based only on the hours spent on the mandamus issue and since the elements of proof were so intertwined, the District Court did not abuse its discretion in basing the award on an estimate given by an experienced trial attorney as to the number of hours necessary to prevail on the mandamus issue. Kadillak v. Dept. of State Lands, 198 M 70, 643 P2d 1178, 39 St. Rep. 773 (1982).

No Authority for Prejudgment Interest on Discretionary Attorney Fees in Mandamus: In a prior decision, this case was remanded for a hearing on attorney fees. The District Court awarded fees, and plaintiffs appealed. Plaintiffs contend that the District Court should have awarded prejudgment interest on the award of attorney fees. In this case, the award of attorney fees is an award of damages under 27-26-402. The determination of reasonable attorney fees was within the discretion of the District Court, and the amount was not definite or capable of being calculated with certainty prior to judgment. Therefore, 27-1-211 did not provide authority for awarding interest. Interest was not properly awardable under 27-1-212 either because it does not authorize a discretionary award of prejudgment interest since the award of attorney fees is itself discretionary. In this case, plaintiffs entered into a contingent fee agreement with their attorneys. No attorney fees were owing prior to judgment; therefore, plaintiffs suffered no detriment in the nature of prejudgment interest on attorney fees since no prejudgment interest was owing. The Supreme Court held that there is no authority in Montana for an award of prejudgment interest on the discretionary award of attorney fees arising from a mandamus action. Kadillak v. Dept. of State Lands, 198 M 70, 643 P2d 1178, 39 St. Rep. 773 (1982).

Attorney Fees Available: Attorney fees are available to plaintiffs under 27-26-402. Kadillak v. The Anaconda Co., 184 M 127, 602 P2d 147 (1979), followed in Kelleher v. Bd. of Social Work Examiners & Professional Counselors, 283 M 188, 939 P2d 1003, 54 St. Rep. 556 (1997) (holding that laches did not apply when the Board knew that applicant had a pending statutory right to attorney fees despite a delay in asserting the right).

Decision Based on Equitable Relief — Attorney Fees Set Aside: Although Writ of Mandate was issued by District Court, since it was not a permissible remedy and the decision in favor of the plaintiff was made on the basis of equitable relief and adjudication of his rights, the award of attorney fees will be set aside. Melton v. Oleson, 165 M 424, 530 P2d 466 (1974).

Proof of Attorney Fees:

In a mandamus and declaratory judgment action by schoolteachers against a school district, the judge, who had observed the extent of the services rendered by counsel for the plaintiffs, could properly award attorneys' fees to schoolteachers who had properly pleaded their right to such award. Benson v. School District, 136 M 77, 344 P2d 117 (1959).

Under this section a successful relator in a mandamus proceeding is entitled to recover a reasonable attorney's fee as damages, and Supreme Court in such proceeding heard by it may fix such fee without hearing proof as to the services performed by the attorney therein. State ex rel. Lynch v. Batani, 103 M 353, 62 P2d 565 (1936).

Case of First Impression — Conservative Attorney Fees: Where a mandamus proceeding involved the validity of a corporation's bylaw abolishing cumulative voting and the matter was one of first impression and there were no existing precedents to guide the respondents, and where the petitioner was a party to the effort to abolish cumulative voting in the first instance, the allowance of attorney fees to the petitioner should be conservative. State ex rel. Lawin v. Polson Plywood Co., 135 M 559, 342 P2d 1070 (1959).

Attorney Fees as Damages:

The damages that the applicant for a Writ of Mandamus is entitled to recover in case judgment is given in his favor include the expense to which he was put in paying for the services of an attorney to bring the proceeding. State ex rel. O'Sullivan v. District Court, 127 M 32, 256 P2d 1076 (1953); State ex rel. Gebhardt v. City Council, 102 M 27, 55 P2d 671 (1936); State ex rel. Shea v. Cocking, 66 M 169, 213 P 594, 28 ALR 772 (1923).

Successful applicant for peremptory Writ of Mandate requiring state Liquor Control Board (now the Department of Revenue) to issue to him retail beer and liquor licenses was entitled to recover the damages which he sustained by reason of having to employ an attorney to prosecute such proceeding. State ex rel. McCarten v. Corwin, 119 M 520, 177 P2d 189 (1947).

Attorney Fees as Incidental Damages: Under this section, a successful applicant for a Writ of Mandamus may be awarded damages and costs; the damages contemplated are such as are incidental to the proceeding itself and not those which arose out of the prior preclusion and deprivation which the Writ was invoked in part to redress; such damages include the expense incurred by relator in payment of services of an attorney rendered in bringing the proceeding. State ex rel. Barry v. O'Leary, 83 M 445, 272 P 677 (1928).

Law Review Articles

". . . And Attorney Fees to the Prevailing Party": Recovering Attorney Fees Under Montana Statutory Law, Williams, 46 Mont. L. Rev. 119 (1985).

Collateral References

Mandamus *key* 176 through 185, 190.

55 C.J.S. Mandamus §§371 through 375, 410 through 415.

52 Am. Jur. 2d Mandamus §470.

Amendment of judgment in mandamus so as to permit recovery of damages by successful plaintiff or relator. 73 ALR 2d 915.

27-26-403. Officers not to be personally liable.

Case Notes

No Opportunity for Parties to Address Issues — Award of Attorney Fees Premature: An award of attorney fees based on this section is premature unless and until an appropriate record is created and the parties have a full and fair opportunity to address the issues. Clark v. Dussault, 265 M 479, 878 P2d 239, 51 St. Rep. 642 (1994).

Good Faith Defense by Public Officer:

If pleaded, an attorney fee award is allowable as an item of damages in a prohibition case. Further, attorney fees may be awarded against a local government body if the government

officers appear and defend the proceeding in good faith. Allen v. Madison County Comm'n, 211 M 79, 684 P2d 1095, 41 St. Rep. 1226 (1984).

Where relator applied for a Writ of Mandamus requiring the court to set a case for trial and return was made and alternate Writ issued, and return and answer showed that the cause had been set for trial, the relator was entitled to recover attorney fees from the county upon the court's finding that the respondents appeared in the action and made defense in the proceeding in good faith. State ex rel. Haegg v. District Court, 130 M 530, 304 P2d 1116 (1956).

Where the good faith of town officials joined in a mandamus proceeding to compel payment of the town's past due bonded indebtedness in making defense is not questioned and the judgment in their favor is reversed on appeal, the costs and damages allowable under this section are assessable against the municipality, the amount thereof being primarily a matter for the trial court to pass upon. State ex rel. Mueller v. Todd, 114 M 35, 132 P2d 154 (1942).

Where defendant members of a City Council defended a mandamus proceeding to compel them to act in the matter of the creation of a housing authority so as to bring the project to completion in good faith but failed, the costs were properly taxable against the city, under this section. State ex rel. Great Falls Housing Authority v. Great Falls, 110 M 318, 100 P2d 915 (1940).

While the general rule is that public officers are personally liable for the costs incurred in mandamus proceedings to compel them to perform their duties, since the enactment of this section, where a state, county, or municipal officer is respondent in such a proceeding, all damages and costs awarded to relator are recoverable from the body represented by the officer, if the court finds that he made his defense in good faith. State ex rel. O'Conner v. McCarthy, 86 M 100, 282 P 1045 (1929).

CHAPTER 27
WRIT OF PROHIBITION

Chapter Case Notes

County Government in Transition Period After Vote to Change Form of Government Not Empowered to Order Special Election: In November 1982, the voters in a county voted to change the county form of government from a charter government, provided for in Title 7, ch. 3, part 7, to a commission government, provided for in Title 7, ch. 3, part 4. The new commission government was to take effect in June 1983, after election of new county officers. During the transition period, the existing charter government, in response to a petition filed under 7-3-125, authorized a special election on the question of returning to a charter government. This special election was then challenged in an action for a Writ of Prohibition under Title 27, ch. 27. The Supreme Court upheld the District Court's issuance of the Writ, ruling that placing on the ballot the question of changing the form of county government was in excess of the charter government's jurisdiction. Allen v. Madison County Comm'n, 211 M 79, 684 P2d 1095, 41 St. Rep. 1226 (1984).

Part 1
General Provisions

27-27-101. Definition and function of writ of prohibition.

Compiler's Comments

1985 Amendment: Near middle of second sentence substituted "exercising judicial functions" for "whether exercising functions judicial or ministerial".

Case Notes

General 1133
Excess of Jurisdiction 1136
Adequacy of Other Remedy 1138
Ministerial Acts 1139

GENERAL

Lack of District Court Jurisdiction Over Child Custody Proceedings — Writ of Prohibition Proper Remedy: When a Montana District Court lacked jurisdiction over parenting plan and child custody matters regarding children of tender ages whose home state was Arkansas, the Supreme Court granted a writ of prohibition restricting the District Court from hearing, enforcing, or deciding any parenting issues concerning the minor children. Stephens v. District Court, 2006 MT 21, 331 M 40, 128 P3d 1026 (2006).

Form of Complaint Not Critical to Investigation of Judicial Misconduct — Dismissal of Writ of Prohibition Proper When Judicial Standards Commission Acting Within Authority: A Justice of the Peace obtained a writ of prohibition barring further proceedings by the Judicial Standards Commission based on an unverified complaint. The complaint was subsequently verified, and the District Court dismissed the writ. The Justice of the Peace objected that his formal verified complaint was not submitted on the standardized form set forth in the Commission's rules, was drafted by the Commission's attorney, and did not identify the specific sections of the Canons of Judicial Ethics that were allegedly violated. The Justice of the Peace also maintained that the Commission violated its authority in investigating the complaint, so dismissal of the writ was in error. The Supreme Court disagreed. The form of a complaint is not critical to the Commission's fulfilling of its constitutional mandate, and nothing in policy, statute, or Commission rules was abrogated by the Commission's attorney by assisting in the drafting of the complaint. Further, a writ of prohibition is an extraordinary remedy available to enjoin a judicial entity from an inappropriate exercise of jurisdiction when no other plain, speedy, and adequate legal remedy exists. Thus, the District Court did not err in dismissing the writ because the Commission acted within its jurisdiction throughout the investigation. State ex rel. Smartt v. Judicial Standards Comm'n, 2002 MT 148, 310 M 295, 50 P3d 150 (2002).

Judicial Standards Commission Authority to Institute Investigation — Investigation Based on Report of Criminal Investigation Within Commission Authority: A written, unverified complaint was filed with the Judicial Standards Commission against a Justice of the Peace, alleging judicial misconduct. The Justice of the Peace obtained a writ of prohibition barring further proceedings based on an unverified complaint. Subsequently, a report was obtained from a Department of Justice investigation of criminal charges against the Justice of the Peace. The Justice of the Peace claimed that the Commission overstepped its authority by obtaining a copy of the report and further investigating the allegations when no complaint had been filed with the Commission regarding the allegations in the report. Under 3-1-1106, a written complaint by any Montana citizen may initiate an investigation of judicial misconduct, and only when the initial investigation indicates that additional proceedings are warranted must the complaining citizen sign a verified complaint. Further, Commission rules provide that a complaint is not a prerequisite to Commission action. The Commission may act on its own motion as well, so the Commission did not exceed its jurisdiction in obtaining a copy of the report by court order and undertaking its own investigation of the subsequently verified allegations. State ex rel. Smartt v. Judicial Standards Comm'n, 2002 MT 148, 310 M 295, 50 P3d 150 (2002).

Recall Act — When Attorney Fees Available: Section 2-16-615 of the Montana Recall Act provides two procedural remedies, depending on the relief sought. If an official refuses to accept a proper recall petition, relief is by mandamus and attorney fees may be recoverable. If a legally insufficient recall petition has been accepted for filing, relief is by injunction and attorney fees are not available. Thus, the right to attorney fees depends on the underlying action and is not reciprocal. Further, the statute does not provide for relief by writ of prohibition. Braach v. Graybeal, 1999 MT 234, 296 M 138, 988 P2d 761, 56 St. Rep. 919 (1999), affirming Sheehy v. Ferda, 235 M 63, 765 P2d 722, 45 St. Rep. 2162 (1988).

Writ Denied Based on Mootness: A citizens' group applied for a writ of prohibition to prevent a school district Board of Trustees from purchasing property without submitting the purchase to the voters. The District Court properly dismissed the application based on mootness because the property had already been purchased at the time of hearing, forestalling the prospect for meaningful relief. Awareness Group v. Bd. of Trustees, 243 M 469, 795 P2d 447, 47 St. Rep. 1333 (1990).

Demonstration of Unlawful Acts by Public Officials Required: Before a writ of prohibition may be granted, parties seeking the writ must demonstrate that the acts of public officials are clearly unlawful. The District Court correctly held a writ of prohibition was not the proper remedy after finding that public officials had not acted in excess of their authority. Kimble Properties, Inc. v. St., 231 M 54, 750 P2d 1095, 45 St. Rep. 425 (1988).

Department of Health Grant of Water Quality Certification — Board of Health Jurisdiction to Reconsider — Writ of Prohibition Inappropriate: Three entities competing for the right to construct a hydroelectric generation facility at a federal site applied for and received "401 certification" from the Department of Health and Environmental Sciences (now Department of Environmental Quality) to allow application for a federal permit under section 401 of the Federal Water Pollution Control Act amendments of 1972, 33 U.S.C. 1341(a). One of the entities, Montana Renewable Resources (MRR), questioned whether its competitors' projects complied with state water quality standards and requested Department reconsideration of the other two entities' "401 certification". The Department refused to modify its decision, so MRR formally

petitioned the Board of Health and Environmental Sciences (now Board of Environmental Review) for an appeal or declaratory ruling. The other two entities filed applications for Writs of Prohibition to halt further Board proceedings with respect to their certifications. The Supreme Court affirmed District Court dismissal of the applications, finding that the Board was acting within its jurisdiction under Montana water quality law and that since a speedy and adequate remedy of judicial appeal from any Board decisions was available, a Writ of Prohibition was inappropriate. Malta Irrigation District v. Mont. Bd. of Health & Environmental Sciences, 224 M 376, 729 P2d 1323, 43 St. Rep. 2264 (1986).

Defrauding Creditor — Elements of Sale Necessary to Establish Ownership: A judgment was entered in favor of the plaintiff, Kovacich, because of failure of Norgaard to make payments for the purchase of farm machinery. Kovacich made an attempt to levy against a truck owned by Norgaard, who, upon learning the truck was going to be seized, removed it from a consignment lot and sold it to McNair, a close friend. McNair did not register the truck in his name or purchase insurance for it. The Department of Justice verified that the truck was registered to Norgaard, and thereafter a Writ of Execution was issued, pursuant to which the truck was seized. Norgaard obtained a Writ of Prohibition preventing sale of the truck. After a hearing, the District Court set aside the Writ of Prohibition, allowing Kovacich to proceed with the sale, and Norgaard appealed, contending District Court error in allowing the sale. The Supreme Court found that resolution of the issue turned on whether the transaction between Norgaard and McNair was an attempt by Norgaard to defraud his creditor. The court held that under 31-2-315 (now repealed), unless the transfer from Norgaard to McNair was accompanied by immediate delivery and followed by an actual and continued change of possession, the transfer "is conclusively presumed to be fraudulent and therefore void against those who are his creditors while he remains in possession". Finding no evidence of immediate delivery or of any actual change of possession, the District Court order allowing sale was upheld. Kovacich v. Norgaard, 221 M 26, 716 P2d 633, 43 St. Rep. 608 (1986).

Attorney Fees: If pleaded, an attorney fee award is allowable as an item of damages in a prohibition case. Further, attorney fees may be awarded against a local government body if the government officers appear and defend the proceeding in good faith. Allen v. Madison County Comm'n, 211 M 79, 684 P2d 1095, 41 St. Rep. 1226 (1984).

Calling of Special Election — Quasi-Judicial Act: The calling by the County Commission of a special election on the issue of changing the form of county government is an act involving discretionary determinations and is therefore a quasi-judicial rather than a ministerial act. Allen v. Madison County Comm'n, 211 M 79, 684 P2d 1095, 41 St. Rep. 1226 (1984).

No Issuance by District Court Against City Court: In an action in City Court, the defendant requested the District Court to issue a Writ of Prohibition to prevent the City Judge from presiding over the action. Because the defendant was entitled to a trial de novo on appeal to District Court, a plain, speedy, and adequate remedy at law existed. The defendant was not entitled to a Writ of Prohibition. Joslyn v. City Court, 198 M 223, 645 P2d 428, 39 St. Rep. 884 (1982).

Supreme Court Jurisdiction Over Actions of Judicial Standards Committee: Despite the constitutional status of the Judicial Standards Commission, the Supreme Court has power to issue a Writ of Prohibition to enjoin the Commission when acting in excess of its authority, where relator's remedy by appeal is inadequate and he has no other plain, speedy, or adequate remedy. State ex rel. Shea v. Judicial Standards Comm'n, 198 M 15, 643 P2d 210, 39 St. Rep. 521 (1982).

Availability of Writ of Prohibition — Drunk Driving: Plaintiff was cited for driving while intoxicated. The Justice's Court did not hear the case although a trial had been scheduled. The defendant then sought a Writ of Prohibition against the Justice's Court to stop further proceedings in the prosecution of the D.W.I. charge. On appeal, the sole issue was whether the District Court judgment for the defendant Justice's Court, denying relief to the plaintiff and granting the motion to quash the Writ of Prohibition, was justified under the state of the record. The Supreme Court held that a Writ of Prohibition was not the appropriate remedy in the case. A Writ of Prohibition is available only when there is not a plain, speedy, and adequate remedy in the ordinary course of law. It is not issued as a matter of right but only in the exercise of sound judicial discretion when there is no other remedy. In this case, the plaintiff did not show why he could not assert his jurisdictional defense in the Justice's Court directly or by Writ of Certiorari in the District Court. State ex rel. Morse v. Justice Court, 192 M 95, 626 P2d 836, 38 St. Rep. 542 (1981).

Administrative Action — Prohibition Not Remedy: A Writ of Prohibition will not lie as a remedy to restrain an administrative action. Knox v. School District, 171 M 521, 559 P2d 1179 (1977).

Prohibiting Unlawful Acts: The District Court properly declined to prohibit a city from revoking a building permit when the permit was void ab initio as being in violation of ordinances regulating building permits. State ex rel. Russell Center v. Missoula, 166 M 385, 533 P2d 1087 (1975).

Not Issued as Matter of Course: The Writ of Prohibition will not be issued as of course or because it may be the most convenient remedy, nor will it be allowed to take the place of an appeal or perform the offices of a Writ of Review. State ex rel. Lee v. Mont. Livestock Sanitary Bd., 135 M 202, 339 P2d 487 (1959).

Discretion of Court: Prohibition does not properly issue as a writ of right but only in the exercise of a sound judicial discretion to arrest the proceedings of courts or tribunals or officers exercising judicial functions but acting at the time without or in excess of jurisdiction. State ex rel. Adamson v. District Court, 128 M 538, 279 P2d 691 (1955).

Grand Jury Proceedings: Supreme Court had jurisdiction to grant Writ of Prohibition to prevent payment of grand jury illegally in session. State ex rel. Adami v. Lewis & Clark County, 124 M 282, 220 P2d 1052 (1950).

Termination of Litigation:

The Writ of Prohibition may be issued to end litigation and save expense. State ex rel. Adami v. Lewis & Clark County, 124 M 282, 220 P2d 1052 (1950).

While this section limits the Writ of Prohibition to cases in which there is no plain, speedy, and adequate remedy in the ordinary course of law, if the District Court cannot render a valid judgment because of lack of jurisdiction, the Writ may run to end litigation and save expense. State ex rel. King v. District Court, 107 M 476, 86 P2d 755 (1939).

Supervisory Control by Supreme Court:

Refusal of District Court to set aside indictments on grounds set forth in Title 25, ch. 31, part 2, may be reviewed under the authority granted the Supreme Court by Art. VIII, sec. 2, 1889 Mont. Const. (now Art. VII, sec. 2, 1972 Mont. Const.), giving it superintending control over the courts. State ex rel. Porter v. District Court, 124 M 249, 220 P2d 1035 (1950), distinguished in St. v. Cockrell, 131 M 254, 309 P2d 316 (1957).

Where a petition for a Writ of Supervisory Control (a Writ which lies only where the lower tribunal has committed error within jurisdiction) also prays for any other appropriate relief and it appears that the lower court has acted without or in excess of jurisdiction, the Supreme Court will treat the petition as one for a Writ of Prohibition. State ex rel. Stewart v. District Court, 103 M 487, 63 P2d 141 (1936).

Nature of Writ:

The Writ of Prohibition arrests proceedings when the court, corporation, board, or person sought to be prohibited is proceeding without or in excess of jurisdiction; it is preventive rather than remedial and cannot take the place of an appeal or undo that which has been done. State ex rel. Hauswirth v. Beadle, 90 M 24, 300 P 197 (1931).

The character of the Writ of Prohibition is not changed by the Code; nor can any question be inquired into except that of jurisdiction in the proceeding inaugurated by it. It is preventive rather than remedial and cannot take the place of an appeal. State ex rel. Boston & Mont. Consol. Copper & Silver Min. Co. v. District Court, 22 M 220, 56 P 219 (1899).

The provision making a Writ of Prohibition "the counterpart of a Writ of Mandate", does not enlarge the class of cases in which the Writ may be resorted to in view of the clause providing that the Writ is to arrest the proceedings of any tribunal that are without or in excess of jurisdiction. State ex rel. Boston & Mont. Consol. Copper & Silver Min. Co. v. District Court, 22 M 220, 56 P 219 (1899).

Disqualify Member of Police Board: Where a policeman under charges for misconduct seeks to disqualify a member of the Police Board from participating in the hearing for bias and prejudice but the state does not provide for such disqualification, leaving the question of jurisdiction unaffected, the writ does not lie. State ex rel. Mueller v. District Court, 87 M 108, 285 P 928 (1930), distinguished in Stewart v. District Court, 103 M 487, 63 P2d 141 (1936).

Writ to Be Used Sparingly: The Writ of Prohibition is to be used sparingly for the furtherance of justice and to secure order and regularity in the inferior tribunals; it arrests proceedings of a judicial character when they are without or in excess of jurisdiction; but it issues only when there is not a plain, speedy, and adequate remedy in the ordinary course of law. State ex rel. Myersick v. District Court, 53 M 450, 164 P 546 (1917).

EXCESS OF JURISDICTION

Lease Rental Affected by Land Reclassification — Writ of Prohibition Proper: Lessees developed a water spreading project on a portion of their state grazing lease, and the Department

of State Lands (now Department of Natural Resources and Conservation) reclassified 32 acres of the lease as agricultural. Lessees later concluded that the project was inadequate for producing a profitable crop at the higher agricultural rental rates. They negotiated to pay back a loan for the project and reverted the land to grazing. After the loan was repaid, there were no other agreements supplementing the original lease. However, the Department subsequently determined that the 32 acres should retain the agricultural classification, sought rental at the agricultural rate, and canceled the lease upon nonpayment. The District Court properly filed a writ of prohibition restraining the Department from canceling the lease, re-leasing the property to other parties, and taking action against lessees for trespass after finding the Department was in excess of its jurisdiction for canceling the lease for nonpayment of agricultural rental when the property was leased for grazing only. Winchell v. Dept. of State Lands, 235 M 10, 764 P2d 1267, 45 St. Rep. 2121 (1988).

County Wrongfully Authorizing Open Burning: When the Board of County Commissioners authorizes open burning without a permit in violation of a rule of the state Board of Health and Environmental Sciences (now Board of Environmental Review), a Writ of Prohibition is the proper remedy. State ex rel. Dept. of Health & Environmental Sciences v. Lincoln County, 178 M 410, 584 P2d 1293 (1978). (Decided prior to 1985 amendment of 27-27-101.)

Public Service Commission — Acting Within Jurisdiction: Since federal price-freeze order did not prevent rate hearings by the Public Service Commission, though it did prevent putting increases into effect, Commission had jurisdiction to hold hearings and Writ of Prohibition was improper. State ex rel. Dept. of Public Service Regulation v. District Court, 158 M 88, 488 P2d 1147 (1971). (Decided prior to 1985 amendment of 27-27-101.)

District Court Acting Beyond Jurisdiction: Writ of Prohibition was issued, pursuant to this section, where District Court had acted beyond its jurisdiction by enjoining Board of Equalization (now the Department of Revenue) from revising grading and valuation on nonirrigated farmland pursuant to Title 15, ch. 7, parts 1 and 2. State ex rel. Lord v. District Court, 154 M 269, 463 P2d 323 (1969).

City Acting Within Jurisdiction: Lower court properly refused petition for Writ of Prohibition against city acting within jurisdiction since Writ lies only when municipal corporation acts without or in excess of jurisdiction. State ex rel. Pat Griffin Co. v. Butte, 151 M 546, 445 P2d 739 (1968).

District Court — No Jurisdiction to Issue Writ: District Court had no jurisdiction to issue an alternative Writ of Prohibition to restrain Board of Equalization (now the Department of Revenue) from enforcing amendments to regulations relating to corporation license tax allegedly due on patronage dividends of farm cooperatives until after hearing before said court, where tax could be paid under protest and action brought to recover the taxes under Title 15 or an action for declaratory judgment could be brought under Title 27, ch. 8. State ex rel. Fulton v. District Court, 139 M 573, 366 P2d 435 (1961).

Jurisdiction Defined: The term "jurisdiction", as used in this section, means the power to hear and determine the particular case. State ex rel. Yuhas v. Bd. of Medical Examiners, 135 M 381, 339 P2d 981 (1959).

Disqualified Judge: Where during the course of a divorce proceeding a judge is disqualified and another judge assumes jurisdiction and commits the husband to jail for contempt, on a habeas corpus petition brought by the jailed husband the disqualified judge would not be authorized to act and a Writ of Prohibition will lie to prohibit such judge from proceeding further in the habeas corpus matter. State ex rel. Middlemas v. District Court, 130 M 73, 295 P2d 233 (1956).

Mistaken Exercise of Existing Jurisdiction:

The Writ of Prohibition lies when a court is proceeding in excess of jurisdiction; but where it has jurisdiction, a mistaken exercise of it does not justify a resort to the Writ. State ex rel. Sands v. District Court, 95 M 427, 26 P2d 970 (1933).

If the District Court has jurisdiction of the subject matter in controversy, a mistaken exercise of that jurisdiction or of its acknowledged powers will not justify a resort to the extraordinary remedy by prohibition. State ex rel. Heinze v. District Court, 32 M 394, 80 P 673 (1905), distinguished in Stewart v. District Court, 103 M 487, 63 P2d 141 (1936).

Excess of Jurisdiction and No Plain, Speedy, and Adequate Remedy: The Writ of Prohibition is appropriate only when the lower court is acting without or in excess of jurisdiction and when the relator has no plain, speedy, and adequate remedy at law. Boucher v. St. George, 88 M 162, 293 P 315 (1930).

Excess of Jurisdiction — What May Be Considered: In considering the question whether the District Court was without jurisdiction in making an order granting alimony and suit money to

defend against an appeal from an order granting alimony and suit money, the Supreme Court may examine not only the pleadings but the evidence before the lower court in order to determine whether the lower court is about to exceed its jurisdiction. State ex rel. Wooten v. District Court, 57 M 517, 189 P 233, 9 ALR 1212 (1920).

Presumption of Regularity of Action: On an application for a Writ of Prohibition to arrest the proceedings of a District Court in a pending suit in equity, it will be presumed, in the absence of a showing to the contrary, that the court will not exceed the limitations of its jurisdiction, though it has no jurisdiction to grant a part of the relief asked for. State ex rel. Boston & Mont. Consol. Copper & Silver Min. Co. v. District Court, 22 M 220, 56 P 219 (1899).

Proof of Excess of Jurisdiction: In order to ascertain whether a necessity exists for granting a Writ of Prohibition, a superior court may determine by all that appears upon the face of the proceedings, and in rare cases even by evidence aliunde the record, whether it is clearly apparent that the inferior court is about to exceed its jurisdiction. State ex rel. Boston & Mont. Consol. Copper & Silver Min. Co. v. District Court, 22 M 220, 56 P 219 (1899).

Jurisdictional Error Required: A Writ of Prohibition will not lie to arrest the proceedings of an inferior court in the administration of an estate unless it clearly appears that such proceedings are without or in excess of the jurisdiction of such inferior court. State ex rel. Spalding v. Benton, 12 M 66, 29 P 425 (1892).

ADEQUACY OF OTHER REMEDY

Scope of Writ of Prohibition — Writ Inappropriate to Stop Conservation District From Making Initial Determination of Whether Body of Water Considered Natural Perennial Flowing Stream When Other Remedies Exist: After unsuccessfully attempting to have the Department of Natural Resources and Conservation, the Department of Fish, Wildlife, and Parks, and the Department of Environmental Quality make the determination as to whether a slough east of Victor was a perennial flowing stream and thus subject to The Natural Streambed and Land Preservation Act of 1975, the county conservation district decided to use a public hearing process to make the determination. Plaintiffs sought a writ of prohibition to stop the conservation district from determining the status of the slough. After the writ was denied in District Court, plaintiffs submitted it to the Supreme Court. A writ of prohibition serves to stop an entity exercising judicial functions from acting when the proceedings are beyond that entity's jurisdiction and are clearly unlawful, but should not replace an appeal or perform the function of a writ of review. A writ of prohibition is justified only by extreme necessity when the grievance cannot be redressed by ordinary proceedings at law, in equity, or by appeal. The existence of another remedy, even if inconvenient or indirect, prevents a party from seeking a writ of prohibition. In the interest of both judicial economy and agency efficiency, an exhaustion of administrative remedies allows a governmental agency to make a factual record and to correct its own errors within its specific expertise before a court interferes. After noting that the Act does not specifically authorize a conservation district or any other entity with the power to classify bodies of water as streams, the Supreme Court found that the conservation district was simply attempting to apply the Legislature's articulated requirement of a natural perennial flowing stream and declined to interfere with the conservation district's ability to initially determine the scope of its jurisdiction and exercise its expertise to decide whether the slough was in fact a stream. Further, once the status of the slough was determined, there was nothing to prevent plaintiffs from seeking judicial review of the conservation district's declaratory rulings. Because extreme necessity and lack of redress did not exist, a writ of prohibition was inappropriate to stop the conservation district from making the initial ruling on the status of the slough, so the writ was denied. Bitterroot River Protection Ass'n, Inc. v. Bitterroot Conserv. District, 2002 MT 66, 309 M 207, 45 P3d 24 (2002).

No Other Plain, Speedy, and Adequate Remedy:

In an appeal of the District Court's issuance of a Writ of Prohibition prohibiting the County Commission and the County Recorder from placing on an election ballot the question of retaining the charter form of county government, appellants claimed that prohibition did not lie because there were other plain, speedy, and adequate remedies available to petitioners. The Supreme Court affirmed the Writ's issuance, ruling that a plain, speedy, and adequate remedy was not afforded by: (1) the judicial review procedure set forth in 7-3-154; (2) the injunction procedure set forth in Title 27, ch. 19; or (3) the declaratory judgment procedure set forth in Title 27, ch. 8. Allen v. Madison County Comm'n, 211 M 79, 684 P2d 1095, 41 St. Rep. 1226 (1984).

The Writ of Prohibition lies when there is no other plain, speedy, and adequate remedy at law, even though appeal is available, if appeal is inadequate. State ex rel. Taylor v. District Court, 131 M 397, 310 P2d 779, 64 ALR 2d 1324 (1957).

If the District Court and Judge were proceeding within the jurisdiction given them by the constitution and statutes of this state, they may not be restrained by this Writ out of the Supreme Court. Moreover, even though the District Court at some point exceeded its jurisdiction, the Writ of Prohibition must be denied if the person has another plain, speedy, and adequate remedy in the ordinary course of law. State ex rel. Adamson v. District Court, 128 M 538, 279 P2d 691 (1955).

Adequate Remedy Available — Gambling Commission: Writ of Prohibition did not lie to arrest the proceedings of a countywide gambling commission in enforcement of a city ordinance regulating gambling because appellant had a plain, speedy, and adequate remedy in the ordinary course of law. Bradbrook v. Billings, 174 M 27, 568 P2d 527 (1977).

Child Custody Order: Where an order of the District Court, issued without notice and without a hearing, was to deprive a mother of the custody of her child and there were two modifications of the original custody decree which would require separate appeals, an appeal would not be adequate to protect the best interests of the child and a Writ of Prohibition was the proper remedy. State ex rel. Taylor v. District Court, 131 M 397, 310 P2d 779, 64 ALR 2d 1324 (1957).

Right to Appeal — Adequate Remedy: Where plaintiff had an appeal from a final judgment of the District Court declaring forfeited liquors claimed by him and seized under the former Prohibition Enforcement Act, he was not entitled to the writ to stay further action in the proceeding. State ex rel. Barnes v. District Court, 59 M 491, 197 P 565 (1921).

MINISTERIAL ACTS

Judicial Standards Commission Investigation of Justice of the Peace — Writ of Prohibition Properly Modified to Cure Ministerial Defects: A written, unverified complaint was filed with the Judicial Standards Commission against a Justice of the Peace, alleging judicial misconduct. The Justice of the Peace obtained a writ of prohibition barring further proceedings based on an unverified complaint. Subsequently, information was obtained from a Department of Justice investigation of criminal charges against the Justice of the Peace. The Commission sought to vacate the writ. By the time that the hearing was held, the complaint was verified, so the District Court modified the writ, allowing the Commission to proceed on the basis of the verified complaint. The Justice of the Peace appealed the modification that allowed the Commission to cure defects before commencing formal proceedings. The Supreme Court affirmed. The function of a writ of prohibition is to halt proceedings that are "without or in excess of the jurisdiction" of the entity exercising judicial functions. The writ here was to continue in force only until verified complaints were received. A procedural error, such as the failure to verify a complaint, will not be allowed to subvert the constitutional mandate of the Commission to investigate judicial misconduct. Because the complaint was verified by the time that the District Court considered modification of the writ, the court did not err in modifying the writ and allowing the Commission to proceed based on the verified complaint. State ex rel. Smartt v. Judicial Standards Comm'n, 2002 MT 148, 310 M 295, 50 P3d 150 (2002).

Arresting Termination of Police Judge: The issuance of a Writ of Prohibition arresting termination of a Police Judge at will of the City Commission (which is not a ministerial act done in furtherance of legal authority) is a proper remedy. State ex rel. Morales v. City Comm'n, 174 M 237, 570 P2d 887 (1977).

Not to Restrain Ministerial Function: The Writ of Prohibition will not restrain a ministerial, executive, or administrative function, no matter how illegal the act thereunder may be, so long as the tribunal sought to be restrained has jurisdiction of the subject matter in controversy; a mistaken exercise of such tribunal's acknowledged powers will not justify the issuance of the Writ. State ex rel. Lee v. Mont. Livestock Sanitary Bd., 135 M 202, 339 P2d 487 (1959).

Outside Scope of Writ at Time Constitution Adopted: The provision of this section purporting to authorize the issuance of a Writ of Prohibition to arrest the ministerial functions of an administrative body is invalid as applied to an order of inspection of cattle by the state Livestock Sanitary Board (now the Board of Livestock) pursuant to 81-2-301, such power being outside the scope of the Writ as known at the time Art. VIII, sec. 11, 1889 Mont. Const., was adopted. State ex rel. Lee v. Mont. Livestock Sanitary Bd., 135 M 202, 339 P2d 487 (1959).

Not to Arrest Exercise of Functions by Ministerial Officer: An application for a Writ of Prohibition to prevent a County Clerk from printing certain names on the official ballot will be dismissed on the ground that the Supreme Court does not have jurisdiction under this section to arrest the exercise of functions by a mere ministerial officer. State ex rel. Scharnikow v. Hogan, 24 M 379, 62 P 493 (1900), explained in State ex rel. Lee v. Mont. Livestock Sanitary Bd., 135 M 202, 339 P2d 487 (1959).

Collateral References

Prohibition *key* 1 through 11.
72A C.J.S. Prohibition §1.
63C Am. Jur. 2d Prohibition §§1 through 7.

27-27-102. Issuance of writ.

Compiler's Comments

1993 Amendment: Chapter 10 in first sentence, at beginning, substituted "A writ of prohibition" for "The same" and substituted "lower tribunal" for "inferior tribunal"; and made minor changes in style.

Case Notes

Lack of District Court Jurisdiction Over Child Custody Proceedings — Writ of Prohibition Proper Remedy: When a Montana District Court lacked jurisdiction over parenting plan and child custody matters regarding children of tender ages whose home state was Arkansas, the Supreme Court granted a writ of prohibition restricting the District Court from hearing, enforcing, or deciding any parenting issues concerning the minor children. Stephens v. District Court, 2006 MT 21, 331 M 40, 128 P3d 1026 (2006).

Scope of Writ of Prohibition — Writ Inappropriate to Stop Conservation District From Making Initial Determination of Whether Body of Water Considered Natural Perennial Flowing Stream When Other Remedies Exist: After unsuccessfully attempting to have the Department of Natural Resources and Conservation, the Department of Fish, Wildlife, and Parks, and the Department of Environmental Quality make the determination as to whether a slough east of Victor was a perennial flowing stream and thus subject to The Natural Streambed and Land Preservation Act of 1975, the county conservation district decided to use a public hearing process to make the determination. Plaintiffs sought a writ of prohibition to stop the conservation district from determining the status of the slough. After the writ was denied in District Court, plaintiffs submitted it to the Supreme Court. A writ of prohibition serves to stop an entity exercising judicial functions from acting when the proceedings are beyond that entity's jurisdiction and are clearly unlawful, but should not replace an appeal or perform the function of a writ of review. A writ of prohibition is justified only by extreme necessity when the grievance cannot be redressed by ordinary proceedings at law, in equity, or by appeal. The existence of another remedy, even if inconvenient or indirect, prevents a party from seeking a writ of prohibition. In the interest of both judicial economy and agency efficiency, an exhaustion of administrative remedies allows a governmental agency to make a factual record and to correct its own errors within its specific expertise before a court interferes. After noting that the Act does not specifically authorize a conservation district or any other entity with the power to classify bodies of water as streams, the Supreme Court found that the conservation district was simply attempting to apply the Legislature's articulated requirement of a natural perennial flowing stream and declined to interfere with the conservation district's ability to initially determine the scope of its jurisdiction and exercise its expertise to decide whether the slough was in fact a stream. Further, once the status of the slough was determined, there was nothing to prevent plaintiffs from seeking judicial review of the conservation district's declaratory rulings. Because extreme necessity and lack of redress did not exist, a writ of prohibition was inappropriate to stop the conservation district from making the initial ruling on the status of the slough, so the writ was denied. Bitterroot River Protection Ass'n, Inc. v. Bitterroot Conserv. District, 2002 MT 66, 309 M 207, 45 P3d 24 (2002).

Mandamus Denied — Failure to Exhaust Administrative Remedies: Applicant who was denied transfer of a liquor license had plain, adequate, and speedy remedy in law under 16-4-411; therefore, the court properly denied his application for alternative Writ of Mandamus or Prohibition. Applicant failed to exhaust his administrative remedies and did not show that the Department of Revenue or State Tax Appeal Board was acting contrary to law. Christopherson v. St., 226 M 350, 735 P2d 524, 44 St. Rep. 712 (1987).

No Issuance by District Court Against City Court: In an action in City Court, the defendant requested the District Court to issue a Writ of Prohibition to prevent the City Judge from presiding over the action. Because the defendant was entitled to a trial de novo on appeal to District Court, a plain, speedy, and adequate remedy at law existed. The defendant was not entitled to a Writ of Prohibition. Joslyn v. City Court, 198 M 223, 645 P2d 428, 39 St. Rep. 884 (1982).

Moratorium on Conditional-Use Permits — Zoning — Mandamus — Prohibition — Declaratory Judgment: Diehl requested a conditional-use permit for a planned shopping center. In response, the city of Helena established a 1-year moratorium on the granting of all

conditional-use permits. Diehl then filed his complaint and petition for a declaratory judgment, Writ of Mandate, and order to show cause. On appeal, the court found: (1) the city may adopt a reasonable general moratorium, but the procedure required by 76-2-306 must be followed; (2) the discretion of the City Commission to approve, modify, or deny the recommendation of the Zoning Commission cannot be controlled by Writ of Mandate, prohibition, or by declaratory judgment; (3) a Writ of Mandate requiring the city to act on Diehl's application within a reasonable time is proper under the circumstances in this case. State ex rel. Diehl Co. v. Helena, 181 M 306, 593 P2d 458 (1979).

Arresting Termination of Police Judge: The issuance of a Writ of Prohibition arresting termination of a police judge at will of the City Commission (which is not a ministerial act done in furtherance of legal authority) is a proper remedy. State ex rel. Morales v. City Comm'n, 174 M 237, 570 P2d 887 (1977).

Standing — Witness Before Grand Jury: A witness subject to a grand jury subpoena does not have standing for a Writ of Prohibition because he is not entitled, as a witness, to notice and a hearing and has no legal interest in the grand jury composition or operation. Kelly v. Grand Jury, 170 M 284, 552 P2d 1339 (1976).

Disqualified Judge: Where Supreme Court issued an alternative Writ of Prohibition against a District Court Judge and before the return date the District Judge conceded that he was disqualified and would take no further part in the case in the District Court, the alternate Writ will be dissolved as there is no purpose for it. State ex rel. Miller v. District Court, 130 M 65, 294 P2d 903 (1956).

Person Beneficially Interested:

The judgment creditor whose attorney secured Sheriff's deed on assigned certificate of sale is the party "beneficially interested" and as such is entitled to petition for Writ of Prohibition to restrain the court from further proceeding in the cause after vacating the default judgment. State ex rel. Redle v. District Court, 102 M 541, 59 P2d 58 (1936).

Since the court will look to the allegations of fact rather than to the legal conclusions that relators are beneficially interested, an application or affidavit for Writ of Prohibition by the Mayor of a city whose interest he seeks to protect in litigation for the reinstatement of a policeman will be held sufficient, without stating that he is beneficially interested. State ex rel. Examining & Trial Bd. v. Jackson, 58 M 90, 190 P 295 (1920).

Appealable Matters:

Where it is apparent that the District Court cannot under any conceivable circumstances render a valid judgment in a cause pending before it and an appeal would be neither speedy nor adequate, the Writ of Prohibition lies to prevent it from proceeding further. State ex rel. Thibodeau v. District Court, 70 M 202, 224 P 866 (1924), distinguished in State ex rel. Putnam v. District Court, 109 M 223, 95 P2d 441 (1939).

The Writ of Prohibition may issue where it clearly appears that the District Court has acted without jurisdiction and the remedy afforded by appeal is not sufficiently speedy or adequate to grant relief. State ex rel. McLeod v. District Court, 67 M 164, 215 P 240 (1923).

Where plaintiff had an appeal from a final judgment of the District Court declaring forfeited liquors claimed by him and seized under the former Prohibition Enforcement Act, he was not entitled to the prohibition to stay further action in the proceeding. State ex rel. Barnes v. District Court, 59 M 491, 197 P 565 (1921).

Where the remedy by appeal from an order allowing alimony pendente lite, attorney's fees, and suit money is not adequate or speedy, the fact that an appeal lies is not sufficient reason for denying the Writ of Prohibition against the enforcement of the order. State ex rel. Wooten v. District Court, 57 M 517, 189 P 233, 9 ALR 1212 (1920).

The right to a Writ of Prohibition is not, like the right to a Writ of Certiorari, defeated by the existence of the remedy by appeal, unless this remedy is plain, speedy, and adequate. An application for prohibition is addressed to the sound discretion of the Supreme Court; and whenever it is made to appear that under no conceivable circumstances can the District Court render a valid judgment because of a lack of jurisdiction, the discretion should be exercised in favor of issuing the Writ. State ex rel. Lane v. District Court, 51 M 503, 154 P 200 (1915), distinguished in State ex rel. Putnam v. District Court, 109 M 223, 95 P2d 441 (1939).

The existence of a remedy by appeal is not of itself a bar to a Writ of Prohibition, unless such remedy be plain, speedy, and adequate. A remedy is speedy when, having in mind the subject matter involved, it can be pursued with expedition and without essential detriment to the party aggrieved; and it is neither speedy nor adequate if its slowness is likely to product immediate injury or mischief. State ex rel. Marshall v. District Court, 50 M 289, 146 P 743 (1915).

Where immediate injury or mischief might follow an attempt to exercise the right of appeal in a proceeding in which the District Court, in alleged excess of jurisdiction, is about to enter a decree awarding a peremptory Writ of Mandate, the remedy is neither so speedy nor adequate as to bar the granting of a Writ of Prohibition under this section. State ex rel. Marshall v. District Court, 50 M 289, 146 P 743 (1915).

Prohibition does not lie to prevent further prosecution of an action in a police court to punish relator for a violation of a city ordinance alleged by him to be void, since the remedy by appeal or by Writ of Habeas Corpus is thorough and complete. State ex rel. Browne v. Booher, 43 M 569, 118 P 271 (1911).

Evidence Illegally Obtained: Where personal property seized under an illegal search warrant was about to be used as evidence in a prosecution against its owner for a violation of the liquor law and a petition to suppress its use had been denied, the Writ of Prohibition lies to prevent the threatened use of the property as evidence, since a judgment of conviction based thereon would be void and the remedy by appeal would be neither speedy nor adequate. State ex rel. Thibodeau v. District Court, 70 M 202, 224 P 866 (1924), distinguished in State ex rel. Putnam v. District Court, 109 M 223, 95 P2d 441 (1939).

Alimony Pending Appeal: Where the court made an order allowing alimony and suit money to defendant to defend against an appeal from an order granting alimony and suit money pendente lite, the fact that an appeal lies from the first mentioned order will not oust the Supreme Court of jurisdiction to entertain a Writ of Prohibition restraining the enforcement of such an order, since upon each appeal a new order would be made and the action would be disposed of on its merits before the appeal could be heard and therefore an appeal would not be adequate or speedy. State ex rel. Wooten v. District Court, 57 M 517, 189 P 233, 9 ALR 1212 (1920).

Inadequacy of Other Remedies: Prohibition may be granted when neither appeal nor other proceeding in the ordinary course of law affords a plain, speedy, and adequate remedy. State ex rel. King v. District Court, 24 M 494, 62 P 820 (1900).

Law Review Articles

". . . And Attorney Fees to the Prevailing Party": Recovering Attorney Fees Under Montana Statutory Law, Williams, 46 Mont. L. Rev. 119 (1985).

Collateral References

Prohibition *key* 3, 16 through 21.

72A C.J.S. Prohibition §§4 through 8, 41, 42.

63C Am. Jur. 2d Prohibition §§8 through 21.

Availability of writ of prohibition or similar remedy against acts of public prosecutor. 16 ALR 4th 112.

Prohibition as appropriate remedy to prevent allegedly disqualified judge from proceeding with case. 92 ALR 2d 306.

Availability of prohibition to review order of reference to master or auditor. 76 ALR 2d 1130.

Depositions, availability of Writ of Prohibition to prevent illegal or unauthorized taking of. 73 ALR 2d 1162.

Prohibition as remedy to enforce right to jury trial. 41 ALR 2d 780.

Prohibition to prevent multiplicity of proceedings. 159 ALR 1283.

Administrative or executive boards or officers, availability of Writ of Prohibition as means of controlling. 159 ALR 627; 115 ALR 3.

Criminal case, appeal in, as adequate remedy precluding prohibition sought on ground of lack or loss of jurisdiction. 141 ALR 1262.

Contempt proceedings, other remedies as adequate or inadequate for purposes of prohibition against. 136 ALR 715.

Jurisdiction, assumption of, by court before completion of administrative procedure as ground of prohibition. 132 ALR 738.

Judicial officer, prohibition as available remedy to restrain performance of a ministerial act by. 117 ALR 1398.

Constitutionality of statute as proper question for determination in prohibition proceeding. 113 ALR 796.

Indictment, information, or complaint, prohibition as remedy in case of defect. 102 ALR 298.

Right of court upon application for prohibition to consider issues of fact outside of record in inferior court. 99 ALR 984.

Writ of Prohibition generally. 77 ALR 245.

Judgment which has been reversed or modified on appeal or from which an appeal with supersedeas or stay is pending, prohibition to prevent enforcement of. 70 ALR 105.

27-27-103. Form and content of writ.

Collateral References

Prohibition *key* 23, 32.
72A C.J.S. Prohibition §44, et seq.
63C Am. Jur. 2d Prohibition §§76 through 85.

27-27-104. Application of procedure governing mandamus.

Case Notes

Attorney Fees:

If pleaded, attorney fees are allowable as an item of damages in prohibition cases. State ex rel. Taylor v. District Court, 131 M 397, 310 P2d 779, 64 ALR 2d 1324 (1957).

If attorney fees are not claimed in the pleading they are waived. State ex rel. Miller v. District Court, 130 M 65, 294 P2d 903 (1956).

Mandamus Statute Applicable: This section adopts for Writs of Prohibition most of the statutes governing the practice applicable to Writs of Mandamus. Esterby v. Justice Court, 127 M 1, 256 P2d 544 (1953).

Law Review Articles

". . . And Attorney Fees to the Prevailing Party": Recovering Attorney Fees Under Montana Statutory Law, Williams, 46 Mont. L. Rev. 119 (1985).

Collateral References

Prohibition *key* 26, 29.
72A C.J.S. Prohibition §44, et seq.

CHAPTER 28
QUO WARRANTO

Part 1
General Provisions

27-28-101. When proceeding may be instituted for unlawful assertion of authority.

Case Notes

Person Seeking Quo Warranto Not Entitled to Public Office — Attorney General Required to Commence Action: It did not appear that petitioner was entitled to the position he claimed was unlawfully held by another, so petitioner did not come within the statutory requirement that authorized him to bring a quo warranto action in the name of the state. The petition should have been brought for the state by the Attorney General and not by the private person. State ex rel. Paugh v. Bradley 231 M 46, 753 P2d 857, 45 St. Rep. 419 (1988).

Restoration to Office Lawfully Held — Quo Warranto Improper: Quo warranto is not a proper remedy if an appellant is seeking restoration to an office which he lawfully held at the institution of the action. State ex rel. Morales v. City Comm'n, 174 M 237, 570 P2d 887 (1977).

Public Employees:

In an action to test the right of defendant to occupy office of clerk of school district board of trustees, application for leave to file a complaint in quo warranto was properly denied by the District Court, the clerk being only an employee and the rule for removal of public officers being inapplicable. State ex rel. Running v. Jacobson, 140 M 221, 370 P2d 483 (1962).

A proceeding in quo warranto, when directed against a person alleged to be usurping, intruding into, or exercising an office, is proper only in the case where defendant is a public officer, not in the case of one who is a mere state employee. State ex rel. Nagle v. Page, 98 M 14, 37 P2d 575 (1934).

Election Contest: Where an election contest involving the office of County Commissioner was commenced before the contestee had assumed office, he may not be said to have usurped, intruded into, unlawfully held, or exercised the office, within the meaning of this section. Snyder v. Boulware, 109 M 427, 96 P2d 913 (1939).

Alternative Remedies: Where a newly elected treasurer of a Firemen's Relief Association petitioned for a Writ of Mandate to compel the former treasurer to turn over the funds and property to him and an alternative Writ was issued but later substitution of parties was made, injecting the question of title to the office and thus warranting quo warranto, the cause should

have been disposed of on its merits, rather than dismissed. State ex rel. Casey v. Brewer, 107 M 550, 88 P2d 49 (1939).

Ferry Franchise Forfeited: Complaint in an action of the nature of quo warranto brought by the Attorney General in behalf of the state to have a ferry franchise declared forfeited for failure of the ferryman to provide a safe and suitable ferryboat for the accommodation of travelers was sufficient to state a cause of action under this chapter. State ex rel. Rankin v. Martin, 68 M 392, 219 P 632 (1923).

Collateral References

Quo Warranto *key* 1, et seq.

74 C.J.S. Quo Warranto §§11 through 13.

65 Am. Jur. 2d Quo Warranto §§12 through 48.

Election campaign activities as ground for disciplining attorney. 26 ALR 4th 170.

Quo warranto as remedy for determining right or title to office in unincorporated private association. 82 ALR 2d 1172.

Venue of actions or proceedings against public officers. 48 ALR 2d 423.

Applicability of Statute of Limitations or laches to quo warranto proceedings. 26 ALR 2d 828.

Corporation as necessary or proper party defendant in proceedings to determine validity of election or appointment of corporate director or officer. 21 ALR 2d 1048.

Quo warranto to oust incumbent of public office, based on misconduct or other ground of forfeiture. 119 ALR 725.

Quo warranto as remedy in field of taxation. 109 ALR 324.

Quo warranto to test right to serve as grand or petit juror. 91 ALR 1009.

Quo warranto to test results of primary election. 86 ALR 246.

Teacher as an officer whose right may be tested by quo warranto. 30 ALR 1423.

Criminal prosecution as a condition of a civil action or proceeding for the cancellation of a corporate charter for violation of law. 9 ALR 106.

Right of corporation to act as relator in information in the nature of quo warranto. 1 ALR 197.

27-28-102. When proceeding may be brought against a corporation for misconduct.

Case Notes

Surety Company: Where the license of a surety company is sought to be revoked for failure to pay a judgment rendered against it in an action on a bond furnished by it, quo warranto may be resorted to. Stabler v. Porter, 72 M 62, 232 P 187 (1924).

Misuse of Franchise: Complaint in an action of the nature of quo warranto brought by the Attorney General in behalf of the state to have a ferry franchise declared forfeited for failure of the ferryman to provide a safe and suitable ferryboat for the accommodation of travelers was sufficient to state a cause of action under this section. State ex rel. Rankin v. Martin, 68 M 392, 219 P 632 (1923).

Collateral References

Quo Warranto *key* 16 through 19.

74 C.J.S. Quo Warranto §§27 through 33.

65 Am. Jur. 2d Quo Warranto §§38 through 48.

Holding or parent corporation as necessary or proper party to quo warranto proceeding against subsidiary corporation. 106 ALR 1188.

Practice of law by corporation as ground for quo warranto. 105 ALR 1376, supplemented by 157 ALR 282; 73 ALR 1336.

Quo warranto to protect corporation against use of name by another corporation. 66 ALR 1026, supplemented by 22 ALR 3d 8.

Quo warranto as a remedy for violation of criminal or penal statute by corporation. 53 ALR 1038.

27-28-103. When attorney general required to commence an action.

Case Notes

Person Seeking Quo Warranto Not Entitled to Public Office — Attorney General Required to Commence Action: It did not appear that petitioner was entitled to the position he claimed was unlawfully held by another, so petitioner did not come within the statutory requirement that authorized him to bring a quo warranto action in the name of the state. The petition should have been brought for the state by the Attorney General and not by the private person. State ex rel. Paugh v. Bradley 231 M 46, 753 P2d 857, 45 St. Rep. 419 (1988).

Collateral References
Quo Warranto *key* 24, 33.
74 C.J.S. Quo Warranto §§60, 61.

27-28-104. Upon whose relation action brought — security for costs.

Collateral References
Quo Warranto *key* 31 through 34.
74 C.J.S. Quo Warranto §42.
Right of private person not claiming office to maintain quo warranto proceedings to test title to or existence of public office. 51 ALR 2d 1306.
Power of district, county, or prosecuting attorney to bring action of quo warranto. 131 ALR 1207.
Right of corporation to act as relator in information in the nature of quo warranto. 1 ALR 197.

27-28-105. Jurisdiction and venue.

Case Notes
Supreme Court Jurisdiction: The Supreme Court will take original jurisdiction of a proceeding in quo warranto brought by one elected to the office of County Commissioner where office was filled by appointment for relator's failure to file his official bond within the time required by law and where the emergencies appear sufficient to warrant that course. State ex rel. Wallace v. Callow, 78 M 308, 254 P 187 (1927).

Collateral References
Quo Warranto *key* 27, 28.
74 C.J.S. Quo Warranto §§52 through 55.
65 Am. Jur. 2d Quo Warranto §§49 through 53.
Venue of actions or proceedings against public officers. 48 ALR 2d 423.

27-28-106. Precedence on court calendar.

Collateral References
Quo Warranto *key* 58; Trial *key* 13(1).
74 C.J.S. Quo Warranto §§89 through 93; 88 C.J.S. Trial §33, et seq.

Part 2
Procedure in General

27-28-201. Leave to file complaint.

Collateral References
Quo Warranto *key* 43.
74 C.J.S. Quo Warranto §§45 through 47.

27-28-202. Summons — complaint filed without leave.

Collateral References
Quo Warranto *key* 45.
74 C.J.S. Quo Warranto §40.
65 Am. Jur. 2d Quo Warranto §§52, 129.

27-28-204. Pleadings.

Case Notes
Inconsistent Defenses: Under this section, the pleadings of both parties to a proceeding in quo warranto fall within the rules relating to pleadings in ordinary civil actions, and under them the defendant may interpose as many defenses as he has, even though they be inconsistent, provided they are not so incompatible as to render the one or the other absolutely false, the test of their propriety being whether or not the proof of one necessarily disproves the other. State ex rel. Nagle v. Stafford, 97 M 275, 34 P2d 372 (1934).
Sufficiency of Complaint: A complaint in an action for usurpation of office, which alleges the election of the relator to the office in question, the making and subscribing of an oath of office, the execution, approval, acceptance, and filing of his official bond, the usurpation and intrusion of the defendant, and the refusal of the County Attorney to institute the action and prays that defendant be excluded from holding and exercising the duties of the office and that the relator be adjudged entitled to hold the same and be installed therein, is good on demurrer (demurrer abolished, Rule 7(c), M.R.Civ.P.). People ex rel. Kern v. McIntyre, 10 M 166, 25 P 100 (1890).

Collateral References

Quo Warranto *key* 47.

74 C.J.S. Quo Warranto §§66 through 68.

27-28-205. Judgment — unlawful assertion of authority.

Collateral References

Quo Warranto *key* 60, 61, 63.

74 C.J.S. Quo Warranto §84.

65 Am. Jur. 2d Quo Warranto §112.

27-28-206. Right to appeal.

Collateral References

Quo Warranto *key* 62.

74 C.J.S. Quo Warranto §§89 through 93.

27-28-207. Procedure when action brought in supreme court.

Collateral References

Courts *key* 207(6).

65 Am. Jur. 2d Quo Warranto §§127 through 131.

Part 3
Actions by Private Persons for Usurpation of Office

27-28-301. When action may be commenced — undertaking for security.

Case Notes

Person Seeking Quo Warranto Not Entitled to Public Office — Attorney General Required to Commence Action: It did not appear that petitioner was entitled to the position he claimed was unlawfully held by another, so petitioner did not come within the statutory requirement that authorized him to bring a quo warranto action in the name of the state. The petition should have been brought for the state by the Attorney General and not by the private person. State ex rel. Paugh v. Bradley 231 M 46, 753 P2d 857, 45 St. Rep. 419 (1988).

Quo Warranto Improper: Quo warranto is not a proper remedy if an appellant is seeking restoration to an office which he lawfully held at the institution of the action. State ex rel. Morales v. City Comm'n, 174 M 237, 570 P2d 887 (1977).

Unqualified Appointee: Taxpayer was not entitled to an injunction in action questioning the qualifications of supervisor appointed by Board of Railroad Commissioners (now the Public Service Commission) in proper exercise of its discretion. Steel v. Bd. of Railroad Comm'rs, 144 M 432, 397 P2d 101 (1964).

Abandonment of Office: County School Superintendent who left note on desk wishing her opponent success, left her the key to the office, and accepted a teaching position elsewhere, under the mistaken belief that the latter was qualified and elected as her rightful successor, the latter having received the highest number of votes, been duly issued a certificate of election, and filed her oath and bond within time, abandons the office and is estopped to inquire into the validity of such election, for the purpose of having herself reinstated in the office on the ground that her opponent did not hold the requisite certificate to teach. State ex rel. Flynn v. Ellis, 110 M 43, 98 P2d 879 (1940).

Exclusive Ground: The authority of the state, represented by the Attorney General, to invoke the remedy by quo warranto is quite extensive, but the right of an individual to the remedy is limited to the single case named in this section. State ex rel. Boyle v. Hall, 53 M 595, 165 P 757 (1917).

Public Office: The chairmanship of the Board of State Railroad Commissioners (now the Public Service Commission) is not a public office, and the Writ of Quo Warranto does not lie to determine the right of one of its members to act as chairman. State ex rel. Boyle v. Hall, 53 M 595, 165 P 757 (1917).

Collateral References

Quo Warranto *key* 36, 63.

74 C.J.S. Quo Warranto §§41 through 47.

Power of district, county, or prosecuting attorney to bring action of quo warranto. 131 ALR 1207.

27-28-302. Contents of complaint.

Collateral References

Quo Warranto *key* 49.
74 C.J.S. Quo Warranto §§69 through 71.

27-28-303. Who may be made defendants.

Collateral References

Quo Warranto *key* 38, 39.
74 C.J.S. Quo Warranto §§58, 59.
Corporation as necessary or proper party defendant in proceedings to determine validity of election or appointment of corporate director or officer. 21 ALR 2d 1048.

27-28-304. Whose rights determined in judgment.

Case Notes

Qualification for Office: Since relator is presumed to know the law relative to the steps necessary to be taken by him to qualify for the office to which he was elected, allegation in his complaint in a quo warranto proceeding that the certificate of election sent him did not advise him as to how and when he should qualify was immaterial and ordered stricken, the law not requiring the giving of such information. State ex rel. Wallace v. Callow, 78 M 308, 254 P 187 (1927).

Collateral References

Quo Warranto *key* 49.
74 C.J.S. Quo Warranto §§56 through 59.

27-28-305. No stay of judgment of ouster pending appeal.

Collateral References

Quo Warranto *key* 62.
74 C.J.S. Quo Warranto §§89 through 93.

27-28-308. Subsequent action for damages for usurpation.

Case Notes

Salary Claim: The right of action given by this section cannot refer to one for salary. Wynne v. Butte, 45 M 417, 123 P 531 (1912).

Part 5
Actions Against Corporations

27-28-503. Costs — judgment against corporation or alleged corporation.

Collateral References

Quo Warranto *key* 63.
74 C.J.S. Quo Warranto §85.

CHAPTER 30
NUISANCES

Chapter Case Notes

Classification of Nuisances — Per Se or Per Accidens — Absolute or Qualified: A nuisance action may be based upon conduct of a defendant that is either intentional, negligent, reckless, or ultrahazardous. Thus, negligence is merely one type of conduct upon which liability for nuisance may be based. In general, a nuisance may be classified as either a nuisance per se or at law or as a nuisance per accidens or in fact. A nuisance per se is an inherently injurious act, occupation, or structure that is a nuisance at all times and under any circumstances, without regard to location or surroundings. A nuisance per accidens is one that becomes a nuisance by virtue of circumstances and surroundings. In turn, nuisances may be classified as either absolute or qualified. An absolute nuisance, similar to a nuisance per se, is a nuisance the substance of which is not negligence and that obviously exposes a person to probable injury. A qualified nuisance is a nuisance dependent on negligence that consists of anything done lawfully but so negligently or carelessly done or permitted as to create a potential and unreasonable risk of harm, which in due course results in injury to another. When determining how a plaintiff can bring a nuisance action against a defendant who is engaged in a statutorily authorized endeavor,

when 27-30-101(2) indicates that authorized activities may not be considered a nuisance, the Supreme Court held that the plaintiff must show, pursuant to a particularized assessment of the authorizing statute, that: (1) the defendant completely exceeded its statutory authority, resulting in a nuisance; or (2) the defendant was negligent in carrying out its statutory authority, resulting in a qualified nuisance. In the present case, the city of Thompson Falls was statutorily authorized to construct the city's storm and sewer drain system, which Barnes alleged to be a nuisance. Given a verdict of no negligence, the city was not negligent in its operation or maintenance of the storm drain behind Barnes's duplex and thus would not have been liable for a qualified nuisance because of the incidental flooding of Barnes's property. Therefore, the District Court did not abuse its discretion in refusing Barnes's proposed instructions on nuisance because the instructions constituted a misstatement of the law. Barnes v. Thompson Falls, 1999 MT 77, 294 M 76, 979 P2d 1275, 56 St. Rep. 321 (1999), citing 58 Am. Jur. 2d Nuisances §9 and 66 C.J.S. Nuisances §§3, 5.

Nuisance Action — Contributory Negligence as Defense: The Supreme Court cited 58 Am. Jur. 2d Nuisances 221 in holding that contributory negligence can be a defense in a nuisance action. Wilhelm v. Great Falls, 225 M 251, 732 P2d 1315, 44 St. Rep. 211 (1987), clarified, with regard to the distinction between an absolute nuisance and a qualified nuisance, in Barnes v. Thompson Falls, 1999 MT 77, 294 M 76, 979 P2d 1275, 56 St. Rep. 321 (1999).

Attractive Nuisance Not Applicable to Certain Artificial Streams or Bodies of Water: The degree of care of one who maintains on his land an artificial stream or body of water for a useful purpose, where the stream or body of water has natural characteristics, is no greater than the degree of care required of one through whose land flows a natural stream or whose land contains a natural body of water. The owner or user of an artificial stream or body of water having natural characteristics is bound to no special duty of care or precaution for the protection of children who may enter therein, unless there is in or about the artificial stream or body of water some peculiar danger, in the nature of a hidden peril or trap for the unwary, of which the owner or user has or ought to have notice. The doctrine of attractive nuisance as such does not apply to such artificial streams or bodies of water any more than it applies to natural streams or bodies of water. Limberhand v. Big Ditch Co., 218 M 132, 706 P2d 491, 42 St. Rep. 1460 (1985).

Limitations of Actions — Nuisances: If a nuisance is abatable, it cannot be considered a permanent nuisance. Therefore the nuisance is of a temporary and continuous character and gives rise to a separate cause of action each time it causes damage. The applicable Statute of Limitations is 2 years. Haugen v. Warner, 204 M 508, 665 P2d 1132, 40 St. Rep. 1036 (1983).

Highway Not an Attractive Nuisance — Summary Judgment Properly Granted: In an action for the wrongful death of the plaintiff's son which occurred when the decedent was struck by an automobile on a controlled-access highway, the District Court did not err in granting the State's motion for summary judgment. As one of the conditions of declaring an object an attractive nuisance, the plaintiff must prove that children are unable to discover or appreciate the dangerous condition of the object. Because there is nothing in the record to prove that a 5-year-old child would not appreciate the dangerous condition of the highway, the highway cannot be found to be an attractive nuisance. Big Man v. St., 192 M 29, 626 P2d 235, 38 St. Rep. 362 (1981).

Chapter Law Review Articles

Airport Noise Pollution, Fulton, 36 Mont. L. Rev. 311 (1975).

Montana's Law of Attractive Nuisance, Roscoe, 30 Mont. L. Rev. 61 (1968).

Chapter Collateral References

43 Am. Jur. POF2d Commercial activity as actionable private nuisance, pp. 303 through 394.

37 Am. Jur. POF2d Outdoor advertising sign or billboard as nuisance, pp. 141 through 222.

33 Am. Jur. POF2d Machinery as attractive nuisance, pp. 611 through 668.

Remedies for sewage treatment plant alleged or deemed to be nuisance. 101 ALR 5th 287.

Hog breeding, confining, or processing facility as constituting nuisance. 93 ALR 5th 621.

Sewage treatment plant as constituting nuisance. 92 ALR 5th 517.

Keeping of domestic animal as constituting public or private nuisance. 90 ALR 5th 619.

Tower or antenna as constituting nuisance. 88 ALR 5th 641.

Windmill as nuisance. 36 ALR 4th 1159.

Liability for damage to land or its occupants from dust, gases, odors, vibration, or the like, occasioned by defendant's continuous vehicular use of adjoining or nearby public highway. 25 ALR 4th 1192.

When statute of limitations begins to run as to cause of action for nuisance based on air pollution. 19 ALR 4th 456.

Funeral home as private nuisance. 8 ALR 4th 324.
Carwash as nuisance. 4 ALR 4th 1308.
Construction and application of ordinances relating to unrestrained dogs, cats, or other domesticated animals. 1 ALR 4th 994.
Landlord and tenant: constructive eviction by another tenant's conduct. 1 ALR 4th 849.
Keeping bees as nuisance. 88 ALR 3d 992.
Airport operations or flight of aircraft as nuisance. 79 ALR 3d 253.
Pornoshops or similar places disseminating obscene materials as nuisance. 58 ALR 3d 1134.
Zoo as nuisance. 58 ALR 3d 1126.
"Coming to nuisance" as a defense or estoppel. 42 ALR 3d 344.
Billboards and other outdoor advertising signs as civil nuisance. 38 ALR 3d 647.
Children's playground as nuisance. 32 ALR 3d 1127.
Horses: keeping horses as nuisance. 27 ALR 3d 627.
Gun club, or shooting gallery or range, as nuisance. 26 ALR 3d 661.
Institution for the punishment or rehabilitation of criminals, delinquents, or alcoholics as enjoinable nuisance. 21 ALR 3d 1058.
Saloons or taverns as nuisance. 5 ALR 3d 989.
Electric generating plant or transformer station as nuisance. 4 ALR 3d 902.
Motorbus or truck terminal as nuisance. 2 ALR 3d 1372.
Poultry, keeping poultry as nuisance. 2 ALR 3d 965.
Gas company's liability on theory of nuisance, for personal injury or property damage caused by gas escaping from mains in street. 96 ALR 2d 1084.
Drive-in theater or outdoor dramatic or musical entertainment as nuisance. 93 ALR 2d 1171.
Swimming pool, private residential swimming pool as nuisance. 92 ALR 2d 1285.
Dairy, creamery, or milk distributing plant, as nuisance. 92 ALR 2d 974.
Drive-in restaurant or cafe as nuisance. 91 ALR 2d 572.
Oil refinery as a nuisance. 86 ALR 2d 1322.
Automobile wrecking yard or place of business as nuisance. 84 ALR 2d 653.
Usury, practice of exacting, as nuisance. 83 ALR 2d 848.
Moving of buildings on highways as nuisance. 83 ALR 2d 478.
Double parking of motor vehicle as nuisance. 82 ALR 2d 732.
Water sports, amusements, or exhibitions as nuisance. 80 ALR 2d 1124.
Air pollution, validity of regulation of. 78 ALR 2d 1305.
House-to-house soliciting and peddling without invitation as nuisance. 77 ALR 2d 1221; 35 ALR 2d 355.
Merry-go-round as nuisance. 75 ALR 2d 803.
Cats, possession of, or manner of keeping as nuisance. 73 ALR 2d 1040.
Golf course or driving range as a nuisance. 68 ALR 2d 1331.
Fishing, boating, bathing, or the like in inland lake as nuisance. 57 ALR 2d 594.
Automobile sales lot or used car lot as nuisance. 56 ALR 2d 776.
Public dump as nuisance. 52 ALR 2d 1134.
"Spot zoned" property, use of, as nuisance. 51 ALR 2d 280.
Cemetery or burial grounds as nuisance. 50 ALR 2d 1324.
Mufflers or similar noise-preventing devices on motor vehicles, aircraft, or boats, validity of public regulation requiring. 49 ALR 2d 1202.
Quarries, gravel pits, and the like as nuisances. 47 ALR 2d 490.
Public dances or dance halls as nuisances. 44 ALR 2d 1397.
Pollution of subterranean waters as nuisance. 38 ALR 2d 1285.
Private school as nuisance. 27 ALR 2d 1249.
Hospital, immunity from liability for damages for nuisance in operation of hospital by state or governmental unit or agency. 25 ALR 2d 217.
Charity, immunity of nongovernmental charity from liability for maintaining nuisance. 25 ALR 2d 52.
Tourist or trailer camps, motor courts or motels as nuisances. 24 ALR 2d 571.
Dust as nuisance. 24 ALR 2d 194, §7 superseded by 79 ALR 3d 253.
Phonograph, loudspeaker, or other mechanical or electrical device for broadcasting music, advertising, or sales talk from business premises, as nuisance. 23 ALR 2d 1289.
Blasting, liability, based on nuisance, for property damage by concussion from. 20 ALR 2d 1406.
Stockyard as a nuisance. 18 ALR 2d 1033.
Dogs, birds, or other pets, keeping by tenant as a nuisance. 18 ALR 2d 880.

Animal rendering or bone-boiling plant or business as nuisance. 17 ALR 2d 1269.

Destruction of building, judicial determination of whether building constitutes nuisance subject to destruction. 14 ALR 2d 82.

Sound amplifiers or loudspeaker broadcasts in streets and other public places, public regulation and prohibition of. 10 ALR 2d 627.

Coalyard as nuisance. 8 ALR 2d 419.

Casting light on another's premises in connection with sporting events or amusements as a nuisance. 5 ALR 2d 707, 708.

Attracting people in such numbers as to obstruct access to the neighboring premises, as nuisance. 2 ALR 2d 437.

Zoning laws prescribing conditions of business or manufacturing designed to avoid nuisance or annoyance. 173 ALR 271.

Racing, or betting on races, as nuisance. 166 ALR 1264.

Zoning regulation as affecting question of nuisance within zoned area. 166 ALR 659.

Medical clinic as a nuisance. 153 ALR 972.

Supermarket, superstore, or public market as a nuisance. 146 ALR 1407.

Spite fences and other spite structures. 133 ALR 691.

Pool and billiard room and bowling alley, power to declare a nuisance per se, and right to enjoin their operations. 72 ALR 1339; 53 ALR 149; 29 ALR 41; 20 ALR 1482.

Circuses, carnivals, and similar itinerant outdoor amusements, injunction against use of property for. 63 ALR 407.

Right to enjoin threatened or anticipated nuisance. 55 ALR 880; 32 ALR 724; 26 ALR 937; 7 ALR 749.

"Comfort stations". 55 ALR 472; 42 ALR 891.

Saw or planing mill as a nuisance. 37 ALR 689.

Amusement park as a nuisance. 33 ALR 725.

Slaughterhouse as nuisance. 27 ALR 329.

Agreement or assumption of parties as affecting the question whether nuisance caused by private corporation or individual is permanent or continuous. 27 ALR 61.

Effect of delay in seeking equitable relief against nuisance. 6 ALR 1098.

Part 1
General Provisions

27-30-101. Definition of nuisance.

Compiler's Comments

1981 Amendment: Added (3) relating to agricultural or farming operation.

Source: Subsection (3) is based upon Georgia Code Annotated sec. 72-108.

Case Notes

Permanent Injunction Inappropriate Limitation of Lawful Irrigation Practices: The Wellses built a home on property adjacent to land that had been flood irrigated by the Youngs for generations. Between 1994 and 1998, the Youngs' land was irrigated three times, and on each occasion, the Wellses experienced flooding in the crawl space of their home. The Wellses sought damages in excess of $80,000 based on tort theories of negligence, nuisance, and trespass. The District Court reasoned that because the irrigation practices predated the construction of the Wellses' home, they could not recover damages or recover on their trespass claim under 85-7-2212. The court also concluded that the nuisance claim was barred by this section. The court held that the Youngs breached the general obligation imposed by 28-1-201 because their irrigation practices caused immediate, irreparable, and substantial harm to the Wellses' home, but the negligence claim was disposed of because the Wellses failed to establish that the irrigation practiced breached the standard of care of a reasonable farm irrigator engaged in flood irrigation. Nevertheless, the District Court permanently enjoined the Youngs from irrigating their property because future irrigation without modification of the head ditch would result in an unreasonable and substantial risk of continuing harm and irreparable injury to the Wellses' property. The Youngs moved to vacate the injunction based on the determination that their irrigation practices were lawful, but the motion was denied, so the Youngs appealed. The Supreme Court examined the record for abuse of discretion, noting that a District Court must find a breach of an obligation by the party sought to be enjoined before imposing a permanent injunction. The District Court's general finding that the Youngs breached the duty imposed under 28-1-201 conflicted with the specific findings that the Youngs did not trespass or create a nuisance and conformed to the applicable standard of care. Absent a specific breach of obligation,

the District Court abused its discretion in issuing a permanent injunction enjoining the Youngs from engaging in lawful flood irrigation practices. Wells v. Young, 2002 MT 102, 309 M 419, 47 P3d 809 (2002), distinguishing Madison Fork Ranch v. L&B Lodge Pole Timber Prod., 189 M 292, 615 P2d 900 (1980).

Classification of Nuisances — Per Se or Per Accidens — Absolute or Qualified: A nuisance action may be based upon conduct of a defendant that is either intentional, negligent, reckless, or ultrahazardous. Thus, negligence is merely one type of conduct upon which liability for nuisance may be based. In general, a nuisance may be classified as either a nuisance per se or at law or as a nuisance per accidens or in fact. A nuisance per se is an inherently injurious act, occupation, or structure that is a nuisance at all times and under any circumstances, without regard to location or surroundings. A nuisance per accidens is one that becomes a nuisance by virtue of circumstances and surroundings. In turn, nuisances may be classified as either absolute or qualified. An absolute nuisance, similar to a nuisance per se, is a nuisance the substance of which is not negligence and that obviously exposes a person to probable injury. A qualified nuisance is a nuisance dependent on negligence that consists of anything done lawfully but so negligently or carelessly done or permitted as to create a potential and unreasonable risk of harm, which in due course results in injury to another. When determining how a plaintiff can bring a nuisance action against a defendant who is engaged in a statutorily authorized endeavor, when subsection (2) of this section indicates that authorized activities may not be considered a nuisance, the Supreme Court held that the plaintiff must show, pursuant to a particularized assessment of the authorizing statute, that: (1) the defendant completely exceeded its statutory authority, resulting in a nuisance; or (2) the defendant was negligent in carrying out its statutory authority, resulting in a qualified nuisance. In the present case, the city of Thompson Falls was statutorily authorized to construct the city's storm and sewer drain system, which Barnes alleged to be a nuisance. Given a verdict of no negligence, the city was not negligent in its operation or maintenance of the storm drain behind Barnes's duplex and thus would not have been liable for a qualified nuisance because of the incidental flooding of Barnes's property. Therefore, the District Court did not abuse its discretion in refusing Barnes's proposed instructions on nuisance because the instructions constituted a misstatement of the law. Barnes v. Thompson Falls, 1999 MT 77, 294 M 76, 979 P2d 1275, 56 St. Rep. 321 (1999), citing 58 Am. Jur. 2d Nuisances §9 and 66 C.J.S. Nuisances §§3, 5.

Lead Batteries Causing Livestock Deaths — Nuisance: The presence of exposed lead batteries on defendants' property that resulted in a series of livestock deaths is potentially injurious to health and sufficiently interferes with plaintiff's use of his property for grazing purposes that it constitutes a nuisance under this section. Whether or not the 2-year statute of limitations can be tolled in a nuisance case depends upon whether it is a permanent, temporary, or continuous nuisance. In this case, the nuisance is continuing and temporary, justifying a tolling of the time limitation. Once the nuisance is removed, the statute of limitations will bar any action that is commenced the latter of 2 years after abatement of the nuisance or discovery of the cause of the injury. Graveley Ranch v. Scherping, 240 M 20, 782 P2d 371, 46 St. Rep. 1908 (1989). However, when it was later discovered that plaintiffs had constructed a fence around the nuisance site within 6 days of initial discovery, effectively cutting the livestock off from the source of the poison, the nuisance was abated as far as the livestock were concerned and the statute of limitations could run. Because the suit was filed more than 2 years after both discovery of the injury and abatement of the nuisance, the filing exceeded the statutory limit and was properly dismissed by summary judgment. Graveley Ranch v. Scherping, 247 M 310, 806 P2d 29, 48 St. Rep. 211 (1991), distinguished in Country Estates Homeowners Ass'n, Inc. v. McMillan, 276 M 100, 915 P2d 806, 53 St. Rep. 297 (1996).

Fence Along Property Boundary — Private Nuisance: Landowner's previous uses of her property were restricted by neighbor's placement of fence and gate along property boundary. As fence interfered with owner's use of her property, it was a private nuisance. Stamm v. Kehrer, 222 M 167, 720 P2d 1194, 43 St. Rep. 1143 (1986).

Slag Pile — No Evidence of Nuisance: A slag pile started burning prior to 1950. For several years red embers were visible, but in later years the embers disappeared. In 1961, when a highway was built through a portion of the pile, the fire was apparently dead. In 1979, during a windstorm, a fire started near the slag pile and spread onto the plaintiff's land. The court found that there was no showing that the slag pile had ever previously caused fires in the area and there was no showing that the pile was ever considered a hazard to neighboring property owners. The court concluded that the slag pile was not a nuisance. Belue v. St., 199 M 451, 649 P2d 752, 39 St. Rep. 1516 (1982).

Power to Prohibit Door-to-Door Solicitation: The city of Billings enacted an ordinance declaring uninvited door-to-door solicitation a nuisance punishable as a misdemeanor. It was argued that a state statute regulating itinerant vendors did not empower a city to prohibit their activities, therefore precluding the ordinance. The Supreme Court disagreed. Under the expanded powers of local self-government provided by Montana's 1972 Constitution, a city possessing those powers may exercise any power not prohibited by the Constitution or state statute. A city possessing self-government powers may prohibit uninvited door-to-door solicitation by itinerant vendors, and a licensing statute does not legalize an activity otherwise prohibited. Any statements to the contrary contained in DeLong v. Downes, 175 M 152, 573 P2d 160 (1977), are expressly overruled. Tipco Corp. v. Billings, 197 M 339, 642 P2d 1074, 39 St. Rep. 600 (1982).

Dog Not a Public Nuisance: In the absence of a statute, the keeping of a domestic animal, a dog, confined by a chain on one's own unfenced premises cannot be declared a public nuisance. State ex rel. Fields v. District Court, 168 M 126, 541 P2d 66 (1975).

Sufficiency of Complaint — Negligence:

Where negligence is an element of nuisance, the fact that plaintiff pleads both negligence and nuisance as independent causes of action does not make pleading a sham. Ekwortzel v. Parker, 156 M 477, 482 P2d 559 (1971).

Complaint in action to enjoin maintenance and operation of storage reservoir, authorized by law and under 27-30-101, used for generating electric power, on the ground that it constituted a nuisance by flooding plaintiff's property, did not state a cause of action in the absence of an allegation of negligence. Jeffers v. Mont. Power Co., 68 M 114, 217 P 652 (1923).

Sports Activities: "Pee wee" baseball league conducted on empty lot in residential district was not nuisance under statute, notwithstanding evidence that: field was brightly illuminated, crowds were noisy, traffic was heavy, field was dusty, some children used foul language, balls were hit into neighboring yards damaging lawns and flowers, and games were played after 10 p.m.; nuisance, if any, was private and arose out of particular manner of operation of legitimate enterprise, and lower court should have done no more than point out nuisance and decree methods calculated to eliminate it. Kasala v. Kalispell Pee Wee Baseball League, 151 M 109, 439 P2d 65 (1968).

Sale of Milk at Less Than Minimum Price: Sale of milk at price less than minimum prescribed by Milk Control Board under 81-23-302 was a nuisance, being an activity which was injurious to health. Mont. Milk Control Bd. v. Rehberg, 141 M 149, 376 P2d 508 (1962).

Gambling: Premises wherein punchboards are operated may be abated as a nuisance inasmuch as it constitutes gambling. State ex rel. Harrison v. Deniff, 126 M 109, 245 P2d 140 (1952).

Unlicensed Photographers: Activities of unlicensed photographers could not be enjoined since taking of pictures either with or without a license was not a nuisance. St. Bd. of Examiners v. Keller, 120 M 364, 185 P2d 503 (1947).

Adverse Possession — Prescriptive Right Limited by Enjoyment — Water: Adverse possession and exercise of right of diverting water for statutory period is sufficient to raise presumption of a grant and to defeat an action for an injunction against a private nuisance; the extent of the prescriptive right, however, must be limited by the actual enjoyment and must be commensurate with that enjoyment. Gibbs v. Gardner, 107 M 76, 80 P2d 370 (1938).

Sale of Intoxicating Liquor Not Nuisance in Itself: Sale of intoxicating liquor is not made a nuisance by the general definition of that term in this section. State ex rel. Nagle v. Naughton, 103 M 306, 63 P2d 123 (1936).

Construction: This section must be given a common-sense construction so as not to suppress a legitimate business on account of some imaginary or trifling annoyance which offends the supersensitive nerves of a fastidious person. However, a home owner may not be compelled to live in positive discomfort so as to accommodate another in pursuit of business offensive to mind and taste of average individual. Purcell v. Davis, 100 M 480, 50 P2d 255 (1935).

Nature of Proof Required — Injunction: In seeking to enjoin erection of oil refinery in residential section because, inter alia, of anticipated reduction in market value of nearby property, plaintiff must show injury is practically certain, not merely probable, and that it cannot be compensated by damages in an action at law. Purcell v. Davis, 100 M 480, 50 P2d 255 (1935).

Waters and Watercourses:

Since a railroad is authorized by law to maintain embankments across waterways and nothing maintained under authority of law can be considered a nuisance, an embankment

constructed and maintained so as not to constitute a nuisance per se may not be held to have been negligently constructed. Heckaman v. N. Pac. Ry., 93 M 363, 20 P2d 258 (1933).

A complaint to enjoin the maintenance and operation of a storage reservoir used for generating electric power, on the ground that it constituted a nuisance during the winter months when water was released for power development purposes causing an unnatural fluctuation of several feet in the level of the river below which caused ice to break and jam, flooding plaintiff's property, did not state a cause of action in the absence of an allegation of negligence, the operation of the reservoir being authorized by law. Jeffers v. Mont. Power Co., 68 M 114, 217 P 652 (1923).

Use of water by an upper appropriator in such a way as to carry sand, gravel, and mining debris over land of a lower proprietor, rendering it valueless, constitutes a nuisance, both at common law and under this section. Chessman v. Hale, 31 M 577, 79 P 254, 68 LRA 410, 3 Ann. Cas. 1038 (1905), distinguished in St. v. Mercier, 70 M 333, 225 P 802 (1924).

Grant of Power as a Defense to a Nuisance: In grants of authority to municipal corporations, authority to commit a nuisance will not be implied but must be expressed; when the use and enjoyment of a legislative grant does not necessarily and naturally create a nuisance but the nuisance results from the method of the use and enjoyment, the grant constitutes no defense. Lennon v. Butte, 67 M 101, 214 P 1101 (1923).

Defense in General: Where mining operations constitute a nuisance, it is no defense that they were carried on according to approved methods, that due care was exercised, or that mining is necessary to the industrial life of the particular district. Cavanaugh v. Corbin Copper Co., 55 M 173, 174 P 184 (1918).

Labor Union Activities:

Labor union's peaceful picketing of theater owned by person alleged to be unfair to organized labor was not a nuisance, and injunction was denied. Empire Theater Co. v. Cloke, 53 M 183, 163 P 107 (1917).

Conduct of labor union members and their sympathizers in congregating in large numbers in immediate vicinity of property of a person whom they deem unfair to organized labor, impeding travel on the sidewalk in front of such property, and interfering with the business there carried on and with the customers at such place, constitutes a nuisance and can be enjoined. Iverson v. Dilno, 44 M 270, 119 P 719 (1911).

Railroads — Failure to Remove Horse Killed by Train: Railroad that allowed carcass of horse killed by one of its trains to remain on its right-of-way near a railroad crossing, emitting offensive odors, was liable for damages occasioned by the nuisance, including the frightening of passing teams. Great N. Ry. v. Ennis, 236 F 17 (1916).

Sufficiency of Complaint — Sewer: The complaint against the city sufficiently stated a cause of action for maintaining a sewer in such a manner as to be a nuisance causing injury to the plaintiff. Murray v. Butte, 35 M 161, 88 P 789 (1907).

Collateral References

Nuisance *key* 5, 6, 64, 65.

66 C.J.S. Nuisances §§10 through 27.

58 Am. Jur. 2d Nuisances §§1 through 4.

27-30-102. Distinction between public and private nuisances.

Case Notes

Dog Not a Public Nuisance: In the absence of a statute, the keeping of a domestic animal, a dog, confined by a chain on one's own unfenced premises cannot be declared a public nuisance. State ex rel. Fields v. District Court, 168 M 126, 541 P2d 66 (1975).

Chicken-Raising Business: Chicken-raising business was not a public nuisance. McCollum v. Kolokotrones, 131 M 438, 311 P2d 780 (1957).

When Public or Private: A nuisance is common or public where it affects rights to which every citizen is entitled; it is private where it affects a single individual or a determinate number of persons in the enjoyment of some private right not common to the public. Gibbs v. Gardner, 107 M 76, 80 P2d 370 (1938).

Obstructing Streets: Under rule that private person may maintain action to abate public nuisance if it causes special or peculiar injury to him, substantial in its nature, complaint by owners of residential property on streets facing a lake against lumber company which had caused large quantities of lumber to be piled across the street ends and along the lakefront between high and low watermark, thus cutting off access to the lake, alleging that defendant's acts made their property less desirable and less valuable for residential purposes, prevented

them from reaching the water's edge, etc., stated a cause of action. Faucett v. Dewey Lumber Co., 82 M 250, 266 P 646 (1928).

Possession of Intoxicating Liquor: The possession of a pint of moonshine liquor by defendant in his dwelling house did not constitute a public nuisance where no proof was made showing a single sale or attempted sale; the liquor was discovered by a search of the premises made without information that it was there; and possession of such a small amount of liquor could not endanger the public health, safety, peace, or comfort of the whole community or a considerable number of people. Bozeman v. Merrell, 81 M 19, 261 P 876 (1927).

What Constitutes a Public Nuisance Generally: Under this section, a public nuisance is one which affects an entire neighborhood or community or any considerable number of persons. Bozeman v. Merrell, 81 M 19, 261 P 876 (1927).

Bawdyhouse: A bawdyhouse is a public nuisance under this section. State ex rel. Ford v. Young, 54 M 401, 170 P 947 (1918), explained in St. v. P.S.C., 129 M 106, 283 P2d 594 (1955).

Collateral References

58 Am. Jur. 2d Nuisances §§30 through 47.

27-30-103. Action for nuisance.

Case Notes

Baseball Park: "Pee wee" baseball league conducted on empty lot in residential district was not nuisance under statute, notwithstanding evidence that: field was brightly illuminated, crowds were noisy, traffic was heavy, field was dusty, some children used foul language, balls were hit into neighboring yards damaging lawns and flowers, and games were played after 10 p.m.; nuisance, if any, was private and arose out of particular manner of operation of legitimate enterprise, and lower court should merely have entered decree calculated to eliminate injurious features. Kasala v. Kalispell Pee Wee Baseball League, 151 M 109, 439 P2d 65, 32 ALR 3d 1120 (1968).

Damages Action:

Nuisance may be abated and damages recovered in the same action. Midland Empire Packing Co. v. Yale Oil Corp., 119 M 36, 169 P2d 732 (1946).

Under this section, plaintiff in an action for damages for the maintenance of a nuisance is entitled to a trial by jury of his right to damages, although he also asks for the equitable relief of injunction to restrain the continuance of the acts complained of. Chessman v. Hale, 31 M 577, 79 P 254 (1904), distinguished in St. v. Mercier, 70 M 333, 225 P 802 (1924), explained in Moore v. Capitol Gas Corp., 117 M 148, 158 P2d 302 (1945).

Dumping Grounds: Where a city gives a lease to land owned by it but reserves the use thereof for the burial of dead animals and for the dumping of garbage and contracts with the lessee to superintend the proper disposition of garbage and the burying of dead animals but the lessee fails to do so and the city, having no other place to make proper disposition of its garbage and dead animals, brings an action for unlawful detainer, it is entitled to a temporary injunction, pendente lite, restraining the lessee from interfering with the city's use of the property, as the result of the lessee's course is the maintenance of a public nuisance. Bozeman v. Bohart, 42 M 290, 112 P 388 (1910).

Collateral References

Nuisance *key* 1, et seq.

66 C.J.S. Nuisances §1, et seq.

58 Am. Jur. 2d Nuisances §§218 through 225.

Remedies for sewage treatment plant alleged or deemed to be nuisance. 101 ALR 5th 287.

Sewage treatment plant as constituting nuisance. 92 ALR 5th 517.

Funeral home as private nuisance. 8 ALR 4th 324.

Liability of private owner or occupant of land abutting highway for injuries or damage resulting from tree or limb falling onto highway. 94 ALR 3d 1160.

Airport operations or flight of aircraft as nuisance. 79 ALR 3d 253.

Drive-in restaurant or cafe as nuisance. 91 ALR 2d 572.

Oil refinery as nuisance. 86 ALR 2d 1322.

Moving of buildings on highways as nuisance. 83 ALR 2d 478.

Double parking of motor vehicles as nuisance. 82 ALR 2d 732.

Water sports, amusements, or exhibitions as nuisance. 80 ALR 2d 1124.

Merry-go-round as nuisance. 75 ALR 2d 803.

Golf course or driving range as nuisance. 68 ALR 2d 1331.

Nuisance by fishing, boating, bathing, or the like in inland lake. 57 ALR 2d 594.

Public dump as nuisance. 52 ALR 2d 1134.
Use of "spot zoned" property as nuisance. 51 ALR 2d 280.
Cemetery or burial ground as nuisance. 50 ALR 2d 1324.
Quarry, gravel pit, or the like, as nuisance. 47 ALR 2d 490.
Public dances or dance halls as nuisances. 44 ALR 2d 1381.
Pollution of subterranean waters as nuisance. 38 ALR 2d 1285.
Private school as nuisance. 27 ALR 2d 1249.
Tourist or trailer camp, motor court, or motel as nuisance. 24 ALR 2d 571; 22 ALR 2d 801.
Dust as nuisance. 24 ALR 2d 194, §7 superseded by 79 ALR 3d 253.
Use of phonograph, loudspeaker, or other mechanical or electrical device for broadcasting music, advertising, or sales talk from business premises, as nuisance. 23 ALR 2d 1289.
Stockyard as nuisance. 18 ALR 2d 1033.
Keeping of dogs, birds, or other pets by tenant as nuisance. 18 ALR 2d 880.
Animal rendering or bone-boiling plant or business as nuisance. 17 ALR 2d 1269.
Action for damages by tenant against stranger for nuisance to health and comfort. 12 ALR 2d 1228.
Liability of landowner on theory of nuisance for drowning of child. 8 ALR 2d 1280.
Coalyard as nuisance. 8 ALR 2d 419.
Casting of light on another's premises as constituting nuisance. 5 ALR 2d 705, §7 superseded by 79 ALR 3d 253.
Attracting people in such numbers as to obstruct access to neighboring premises, as nuisance. 2 ALR 2d 437.
Necessity of knowledge by owner of real estate of a nuisance maintained thereon by another to subject him to the operation of a statute providing for the abatement of nuisances, or prescribing a pecuniary penalty therefor. 121 ALR 642; 12 ALR 431.
Constitutionality of statutes conferring on chancery courts power to abate public nuisances. 75 ALR 1298; 22 ALR 542; 5 ALR 1474.
Power to declare pool and billiard rooms and bowling alleys a nuisance per se, and right to enjoin their operations. 72 ALR 1339; 53 ALR 149; 29 ALR 41; 20 ALR 1482.
Right to enjoin threatened or anticipated nuisance. 55 ALR 880; 32 ALR 724; 26 ALR 937; 7 ALR 749.
Amusement park as a nuisance. 33 ALR 725.
Effect of delay in seeking equitable relief against nuisance. 6 ALR 1098.

27-30-104. Right to recover damages unaffected by abatement.

Case Notes

Action Against City for Expenses in Abating Nuisance: Where city maintained private nuisance that a party abated at his own expense, he might recover from city such damages as he sustained by reason of the maintenance of such nuisance and could recover the necessary expense in abating it as an element of such damages. Murray v. Butte, 35 M 161, 88 P 789 (1907).

Collateral References

Nuisance *key* 41 through 43.
66 C.J.S. Nuisances §133.
58 Am. Jur. 2d Nuisances §259.

27-30-105. Successive owners liable for nuisance.

Case Notes

Nuisance Created by Structure: This section is limited to nuisances that are created by erection of a structure and that may be termed nuisances per se and does not comprehend a nuisance arising because of manner of using property or a structure whose mere creation did not constitute a nuisance. Midland Empire Packing Co. v. Yale Oil Corp., 119 M 36, 169 P2d 732 (1946).

Oil Refinery: An oil refinery is not harmful per se, whether it is a nuisance in a given case depending upon how it is operated, and hence former owner and operator of oil refinery was not liable for damage to adjacent slaughterhouse premises after sale of refinery to another company, though similar injury to slaughterhouse occurred while refinery was under operation of former owner. Midland Empire Packing Co. v. Yale Oil Corp., 119 M 36, 169 P2d 732 (1946).

Notice: It is not necessary to give notice to abate to one who continues a nuisance before bringing suit for damages. Watson v. Colusa-Parrot Min. & Smelting Co., 31 M 513, 79 P 14 (1905).

Collateral References

Nuisance *key* 10, 70.
66 C.J.S. Nuisances §72, et seq.
58 Am. Jur. 2d Nuisances §119.
Liability of purchaser of premises for nuisance thereon created by predecessor. 14 ALR 1094.

Part 2
Public Nuisances

27-30-201. Public nuisance not legalized by time.

Compiler's Comments

Department Ruling: In a declaratory ruling, the Department of Highways (now Department of Transportation) held that there is no authority for the Department to remove unlawful advertising under this section. The Department must comply with the specific statutory provisions of 75-15-131.

Collateral References

Nuisance *key* 11 through 17, 66, 73.
66 C.J.S. Nuisances §§77, 78.
58 Am. Jur. 2d Nuisances §§36, 37.

27-30-202. Remedies for public nuisances.

Case Notes

Duty of City to Inspect City Property for Hazards: Plaintiff was injured after tripping on a fence wire while walking her dog at night in an unmaintained grassy area on city right-of-way next to a city street. Plaintiff contended that the city was negligent in allowing a dangerous and hazardous condition to exist on a public right-of-way and guilty of negligence per se under 81-4-105 for allowing a public nuisance. The District Court granted summary judgment, determining as a matter of law that the city owed plaintiff no duty of care because: (1) she was not walking on a sidewalk, street, or path of any kind; (2) the city did not invite her to travel in that area; and (3) there were no city lights or signs in the vicinity. On appeal, plaintiff cited Richardson v. Corvallis Pub. School District No. 1, 286 M 309, 950 P2d 748 (1997), contending that the city ignored its duty to maintain the public streets, sidewalks, and rights-of-way within corporate limits in a reasonably safe condition for public travel by never going onto the premises, mowing it, raking it, or removing debris and that if routine maintenance had been done, the wire would have been found and removed. The Supreme Court agreed. The city's contention that it did not owe a duty of care in this case, because there was nothing in the area suggesting that it was a walkway or inviting the public to use it as such, failed under the Richardson test because of the city's neglect in exercising ordinary care or skill in the management of its property. Reasonable minds could differ on whether the city should have taken some action to inspect or maintain the property, so summary judgment was improper and thus reversed for a jury determination of negligence, including possible contributory negligence. Dobrocke v. Columbia Falls, 2000 MT 179, 300 M 348, 8 P3d 71, 57 St. Rep. 718 (2000).

Classification of Nuisances — Per Se or Per Accidens — Absolute or Qualified: A nuisance action may be based upon conduct of a defendant that is either intentional, negligent, reckless, or ultrahazardous. Thus, negligence is merely one type of conduct upon which liability for nuisance may be based. In general, a nuisance may be classified as either a nuisance per se or at law or as a nuisance per accidens or in fact. A nuisance per se is an inherently injurious act, occupation, or structure that is a nuisance at all times and under any circumstances, without regard to location or surroundings. A nuisance per accidens is one that becomes a nuisance by virtue of circumstances and surroundings. In turn, nuisances may be classified as either absolute or qualified. An absolute nuisance, similar to a nuisance per se, is a nuisance the substance of which is not negligence and that obviously exposes a person to probable injury. A qualified nuisance is a nuisance dependent on negligence that consists of anything done lawfully but so negligently or carelessly done or permitted as to create a potential and unreasonable risk of harm, which in due course results in injury to another. When determining how a plaintiff can bring a nuisance action against a defendant who is engaged in a statutorily authorized endeavor, when 27-30-101(2) indicates that authorized activities may not be considered a nuisance, the Supreme Court held that the plaintiff must show, pursuant to a particularized assessment of the authorizing statute, that: (1) the defendant completely exceeded its statutory authority, resulting in a nuisance; or (2) the defendant was negligent in carrying out its statutory authority, resulting in a qualified nuisance. In the present case, the city of Thompson Falls was

statutorily authorized to construct the city's storm and sewer drain system, which Barnes alleged to be a nuisance. Given a verdict of no negligence, the city was not negligent in its operation or maintenance of the storm drain behind Barnes's duplex and thus would not have been liable for a qualified nuisance because of the incidental flooding of Barnes's property. Therefore, the District Court did not abuse its discretion in refusing Barnes's proposed instructions on nuisance because the instructions constituted a misstatement of the law. Barnes v. Thompson Falls, 1999 MT 77, 294 M 76, 979 P2d 1275, 56 St. Rep. 321 (1999), citing 58 Am. Jur. 2d Nuisances §9 and 66 C.J.S. Nuisances §§3, 5.

Remedy for Criminal Prosecution of Public Nuisance: Panasuk, convicted in City Court of misdemeanor criminal public nuisance charges under 45-8-111, contended that because 3-10-301, 25-31-102, and Rule 4(B), M.R.Civ.P. (Title 25, ch. 20), preclude a nonrecord court from hearing actions involving the title to or possession of real property, jurisdiction for prosecution of the public nuisance charge must lie with the District Court. He cited 45-8-112 as authority that any action to abate a nuisance must be brought in the name of the state and that because abatement is a form of injunctive relief, the District Court has exclusive jurisdiction. He also argued that this section provides the exclusive civil and criminal remedies for public nuisance. His claims were dismissed for the following reasons: (1) charges filed under 45-8-111 were criminal rather than related to a civil action involving title to or possession of real property, which is regulated by the sections cited by Panasuk; (2) the remedy created by this section has been supplemented by subsequent legislative action regarding a City Court's jurisdiction over misdemeanors and by the enactment of 46-17-101, which requires that all prosecutions brought in City Court be commenced by a sworn complaint; and (3) because Panasuk's interpretation would result in a direct contradiction between this section and statutes subsequently enacted, the argument that this section provides the exclusive remedies for public nuisance is erroneous. Billings v. Panasuk, 253 M 403, 833 P2d 1050, 49 St. Rep. 499 (1992).

Nuisance Action — Contributory Negligence as Defense: The Supreme Court cited 58 Am. Jur. 2d Nuisances 221 in holding that contributory negligence can be a defense in a nuisance action. Wilhelm v. Great Falls, 225 M 251, 732 P2d 1315, 44 St. Rep. 211 (1987), clarified, with regard to the distinction between an absolute nuisance and a qualified nuisance, in Barnes v. Thompson Falls, 1999 MT 77, 294 M 76, 979 P2d 1275, 56 St. Rep. 321 (1999).

Petition for Mandamus Premature Remedy: The plaintiffs' petition for mandamus to compel public officers to declare property adjacent to plaintiffs' a public nuisance and abate same was premature, as the plaintiffs failed to show they had asked officers to abate the alleged nuisance before filing petition for a Writ of Mandamus. Generally, before mandamus will issue to a public officer, a demand for performance of the act sought to be compelled is required. Liebman v. Brunell, 212 M 459, 689 P2d 248, 41 St. Rep. 1863 (1984).

Operation and Effect: The Attorney General has power, by injunction, to obtain the suppression of a bawdyhouse as a nuisance. State ex rel. Ford v. Young, 54 M 401, 170 P 947 (1918), explained in St. v. P.S.C., 129 M 106, 283 P2d 594 (1955).

Collateral References

Nuisance *key* 18 through 58, 71 through 96.

66 C.J.S. Nuisances §§84 through 158.

58 Am. Jur. 2d Nuisances §§218, 246 through 255.

Modern status of rules as to balance of convenience or social utility as affecting relief from nuisance. 40 ALR 3d 601.

Contributory negligence or assumption of risk as defense to action for damages for nuisance—modern views. 73 ALR 2d 1378.

Life tenant's right of action for injury or damage to property. 49 ALR 2d 1117.

Joinder, in injunction action to restrain or abate nuisance, of persons contributing thereto through separate and independent acts. 45 ALR 2d 1284.

Tenant's action for damages against stranger for nuisance to health and comfort. 12 ALR 2d 1228.

Venue of suit to enjoin nuisance. 7 ALR 2d 481.

Necessity of knowledge by owner of real estate of a nuisance maintained thereon by another to subject him to the operation of a statute providing for the abatement of nuisances, or prescribing a pecuniary penalty therefor. 121 ALR 642; 12 ALR 431.

Constitutionality of statutes conferring on chancery courts power to abate public nuisances. 75 ALR 1298; 22 ALR 542; 5 ALR 1474.

Right to enjoin threatened or anticipated nuisance. 55 ALR 880; 32 ALR 724; 26 ALR 937; 7 ALR 749.

Effect of delay in seeking equitable relief against nuisance. 6 ALR 1098.

27-30-203. When private person may maintain action for public nuisance.

Case Notes

Chicken-Raising Business: Chicken-raising business did not constitute a nuisance where defendants kept their property clean and conducted their enterprise in a reasonable and proper manner, none of structures or chickens or use thereof had damaged the plaintiff or the neighborhood, and structures did not constitute a fire hazard. McCollum v. Kolokotrones, 131 M 438, 311 P2d 780 (1957).

Special Damage: Where owner of tourist camp sought to have chicken-raising business on nearby property declared a public nuisance and abated, it was incumbent upon the owner to prove special damage, in other words, damage distinct from that unto the public at large. McCollum v. Kolokotrones, 131 M 438, 311 P2d 780 (1957).

Obstructing Streets: Complaint by owners of residential property on streets facing a lake against a lumber company which had caused large quantities of lumber to be piled across the street ends and along the lakefront between high and low watermark, thus cutting off access to the lake, alleging that defendant's acts made their property less desirable and less valuable for residential purposes, prevented them from reaching the water's edge, etc., stated a cause of action. Faucett v. Dewey Lumber Co., 82 M 250, 266 P 646 (1928).

Operation and Effect: Since private person may maintain action for public nuisance if it is specially injurious to himself, fact that conduct constituted public nuisance did not defeat right to injunction. Iverson v. Dilno, 44 M 270, 119 P 719 (1911).

Collateral References

Nuisance *key* 71 through 76.

66 C.J.S. Nuisances §§65 through 69.

27-30-204. Abatement of public nuisance by public body or officer or injured party.

Case Notes

Administrative Remedy Exhaustion: Fact that nonconforming signs are defined as public nuisances does not per se authorize County Attorney to abate in circumvention of administrative remedies within Department of Highways (now Department of Transportation) because judicial relief may not be sought until administrative remedies provided by statute have first been exhausted. State ex rel. Jones v. Giles, 168 M 130, 541 P2d 355 (1975).

Operation and Effect as to Private Person:

The right given a person by this section to abate a nuisance which is especially injurious to him may be exercised "only under those circumstances which necessity indulges in cases of extremity or great emergency wherein the ordinary remedy by legal proceedings is ineffectual". Quong v. McEvoy, 70 M 99, 224 P 266 (1924).

In absence of provision in lease requiring tenant to keep premises in condition fit for occupation, landlord has duty to do so, and where by his failure in that respect a nuisance is created, its presence is not a justification for evicting the tenant on theory that the nuisance is thereby being abated. Quong v. McEvoy, 70 M 99, 224 P 266 (1924).

Law Review Articles

Defining a Proper Role for Public Nuisance Law in Municipal Suits Against Gun Sellers: Beyond Rhetoric and Expedience, Culhane & Eggen, 52 S.C.L. Rev. 287 (2001).

Collateral References

Nuisance *key* 74, 77 through 88.

66 C.J.S. Nuisances §§85 through 90.

Modern status of rules as to balance of convenience or social utility as affecting relief from nuisance. 40 ALR 3d 601.

Billboards and other outdoor advertising signs as civil nuisance. 38 ALR 3d 647.

Joinder, in injunction action to restrain or abate nuisance, of person contributing thereto through separate and independent acts. 45 ALR 2d 1284.

Tourist or trailer camps, motor courts, or motels as nuisances subject to abatement. 22 ALR 2d 801.

Power of municipal corporation to declare stockyards to be nuisances. 18 ALR 2d 1039.

Constitutional rights of owners as against destruction of building by public authorities. 14 ALR 2d 73.

Venue of suit to enjoin nuisance. 7 ALR 2d 481.

Failure of police officer to suppress bawdyhouse as conduct contemplated by statutes which makes neglect of duty by public officer or employee a punishable offense. 134 ALR 1250.

Constitutionality of statute conferring on chancery courts power to abate public nuisances. 75 ALR 1298; 22 ALR 542; 5 ALR 1474.

Right, as between state and county or municipality, to maintain action to abate a public nuisance in a street or highway. 65 ALR 699.

Threatened or anticipated nuisance, right to enjoin. 55 ALR 880; 32 ALR 724; 26 ALR 937; 7 ALR 749.

Liability of municipality for damages or compensation for abating as a nuisance what is not in fact such. 46 ALR 362.

Part 3
Private Nuisances

27-30-301. Remedies for private nuisances.

Case Notes

Classification of Nuisances — Per Se or Per Accidens — Absolute or Qualified: A nuisance action may be based upon conduct of a defendant that is either intentional, negligent, reckless, or ultrahazardous. Thus, negligence is merely one type of conduct upon which liability for nuisance may be based. In general, a nuisance may be classified as either a nuisance per se or at law or as a nuisance per accidens or in fact. A nuisance per se is an inherently injurious act, occupation, or structure that is a nuisance at all times and under any circumstances, without regard to location or surroundings. A nuisance per accidens is one that becomes a nuisance by virtue of circumstances and surroundings. In turn, nuisances may be classified as either absolute or qualified. An absolute nuisance, similar to a nuisance per se, is a nuisance the substance of which is not negligence and that obviously exposes a person to probable injury. A qualified nuisance is a nuisance dependent on negligence that consists of anything done lawfully but so negligently or carelessly done or permitted as to create a potential and unreasonable risk of harm, which in due course results in injury to another. When determining how a plaintiff can bring a nuisance action against a defendant who is engaged in a statutorily authorized endeavor, when 27-30-101(2) indicates that authorized activities may not be considered a nuisance, the Supreme Court held that the plaintiff must show, pursuant to a particularized assessment of the authorizing statute, that: (1) the defendant completely exceeded its statutory authority, resulting in a nuisance; or (2) the defendant was negligent in carrying out its statutory authority, resulting in a qualified nuisance. In the present case, the city of Thompson Falls was statutorily authorized to construct the city's storm and sewer drain system, which Barnes alleged to be a nuisance. Given a verdict of no negligence, the city was not negligent in its operation or maintenance of the storm drain behind Barnes's duplex and thus would not have been liable for a qualified nuisance because of the incidental flooding of Barnes's property. Therefore, the District Court did not abuse its discretion in refusing Barnes's proposed instructions on nuisance because the instructions constituted a misstatement of the law. Barnes v. Thompson Falls, 1999 MT 77, 294 M 76, 979 P2d 1275, 56 St. Rep. 321 (1999), citing 58 Am. Jur. 2d Nuisances §9 and 66 C.J.S. Nuisances §§3, 5.

Nuisance Action — Contributory Negligence as Defense: The Supreme Court cited 58 Am. Jur. 2d Nuisances 221 in holding that contributory negligence can be a defense in a nuisance action. Wilhelm v. Great Falls, 225 M 251, 732 P2d 1315, 44 St. Rep. 211 (1987), clarified, with regard to the distinction between an absolute nuisance and a qualified nuisance, in Barnes v. Thompson Falls, 1999 MT 77, 294 M 76, 979 P2d 1275, 56 St. Rep. 321 (1999).

Action Within Reasonable Time: One seeking to abate a private nuisance must act within reasonable time, since court of equity will refuse its aid where the complainant has slept upon his rights for a considerable time by acquiescing in the alleged nuisance. Gibbs v. Gardner, 107 M 76, 80 P2d 370 (1938).

Maintenance of Headgate in Ditch: In action to enjoin owner of water right in ditch from operating a headgate in the ditch in an unlawful manner and to abate a nuisance resulting therefrom, owner had acquired a prescriptive right in headgate's use by virtue of his use of headgate in like manner since 1911, and plaintiff lost his right to relief through laches. Gibbs v. Gardner, 107 M 76, 80 P2d 370 (1938).

Collateral References

Nuisance *key* 18, et seq.

66 C.J.S. Nuisances §§84, 86.

58 Am. Jur. 2d Nuisances §§218, 256, 257.

Contributory negligence or assumption of risk as defense to action for damages for nuisance—modern views. 73 ALR 2d 1378.

Life tenant's right of action for injury or damage to property. 49 ALR 2d 1117.

Expense incurred by injured party in remedying temporary nuisance or in preventing injury as element of damages recoverable. 41 ALR 2d 1064.

Tenant's action for damages against stranger for nuisance to health and comfort. 12 ALR 2d 1228.

27-30-302. Abatement of private nuisance by injured party.

Case Notes

Reasonable Notice: There can be no question but that in the ordinary case of this nature, a 5- to 10-day notice given a local resident would be "reasonable"; it is the usual time fixed in orders to show cause and the only requirement in this state as to notice for the abatement of any nuisance is that the notice be reasonable. State ex rel. Brooks v. Cook, 84 M 478, 276 P 958 (1929).

Sewer as Nuisance — Sufficiency of Complaint: Complaint alleging facts sufficient to show that sewer was a nuisance, that it was maintained by defendant city to plaintiff's detriment, that plaintiff was compelled to abate it, and that amount expended by him was reasonable, stated a cause of action for recovery of expenditures. The second count, seeking recovery of property damage, was insufficient. Murray v. Butte, 35 M 161, 88 P 789 (1907).

Collateral References

Nuisance *key* 20.

66 C.J.S. Nuisances §§86 through 89.

58 Am. Jur. 2d Nuisances §§256, 257, 418 through 422.

CHAPTER 31
CHANGE OF NAME

Chapter Case Notes

Use of Mother's Surname in Best Interests of Child: The selection of a child's surname is a matter of choice, not law, and in determining whether to change a child's surname, a District Court must be guided by a child's best interests. In this case, the court correctly applied the best interests of the child standard in a nonsexist, nonpaternalistic manner, focusing on the child's interests rather than the wishes of a parent, such as the father's desire that his surname be carried on into future generations, in determining that the child would best carry the mother's surname. In re Custody of J.C.O., 1999 MT 325, 297 M 327, 993 P2d 667, 56 St. Rep. 1298 (1999).

Consideration of Child's Best Interests in Name Change — Parental Interest in Child: Mother and father were not married at the time a child was born, but as the result of a promise to marry, mother gave the child the father's surname. When the engagement subsequently fell through, mother sought to change the child's name to the maternal surname. The District Court properly found a change of name was not in the child's best interests in light of father's acknowledged paternity, his provision of regular child support, and his efforts to gain visitation rights. In re Petition for Change of Name of Iverson, 241 M 140, 786 P2d 1, 47 St. Rep. 146 (1990), followed in In re Custody of J.C.O., 1999 MT 325, 297 M 327, 993 P2d 667, 56 St. Rep. 1298 (1999).

Statutes in Aid of Common Law: Title 27, ch. 31, parts 1 and 2, are in affirmance and aid of common law and do not abrogate it. In re the Marriage of Firman, 187 M 465, 610 P2d 178 (1980).

Use of Father's Surname in Best Interest of Child: The District Court erred in allowing the children to use the surname of their stepfather. Under the circumstances presented, it is in the best interest of the children to use the father's surname until the children reach an age when they can fully understand the circumstances of their parents' dissolution. In re the Marriage of Firman, 187 M 465, 610 P2d 178 (1980), followed, in deciding that use of the mother's surname was in the child's best interests, in In re Custody of J.C.O., 1999 MT 325, 297 M 327, 993 P2d 667, 56 St. Rep. 1298 (1999).

Chapter Collateral References

Rights and remedies of parents inter se with respect to the names of their children. 40 ALR 5th 697.

Circumstances justifying grant or denial of petition to change adult's name. 79 ALR 3d 562.

Right of married woman to use maiden surname. 67 ALR 3d 1266.

Part 1
General Provisions

27-31-101. Petition for change of name of natural person.

Case Notes

Use of Mother's Surname in Best Interests of Child: The selection of a child's surname is a matter of choice, not law, and in determining whether to change a child's surname, a District Court must be guided by a child's best interests. In this case, the court correctly applied the best interests of the child standard in a nonsexist, nonpaternalistic manner, focusing on the child's interests rather than the wishes of a parent, such as the father's desire that his surname be carried on into future generations, in determining that the child would best carry the mother's surname. In re Custody of J.C.O., 1999 MT 325, 297 M 327, 993 P2d 667, 56 St. Rep. 1298 (1999).

Changing Child's Name to Father's After Divorce: After divorcing child's father, mother gave birth to the child and gave it mother's last name. It was not a violation of Art. II, sec. 4, Mont. Const., for court to order the child's last name to be changed to that of the father. The findings and conclusions did not state the husband had any preference or natural right to have the child bear his name; they stressed the best interests of the child, and the child's best interests did not involve the equality of the sexes in this instance. Overton v. Overton, 207 M 292, 674 P2d 1089, 40 St. Rep. 2047 (1983). See also In re Custody of J.C.O., 1999 MT 325, 297 M 327, 993 P2d 667, 56 St. Rep. 1298 (1999).

Collateral References

Rights and remedies of parents inter se with respect to the names of their children. 40 ALR 5th 697.

27-31-103. District court jurisdiction.

Collateral References

Names *key* 20.
65 C.J.S. Names §11.

Part 2
Procedure

27-31-201. Order setting hearing date — notice — safety.

Compiler's Comments

1997 Amendment: Chapter 169 in (1), near beginning of second sentence after "(2)", inserted "and (3)"; inserted (3) authorizing a name change petition to proceed on a sealed-record basis; and made minor changes in style. Amendment effective March 27, 1997.

Applicability: Section 2, Ch. 169, L. 1997, provided: "[Section 1] [27-31-201] applies to petitions filed on or after [the effective date of this act]." Effective March 27, 1997.

1987 Amendment: At beginning of second sentence inserted exception clause; and inserted (2) dispensing with publication if both parents consent to name change of minor.

CHAPTER 32
JUDICIAL DETERMINATION OF BIRTH DATE

Part 1
General Provisions
Petition for Determination

27-32-101. Who may petition — where petition filed.

Collateral References

Computation of one's age by inclusion or exclusion of day of birth. 5 ALR 2d 1143.

27-32-102. Contents of petition.

Collateral References

Computation of one's age by inclusion or exclusion of day of birth. 5 ALR 2d 1143.

27-32-104. Fees.

Compiler's Comments

1993 Amendment: Chapter 570 near beginning of first sentence, after "fee", substituted "for commencing an action, as provided for in 25-1-201" for "of $1" and at end, after "additional fee", substituted "for entry of judgment, as provided for in 25-1-201" for "of $1"; and made minor changes in style. Amendment effective July 1, 1993.

Part 3
Judgment — Appeal

27-32-302. Clerk to certify and file judgment.

Compiler's Comments

1995 Amendments — Composite Section: Chapter 418 substituted "department of public health" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 substituted "department of public health and human services" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Style changes in the chapters were slightly different. In each case, the codifier chose the most appropriate.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clauses: Section 503, Ch. 418, L. 1995, and sec. 571, Ch. 546, L. 1995, were saving clauses.

Attorney General's Opinions

No Fee Collectible: No fee is collectible by the County Clerk and Recorder for filing the copy of a judicial determination of date of birth under this section. 26 A.G. Op. 50 (1955).

State Law Library of Montana
3 0000 00239928 9

DOES NOT
CIRCULATE